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

COURT (PLENARY)

CASE OF AUTRONIC AG v. SWITZERLAND

(Application no. 12726/87)

JUDGMENT

STRASBOURG

22 May 1990

In the Autronic AG case[*],

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 51 of the Rules of Court[**] and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr J.A. CARRILLO SALCEDO,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 25 January and 24 April 1990,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Swiss Confederation ("the Government") on 12 April and 6 July 1989 respectively, within the three-month period laid down by Article 32 § 1 and

[*] Note by the registry: The case is numbered 15/1989/175/231. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] Note by the registry: The amendments to the Rules of Court which entered into force on 1 April 1989 are applicable to this case.

Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 12726/87) against Switzerland lodged with the Commission under Article 25 (art. 25) by a Swiss company, Autronic AG, on 9 January 1987.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) of the Convention and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicant company stated that it wished to take part in the proceedings and designated the lawyer who would represent it (Rule 30).

3. On 29 April 1989 the President of the Court decided that, in the interests of the proper administration of justice, this case should be considered by the Chamber constituted on 24 November 1988 to hear the case of Groppera Radio AG and Others[*] (Rule 21 § 6). That Chamber included ex officio Mrs D. Bindschedler-Robert, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)); and the five members drawn by lot (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43) were Mr F. Gölcüklü, Mr F. Matscher, Mr L.-E. Pettiti, Mr J. De Meyer and Mrs E. Palm.

4. In his capacity as President of the Chamber (Rule 21 § 5), Mr Ryssdal consulted - through the Registrar - the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant company on the need for a written procedure (Rule 37 § 1). In accordance with his Order and his instructions, the Registrar received the Government's and Autronic AG's memorials on 12 September. On 13 November the Secretary to the Commission informed him that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 15 June that the oral proceedings should open on 21 November 1989 (Rule 38).

6. On 20 June the Chamber decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 51).

7. On 17 October the Commission's secretariat lodged in the registry the documents relating to the proceedings before the Commission.

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[*] Note by the Registrar: Case no. 14/1988/158/214.

On 2 November the Government sent the Court the International Telecommunication Union's reply to the questions that the Government had put to it.

8. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mr O. JACOT-GUILLARMOD, Assistant Director,
Federal Office of Justice, Head of the International Affairs Division, *Agent*,

Mr B. MÜNGER, Federal Office of Justice,
Deputy Head of the International Affairs Division,

Mr P. KOLLER, Federal Department of Foreign Affairs,
Deputy Head of the Cultural Affairs Section,

Mr A. SCHMID, Head Office of the PTT,
Head of the General Legal Affairs Division,

Mr H. KIEFFER, Head Office of the PTT,
Head of the Frequency Management and Broadcasting Rights Section,

Mr M. REGNOTTO, Federal Department
of Transport, Communications and Energy - Radio and Television Department, *Counsel*;

- for the Commission

Mr J.A. FROWEIN, *Delegate*;

- for the applicant company

Mr R. GULLOTTI, Rechtsanwalt, *Counsel*,
Mr W. STREIT, *Adviser*.

The Court heard addresses by Mr Jacot-Guillarmod and Mr Kieffer for the Government, by Mr Frowein for the Commission and by Mr Gullotti for the applicant company, as well as their answers to its questions.

9. The Agent of the Government and counsel for the applicant company produced several documents at the hearing.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. Autronic AG is a limited company incorporated under Swiss law and has its head office at Dübendorf (Canton of Zürich). It specialises in electronics and in particular sells 90 cm-diameter dish aerials for home use.

11. Its application relates to the reception in Switzerland of uncoded television programmes made and broadcast in the Soviet Union. They are transmitted to the Soviet satellite G-Horizont (also called Stationar-4), which sends them back to receiving earth stations on Soviet territory, and these in turn distribute them to users. The satellite is a telecommunications satellite and not a direct-broadcasting one: it provides a fixed point-to-point radiocommunication service (number 22 of the Radio Regulations - see paragraph 36 below) and uses the frequencies allotted to radiocommunications. It also transmits telephone conversations, telexes or telegrams and data.

12. In 1982 the only television broadcasts by satellite that could be received in Switzerland by means of a dish aerial were those from G-Horizont.

A. Background to the case

1. The first application for permission

13. In the spring of 1982 Autronic AG applied to the Radio and Television Division of the Head Office of the national Post and Telecommunications Authority (PTT). It requested permission to give a showing at the Basle Trade Fair (Mustermesse) from 17 to 26 April 1982 of the public television programme that it received direct from G-Horizont by means of a private dish aerial, its object being to give a demonstration of the technical capabilities of the equipment in order to promote sales of it.

14. The Division wrote to the Soviet Union's embassy in Berne, which on 21 April conveyed the Soviet authorities' consent for the duration of the fair.

2. The second application for permission

15. On 7 July 1982 Autronic AG made a similar approach in order to give demonstrations at the FERA exhibition, which was to be held in Zürich from 30 August to 6 September 1982 and covered the latest developments in radio, television and electronics.

16. The Radio and Television Division again applied to the Soviet embassy, but did not receive a reply. On 14 and 26 July and on 6 August it informed Autronic AG that without the express consent of the Soviet authorities it could not allow reception of the G-Horizont broadcasts and that the Radio Regulations (see paragraph 36 below) required it to prevent such reception.

B. The application for a declaratory ruling

1. The proceedings before the Radio and Television Division

(a) The application of 1 November 1982

17. As Autronic AG was anxious to give further demonstrations, it applied to the Radio and Television Division, on 1 November 1982, for a declaratory ruling (Feststellungsverfügung) that, in particular, reception for private use of uncoded television programmes from satellites such as G-Horizont should not require the consent of the broadcasting State's authorities.

18. The applicant company relied on several arguments: the confidentiality of a programme could not depend on the use of particular frequencies; numbers 1992-1994 of the Radio Regulations gave no indication of which kind of broadcast was to be kept confidential; reception of radio and television programmes intended for and accessible to the general public could be made subject only to the award of a licence under Swiss law, which was available to everybody; and, lastly, the reception in question did not infringe Swiss legislation on intellectual property, because while programmes taken individually could have the status of "works", the same was not true of a whole schedule.

(b) The decision of 13 January 1983

19. On 13 January 1983 the Radio and Television Division rejected the applicant company's application, stating that it could not grant a receiving licence without the consent of the broadcasting State's authorities.

20. The Division noted that only duly approved earth stations were entitled to receive signals from telecommunications satellites. In this connection it referred to number 960 of the Radio Regulations, under which each national authority could assign certain frequencies to point-to-point radiocommunications provided that the broadcasts were not intended for direct reception by the general public.

It also stressed the difference between broadcasting satellites and telecommunications satellites. The former transmitted radio and television programmes to an undefined number of receiving stations within a given area, on frequencies expressly reserved for direct reception, while the latter were covered by the secrecy of broadcasts which all member States were obliged to ensure under Article 22 of the International Telecommunication Convention and numbers 1992-1994 of the Radio Regulations (see paragraphs 34 and 36 below). It added, lastly (translation from German):

> "As to whether a broadcast is intended for direct reception by the general public, the decisive factor is accordingly not the content of the radiocommunication transmitted (a television programme, for example) but the mode of its transmission, in other words

its classification as a telecommunication. It follows that radio or television programmes transmitted via a telecommunications satellite cannot be received in a country unless the telecommunications authority of the broadcasting State ... has given its permission to the telecommunications authority of the receiving State. This will ensure compliance with the provisions on the secrecy of telecommunications. There is no apparent reason why telecommunications authorities should not be able to keep certain radiocommunications secret since they are under an obligation to ensure that the provisions of the International Telecommunication Convention and of the Radio Regulations are complied with."

2. The proceedings before the Head Office of the PTT

21. On 14 February 1983 Autronic AG lodged an appeal (Beschwerde) against the Radio and Television Division's decision but this was rejected by the Head Office of the PTT on 26 July.

The Head Office began by holding that it had jurisdiction and that the company had an interest, worthy of protection, in having the disputed decision set aside under section 48 of the Federal Administrative Procedure Act.

It went on to set out its reasons for dismissing the appeal. Protection of the material information could not depend on whether the broadcasts were intended for the general public, since as a rule it was not known, at the time of transmission by telecommunications satellites, which broadcasts were intended for general use. Furthermore, Article 10 (art. 10) of the European Convention on Human Rights secured only the right to receive information from generally accessible sources, which telecommunications satellites were not. Lastly, it was irrelevant that the broadcasts were ultimately intended for general use, as the obligation to keep the transmitted data secret subsisted at the time of broadcasting.

3. The proceedings in the Federal Court

22. On 13 September 1983 Autronic AG lodged an administrative-law appeal with the Federal Court against the decision of the Head Office of the PTT. It applied to have that decision set aside and sought a judgment which would clarify the legal situation for the future; it asked the court in particular to rule that reception for private use of uncoded broadcasts emanating from telecommunications satellites and intended for the general public should not be subject to the broadcasting State's consent.

(a) Consideration of the appeal

23. In reply to a request for information made by the Radio and Television Division of the Head Office of the Swiss PTT, the Head Office of the Soviet Union's Gostelradio said the following in a telex of 7 February 1984:

"With reference to your letter of 9 January 1984, we should like to inform you that the programmes transmitted by 'Stationar 4' [G-Horizont] are not satellite broadcasts intended for foreign countries. The programmes are intended for Soviet television viewers and are our internal affair. On the other hand, we have no technical means of preventing them from reaching other countries, particularly Switzerland. As regards the international use of the signal, only discussion and settlement of the problem at world level will provide a solution."

24. On 9 July 1984 the Federal Court put a number of questions to the parties about the factual and legal position. The Head Office of the PTT replied on 22 August and the applicant company on 31 August.

25. On 10 June 1985 the rapporteur informed Autronic AG that the Federal Court had not yet been able to consider the appeal and that the company had until 16 August 1985 to submit any further observations.

26. On 26 June 1985 the Radio and Television Division sent the Netherlands telecommunications authorities the following telex:

"...

In connection with the judgment of a request, we would like to know on which conditions reception of TV programmes via telecommunications satellites is permitted in the Netherlands. Please let us also know if the Soviet communications satellite G-Horizont Stationar is received in your country (by cable operators).

..."

The Netherlands authorities replied on 1 July 1985 as follows:

"... The conditions for reception of TV programmes by cable operators in the Netherlands seem to be quite similar to those in your country.

The Netherlands PTT issues licences to cable operators, separate for each particular TV program. With such a licence the operator can install his own TVRO antenna, although it is advisable for him to consult with PTT for frequency co-ordination purposes in order to avoid interference from terrestrial microwaves.

...

A few years ago some reception of the G-Horizont satellite did indeed take place.

This was considered illegal because of the absence of agreements with the USSR program provider and satellite operator, and the cable operators were so informed.

..."

In response to a similar request for information, the Finnish telecommunications authorities stated the following on 8 July 1985:

"...

We have permission from the Telecommunications Ministry of USSR to receive as an experiment the [G-Horizont] signal up to 31.12.1985. Authorization for distribution has been given in seven cases so far."

(b) The judgment of 10 July 1986

27. The Federal Court gave judgment on 10 July 1986 and served the text on Autronic AG on 11 November.

The court held that the appellant company was seeking a review in the abstract of the legal position, whereas in reality it could only complain of the ban on receiving the disputed broadcasts during the FERA exhibition. There was, however, no point in ruling on the admissibility of the appeal, since at all events the company had failed to show that it had an interest worthy of protection.

Apart from G-Horizont, there was no other satellite over Europe at the time whose broadcasts were receivable by means of a domestic dish aerial. Autronic AG picked up the signals from the Soviet satellite because there was no alternative source. As long as this situation continued, there would be practically no market for such equipment and only "eccentrics" (Sonderlinge) would be inclined to buy it. Although two other satellites - one German and one French - were to be launched, it remained unclear how they would be used and it was impossible to assess either the interest that direct reception of their broadcasts would arouse or the number of dish aerials that would come into use.

The Federal Court concluded that as it had failed to adduce evidence of any direct economic interest, the applicant company had no interest worthy of protection. It therefore refused to determine the merits of the case.

C. Subsequent developments

28. At the present time, there are still only a handful of direct-broadcasting satellites, whereas there are more than 150 telecommunications satellites such as G-Horizont, covering all or part of western Europe and broadcasting all kinds of uncoded programmes intended for the general public.

II. THE LEGAL RULES IN ISSUE

A. Swiss legislation

29. Article 36 § 4 of the Federal Constitution guarantees "inviolability of the secrecy of letters and telegrams".

1. The Federal Act of 1922

30. The relevant provisions of the Federal Act of 14 October 1922 regulating telegraph and telephone communications are as follows:

Section 1

"The Post and Telecommunications Authority shall have the exclusive right to set up and operate transmitting and receiving equipment or equipment of any kind for the electric or radio transmission of signals, images or sounds."

Section 3

"The competent authority shall be able to issue licences for setting up and operating equipment for the electric and radio transmission of signals, images and sounds."

Section 46 § 2

"The provisions required for the implementation of this Act shall be incorporated into the Ordinance on telegraphs and telephones to be enacted by the Federal Council and in the detailed regulations ..."

2. The 1973 Ordinance

31. On 10 December 1973 the Federal Council enacted Ordinance no. 1 relating to the 1922 Act; among other things the Council laid down the scope of television licences:

Article 66

"1. Licence I for television-receiving equipment shall entitle the holder to operate equipment for the private reception, by means of radio waves or by electric wire, of Swiss and foreign public television broadcasts.

2. Reception of television broadcasts on premises which are not accessible to the public shall be deemed to be private.

3. The licence-holder may himself install his equipment for receiving broadcasts by means of radio waves.

4. A special licence must be held in order to exercise rights vested in the State other than those mentioned in paragraphs 1 and 3, in particular in order to demonstrate how receiving equipment works, to install receiving equipment in the homes of third parties and to arrange for public reception of broadcasts."

32. The revised text of Ordinance no. 1, which was enacted on 17 August 1983, came into force on 1 January 1984. Although it does not apply in the instant case, several of its provisions are worth quoting:

Article 19 § 1

"Licences may be refused where there is good reason to suppose that the telecommunications equipment will be used for a purpose that is

(a) unlawful;

(b) contrary to public morals or public policy; or

(c) prejudicial to the higher interests of the country, of the Post and Telecommunications Authority or of broadcasting."

Article 57 § 1

"Radio- and television-receiving licences shall authorise their holders to receive Swiss and foreign radio broadcasts privately or publicly."

Article 78 § 1

"A community-antenna licence shall entitle the holder to:

(a) Operate the local distribution network defined in the licence and rebroadcast by this means radio and television programmes from transmitters which comply with the provisions of the International Telecommunication Convention of 25 October 1973 and the International Radio Regulations and with those of the international conventions and agreements concluded within the International Telecommunication Union;

...

(f) Transmit programmes and special broadcasting services which, on the authorisation of the Post and Telecommunications Authority, which itself requires the Department's consent, are received from telecommunications satellites;

..."

Article 79 § 2

"The authorisation referred to in Article 78 § 1 (f) shall be granted where the appropriate telecommunications authority has given its consent and none of the grounds for refusal provided for in Article 19 exist."

3. The Federal Decree of 1987

33. On 20 December 1985 the Federal Council submitted to Parliament, by means of a communication, a draft decree of general application on satellite broadcasting. The decree, enacted on 18 December 1987 and effective from 1 May 1988, contained an Article 28 concerning foreign programmes, which was worded as follows:

"1. A licence from the [appropriate federal] department shall be required in order to retransmit programmes broadcast by satellite under a foreign licence.

2. Such a licence shall be granted where this is not contrary to the country's higher interests and where

(a) the PTT finds that the requirements of Swiss and international telecommunications law are satisfied;

...

3. The department may refuse to grant a licence where a State whose licensing system allows a programme does not accept the retransmission on its territory of programmes broadcast under a Swiss licence."

B. The international rules

1. The International Telecommunication Convention

34. The International Telecommunication Convention, which was concluded in 1947 within the International Telecommunication Union and has been revised several times, came into force on 1 January 1975 and has been ratified by all the Council of Europe's member States. In Switzerland it has been published in full in the Official Collection of Federal Statutes (1976, p. 994, and 1985, p. 1093) and in the Compendium of Federal Law (0.784.16).

Article 22, entitled "Secrecy of telecommunications", provides:

"1. Members agree to take all possible measures, compatible with the system of telecommunication used, with a view to ensuring the secrecy of international correspondence.

2. Nevertheless, they reserve the right to communicate such correspondence to the competent authorities in order to ensure the application of their internal laws or the execution of international conventions to which they are parties."

Under Article 44 member States are bound to abide by the Convention and the Administrative Regulations in all telecommunications offices and stations established or operated by them which engage in international services or which are capable of causing harmful interference with radio services of other countries.

35. The Convention is complemented by three sets of detailed administrative rules (as indicated in Article 83): the Radio Regulations, the Telegraph Regulations and the Telephone Regulations. Only the Radio Regulations are relevant in the instant case.

2. The Radio Regulations

36. The Radio Regulations date from 21 December 1959 and were likewise amended in 1982 and also on other occasions. They run to over a thousand pages and - except for numbers 422 and 725 - have not been published in the Official Collection of Federal Statutes. The latter contains the following reference to them:

"The administrative regulations relating to the International Telecommunication Convention of 25 October 1973 are not being published in the Official Collection of Federal Statutes. They may be consulted at the Head Office of the PTT, Library and Documentation, Viktoriastrasse 21, 3030 Berne, or may be obtained from the ITU, International Telecommunication Union, Place des Nations, 1202 Geneva."

The following provisions are the ones relevant in the present case:

Number 22

"Fixed-Satellite Service: A radiocommunication service between earth stations at specified fixed points when one or more satellites are used; in some cases this service includes satellite-to-satellite links, which may also be effected in the inter-satellite service; the fixed-satellite service may also include feeder links for other space radiocommunication services."

Number 37

"Broadcasting-Satellite Service: A radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public.

In the broadcasting-satellite service, the term 'direct reception' shall encompass both individual reception and community reception."

Number 960

"Any administration may assign a frequency in a band allocated to the fixed service or allocated to the fixed-satellite service to a station authorized to transmit, unilaterally, from one specified fixed point to one or more specified fixed points provided that such transmissions are not intended to be received directly by the general public."

Numbers 1992-1994

"In the application of the appropriate provisions of the Convention, administrations bind themselves to take the necessary measures to prohibit and prevent:

(a) the unauthorized interception of radiocommunications not intended for the general use of the public;

(b) the divulgence of the contents, simple disclosure of the existence, publication or any use whatever, without authorization, of information of any nature whatever obtained by the interception of the radiocommunications mentioned [in sub-paragraph (a)]"

3. The International Telecommunication Union's reply to the Swiss Government's questions

37. On 29 September 1983 the Permanent Mission of Switzerland to the international organisations in Geneva put two questions to the International Telecommunication Union, which replied on 31 October, saying inter alia:

> "17. With regard to this aspect of [the] practical pursuance [of the principle of secrecy of telecommunications], it is ... important, indeed essential, to note also that no precise measures concerning practical ways of effectively ensuring such 'secrecy of telecommunications' are prescribed by either the Convention or the RR [Radio Regulations], but that the RR leave the choice of these practical measures to the administrations of the Union's Members.
>
> 18. That is how it is necessary to understand and interpret numbers 1992 and 1993 of the RR, which stipulate that it is administrations that bind themselves to take the necessary measures to prohibit and prevent: (a) the unauthorised interception of radiocommunications not intended for the general use of the public (... that also applies, of course, to number 1994 of the RR).
>
> 19. This means that it is for the administration of each of the Union's Members itself to take whatever measures it deems necessary to prohibit and prevent on its territory the unauthorised interception of the radiocommunications referred to in number 1993 of the RR. This, incidentally, is in accordance with the first principle laid down in the preamble to the Convention, which is worded as follows: "While fully recognising the sovereign right of each country to regulate its telecommunication ... ". In the case under consideration here ..., it is for the Swiss Administration to put into effect Switzerland's undertaking to ensure the secrecy of telecommunications by whatever measures it itself considers necessary for the purpose. Such measures may, of course, be different from those regarded as necessary by the administrations of other Members of the Union which have given the same undertaking.
>
> 20. With regard, lastly, to the authorisation required for the interception of radiocommunications not intended for the general use of the public ..., it should be inferred from the terms of numbers 1992 and 1993 of the RR that an administration which has committed itself to taking the necessary measures to prohibit and prevent such unauthorised interception in order to ensure the secrecy of telecommunications is also to be regarded as the one empowered to give, where appropriate, the authorisation for such interception on its territory and hence to lay down the terms and conditions on which it grants such authorisation. In the case under consideration here ... it is therefore the Swiss Administration that, with a view to ensuring the secrecy of telecommunications, should decide whether or not such authorisation is to be granted and lay down the terms and conditions it itself considers necessary for the purposes of that decision. By way of a conclusion and a final legal consequence, it should be borne in mind that what was stated in the preceding paragraph also applies, mutatis mutandis, in respect of the authorisation itself."

4. Recommendation T/T2

38. At a session held in Vienna from 14 to 25 June 1982 the European Conference of Postal and Telecommunications Administrations adopted Recommendation T/T2, which reads:

"The European Conference of Postal and Telecommunications Administrations, considering

(a) ...

(b) that fixed-satellite service signals are intended for reception only by known correspondents duly authorised under the Radio Regulations appended to the International Telecommunication Convention;

(c) ...

(d) that there is a risk that the technical development of small earth stations may facilitate the unauthorised reception and use of fixed-satellite service signals, particularly television signals, thus turning the fixed-satellite service into a broadcasting-satellite service, which would be unlawful under the International Telecommunication Convention and the Radio Regulations;

(e) ...

(f) ...

(g) that all ITU Members are under an obligation to apply and enforce the provisions of the International Telecommunication Convention and the Radio Regulations appended to the Convention; ...

Recommends

1. ...

2. that reception of these signals should be authorised only with the consent of the Administration of the country in which the station transmitting to the satellite is situated and of that of the country in which the prospective receiving earth station is located;

3. ..." (translation by the registry)

5. The European Convention on Transfrontier Television

39. The European Convention on Transfrontier Television, which was drawn up within the Council of Europe and signed on 5 May 1989 by nine States, including Switzerland, is not yet in force. Article 4, entitled "Freedom of reception and of retransmission", provides:

"The Parties shall ensure freedom of expression and information in accordance with Article 10 (art. 10) of the Convention for the Protection of Human Rights and Fundamental Freedoms and they shall guarantee freedom of reception and shall not restrict the retransmission on their territories of programme services which comply with the terms of this Convention."

The Swiss Government made a declaration to the effect that the Confederation would apply the Convention provisionally, in accordance with Article 29 § 3.

PROCEEDINGS BEFORE THE COMMISSION

40. Autronic AG applied to the Commission on 9 January 1987 (application no. 12726/87). The company complained that the granting of permission to receive uncoded television broadcasts for general use from a telecommunications satellite had been made subject to the consent of the broadcasting State and it alleged an infringement of its right to receive information, as guaranteed in Article 10 (art. 10) of the Convention.

41. The Commission declared the application admissible on 13 December 1988. In its report of 8 March 1989 (made under Article 31) (art. 31) the Commission expressed the opinion, by eleven votes to two with one abstention, that there had been a breach of Article 10 (art. 10). The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS TO THE COURT

42. At the hearing the Government confirmed their submissions in their memorial. They requested the Court to hold:

> "That Article 10 (art. 10) of the Convention is not applicable to the case at issue; In the alternative, that since, by the terms of Article 10 § 1, third sentence (art. 10-1), of the Convention, even broadcasting enterprises may be subject to licensing both to receive and to retransmit television broadcasts sent via a telecommunications satellite, there is all the more reason why a private commercial enterprise should be required to apply for a receiving licence in a given case; In the further alternative, that the State interference relating to this licensing system was "prescribed by law" (including international law) and was necessary, in a democratic society, for the purpose of maintaining international order in telecommunications and to prevent the disclosure of confidential information transmitted by a telecommunications satellite from one fixed point to another."

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

43. Autronic AG complained that the Swiss Post and Telecommunications Authority had made reception of television

[*] Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 178 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

programmes from a Soviet telecommunications satellite by means of a dish aerial subject to the consent of the broadcasting State (see paragraphs 13-16 above). It regarded this as a violation of Article 10 (art. 10) of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Having regard to the arguments of the parties, the first issue to be settled is whether this provision is applicable.

A. Applicability of Article 10 (art. 10)

44. In the Government's submission, the right to freedom of expression was not relevant to the applicant company's complaint in the present case.

In the first place, the company had not attached any importance to the content of the transmission (programmes in Russian), since it was pursuing purely economic and technical interests. The company was a corporate body whose activities were commercial and its sole object had been to give a demonstration at a fair of the capabilities of a dish aerial in order to promote sales of it. Freedom of expression that was exercised, as in the present case, exclusively for pecuniary gain came under the head of economic freedom, which was outside the scope of the Convention. The "information" in question was therefore not protected by Article 10 (art. 10).

In the second place, the Government emphasised that the television programmes in issue had not been intended for or made accessible to the public at the time Autronic AG could have received them. At that time they were in process of transmission between two fixed points of the distribution network on Soviet territory by means of the telecommunications satellite G-Horizont (see paragraphs 11 and 12 above) and were accordingly covered by the secrecy of such telecommunications under international law, that is to say Article 22 of the International Telecommunication Convention and numbers 1992-1994 of the Radio Regulations.

45. The applicant company argued on the contrary that the right to freedom of expression included the right to receive information from accessible sources and consequently to receive television programmes

intended for the general public which were retransmitted by a telecommunications satellite. Moreover, Article 10 (art. 10) protected not only the substance but also the process of communication. The company could not see why the fundamental rights which corporate bodies undoubtedly enjoyed under Article 10 (art. 10) should be subject to restrictions merely because they were pursuing economic or technical objectives.

46. In its report of 8 March 1989 the Commission noted that "at present" only telecommunications satellites were in operation over Europe. Their programmes were undoubtedly picked up primarily by receiving stations for retransmission but they were also received direct by private aerials or community antennas. The practice of several Council of Europe member States, including France and the United Kingdom, suggested that the International Telecommunication Convention and the Radio Regulations did not preclude direct reception of signals retransmitted by telecommunications satellite where they were intended for the general public.

At the material time - in 1982 - only G-Horizont was concerned, but that was of little importance as Autronic AG's application of 1 November 1982 to the Swiss authorities for a declaratory ruling (see paragraph 17 above) was not limited to transmissions from the Soviet satellite; and in any case, on the Government's own admission, the Swiss PTT would adopt the same attitude today if faced with a similar application. The Commission considered that the distinction between signals according to their means of transmission - direct-broadcasting satellite or, where uncoded, telecommunications satellite - was purely formal. Since no question of secrecy arose and technological progress meant that anyone could receive broadcasts by means of his own equipment, the corresponding right to do so was included in the freedom to receive information.

47. In the Court's view, neither Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10 (art. 10). The Article (art. 10) applies to "everyone", whether natural or legal persons. The Court has, moreover, already held on three occasions that it is applicable to profit-making corporate bodies (see the Sunday Times judgment of 26 April 1979, Series A no. 30, the Markt Intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989, Series A no. 165, and the Groppera Radio AG and Others judgment of 28 March 1990, Series A no. 173). Furthermore, Article 10 (art. 10) applies not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information. Indeed the Article (art. 10) expressly mentions in the last sentence of its first paragraph (art. 10-1) certain enterprises essentially concerned with the means of transmission.

Before the Convention institutions the applicant company complained of an interference with its freedom to receive information and ideas regardless of frontiers, and not with its freedom to impart them. Like the Commission, the Court is of the view that the reception of television programmes by means of a dish or other aerial comes within the right laid down in the first two sentences of Article 10 § 1 (art. 10-1), without it being necessary to ascertain the reason and purpose for which the right is to be exercised. As the administrative and judicial decisions complained of (see paragraphs 16, 19 and 27 above) prevented Autronic AG from lawfully receiving G-Horizont's transmissions, they therefore amounted to "interference by public authority" with the exercise of freedom of expression.

The Government's submission based on the concern to protect the secrecy of telecommunications relates only to justification for the interference and accordingly needs to be considered, if at all, in regard to paragraph 1 in fine or paragraph 2 of Article 10 (art. 10-1, art. 10-2).

48. In conclusion, Article 10 (art. 10) was applicable.

B. Compliance with Article 10 (art. 10)

49. The Government submitted in the alternative that the interference was compatible with paragraph 1 in fine, whereby Article 10 (art. 10) is not to "prevent States from requiring the licensing of broadcasting [or] television ... enterprises"; in the further alternative, they argued that the interference satisfied the requirements of paragraph 2.

1. Paragraph 1, third sentence, of Article 10 (art. 10-1)

50. On the first point Autronic AG maintained that the International Telecommunication Convention and the Radio Regulations did not make reception for private use of uncoded programmes broadcast by satellite subject to the consent of the authorities of the broadcasting State and that the third sentence of Article 10 § 1 (art. 10-1) was therefore of no relevance.

The Commission likewise thought that this provision could not justify the impugned interference. Since the rights recognised in paragraph 1 (art. 10-1) applied "regardless of frontiers", the Contracting States could only, in its view, "restrict information received from abroad" on the basis of paragraph 2 (art. 10-2). Furthermore, the third sentence covered only broadcasting, television and the cinema, not the use of receiving equipment.

51. The Government submitted, on the contrary, that international law required that any transmission from a telecommunications satellite should be kept secret and laid a duty upon States to ensure this. Article 10 § 1 (art. 10-1) in fine, they said, empowered States to establish a system whereby broadcasting enterprises had to obtain a licence both to receive such transmissions and to rebroadcast them. This applied all the more in the case of a private commercial company such as Autronic AG.

52. It is unnecessary to consider this submission and, therefore, to rule on the applicability of the third sentence of Article 10 § 1 (art. 10-1) in the instant case; at all events, that sentence "does not ... provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2 (art. 10-2), for that would lead to a result contrary to the object and purpose of Article 10 (art. 10) taken as a whole", as the Court pointed out in its Groppera Radio AG and Others judgment of 28 March 1990 (Series A no. 173, p. 24, § 61).

2. Paragraph 2 of Article 10 (art. 10-2)

53. It must be determined whether the interference complained of was "prescribed by law", was in pursuance of one or more of the legitimate aims listed in paragraph 2 (art. 10-2) and was "necessary in a democratic society" in order to achieve them.

(a) "Prescribed by law"

54. The applicant company submitted that Swiss law did not contain any rule that would provide a legal basis for the decision in issue or that referred to provisions of international telecommunications law. The International Telecommunication Union's reply to the Swiss Government's questions afforded proof of this (see paragraphs 7 and 37 above), as it showed that it was for each member State to take the measures it considered necessary in order to achieve the treaty objectives and honour its own corresponding commitments.

55. The Government considered that the national and international rules satisfied the requirements of precision and accessibility that had been established in the Convention institutions' case-law.

As to the first of these requirements, they pointed out that the decisions taken on 13 January 1983 by the Radio and Television Division and on 26 July 1983 by the Head Office of the PTT were founded on the Federal Council's Ordinance no. 1 of 10 December 1973 and several specific provisions of international telecommunications law (the International Telecommunication Convention and the Radio Regulations).

As to the requirement of accessibility, the Government recognised that only the International Telecommunication Convention had been published in full in the Official Collection of Federal Statutes and in the Compendium of Federal Law. While the Radio Regulations had not been so published - except for numbers 422 and 725 -, the Official Collection indicated how they could be consulted or obtained (see paragraph 36 above). This practice was, the Government said, justified by the length of the text, which ran to more than a thousand pages. Moreover, the practice had been approved by the Federal Court (judgment of 12 July 1982 in the case of Radio 24 Radiowerbung Zürich AG gegen Generaldirektion PTT, Judgments of the Swiss Federal Court, vol. 108, Part Ib, p. 264) and could be found in at least

ten other member States of the Council of Europe. Lastly, it was consonant with the European Court's case-law on individuals' access to legal norms in common-law systems.

56. The Commission did not share this opinion. The Federal Council's Ordinance no. 1 did not provide a sufficient legal basis as it did not make any mention of the need for the broadcasting State's consent in order to receive television programmes intended for the general public. As to the Radio Regulations, the provisions relied on by the Government lacked precision.

57. In the Court's view, the legal basis for the interference is to be found in the Federal Act of 1922 and Article 66 of Ordinance no. 1 relating to that Act (see paragraph 31 above), taken together with Article 22 of the International Telecommunication Convention and the provisions of the Radio Regulations cited in paragraph 36 above.

Having regard to the particular public for which they are intended, these enactments are sufficiently accessible (see paragraphs 34 and 36 above and the Groppera Radio AG and Others judgment previously cited, Series A no. 173, p. 26, § 68). Their status as "law" within the meaning of Article 10 § 2 (art. 10-2), however, remains doubtful, because it may be asked whether they do not lack the required clarity and precision. The national provisions do not indicate exactly what criteria are to be used by the authorities in determining applications for one of the licences referred to in Article 66, while the international provisions seem to leave a substantial margin of appreciation to the national authorities.

But it does not appear necessary to decide the question, since even supposing that the "prescribed by law" condition is satisfied, the Court comes to the conclusion that the interference was not justified (see paragraphs 60-63 below).

(b) Legitimate aim

58. The Government contended that the impugned interference was in pursuance of two aims recognised in the Convention.

The first of these was the "prevention of disorder" in telecommunications. It was important to have regard to the limited number of frequencies available, to prevent the anarchy that might be caused by unlimited international circulation of information and to ensure cultural and political pluralism.

Secondly, the interference was, the Government maintained, aimed at "preventing the disclosure of information received in confidence": the secrecy of telecommunications, which covered the television transmissions in question and was guaranteed in Article 22 of the International Telecommunication Convention, had to be protected.

The applicant company, on the other hand, observed that the material broadcasts were intended for the general public and that other Contracting States had more liberal rules on the subject.

The Commission acknowledged the legitimacy of the first objective mentioned by the Government, the only one on which they had relied in the proceedings before the Commission.

59. The Court finds that the interference was in pursuance of the two aims cited by the Government, which were fully compatible with the Convention - the prevention of disorder in telecommunications and the need to prevent the disclosure of confidential information.

(c) "Necessary in a democratic society"

60. The applicant company submitted that the refusal to give it permission did not correspond to any pressing social need; it was not necessary in order to prevent the disclosure of confidential information, since broadcasters anxious to restrict their broadcasts to a particular audience would encode them.

The Government emphasised the distinction between direct-broadcasting satellites and telecommunications satellites; they claimed that international telecommunications law was designed to afford the same legal protection to broadcasts from the latter as to telephonic communications.

In the Commission's view, the case raised no problem with regard to the protection of confidential information; merely receiving G-Horizont's signals could not upset the international telecommunications order, and the distinction between direct-broadcasting satellites and telecommunications satellites was purely formal. In short, the interference appeared to be unnecessary.

61. The Court has consistently held that the Contracting States enjoy a certain margin of appreciation in assessing the need for an interference, but this margin goes hand in hand with European supervision, whose extent will vary according to the case. Where, as in the instant case, there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10 (art. 10-1), the supervision must be strict, because of the importance of the rights in question; the importance of these rights has been stressed by the Court many times. The necessity for restricting them must be convincingly established (see the Barthold judgment of 25 March 1985, Series A no. 90, p. 26, § 58).

62. The Government maintained that the Court, in carrying out its review, should look at matters as they stood at the material time and, in particular, should ignore the legal and technical developments that had taken place since. On the other hand, the Government held the view that Article 22 of the International Telecommunication Convention and the aforementioned provisions of the Radio Regulations would still leave the PTT no choice but to refuse applications such as those from the applicant

company, if permission had not first been obtained from the authorities of the country in which the station transmitting to the satellite was situated.

The Court observes that later developments can be taken into account in so far as they contribute to a proper understanding and interpretation of the relevant rules.

In the technical field, several other telecommunications satellites broadcasting television programmes have come into service. In the legal field, developments have included, at international level, the signature within the Council of Europe on 5 May 1989 of the European Convention on Transfrontier Television and, at national level, the fact that several member States allow reception of uncoded television broadcasts from telecommunications satellites without requiring the consent of the authorities of the country in which the station transmitting to the satellite is situated.

The latter circumstance is not without relevance, since the other States signatories to the International Telecommunication Convention and the international authorities do not appear to have protested at the interpretation of Article 22 of this Convention and the provisions of the Radio Regulations that it implies. The contrary interpretation of these provisions, which was relied on by the Swiss Government in support of the interference, is consequently not convincing. This is also apparent from paragraphs 19 and 20 of the International Telecommunication Union’s reply to the Government’s questions (see paragraph 37 above).

63. That being so, the Government’s submission based on the special characteristics of telecommunications satellites cannot justify the interference. The nature of the broadcasts in issue, that is to say uncoded broadcasts intended for television viewers in the Soviet Union, in itself precludes describing them as "not intended for the general use of the public" within the meaning of numbers 1992-1994 of the Radio Regulations. Leaving aside the international rules discussed above, there was therefore no need to prohibit reception of these broadcasts.

Before the Court the Swiss Government also argued that a total ban on unauthorised reception of transmissions from telecommunications satellites was the only way of ensuring "the secrecy of international correspondence", because there was no means of distinguishing signals conveying such correspondence from signals intended for the general use of the public. That submission is unpersuasive, since the Government had already conceded before the Commission that there was no risk of obtaining secret information by means of dish aerials receiving broadcasts from telecommunications satellites.

The Court concludes that the interference in question was not "necessary in a democratic society" and that there has accordingly been a breach of Article 10 (art. 10).

II. APPLICATION OF ARTICLE 50 (art. 50)

64. By Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

Autronic AG did not seek compensation for damage. On the other hand, the company did claim reimbursement of its costs and expenses in the domestic proceedings and in those before the Convention institutions. It said that these amounted to 42,245 Swiss francs, namely 380 in costs paid to the Swiss authorities for the decision taken by the Head Office of the PTT on 26 July 1983, 40,000 for lawyer's fees (representing 235 hours' work) and 1,865 for sundry expenses.

The Government did not contest the first or third heads, but found the second head "frankly excessive" - the applicant company had not provided a breakdown of the fees and had committed "a procedural error" by submitting an abstract question to the Federal Court, which would in any case not have awarded more than 4,000 Swiss francs in costs if the administrative-law appeal had been allowed.

The Delegate of the Commission did not express any view.

65. Taking its decision on an equitable basis as required by Article 50 (art. 50), the Court considers that Autronic AG is entitled to be reimbursed for costs and expenses in the amount of 25,000 Swiss francs.

FOR THESE REASONS, THE COURT

1. Holds by sixteen votes to two that Article 10 (art. 10) applied and that there has been a breach of it;

2. Holds unanimously that Switzerland is to pay the applicant company costs and expenses in the amount of 25,000 (twenty-five thousand) Swiss francs;

3. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 May 1990.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 53 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mrs Bindschedler-Robert and Mr Matscher;

(b) concurring opinion of Mr De Meyer.

R.R.
M.-A.E.

DISSENTING OPINION OF JUDGES BINDSCHEDLER-ROBERT AND MATSCHER

(Translation)

We regret that we cannot share the majority's opinion as to the applicability of Article 10 (art. 10) or as to the breach if Article 10 (art. 10) is held to be applicable.

1. We do not dispute that a commercial company can in principle rely on Article 10 (art. 10), even in connection with its commercial activities. But we note that in the instances mentioned in the judgment (The Sunday Times, Series A no. 30; Markt Intern Verlag GmbH and Klaus Beermann, Series A no. 165, and Groppera Radio AG and Others, Series A no. 173) the content of the information which the company wished to disseminate was of some significance to it or to the intended recipients. In our opinion, Article 10 (art. 10) presupposes a minimum of identification between the person claiming to rely on the right protected by that Article (art. 10) and the "information" transmitted or received. In the instant case, however, the content of the information - by pure chance Soviet programmes in Russian - was a matter of complete indifference to the company and to the visitors to the trade fair who were likely to see the programmes; the sole purpose was to give a demonstration of the technical characteristics of the dish aerial in order to promote sales of it. That being so, we consider it unreasonable on the part of the company to invoke freedom of information, and Article 10 (art. 10) is accordingly not, in our opinion, applicable in the instant case.

2. Even supposing that Article 10 (art. 10) was applicable, we cannot see that there has been any breach of that provision in the restriction of freedom of reception imposed on the applicant company.

We would point out at the outset that the sale of dish aerials was not itself made subject to any restriction. It is therefore not possible in the instant case to derive a restriction of freedom of information from an alleged restriction of trade in technical equipment for radiocommunication.

As the majority accepted, the restriction that was imposed was in pursuit of a legitimate aim: order in international telecommunications. The majority leave a lingering doubt, however, as to the "law" status of the statutory provisions on which the interference was based. In our opinion, both the International Telecommunication Convention and the international Radio Regulations had, as was recognised in the Groppera Radio AG and Others case (judgment of 28 March 1990, § 68), the necessary clarity and precision in respect of the vital points: the fundamental distinction between direct-broadcasting satellites, whose broadcasts are intended for direct reception by the general public; and telecommunications satellites (broadcasting from point to point), whose broadcasts are not directly intended for the general use of the public, and the obligation to take the necessary measures to

prohibit and prevent the unauthorised interception of radiocommunications not intended for the general use of the public, that is to say broadcasts from telecommunications satellites (RR nos. 22, 37, 1992-1994). It should be remembered that the G-Horizont satellite was precisely a satellite of this latter type.

As the ITU pointed out in its reply of 2 November 1989, it follows from these provisions that the interception of the broadcasts via telecommunications satellite was subject to authorisation by the Swiss PTT, which was empowered to lay down the terms and conditions of such authorisation and which, in so doing, had to have regard to the undertaking it had entered into under the Radio Regulations. The disputed interference - the Swiss authorities' refusal of permission - therefore had a sufficient legal basis.

3. Switzerland's opinion that this undertaking obliged it to make permission for reception subject to the consent of the broadcasting State - in this instance the Soviet Union - was in keeping with the interpretation generally accepted at the time (and even until quite recently), as appears from the replies of the foreign authorities from which Switzerland requested information (the USSR, 7 February 1984; the Netherlands, 1 July 1985; Finland, 8 July 1985; and the Federal Republic of Germany, 29 August 1989); it was also in keeping with the recommendation adopted in 1982 by the European Conference of Postal and Telecommunications Administrations (see the judgment, § 38).

It was therefore legitimate for Switzerland to believe itself to be not only entitled but obliged to make the permission sought by Autronic AG subject to the consent of the appropriate Soviet authorities, in order to discharge the international obligations it had undertaken, by complying with them as they were understood by the relevant international bodies and by the other States, in particular by the State concerned in this instance, the Soviet Union. In other words, since the Soviet authorities' consent had not been secured, the refusal of permission complained of by Autronic AG could be regarded at the time as a measure necessary for ensuring order in international telecommunications.

Even if, in recent years, some national authorities seem to have dispensed with the condition of first securing the consent of the broadcasting State, it nonetheless emerges from the replies received as late as 1989 that this approach is not yet a general one. The inter-State agreements concluded in order to set up Eutelsat and Intelsat, which allow only specially authorised earth stations to pick up broadcasts from satellites, prove this. But even if that were not the case and if views have changed, this cannot be taken as a basis for determining the issue of whether or not there has been a violation of the Convention in this case and therefore of the State's responsibility, which is an issue that has to be assessed in the light of the legal rules in force (and as understood) at the material time.

The fact that the ITU considers that it is for the authorities of each member of the Union themselves to take the "necessary measures to prohibit and prevent the unauthorised interception of radiocommunications not intended for the general use of the public" and that any national administration is empowered to "lay down the terms and conditions on which it grants such authorisation" means only that, under the International Telecommunication Convention and the Radio Regulations, the States enjoy some discretion in deciding on suitable measures for the purposes laid down in the aforesaid international rules; it cannot be argued from this discretion that a measure taken in this context which appears perfectly suitable and proportionate to the legitimate aim pursued, that is to say in the instant case to the prevention of international disorder in telecommunications, is unnecessary. Moreover, the measure complained of was not an absolute, indiscriminate prohibition but a reasonable response to the international undertakings entered into by the State in question, a response which had regard to the legal interests of the broadcasting State.

That being so, we consider that there has been no breach of Article 10 (art. 10).

CONCURRING OPINION OF JUDGE DE MEYER

(Translation)

The reasons which led me to hold that there had been a breach of the right to freedom of expression in the case of Groppera Radio AG and Others[1] could not but prompt me to reach the same decision in the instant case, especially as what was in issue here was measures preventing public demonstration of equipment for receiving television broadcasts.

In this connection I think it useful to say that the licensing power of States in respect of radio and television does not extend to the reception of broadcasts[2] and that, for the rest, such reception can only be interfered with by States as regards methods or circumstances and only to the extent that one or other of those is giving rise to harmful effects which there is a pressing social need to prevent or eliminate[3]. The freedom to see and watch and to hear and listen is not, as such, subject to States' authority.

[1] Series A no. 173, pp. 39-41.
[2] See § 61 of the Commission's report.
[3] Such as the disturbances mentioned in §§ 79 and 82 of the Commission's report.

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

COURT (CHAMBER)

CASE OF BARFOD v. DENMARK

(Application no. 11508/85)

JUDGMENT

STRASBOURG

22 February 1989

In the Barfod case*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr B. WALSH,
Mr B. GOMARD, *ad hoc judge*,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 October 1988 and on 28 January 1989,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was brought before the Court on 16 October 1987 by the European Commission of Human Rights ("the Commission") and on 4 November by the Government of the Kingdom of Denmark ("the Government"), within the period of three months laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. The case originated in an application (no. 11508/85) against Denmark lodged with the Commission in 1985 by Mr Bjørn Barfod, a Danish citizen, under Article 25 (art. 25).

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Denmark recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request and of the Government's application was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) of the Convention.

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* Note by the Registrar: The case is numbered 13/1987/136/190. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

2. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included, as ex officio members, Mr J. Gersing, the elected judge of Danish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 30 November 1987 the President of the Court drew by lot, in the presence of the Registrar, the names of the other five members, namely Mr J. Cremona, Mrs D. Bindschedler-Robert, Mr F. Gölcüklü, Mr B. Walsh and Mr A.M. Donner (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

Subsequently, Professor B. Gomard was appointed by the Government on 28 September 1988 to sit as an ad hoc judge in place of Mr Gersing, who had died, and Mr F. Matscher, substitute judge, replaced Mr Donner, who had resigned and whose successor at the Court had taken up his duties before the hearing (Rules 2 para. 3, 22 para. 1, 23 para. 1 and 24 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5). He ascertained, through the Registrar, the views of the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant regarding the need for a written procedure (Rule 37 para. 1). Thereafter, in accordance with the Order and directions of the President, the registry received the Government's memorial on 12 October 1988 and the applicant's claims under Article 50 (art. 50) on 25 October and 10 November 1988.

5. In a letter of 27 May 1988, the Agent of the Government advised the Court of an attempt to reach a friendly settlement with the applicant. On 15 June 1988, after consulting, through the Registrar, those who would be appearing before the Court, the President directed that the oral proceedings should open on 24 October 1988 (Rule 38) unless such a settlement intervened before this date. On 28 September, the Court was informed by the Agent of the Government that the negotiations had failed.

6. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. Immediately prior to its opening, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mr T. LEHMANN, Under-Secretary for Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mr I. FOIGHEL, Professor, *Counsel*,
Mr J. BERNHARD, Head of Division, Ministry of Foreign Affairs,
Mr F. ABRAHAMSEN, Assistant Head of Division,
Ministry of Foreign Affairs,
Mr K. HAGEL-SØRENSEN, Ministry of Justice,

Ms N. HOLST-CHRISTENSEN, Head of Section,
Ministry of Justice, *Advisers*;
- for the Commission
Mr S. TRECHSEL, *Delegate*;
- for the applicant
Mr J. KORSØ JENSEN, advokat, *Counsel*.

The Court heard addresses by Mr Lehmann and Mr Foighel for the Government, by Mr Trechsel for the Commission and by Mr Korsø Jensen for the applicant, as well as their replies to its questions.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

7. The applicant is a Danish citizen, born in 1919. He is a precious-stone cutter by profession and resides at Narssaq, Greenland.

8. When, in 1979, the Greenland Local Government decided to introduce taxation of Danish nationals working on American bases in Greenland, a number of the persons affected (which persons did not include Mr Barfod) challenged that decision before the High Court of Greenland (Grønlands Landsret). They argued that the decision was illegal on the grounds, inter alia, that they did not have the right to vote in local elections in Greenland and did not receive any benefits from the Greenland authorities. The case was heard in the High Court sitting with one professional judge and two lay judges; the latter were both employed by the Local Government. In its judgment of 28 January 1981, which is not the object of the present complaint, the High Court unanimously found for the Local Government; this judgment was subsequently upheld by the High Court for Eastern Denmark (Østre Landsret) on 8 September 1983 ("the 1981 tax case").

9. After learning about the judgment of the High Court of Greenland, the applicant wrote an article on the judgment, published in a magazine called "Grønland Dansk" in August 1982.

In the article he expressed his opinion that the two lay judges were disqualified under Article 62 of the Danish Constitution (see paragraph 15 below); he also questioned their ability and power to decide impartially in a case brought against their employer. The article included the following passage (translation from Danish):

> "Most of the Local Government's members could ... afford the time to watch that the two Greenland lay judges - who are by the way both employed directly by the Local Government, as director of a museum and as consultant in urban housing affairs

> - did their duty, and this they did. The vote was two to one [cf paragraph 13 below] in favour of the Local Government and with such a bench of judges it does not require much imagination to guess who voted how."

10. The professional High Court judge considered that these remarks on the two lay judges were of a kind which might damage their reputation in the eyes of the public and hence generally impair confidence in the legal system. As head of the Greenland judiciary, he consequently applied to the Greenland Chief of Police, asking for a criminal investigation to be instituted. The applicant was subsequently charged with defamation of character within the meaning of Article 71(1) of the Greenland Penal Code (Kriminalloven for Grønland; see paragraph 17 below) before the District Court (Kredsret) of Narssaq.

11. After an initial question of venue had been settled, the case was heard by the District Court of Narssaq on 9 December 1983. The applicant confirmed that he had written the article in question but he maintained that the lay judges had been barred, by virtue of Article 62 of the Danish Constitution (see paragraph 15 below), from adjudicating in the tax case and that the defamation case brought against him violated Article 77 of the Danish Constitution, which guarantees freedom of expression (see paragraph 16 below). In its judgment of the same day, the District Court stated (translation from Danish):

> "The Court does not find that the validity of the High Court judgment of 28 January 1981 should be examined in the present proceedings. The sole question is whether the accused, through the contents of his article, has insulted two of the judges sitting in that case.
>
> The Court finds that in the particular paragraph of the article in question the accused used such words that the two judges concerned may rightly consider their honour offended.
>
> The right invoked by the accused to freedom of expression in accordance with Article 77 of the Constitution is not found to be violated since the accused is entitled, without prior censorship, to state his views, although he may still be held responsible in the courts.
>
> Accordingly, the Court finds the accused guilty of having violated Article 71(1) of the Greenland Penal Code since it does not find that the accused has, in accordance with Article 71(2) of the same Code, proved the justification of his choice of words in the article in question."

The District Court imposed a fine of 2,000 Danish Crowns on the applicant.

12. The applicant appealed to the High Court for Eastern Denmark, but the proceedings were transferred to the High Court of Greenland as this court was considered the proper court of appeal. When the High Court heard the case, the usual professional judge, who was disqualified as he had been

responsible for initiating the proceedings, was replaced by one of his deputies (see paragraphs 10 above and 18 below).

13. In its judgment of 3 July 1984 upholding the District Court's judgment, the High Court emphasised that the applicant had misunderstood the votes in the 1981 tax case: it was only with regard to the reasoning that there was a dissent; with regard to the conclusion all three judges had decided in favour of the Local Government (see paragraph 8 above). As to the charge brought against the applicant, the Court stated inter alia (translation from Danish):

> "Like the District Court, the High Court agrees with the prosecution that the words of the article to the effect that the two Greenland lay judges did their duty - namely their duty as employees of the Local Government to rule in its favour - represent a serious accusation which is likely to lower them in public esteem. Proof of the accusation has not been adduced, something which, moreover, would not have been possible since it cannot be excluded that they would have reached the same result had they not been employed by the Local Government. The accused will hereafter be considered guilty of having violated Article 71(1) of the Penal Code.
>
> Finally, concerning the question of the competence of the two lay judges, the High Court agrees with the accused that they, being employed in leading positions by the defendant party, ought - as was pointed out by the defence and notwithstanding the specific difficulties in Greenland of observing strict rules in regard to competence - to have considered themselves as disqualified and thus refrained from participating in the case, and that he was correct in drawing attention to this.
>
> Having regard, on the one hand, to the seriousness of the accusation and the information now available about the accused's economic situation - which would give grounds for a considerable increase of the fine imposed - and, on the other hand, to the appropriateness of drawing attention to the failure to observe reasonable rules of competence which occurred, the Court finds that the fine imposed should be confirmed."

14. The applicant subsequently asked the Ministry of Justice for leave to appeal to the Supreme Court (Højesteret), but his request was rejected on 14 March 1985.

II. DOMESTIC LAW AND PRACTICE

A. Danish Constitution

15. According to Article 62 of the Constitution (Danmarks Riges Grundlov), the administration of justice shall remain separated from the Executive and the rules in this respect shall be laid down by law.

16. Freedom of expression is protected by Article 77 of the Constitution, which provides (translation from Danish):

"Everyone shall be entitled to make public his views in print, in writing and in speech, with the proviso that he may be held responsible in a court of justice. Censorship and other preventive measures shall never again be introduced."

B. Greenland Penal Code

17. The crime of defamation of character is defined in Article 71 of the Greenland Penal Code (Kriminalloven for Grønland), which provides (translation from Danish):

[(1)] "Any person shall be liable to punishment for defamation of character if he degrades the honour of another person through insulting words or acts or if he makes or disseminates an accusation which is likely to damage the esteem in which the insulted party is held by his fellow citizens or which may in other ways damage his relationship with other people.

(2) However, no person may be convicted on the ground of an accusation which is proved true or has been made in good faith, if the perpetrator was under an obligation to make the statement or acted in order to safeguard, justifiably, an evident public interest or his own or another's interest.

(3) A person making an accusation supported by evidence may nevertheless be convicted if the wording of the accusation is unduly insulting or if the perpetrator had no reasonable cause to make the accusation.

(4) Whenever a defamatory accusation is unwarranted, the insulted party may call for a statement to this effect to be included in the conclusions of the judgment."

C. Administration of justice in Greenland

18. The administration of justice in Greenland is much influenced by the special conditions obtaining there: time-honoured traditions, the country's enormous size and widely scattered settlements. The legal system consists of two levels of courts: the district courts, which are the courts of first instance, and the High Court, which is the court of appeal but can also hear certain cases at first instance. Depending on whether the High Court decides a case on appeal or at first instance, its judgment can be appealed either to the Supreme Court, if leave to appeal is granted by the Ministry of Justice, or to the High Court for Eastern Denmark.

The High Court is presided over by the High Court Judge or one of his deputies, all of whom are legally trained. The High Court also includes two lay judges, appointed for four years at a time by the Greenland Parliament (Landstinget) upon nomination by the High Court Judge. The district courts are composed of three lay judges appointed for four years: the president, appointed by the High Court Judge, and two other lay judges appointed by the local authorities upon nomination by the High Court Judge.

The lay judges discharge their duties as a civic obligation alongside their ordinary work. Any person entitled to vote in local elections may be appointed to act as a lay judge. Only if it is especially onerous for a lay judge to discharge his duties, may he be relieved of his appointment by the High Court Judge.

19. It is a fundamental principle of Danish as well as Greenland administration of justice that a judge must be impartial and be guided solely by the law and the evidence adduced. This principle applies to all persons exercising judicial power, that is both professional judges and lay judges.

20. The rules relating to disqualification of judges are laid down in the Greenland Administration of Justice Act. However this Act is worded in general terms and does not explicitly mention an employee/employer relationship between judges and parties as a ground for disqualification.

21. A decision given by a judge under the influence of considerations other than those deriving from the law or the evidence adduced, for example in deference to his employers, would be a manifest breach of duty for which sanctions would be available either under the Greenland Administration of Justice Act (disciplinary punishment) or under Article 28 of the Greenland Penal Code (abuse of public authority).

PROCEEDINGS BEFORE THE COMMISSION

22. In his application (no. 11508/85) lodged with the Commission on 22 March 1985, Mr Barfod complained of violations of the following Articles of the Convention: Article 6 para. 3 (art. 6-3), in that neither of the lay judges was heard as a witness in the defamation case against him; Article 10 (art. 10), because of his conviction for defamation of character; and Article 13 (art. 13), in that the Ministry of Justice refused him leave to appeal to the Supreme Court. He additionally invoked Article 17 (art. 17) of the Convention.

23. On 17 July 1986, the Commission declared admissible "the complaint that there has been an unjustified interference with the applicant’s right to freedom of expression", guaranteed by Article 10 (art. 10); it declared the remainder of the complaints inadmissible. In its report of 16 July 1987 (Article 31) (art. 31), it concluded, by fourteen votes to one, that there had been a violation of Article 10 (art. 10).

The full text of the Commission’s opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment.

AS TO THE LAW

24. The applicant submitted that his conviction for defamation by the Greenland High Court constituted a violation of Article 10 (art. 10) of the Convention, which reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Government contested the applicant's allegation, whereas the Commission agreed with it.

25. As was not disputed, the applicant's conviction clearly amounted to an interference by a public authority with his right to freedom of expression as enshrined in Article 10 (art. 10). Such interferences will not however contravene the Convention provided the conditions laid down in the Article's second paragraph (art. 10-2) are fulfilled.

26. The applicant did not contest either that the interference was "prescribed by law" or that its aims were those invoked by the Government, namely the protection of the reputation of others and, indirectly, the maintenance of the authority of the judiciary. Like the Commission, the Court has no cause to doubt that the interference satisfied the requirements of Article 10 para. 2 (art. 10-2) in these respects.

27. The sole issue debated before the Court was whether the interference was "necessary in a democratic society" for achieving the above-mentioned aims.

28. The Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the existence and extent of such a necessity, but this margin is subject to a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court.

The Court is therefore empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression. In so doing, the Court must consider the impugned judgment of 3 July 1984 in the light of the case as a whole, including the relevant statements in the applicant's article and the context in which they were written; in particular, it must determine whether the interference at issue was "proportionate to the legitimate aim pursued", due regard being had to the importance of freedom

of expression in a democratic society (see the Müller and Others judgment of 24 May 1988, Series A no. 133, pp. 21-22, paras. 32-33).

29. In the present case proportionality implies that the pursuit of the aims mentioned in Article 10 para. 2 (art. 10-2) has to be weighed against the value of open discussion of topics of public concern (see, mutatis mutandis, the Lingens judgment of 8 July 1986, Series A no. 103, p. 26, para. 42). When striking a fair balance between these interests, the Court cannot overlook, as the applicant and the Commission rightly pointed out, the great importance of not discouraging members of the public, for fear of criminal or other sanctions, from voicing their opinions on issues of public concern.

30. The applicant's article contained two elements: firstly, a criticism of the composition of the High Court in the 1981 tax case and, secondly, the statement that the two lay judges "did their duty", which in this context could only mean that they cast their votes as employees of the Local Government rather than as independent and impartial judges (see paragraph 9 above).

31. The interference with the applicant's freedom of expression was prompted by the second element alone. However, in the opinion of the Commission this statement concerned matters of public interest involving the functioning of the public administration, including the judiciary. According to the Commission, the test of necessity had to be particularly strict in such matters: thus, even if the article could be interpreted as an attack on the two lay judges, the general interest in allowing public debate about the functioning of the judiciary weighed more heavily than the interest of the two lay judges in being protected against criticism of the kind expressed in the applicant's article.

The applicant supported this view; he maintained in particular that his remarks related to a matter of obvious public concern as they drew attention to the alleged procedural mistake committed by the High Court Judge when he nominated disqualified lay judges.

The Government objected that the Commission had minimised the applicant's impugned statement by treating it merely as a criticism of the composition of the High Court: it was in fact an allegation of abuse of public authority in violation of Article 28 of the Greenland Penal Code (see paragraph 21 above). The Government also disagreed with the Commission's interpretation of the test of necessity: they laid great stress on the national authorities' margin of appreciation. According to the Government, the applicant's accusations were defamatory, unsupported by any evidence and in fact false; furthermore, regardless of whether or not the lay judges were effectively disqualified in the 1981 tax case, the accusations did not constitute a contribution to the formation of public opinion worthy of safeguarding in a democratic society.

32. The basis of the Greenland High Court's judgment was its finding, made in the proper exercise of its jurisdiction, that "the words of the article to the effect that the two ... lay judges did their duty - namely their duty as employees of the Local Government to rule in its favour - represent a serious accusation which is likely to lower them in public esteem". Having regard to this and to the other circumstances of the applicant's conviction, the Court is satisfied that the interference with his freedom of expression did not aim at restricting his right under the Convention to criticise publicly the composition of the High Court in the 1981 tax case. Indeed, his right to voice his opinion on this issue was expressly recognised by the High Court in its judgment of 3 July 1984 (see paragraph 13 above).

33. Furthermore, the applicant's conviction cannot be considered even to have had the result of effectively limiting this right.

It was quite possible to question the composition of the High Court without at the same time attacking the two lay judges personally. In addition, no evidence has been submitted to the effect that the applicant was justified in believing that the two elements of criticism raised by him (see paragraph 30 above) were so closely connected as to make the statement relating to the two lay judges legitimate. The High Court's finding that there was no proof of the accusations against the lay judges (see paragraph 13 above) remains unchallenged; the applicant must accordingly be considered to have based his accusations on the mere fact that the lay judges were employed by the Local Government, the defendant in the 1981 tax case. Although this fact may give rise to a difference of opinion as to whether the court was properly composed, it was certainly not proof of actual bias and the applicant cannot reasonably have been unaware of that.

34. The State's legitimate interest in protecting the reputation of the two lay judges was accordingly not in conflict with the applicant's interest in being able to participate in free public debate on the question of the structural impartiality of the High Court.

When it assessed the amount of the fine to be imposed, the High Court nevertheless took into account that the impugned statement was published in the context of the applicant's criticism of its composition in 1981 (see paragraph 13 above).

35. The applicant alleged that, having regard to the political background to the 1981 tax case, his accusations against the lay judges should be seen as part of political debate, with its wider limits for legitimate criticism.

The Court cannot accept this argument. The lay judges exercised judicial functions. The impugned statement was not a criticism of the reasoning in the judgment of 28 January 1981, but rather, as found by the High Court in its judgment of 3 July 1984, a defamatory accusation against the lay judges personally, which was likely to lower them in public esteem and was put forward without any supporting evidence (see paragraph 13 above). In view

of these considerations, the political context in which the tax case was fought cannot be regarded as relevant for the question of proportionality.

36. Having regard to the foregoing, the Court reaches the conclusion that no breach of Article 10 (art. 10) has been established in the circumstances of the present case.

FOR THESE REASONS, THE COURT

Holds by six votes to one that there has been no violation of Article 10 (art. 10).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg on 22 February 1989.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the dissenting opinion of Mr Gölcüklü is annexed to this judgment.

R.R.
M.-A.E.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

With the greatest respect for the opinion of the majority of my colleagues, I regret that I am unable to agree with the conclusion which the Court has reached in this case. My view is based on the following considerations:

1. In the article giving rise to the case, the applicant called in question the impartiality of the two lay judges, both employees of the Local Government, in proceedings instituted against "their employer". In support of this position he cited Article 62 of the Danish Constitution.

2. Since he was not a party to, nor had any direct or indirect personal interest in the initial proceedings, in which the Government was defendant, Mr Barfod had no motive for attacking the two lay judges individually. He called in question their impartiality not by criticising their actual conduct in the proceedings concerned, but by attacking the fact that they were government officials, in other words the fact that they were government employees sitting in a court which was supposed to be independent and impartial.

3. Although these two lay judges were not strictly speaking politicians, I consider that this case has political overtones inasmuch as it involved criticism of a specific judicial system, namely the Greenland judiciary and its composition, which, in the applicant’s view, did not inspire public confidence.

It is in my opinion not possible to extract an a contrario argument from the Lingens case in which the Court held that "politicians" must be ready to accept more criticism than non-politicians (judgment of 8 July 1986, Series A no. 103, p. 26 para. 42). The Court did not of course mean by this that public criticism in political matters could be directed solely against politicians or that the assessment of State institutions and the position of those who, although not politicians in the strict sense, nevertheless take part in public affairs should be excluded from the arena of free discussion and democratic debate.

4. Democracy is an open system of government in which the freedom of expression plays a fundamental role, as the Court stated in its judgment in the Handyside case (7 December 1976, Series A no. 24, p. 29, para. 49, and most recently in the Müller and Others judgment of 24 May 1988, Series A no. 133, p. 21, para. 32). I am in full agreement with the opinion of the European Commission of Human Rights when it states: ".... For the citizen to keep a critical control of the exercise of public power it is essential that particularly strict limits be imposed on interferences with the publication of opinions which refer to activities of public authorities, including the judiciary" (report para. 64); and "... even if the article in question could be

interpreted as an attack on the integrity or reputation of the two lay judges, the general interest in allowing a public debate about the functioning of the judiciary weighs more heavily than the interest of the two judges in being protected against criticism of the kind expressed in the applicant's article" (ibid. para. 71).

5. I consider that what Mr Barfod said, admittedly in somewhat crude and extreme terms, was no different to what was, is or has been stated:

- by the Supreme Court of Greenland - which agreed with him that the two lay judges "ought ... to have considered themselves as disqualified and thus refrained from participating in the case" and that "the accused was correct in drawing attention to this" because they were "employed in leading positions by the defendant party" (judgment, para. 13);

- in Article 62 of the Danish Constitution and by the Danish Government - who "agree ... that the two lay judges to whom the applicant referred in his statement, as employed in leading positions by the defendant party, should have refrained from sitting because this relationship might raise doubt as to their impartiality" (report, para. 42);

- by this Court, on more than one occasion, in its judgments, when it has held that: Justice must not only be done, it must also be seen to be done.

6. Finally, I wish to stress that it is difficult to reconcile the Convention, whose ultimate purpose is to establish European standards, with specific national features such as those put forward by the Government.

7. For the above-mentioned reasons, I consider that this interference in the exercise of the applicant's right to freedom of expression cannot be regarded as "necessary in a democratic society" and that there has therefore been violation of Article 10 (art. 10) of the Convention.

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

COURT (CHAMBER)

CASE OF BARTHOLD v. GERMANY

(Application no. 8734/79)

JUDGMENT

STRASBOURG

25 March 1985

In the Barthold case*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr. G. WIARDA, *President*,
Mr. Thór VILHJÁLMSSON,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. L.-E. PETTITI,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. J. GERSING,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 25 October 1984 and 25 February 1985,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 12 October 1983, within the period of three months laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. The case originated in an application (no. 8734/79) against the Federal Republic of Germany lodged with the Commission on 13 July 1979 under Article 25 (art. 25) by a national of that State, Dr. Sigurd Barthold, a veterinary surgeon.

2. The Commission's request refers to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Federal Republic of Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision as to whether the facts of the case disclose a breach by the respondent State of its obligations under Article 10 (art. 10) of the Convention.

3. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Dr. Barthold stated that he wished to take part in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

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* The case is numbered 10/1983/66/101. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

4. The Chamber of seven judges to be constituted included, as ex officio members, Mr. R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 para. 3 (b)). On 27 October 1983, the President of the Court drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. Thór Vilhjálmsson, Mrs. D. Bindschedler-Robert, Mr. E. Garcia de Enterria, Mr. L.-E. Pettiti and Mr. J. Gersing (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43), Rule 21-4). Mr. C. Russo, substitute judge, subsequently replaced Mr. E. Garcia de Enterria, who was prevented from taking part in the consideration of the case (Rule 22 para. 1 and Rule 24 para. 1).

5. Having assumed the office of President of the Chamber (Rule 21 para. 5), Mr. Wiarda consulted, through the Deputy Registrar, the Agent of the German Government ("the Government"), the Commission's Delegate and the lawyer for the applicant regarding the need for a written procedure (Rule 37 para. 1). On 8 December, he directed that the Agent and the applicant's lawyer should each have until 1 March 1984 to file a memorial and that the Delegate should be entitled to reply in writing within two months from the date of the transmission to him by the Registrar of whichever of the aforesaid memorials should last be filed.

The President twice extended the time-limit accorded to the Agent: on 21 February until 30 March, and then on 5 April until 11 May.

On 21 February, the President granted the applicant's lawyer leave to use the German language (Rule 27 para. 3).

6. The memorial of the applicant was received at the registry on 21 February, and that of the Government on 11 May.

Acceding to a request by the Government, the President decided on 14 May that a document submitted by the Agent on 11 May should be neither published nor made available to the public.

On 18 May, the Agent communicated several other documents to the Registrar.

On 11 July, the Secretary to the Commission informed the Registrar that the Delegate would present his observations at the hearings.

7. On 12 July, the President set 23 October as the date for the opening of the oral proceedings, having first consulted the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant through the Deputy Registrar (Rule 38). On 2 October, he gave leave for those appearing on behalf of the Government to use the German language at the hearings (Rule 27 para. 2).

8. On various dates between 24 July and 18 October, the Commission, the applicant and the Government, as the case may be, lodged a number of documents and submissions with the registry, either at the request of the President or of their own motion.

9. The hearings took place in public on 23 October 1984 at the Human Rights Building in Strasbourg. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mrs. I. MAIER, Ministerialdirigentin
at the Federal Ministry of Justice, *Agent*,
Mrs. E. STEUP, Ministerialrätin
at the Federal Ministry of Justice,
Mr. H. VIEHMANN, Ministerialrat
at the Federal Ministry of Justice, *Advisers*;

- for the Commission

Mr. F. ERMACORA, *Delegate*;

- for the applicant

Mr. E. Eyl, RECHTSANWALT, *Counsel*.

The Court heard addresses by Mrs. Maier for the Government, by Mr. Ermacora for the Commission and by Mr. Eyl for the applicant, as well as their replies to its questions. During the course of the hearings, the Agent of the Government submitted several documents to the Court.

AS TO THE FACTS

10. Dr. Barthold, who was born in 1926, is a veterinary surgeon practising in Hamburg-Fuhlsbüttel. In 1978 and until March 1980, his practice operated as a "veterinary clinic", of which there were eight in Hamburg at the time. He closed down this clinic on 5 March 1980 but subsequently re-opened it on 1 January 1983.

11. By virtue of the Hamburg Veterinary Surgeons' Council Act of 26 June 1964 (Tierärztekammergesetz - "the 1964 Act"), the applicant is a member of the Hamburg Veterinary Surgeons' Council, whose task, among other things, is to ensure that its members comply with their professional obligations (section 1 and section 3 sub-section no. 2 of the 1964 Act). These obligations are laid down principally in the Rules of Professional Conduct of Hamburg Veterinary Surgeons (Berufsordnung der Hamburger Tierärzteschaft - "the Rules of Professional Conduct"), which were promulgated on 16 January 1970 by the Council in pursuance of section 8 sub-section 1 no. 1 of the 1964 Act and approved on 10 February 1970 by the Government (Senat) of the Land of Hamburg (section 8 sub-section 3).

12. As the director and proprietor of a clinic, Dr. Barthold provided a round-the-clock emergency service (Rule 19 of the Rules of Professional Conduct and Regulation 2 of the Regulations of 27 August 1975 on the Establishment of Veterinary Clinics - Richtlinien zur Einrichtung von

tierärztlichen Kliniken; see also paragraph 29 below). This was not necessarily the case as far as other veterinary surgeons were concerned (praktische Tierärzte - see paragraph 28 below).

From 1974 onwards, the applicant - who was one of the authors of the above-mentioned Regulations and who had insisted on the provision of a round-the-clock service by clinics - advocated within the Council that a regular night service involving the participation, by rota, of all veterinary surgeons should be organised. However, the majority of his colleagues voted on two occasions, on 19 December 1974 and 7 December 1979, against such a proposal (see also paragraph 28 below).

I. THE CIRCUMSTANCES OF THE CASE

A. The article published on 24 August 1978 in the "Hamburger Abendblatt"

13. On 24 August 1978, there appeared in the daily newspaper Hamburger Abendblatt an article signed by Mrs. B, a journalist, and entitled "Tierärzte ab 20 Uhr schwer erreichbar - Warum ‘Shalen’ die Nacht doch noch überlebte" ("Veterinary surgeons hard to reach after 8 p.m. - why "Shalen" managed to survive the night after all").

The article, 146 lines and 4 columns long, comprised an introductory paragraph and in brackets, in bolder type, the three following sub-heads: "Auf eine spätere Zeit vertröstet" ("Put off until later"), "Unfreundliche Absage" ("Unfriendly refusal") and "Zur Not hilft die Polizei" ("Police to the rescue").

The introductory paragraph, in bold type, read as follows:

> "When the owner of a domestic pet needs help at night for his beloved animal, he may often become desperate: not one veterinary surgeon can be contacted. This state of affairs ought now to improve. There are plans to bring in a new Act on veterinary surgeons, along the lines of the Hamburg legislation governing doctors. According to Dr. Jürgen Arndt, veterinary surgeon and Chairman of the Hamburg Land Association which is part of the Federal Association of Veterinary Surgeons (Bundesverband praktischer Tierärzte e.V.), ‘it will also regulate the emergency night service’. At present, it is true, a few clinics voluntarily provide an emergency service from time to time, and [other] veterinary surgeons also help, but this is not on a regular basis and does not give pet-owners security. They only do it voluntarily."

The journalist writing the article began by recounting the efforts made by the owners of the cat "Shalen" to find a veterinary surgeon prepared to help them one evening between 7.30 and 10.00 p.m. After telephoning in vain to two veterinary practices and to the emergency service, apparently they at last struck lucky: "Dr. Barthold, director of the Fuhlsbüttel veterinary clinic,

intervened". The journalist then quoted the applicant as saying: "It was high time; ... [the cat] would not have survived the night."

According to the author, Mrs. B, the particular case disclosed a problem, namely the inadequacy of the emergency service, at least on weekdays between 8 p.m. and 8 a.m. There followed a passage which read:

> "'I think that in a big city such as Hamburg there ought to be a regular service for attending to animals', Dr. Sigurd Barthold emphasised.
>
> Hamburg's animal lovers" - added the journalist, summarising her interview with Dr. Barthold - "would then no longer have to get sore fingers trying to ring up veterinary surgeons, looking for one who is prepared to help. In that case it would not only be the clinics which would voluntarily be on emergency duty round the clock; each of the 53 practising veterinary surgeons would be on night duty once a month if arrangements were made for two of them to be on duty each night.
>
> The fact that there is a demand for an emergency service at night-time is illustrated by Dr. Barthold by reference to the number of calls received by his practice between 8 p.m. and 8 a.m.: 'Our telephone rings between two and twelve times each night. Of course these are not all emergency cases. Sometimes advice over the telephone is all that is needed.'"

The author concluded the article by presenting under the third sub-head comments of Dr. Jürgen Arndt, "Vice-Chairman of the Hamburg Veterinary Surgeons' Council and himself director of a clinic in Harburg". Believing that an emergency service organised on a rota basis "would not release clinics from dispensing their voluntary service but would lessen the strain on them", Dr. Arndt said that he was actively trying to promote such a service. He added that the appropriate Hamburg authorities envisaged drafting the Act on veterinary surgeons during the fourth quarter of the year. Until it came into force, owners of animals would have to call one veterinary surgeon after another - or else the police, who would normally be prepared to help them.

The article was illustrated by two photographs. The larger, centrally placed, showed a cat and had the caption: "Um das Leben der kleinen 'Shalen' wurde gekämpft - erfolgreich" ("They fought for the life of little 'Shalen' - and won"). The second one was an identity photograph which appeared alongside the title and introductory paragraph of the article; it was a photograph of the applicant, though its caption erroneously gave the name of Dr. Arndt.

Below the photograph of the cat and outside the space occupied by the article, there was a short text under the heading "Hamburg - Stadt der Tiere" ("Hamburg - city of animals"), giving the number of domestic pets, veterinary surgeons and veterinary clinics in Hamburg and the telephone number of the emergency service available at weekends and on public holidays.

14. On 25 August 1978, the Hamburger Abendblatt once again published the applicant's photograph under the heading "Unter dem Foto

ein falscher Name" ("Wrong name under photo"), together with the following explanation: "An error crept into our report yesterday on the emergency veterinary service. Unfortunately, the wrong name appeared under the photograph. The person in question is in fact Dr. Sigurd Barthold, director of the Fulhsbüttel veterinary clinic."

B. The unfair competition proceedings

15. A number of Dr. Barthold's fellow practitioners, who regarded the article in question as publicity conflicting with the Rules of Professional Conduct, referred the matter to the association "PRO HONORE - Verein für Treu und Glauben im Geschäftsleben e.V." ("Pro Honore Association for fairness and trustworthiness in business" - "Pro Honore"). This association was founded in 1925 by the businessmen of Hamburg and exists in order to "ensure honesty and good faith in all spheres of business life" and "in particular to combat unfair competition, fraud in connection with moneylending and corruption" (article 2 of the Charter of 26 September 1979).

Between 1978 and 30 September 1980, Pro Honore was operating simultaneously as a branch organisation of the Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V. Frankfurt-am-Main (the Frankfurt-am-Main Central Agency for Combatting Unfair Competition - "the Central Agency"). The latter has been active for decades in curbing unfair competition, and counts among its members all the chambers of industry, trade and crafts and some 400 other associations, including the Federal Association of Veterinary Surgeons. The Hamburg Veterinary Surgeons' Council and the Deutsche Tierärzteschaft e.V, which is the umbrella organisation of the councils and private associations of veterinary surgeons, are not members of the Agency.

Under section 13 of the Unfair Competition Act of 7 June 1909 (Gesetz gegen den unlauteren Wettbewerb - "the 1909 Act"), Pro Honore and the Central Agency are empowered to bring against anyone engaged in business proceedings to restrain that person from breaking certain rules set forth in the Act.

16. On 4 September 1978, Pro Honore wrote to the applicant to say that it had been informed by certain veterinary surgeons that he had "instigated or tolerated, in the Hamburger Abendblatt of 24 August 1978, publicity on [his] own behalf". The letter went on to quote extracts from the article in question. The applicant was said to have thereby infringed section 1 of the 1909 Act in conjunction with Rule 7 of the Rules of Professional Conduct.

Section 1 of the 1909 Act stipulates that: "Any person who in the course of business commits, for purposes of competition, acts contrary to honest practices (gute Sitten) may be enjoined from further engaging in those acts (Unterlassung) and held liable in damages."

Rule 7 of the Rules of Professional Conduct deals with advertising and publicity (Werbung und Anpreisung) and reads as follows:

> "It is contrary to the ethics of the profession (standeswidrig):
>
> (a) to advertise publicly one's veterinary practice,
>
> (b) to instigate or tolerate publicity or public acknowledgements on television, radio or in the press or other publications,
>
> (c) to disclose case histories or methods of operation or of treatment elsewhere than in specialised journals (Fachzeitschriften),
>
> (d) to co-operate with non-veterinarians for the purpose of publicising one's own practice."

Pro Honore asserted its right to bring proceedings against the applicant for unfair competition (section 13 sub-section 1 of the 1909 Act) and called on him, for the purposes of a friendly settlement of the matter, to sign an enclosed declaration. Under the terms of this declaration, he would undertake not to make publicity on his own behalf by instigating or tolerating press articles such as that which had appeared in the Hamburger Abendblatt, to pay the Central Agency 1000 DM for each infringement and to pay Pro Honore 120 DM by way of costs incurred in asserting its right (Rechtsverfolgung).

17. A lawyer replied two days later on behalf of the applicant. The request made to Dr. Barthold was, he wrote, very close to blackmail. It was presumptuous (Zumutung) to speak of unlawful publicity. The reproaches directed against his client, who had not instigated the article complained of, had done considerable damage to his personal and professional reputation.

The applicant's lawyer asked Pro Honore to confirm in writing that it would be dropping its claim against his client, withdrawing its accusations and expressing regret. He also asked for reimbursement of his costs and announced that he would sue Pro Honore if it failed to meet his demands within three days.

1. The interim injunction (einstweilige Verfügung)

18. The Central Agency then applied to the Hamburg Regional Court (Landgericht) for an interim injunction (Articles 936 and 944 of the Code of Civil Procedure).

An interim injunction was issued on 15 September 1978 by the presiding judge of the 15th Civil Chamber. This decision forbade the applicant

> "to report in the press (except in professional journals), giving his full name, a photograph of himself and an indication of his occupation as director of the Fuhlsbüttel veterinary clinic, that at least on working days between 8 p.m. and 8 a.m., animal lovers in Hamburg would get sore fingers from trying to telephone veterinary surgeons ready to help them, in conjunction with (in Verbindung mit)

(a) the statement that only veterinary clinics were on voluntary emergency duty round the clock, and/or

(b) the statement that in his practice the telephone rang between two and twelve times between 8 p.m. and 8 a.m., though not all these calls were emergency cases and advice over the telephone would sometimes be sufficient, and/or

(c) the description of a case in which the owner of an animal had tried in vain one ordinary weekday between 7.30 p.m. and 10 p.m. to find a veterinary surgeon to treat his cat, until finally he was lucky enough to contact Dr. Barthold, who acted when it was more than 'high time',

and/or to contribute to such reports by giving journalists information".

For each and every breach of the injunction, he was liable to a maximum fine (Ordnungsgeld) of 500,000 DM or non-criminal imprisonment (Ordnungshaft) of up to six months, the precise penalty to be fixed by the court.

19. The applicant lodged an objection (Widerspruch) against this injunction (Articles 936 and 924 of the Code of Civil Procedure). The competent Chamber of the Regional Court upheld the injunction, however, on 15 November 1978. He thereupon entered an appeal which was dismissed on 22 March 1979 by the 3rd Chamber (Senat) of the Hanseatic Court of Appeal (Hanseatisches Oberlandesgericht). Finally, on 2 July 1979, the Federal Constitutional Court (Bundesverfassungsgericht), sitting as a bench of three judges, decided not to entertain the constitutional application he had brought against the latter judgment and the interim injunction of 15 September 1978, on the ground that the application did not offer sufficient prospects of success.

2. The proceedings in the main action

20. Before completion of the proceedings relating to the interim injunction, Dr. Barthold had asked the Regional Court to set a time-limit within which the Central Agency should commence the action as to the main issue (Articles 936 and 926 of the Code of Civil Procedure); whereupon the Agency instituted the necessary proceedings on 22 December 1978. Its statement of claim was couched in the same terms as the prohibitory injunction issued by the Regional Court on 15 September 1978 (see paragraph 18 above).

21. On 20 July 1979, the 16th Commercial Chamber of the Regional Court found in favour of the defendant.

The Regional Court rejected certain objections raised by him as to the Agency's right of action. Nor did it accept his argument that the plaintiff, in complaining of an infringement of section 1 of the 1909 Act, could not rely upon Rule 7, paragraph (a), of the Rules of Professional Conduct.

On the other hand, the Regional Court was satisfied that the evidence adduced did not support the charge of infringing the rules governing competition (Wettbewerbsverstoss). It had not been established that the applicant had influenced to an appreciable extent or tolerated the publication complained of. In fact, there were important indications pointing in the opposite direction. The author of the article had declared that Dr. Barthold's name had been mentioned without his knowledge. It could be inferred from her testimony that the applicant had not asked for his identity to be divulged and must have expected not to find mention of it in the newspaper. He might thus have believed - as indeed he asserted - that the Hamburger Abendblatt would do no more than discuss the deplorable situation brought about by the absence of a night service. In addition, it was quite possible that the article in question, instigated by the journalist, was not based solely on the interview with Dr. Barthold and that the newspaper or the journalist had included the name of Dr. Barthold and of his clinic so as to emphasise the difference between the latter - praiseworthy - clinic and other less helpful veterinary surgeons. The question whether the applicant had taken care, or at least endeavoured, to prevent his name and clinic being given prominence over his fellow practitioners had been impossible to elucidate - and this should not operate to Dr. Barthold's detriment - as the journalist had refused to give any further evidence, on the justified ground that she was not obliged to disclose her sources.

22. On 24 January 1980, the Hanseatic Court of Appeal, after declaring admissible the appeal brought by the Central Agency, upheld the Agency's grounds of appeal, which reiterated the terms of the injunction granted on 15 September 1978 (see paragraphs 18 and 20 above).

The Court of Appeal held in the first place that the applicant had infringed Rule 7, paragraph (a), of the Rules of Professional Conduct, a legally valid (formell rechtmässig) provision that was in conformity with the Basic Law as well as other superior rules of law. That Rule did not unreasonably limit Dr. Barthold's right to freedom of expression as guaranteed by Article 5 of the Basic Law, for there was nothing to prevent him from freely stating his opinion and in particular from criticising deplorable situations, even if this had the inevitable effect of producing publicity favourable to himself. The Agency was not seeking to restrain Dr. Barthold from making public pronouncements about veterinary assistance. Its application was concerned solely with a given form of conduct comprising - "cumulatively!" - several aspects: the giving of Dr. Barthold's full name, the reproduction of his photograph, the mention of his being director of the Fuhlsbüttel veterinary clinic and the statement that, at least between 8 p.m. and 8 a.m. on working days, animal lovers in Hamburg would get sore fingers trying to telephone a veterinary surgeon willing to help them, plus one of the three assertions set out in the Agency's grounds

of appeal (and, previously, in the interim injunction of 15 September 1978 - see paragraph 18 above).

Objectively, the article complained of entailed publicity for Dr. Barthold: compared to other veterinary surgeons, it presented him as an exemplary practitioner, thereby being particularly likely to incite the owners of sick animals to turn to his clinic. Such publicity exceeded the bounds of objective comment on matters of justified concern for the applicant. If in the future he were to supply the press with information necessary for the writing of an article, he should, in order to avoid any infringement of Rule 7, paragraph (a), of the Rules of Professional Conduct, ensure beforehand that the text to be published did not involve any unlawful publicity or advertising, by reserving a right of correction or by agreeing on the form of the article with the journalist.

In the view of the Hanseatic Court of Appeal, the respondent had at the same time contravened section 1 of the 1909 Act. His intention of enhancing his own competitivity to the detriment of his competitors was to be presumed in the case of this type of publication, and that presumption was not rebutted in the circumstances. It mattered little (unerheblich) that he may additionally or even primarily have been pursuing other objectives, as there was an act done for the purposes of commercial competition as long as the intent to stimulate such competition had not been entirely overriden by other motives ("nicht völlig hinter sonstigen Beweggründen verschwindet").

As for the risk of repetition, also presumed in this matter, there were no grounds for concluding that this was non-existent. Contrary to what the Regional Court had found, the applicant had knowingly and substantially contributed to the publication which highlighted his person and his clinic. It was true that the press had itself taken up the case of "Shalen" and had invited Dr. Barthold to comment only after being informed of the incident by the animal’s owner. However, the applicant had, by his interview, greatly influenced the content of the article and, what was more, had authorised a photograph to be taken of himself. He had thereby provided the opportunity for producing the article in question, with its character of publicity.

He could not have been unaware of this risk and the Rules of Professional Conduct required him to ensure that the text to be published did not involve illegal publicity favourable to himself, by reserving a right of correction or by agreeing on the form of publication with the journalist. He could also have made an arrangement with Mrs. B to remain anonymous, although he was in no way obliged to express his views without disclosing his identity.

In fact, the respondent had acknowledged in his written pleadings of 13 December 1978 and 12 January 1979 that he had authorised the inclusion of his name and photograph. Although he retracted those statements on 29 March and 6 April 1979, he had not shown that he had insisted on publication without inclusion of such details. The testimony of the journalist

was not conclusive on this point. It was not necessary to take evidence from Dr. Arndt, because Dr. Barthold had unquestionably allowed photographs to be taken. That being so, he ought not to have contented himself with obtaining a verbal promise - as he claimed to have done - that he would not himself appear in one of the photographs. Whilst he claimed to have told the journalist that the Rules of Professional Conduct prohibited advertising and publicity, he was wrong to have passed on to her the responsibility of writing an article which complied with those Rules.

The danger of repetition persisted notwithstanding the time that had elapsed. The "Shalen" affair was no longer topical, but the press was likely to come back to the issues it had raised, by making reference to this incident along with others, after another interview with Dr. Barthold.

The Court of Appeal decided finally not to give leave to appeal on points of law against its judgment: the latter did not depart from the established case-law of the Federal Court of Justice (Bundesgerichtshof), and the case did not raise questions of principle.

23. Dr. Barthold challenged the judgment of 24 January 1980 before the Federal Constitutional Court. He repeated various arguments on which he had based his constitutional application in the interim proceedings (see paragraph 19 above), namely non-observance of equality before the law, of freedom of expression and of freedom to practise a profession, as safeguarded by Articles 3, 5 and 12 of the Basic Law, and incompatibility of the obligation to belong to the Veterinary Surgeons' Council with freedom of association, as guaranteed by Article 9 of the Basic Law. In addition, he alleged violation of his right to be heard, in particular by a legally competent court (gesetzlicher Richter). On this latter point, he claimed that it was not within the province of the civil courts to apply the Rules of Professional Conduct.

The Constitutional Court, sitting as a bench of three judges, dismissed the constitutional application on 6 October 1980, on the ground that it lacked sufficient prospects of success.

II. THE RELEVANT LEGISLATION

A. The law governing the veterinary profession

24. In the Federal Republic of Germany, veterinary medicine is governed partly by federal law and partly by the law of the Länder. The principal rules relevant to the present case are to be found in the Federal Veterinary Practitioners Act (Bundes-Tierärzteordnung, in the version of 22 August 1977 - "the Federal Act"), the Hamburg Act of 26 June 1964 on the Veterinary Surgeons' Council ("the 1964 Act" - see paragraph 11 above), the Hamburg Act on Disciplinary Tribunals for the Medical Professions

(Gesetz über die Berufsgerichtsbarkeit der Heilberufe, in the version of 20 June 1972 - "the 1972 Act"), the Rules of Professional Conduct of 16 January 1970 (see paragraph 11 above) and the Regulations on the establishment of veterinary clinics (see paragraphs 12 above and 29 below).

25. The profession of veterinary surgeon is not an industrial, commercial or craft occupation (Gewerbe) but, by its nature, a liberal profession (section 1(2) of the Federal Act). According to sub-section 1 of section 1 of the Federal Act,

> "It shall be the task of the veterinary surgeon to prevent, alleviate and cure suffering and disease in animals, to contribute to the maintenance and development of productive livestock, to protect man from the dangers and harm arising from animal disease and from foodstuffs and products of animal origin, and to endeavour to improve the quality of foodstuffs of animal origin".

In order to be able to practise on a permanent basis, an authorisation (Approbation) issued by the appropriate Land authorities is required; such authorisation is granted if the person concerned satisfies the conditions laid down by law (sections 2 to 4 of the Federal Act).

26. The veterinary surgeons practising in Hamburg constitute the Hamburg Veterinary Surgeons' Council, which is a public-law association (sections 1 and 2 of the 1964 Act). Its functions include defending the professional interests of the veterinary surgeons, ensuring that the latter meet their professional obligations and assisting the public health services (öffentlicher Gesundheitsdienst) in the performance of their duties (section 3 of the 1964 Act).

The Council's organs are the governing board (Vorstand) and the general assembly; the latter adopts the Charter and the Rules of Professional Conduct, which are submitted to the Government of the Land for approval (sections 5 and 8 of the 1964 Act).

The Council is under the supervision of the State, which supervision extends to observance of the laws and the Charter (section 18 of the 1964 Act).

27. The Rules of Professional Conduct of the Hamburg Council require each veterinary surgeon to practise in such a way that the profession inspires respect and confidence; the making of pejorative statements about the person, knowledge or skills of another veterinary surgeon is not allowed (Rule 1 (1) and (2)).

The Rules contain a number of provisions forbidding veterinary surgeons from advertising their own practices. Under Rule 5, veterinary surgeons may only intervene if asked to do so; offering or providing their services without being requested is at variance with the rules of the profession. Rule 7 deals more specifically with publicity and lays down conditions to be observed (see paragraph 16 above). In addition there are Rules 8 and 9, which concern advertisements in the press and name-plates respectively.

28. Each veterinary surgeon is required to intervene in the event of an emergency (Rule 1 (3)); he must (soll) participate in providing a service at weekends and on holidays and hold himself in readiness to replace any other colleague (Rule 14).

The question of a night service for veterinary surgeons, a matter not dealt with in the law or the Rules of Professional Conduct, has been the subject of debate within the profession (see paragraph 12 above). The Council opted on 11 December 1978 for a voluntary solution whereby veterinary surgeons indicate on a list the times when they may be contacted and the Council communicates to the public, by means of an automatic reply service, the names of those veterinary surgeons who are available even outside normal consultation hours.

According to the Government, it was apparently quite a long time before a relatively sizeable number of veterinary surgeons agreed to participate in this scheme. In 1979, the Council was said to have felt the need to launch an appeal for volunteers for the weekend and emergency service.

Yet again, in 1981, the director of a veterinary clinic publicly criticised the working of the emergency service in Hamburg and stated that he had been unsuccessfully campaigning for two years for a duty rota for all veterinary surgeons (see Die Zeit of 11 December 1981).

However, according to the applicant, there has existed since 1982 a system along the lines he had proposed. The Government did not contest this assertion.

29. An establishment for the treatment of sick animals may be called a "veterinary clinic" if it has the requisite premises and equipment and if the Council has given its approval (Rule 19). The detailed rules are set out in Regulations promulgated by the Council (see paragraph 12 above), the most recent version of which dates from December 1982. The 1982 Regulations lay down that henceforth clinics must provide a round-the-clock service for emergencies unless the Council has made other arrangements guaranteeing adequate assistance.

B. The law on unfair competition

30. The 1909 Act applies to any person seeking to derive income from a regular economic activity; it thus covers industrial, commercial and craft activities, services and the liberal professions. It is designed to protect competitors and consumers, and applies independently of the texts, if any, governing the conduct of members of the liberal profession in matters of publicity and advertising.

31. The courts with jurisdiction to deal with infringements of the 1909 Act - principally the civil courts (section 13 of the Act) - are not bound by any findings made by such professional tribunals as may have considered the same facts in the light of the professional rules governing publicity.

However, it has been consistently held by the Federal Court of Justice that breach of these professional rules will, in the normal course of things, also entail infringement of section 1 of the 1909 Act (see paragraph 16 above). The court having to decide the case on the basis of the 1909 Act must nonetheless inquire in each case whether the requirements of section 1 are satisfied.

32. By virtue of section 13, an action for contravention of, for example, section 1 may be brought by any competitor, by trade and professional associations (gewerbliche und Berufsverbände) and, since 1965, by consumer associations.

PROCEEDINGS BEFORE THE COMMISSION

33. In his application of 13 July 1979 to the Commission (no. 8734/79), Dr. Barthold complained of the injunctions against him issued by the German courts. He regarded these injunctions as "indirect sanctions" which had wrongfully interfered with his freedom of expression and freedom of thought as secured by Articles 10 and 9 (art. 10, art. 9) of the Convention, and had violated Articles 6 and 7 (art. 6, art. 7). He further maintained that compulsory membership of the Veterinary Surgeons' Council contravened Article 11 (art. 11).

34. On 12 March 1981, the Commission declared the application inadmissible as regards the complaints under Articles 6 and 7 (art. 6, art. 7) (manifestly ill-founded) and Article 11 (art. 11) (incompatibility ratione materiae with the provisions of the Convention). On 13 October 1981, after observing that Dr. Barthold seemed no longer to be pursuing his complaint of interference with his freedom of thought, it admitted the remainder of the application.

In its report of 13 July 1983 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a violation of Article 10 (art. 10). The full text of the Commission's opinion is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS PRESENTED TO THE COURT

35. At the hearings on 23 October 1984, the Government confirmed the final submissions set out in their memorial and requested the Court "to find that there was no violation of the rights of the applicant".

The Delegate of the Commission invited the Court "to follow the opinion of the Commission".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

36. Article 10 (art. 10) of the Convention provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

37. The applicant complained of the prohibitory injunctions issued against him by the German courts following publication of an article in the Hamburger Abendblatt on 24 August 1978. In his submission, these injunctions, namely the interim injunction whose terms were then reiterated in the injunction of the Hanseatic Court of Appeal in the main proceedings, prevented him from making known his views on the need for an emergency veterinary service and thereby violated his freedom of expression.

Dr. Barthold further contended before the Commission that the rule of professional conduct obliging veterinary surgeons to abstain from advertising was in itself contrary to Article 10 (art. 10). The injunctions complained of were, however, grounded not on Rule 7, paragraph (a), of the Rules of Professional Conduct but on section 1 of the 1909 Act taken in conjunction with Rule 7, paragraph (a). Moreover, the applicant did not repeat this contention before the Court. Like the Commission, the Court will therefore limit its examination to the application of the two relevant provisions in the particular circumstances of the case before it.

38. The Government's main submission was as follows. The subject-matter of the injunctions complained of was not Dr. Barthold's critical comments regarding the organisation of a night service for veterinary surgeons in Hamburg, but was exclusively the praise of his own practice and clinic and the disparaging remarks about his professional colleagues. These statements, which in part gave incorrect information, went beyond the objective expression of opinion and amounted to commercial advertising. Article 10 (art. 10), however, did not cover commercial advertising, this being a matter relating to the right freely to exercise a trade or profession, a right not protected by the Convention.

In the alternative, the Government argued that the contested measure was justified under paragraph 2 of Article 10 (art. 10-2).

39. The Commission found a violation. In its opinion, the circumstances of the case did not involve commercial advertising in the sense in which that term is generally understood and, in any event, commercial advertising did not fall outside the scope and intendment of Article 10 (art. 10) (see the decision of 5 May 1979 on the admissibility of application no. 7805/77, X and Church of Scientology v. Sweden).

A. Applicability of Article 10 (art. 10)

40. According to the Delegate, the Government are estopped from re-opening the issue of the applicability of Article 10 (art. 10) since before the Commission they had conceded that the case could be examined under this Article (art. 10).

The Government considered themselves entitled to raise the point as they had always maintained that certain features of the interview in issue did not relate to the exchange of ideas, which lies at the heart of freedom of expression, but fell within the field of economic activity.

41. The Court is unable to agree with the Delegate. For the purposes of the procedure before the Court, the applicability of one of the substantive clauses of the Convention constitutes, by its very nature, an issue going to the merits of the case, to be examined independently of the previous attitude of the respondent State (see, mutatis mutandis, the judgment of 9 February 1967 in the "Belgian Linguistic" case, Series A no. 5, pp. 18-19, and the Airey judgment of 9 October 1979, Series A no. 32, p. 10, para. 18).

42. Article 10 para. 1 (art. 10-1) specifies that freedom of expression "shall include freedom to hold opinions and to ... impart information and ideas". The restrictions imposed in the present case relate to the inclusion, in any statement of Dr. Barthold’s views as to the need for a night veterinary service in Hamburg, of certain factual data and assertions regarding, in particular, his person and the running of his clinic (see paragraph 18 above). All these various components overlap to make up a whole, the gist of which is the expression of "opinions" and the imparting of "information" on a topic of general interest. It is not possible to dissociate from this whole those elements which go more to manner of presentation than to substance and which, so the German courts held, have a publicity-like effect. This is especially so since the publication prompting the restriction was an article written by a journalist and not a commercial advertisement.

The Court accordingly finds that Article 10 (art. 10) is applicable, without needing to inquire in the present case whether or not advertising as such comes within the scope of the guarantee under this provision.

B. Compliance with Article 10 (art. 10)

43. There has clearly been an "interference by public authority" with the exercise of the applicant's freedom of expression, namely the interference resulting from the judgment delivered at final instance in the main proceedings by the Hanseatic Court of Appeal on 24 January 1980 at the close of the action brought by the Central Agency (see paragraph 22 above). This interference will not be compatible with Article 10 (art. 10) unless it satisfies the conditions laid down in paragraph 2 (art. 10-2), a clause calling for a narrow interpretation (see the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 41, para. 65). Thus, the interference must be "prescribed by law", have an aim or aims that is or are legitimate under Article 10 para. 2 (art. 10-2) and be "necessary in a democratic society" for the aforesaid aim or aims (ibid., p. 29, para. 45).

1. Is the interference "prescribed by law"?

44. In the submission of Dr. Barthold, the injunctions in question were neither grounded on a "law" nor "prescribed". Both the Government and the Commission disagreed with this contention.

45. According to the Court's case-law on this point, the interference must have some basis in domestic law, which itself must be adequately accessible and be formulated with sufficient precision to enable the individual to regulate his conduct, if need be with appropriate advice (see the above-mentioned Sunday Times judgment, p. 30, para. 47, and p. 31, para. 49; see also, mutatis mutandis, the Silver and Others judgment of 25 March 1983, Series A no. 61, pp. 32-34, paras. 85-88, and the Malone judgment of 2 August 1984, Series A no. 82, pp. 31-33, paras. 66-68).

46. The legal basis of the interference under consideration was provided by section 1 of the 1909 Act, section 8 (1) of the 1964 Act and Rule 7, paragraph (a), of the Rules of Professional Conduct, as applied by the Hanseatic Court of Appeal (see paragraph 22 above). Unlike the first two of these provisions, the third emanated from the Veterinary Surgeons' Council (see paragraphs 11 and 26 above) and not directly from parliament. It is nonetheless to be regarded as a "law" within the meaning of Article 10 para. 2 (art. 10-2) of the Convention. The competence of the Veterinary Surgeons' Council in the sphere of professional conduct derives from the independent rule-making power that the veterinary profession - in company with other liberal professions - traditionally enjoys, by parliamentary delegation, in the Federal Republic of Germany (see notably the judgment of 9 May 1972 by the Federal Constitutional Court, Entscheidungen des Bundesverfassungsgerichts, vol. 33, pp. 125-171). Furthermore, it is a competence exercised by the Council under the control of the State, which in particular satisfies itself as to observance of national legislation, and the Council is obliged to submit its rules of professional conduct to the Land Government for approval (sections 8 (3) and 18 of the 1964 Act - see paragraphs 11 and 26 above).

47. The "accessibility" of the relevant texts has not been the subject of any dispute. On the other hand, the applicant argued that the injunctions complained of were not "foreseeable", either subjectively or objectively. In his submission, the relevant legislation did not fix the limits of freedom of expression with sufficient clarity to indicate in advance to each member of the veterinary profession the dividing line between what was permitted and what was not; in particular, section 1 of the 1909 Act was couched in extremely vague terms.

Section 1 of the 1909 Act does indeed employ somewhat imprecise wording, notably the expression "honest practices". It thereby confers a broad discretion on the courts. The Court has, however, already had the occasion to recognise the impossibility of attaining absolute precision in the framing of laws (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 31, para. 49; the above-mentioned Silver and Others judgment, Series A no. 61, p. 33, para. 88). Such considerations are especially cogent in the sphere of conduct governed by the 1909 Act, namely competition, this being a subject where the relevant factors are in constant evolution in line with developments in the market and in means of communication. Finally, the Hanseatic Court of Appeal based its judgment of 24 January 1980 on a combined application of section 1 of the 1909 Act and paragraph (a) of Rule 7 of the Rules of Professional Conduct, which is a clearer and more detailed provision.

48. Before the Commission, Dr. Barthold also pleaded non-compliance with the domestic law. His arguments ran as follows. The civil courts had no jurisdiction to apply the Rules of Professional Conduct; failure to observe the requirements of those Rules could not automatically entail violation of the 1909 Act, a text which, moreover, was inapplicable to the liberal professions; the ordinary courts had interpreted Rule 7, paragraph (a), differently from the professional tribunals; finally, the Central Agency lacked locus standi to sue him.

Whilst it is true that no interference can be considered as "prescribed by law", for the purposes of Article 10 para. 2 (art. 10-2) of the Convention, unless the decision occasioning it complied with the relevant domestic legislation, the logic of the system of safeguard established by the Convention sets limits upon the scope of the power of review exercisable by the Court in this respect. It is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law: the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection (see, mutatis mutandis, the Winterwerp judgment of 24 October 1979, Series A no. 33, p. 20, para. 46; the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, pp. 19-20, para. 43). The evidence adduced in the present case does not disclose any clear non-observance either of the 1909 Act or of the Rules of Professional Conduct. The applicant’s arguments - to which, moreover, he did not revert

before the Court - do no more than evince his disagreement with the Hamburg courts.

49. To sum up, the injunctions complained of are "prescribed by law".

2. Does the interference have an aim that is legitimate under Article 10 para. 2 (art. 10-2)?

50. The Government argued that the interference in issue served to protect human "health" as well as the "rights" of the applicant's fellow veterinary surgeons and of clients of veterinary surgeons, that is to say, "others"; and that the interference was also aimed at the protection of "morals".

Dr. Barthold considered, on the contrary, that the interference was likely to perpetuate a situation which constituted a potential risk to public health. The Commission, for its part, found there to be a legitimate object in the protection of the rights of clients of veterinary surgeons.

51. The Court notes that, according to the reasons given in the judgment of 24 January 1980, the final injunction in the present case was issued in order to prevent the applicant from acquiring a commercial advantage over professional colleagues prepared to conduct themselves in compliance with the rule of professional conduct that requires veterinary surgeons to refrain from advertising (see paragraph 22 above). The Hanseatic Court of Appeal grounded its decision on the protection of the "rights of others" and there is no cause for believing that it was pursuing other objectives alien to the Convention. The judgment of 24 January 1980 thus had an aim that was in itself legitimate - that is to say, subject to the "necessity" of the measure in issue - for the purposes of Article 10 para. 2 (art. 10-2) of the Convention. There is no need to inquire whether that judgment is capable of being justified under Article 10 para. 2 (art. 10-2) on other grounds as well.

3. Is the interference "necessary in a democratic society"?

52. The Government considered the restriction imposed to be one that was "necessary in a democratic society". Their arguments may be summarised as follows. The statements that the applicant was restrained by the judgment of 24 January 1980 from repeating denigrated his fellow veterinary surgeons and were in part erroneous; by reason of the form they took and the type of publication in which they appeared, these statements went beyond objective criticism and amounted to advertising incompatible with the Rules of Professional Conduct. Although Dr. Barthold was not himself the author of the article in the Hamburger Abendblatt, the Hanseatic Court of Appeal was not mistaken to hold him responsible.

In addition, the prohibition complained of was consistent with the principle of proportionality. Being circumscribed within narrow limits, it did not bar Dr. Barthold from expressing an opinion on the issue of a night

veterinary service in Hamburg. The Commission had exaggerated the interest of the people of Hamburg for a statutory scheme for such a service. Nor did the penalties that the applicant risked incurring if he were to repeat the prohibited statements fall foul of the principle of proportionality, since they amounted to no more than an "abstract threat" that the domestic courts would have to implement in the event of wrongful conduct in the light of the particular circumstances obtaining at that time.

Finally, in the submission of the Government, in the field of the repression of unfair competition the Contracting States enjoyed a wide margin of appreciation and the legal traditions of the Contracting States had to be respected by the Convention institutions. In this connection, provisions comparable to those of the relevant German legislation were to be found in other member States of the Council of Europe, in international instruments and in the law of the European Communities.

53. The applicant contested the "necessity" of the interference, adducing the following arguments. His declarations did not have any advertisement-like effect. The prohibition on his publicly disseminating his opinion together with an indication of his name and professional activities struck at the very essence of his freedom of expression, as did the precautions that the Hanseatic Court of Appeal directed him to observe in his contacts with the press. Moreover, in a democratic society, it was not necessary to prohibit veterinary surgeons from advertising, at least not in as comprehensive a manner as in his case.

In addition, the injunction imposed on him was capable of harming the legitimate interests of animal owners, especially as the Veterinary Surgeons' Council had not made available to animal owners the information they would need regarding the night service. The effect of the judgment of 24 January 1980 was to prevent journalists from checking or exploring with a qualified person information they had received and from revealing the source of any such information, thereby adversely affecting the credibility of any statements published. The judgment was thus liable, directly or indirectly, to render the task of the press more difficult and to reduce the range of information supplied to readers, a result contrary to one of the objectives of a "democratic society". Although the applicant remains free to express his views in professional journals, that would not be sufficient to enable the 200,000 households of animal owners in Hamburg to be informed.

54. In the opinion of the Commission, the article in the Hamburger Abendblatt dealt with a topic of general interest. There was no indication that Dr. Barthold had intended to exploit the article for advertising purposes. The disclosure of his identity and of various facts relating to his practice constituted an essential element of the exercise of his freedom of expression. The Commission further considered that the precautions which the domestic courts required him to take could not be regarded as necessary

in a democratic society. In sum, the principle of proportionality had not been respected in the circumstances.

55. It has been pointed out in the Court's case-law that, whilst the adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2) of the Convention, is not synonymous with "indispensable", neither does it have the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable"; rather, it implies a "pressing social need". The Contracting States enjoy a power of appreciation in this respect, but that power of appreciation goes hand in hand with a European supervision which is more or less extensive depending upon the circumstances; it is for the Court to make the final determination as to whether the interference in issue corresponds to such a need, whether it is "proportionate to the legitimate aim pursued" and whether the reasons given by the national authorities to justify it are "relevant and sufficient" (see, inter alia, the above-mentioned Sunday Times judgment, Series A no. 30, pp. 35-37, para. 59, and p. 38, para. 62).

56. In order to assess the necessity for restraining Dr. Barthold from repeating those of his declarations which were adjudged to be incompatible with the 1909 Act and with the Rules of Professional Conduct, the prohibited declarations must be placed in their proper context and examined in the light of the particular circumstances of the case.

The gist of the article in the Hamburger Abendblatt concerned the absence in Hamburg of a night service operated by the entirety of veterinary surgeons. The article explained the general problem to readers by illustrating it with the case of the cat "Shalen" and then by quoting interviews given by the applicant and by Dr. Arndt, who at that time was Vice-Chairman of the local Veterinary Surgeons' Council. In addition, the newspaper indicated to readers the telephone number of the emergency service where they could obtain the name and address of practitioners available at the weekend. The article was thus pursuing a specific object, that is to say, informing the public about the situation obtaining in Hamburg, at a time when, according to the two practitioners interviewed, the enactment of new legislation on veterinary surgeons was under consideration.

57. It has not been disputed that the problem discussed in the article was a genuine one. As recently as 1981, a professional colleague of Dr. Barthold criticised in Die Zeit the lack of a compulsory night duty for veterinary surgeons in Hamburg (see paragraph 28 above). In any event, the applicant felt strongly that such a service should be organised; he had always campaigned to this effect within the Veterinary Surgeons' Council.

The Government maintained that on one point at least Dr. Barthold was making a false assertion. According to the Government, clinics provided a round-the-clock emergency service because they were obliged to do so and not of their own volition; as proof of this, the Government pointed to

Regulation 2 of the Regulations on the Establishment of Veterinary Clinics (see paragraph 12 above). The Court restricts itself to noting that the correctness or incorrectness of the applicant's declarations - which, in fact, would seem to have been corroborated on this point by Dr. Arndt, himself the director of a clinic - had no influence on the judgment of 24 January 1980, which did not go into the matter.

58. The Court must come to its decision on the basis of all these various factors.

As the Court has already had the occasion to point out, freedom of expression holds a prominent place in a democratic society. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every man and woman (see, in particular, the Handyside judgment of 7 December 1976, Series A no. 24, p. 23, para. 49). The necessity for restricting that freedom for one of the purposes listed in Article 10 para. 2 (art. 10-2) must be convincingly established.

When considered from this viewpoint, the interference complained of went further than the requirements of the legitimate aim pursued.

It is true, as was stated in the judgment of the Hanseatic Court of Appeal, that the applicant retained the right to express his opinion on the problem of a night service for veterinary surgeons in Hamburg and even, in so doing, to divulge his name, have a photograph of himself published and disclose that he was the director of the Fuhlsbüttel veterinary clinic. He was, however, directed not to supplement his opinion, when accompanied by such indications, with certain factual examples drawn from his own experience and illustrating the difficulties encountered by animal owners in obtaining the assistance of a veterinary surgeon during the night.

It may well be that these illustrations had the effect of giving publicity to Dr. Barthold's own clinic, thereby providing a source of complaint for his fellow veterinary surgeons, but in the particular circumstances this effect proved to be altogether secondary having regard to the principal content of the article and to the nature of the issue being put to the public at large. The injunction issued on 24 January 1980 does not achieve a fair balance between the two interests at stake. According to the Hanseatic Court of Appeal, there remains an intent to act for the purposes of commercial competition, within the meaning of section 1 of the 1909 Act, as long as that intent has not been entirely overriden by other motives ("nicht völlig hinter sonstigen Beweggründen verschwindet" - see paragraph 22 above). A criterion as strict as this in approaching the matter of advertising and publicity in the liberal professions is not consonant with freedom of expression. Its application risks discouraging members of the liberal professions from contributing to public debate on topics affecting the life of the community if ever there is the slightest likelihood of their utterances being treated as entailing, to some degree, an advertising effect. By the

same token, application of a criterion such as this is liable to hamper the press in the performance of its task of purveyor of information and public watchdog.

59. In conclusion, the injunctions complained of are not proportionate to the legitimate aim pursued and, accordingly, are not "necessary in a democratic society" "for the protection of the rights of others", with the result that they give rise to a violation of Article 10 of the Convention (art. 10).

II. ALLEGED VIOLATION OF ARTICLE 11 (art. 11)

60. In his memorial of 21 February 1984, Dr. Barthold had additionally alleged a breach of Article 11 (art. 11), which reads:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article (art. 11) shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

His objection was directed not against the restrictions imposed by the domestic courts on his freedom of expression, but against the legal obligation to be a member of the Veterinary Surgeons' Council. He considered this obligation to be inconsistent with freedom of association.

61. The applicant did not explicitly revert to the question at the hearings on 23 October 1984. In any event, the complaint under this head does not cover the same ground as the claim already examined by the Court; it does not merely amount to a supplementary legal submission or argument adduced in support of that claim. Having been declared inadmissible by the Commission on 12 March 1981 as being incompatible ratione materiae with the provisions of the Convention (Article 27 para. 2) (art. 27-2), this complaint falls outside the ambit of the case referred to the Court (see, amongst other authorities, mutatis mutandis, the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 18, para. 38).

III. APPLICATION OF ARTICLE 50 (art. 50)

62. In his memorial of 21 February 1984, Dr. Barthold made several comments as to the application of Article 50 (art. 50) in the present case, but at the hearings on 23 October 1984 his lawyer asked the Court to reserve the question.

The Government replied that they did not propose to make any statement on the subject in the absence of specific claims put forward by the Commission.

63. The question is therefore not yet ready for decision. Accordingly, it is necessary to reserve the matter and to fix the further procedure, taking due account of the possibility of an agreement between the respondent State and the applicant (Rule 53 paras. 1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT

1. Holds by five votes to two that there is breach of Article 10 (art. 10);

2. Holds unanimously that it has no jurisdiction to entertain the applicant's complaint under Article 11 (art. 11);

3. Holds unanimously that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) invites the applicant to submit, within the forthcoming two months, his written comments on the said question and, in particular, to notify the Court of any agreement reached between himself and the Government;

(c) reserves the further procedure and delegates to the President of the Chamber power to fix the same if need be.

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 25 March 1985.

Gérard WIARDA
President

Marc-André EISSEN
Registrar

The separate opinions of the following judges are annexed to the present judgment in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court:

- dissenting opinion of Mr. Thór Vilhjálmsson and Mrs. Bindschedler-Robert;

- concurring opinion of Mr. Pettiti.

G.W.
M.-A.E.

DISSENTING OPINION OF JUDGES THÓR VILHJÁLMSSON AND BINDSCHEDLER-ROBERT

Although the facts of this case border on the trivial, they nevertheless require the Court to make an assessment, by no means easy, as to whether a given interference with the exercise of the right to freedom of expression was "necessary in a democratic society". We have voted against the finding of a violation as, with respect, we disagree with the majority of the Chamber on this assessment. The majority has set out its opinion on the relevant point in paragraph 58 of the judgment. Our view may be stated as follows.

The newspaper item which gave rise to this case and the court actions that followed are described in the judgment. As is evident from paragraph 18, the interim injunction issued on 15 September 1978 was very specific. The applicant was restrained from making certain public statements, but the injunction did not preclude him from making statements on other points concerning, or from contributing to public debate on, the veterinary services available in his city. It is equally evident from paragraph 22 of the judgment that the resultant interference was confirmed by the Hanseatic Court of Appeal on 24 January 1980 in a fully-reasoned ruling in which the relevant issues under German law were considered in detail. To this should be added that the decisions of the German courts were grounded on rules on professional conduct and unfair competition. Although restrictions on advertising and publicity by members of the liberal professions are well known in the States Parties to the Convention, the combined application of rules from these two categories is not the general practice.

The foregoing brief indications regarding the particular facts of the present case have to be kept in mind when determining whether the interference with the applicant’s freedom of expression was "necessary in a democratic society" for the purposes of paragraph 2 of Article 10 (art. 10-2) of the Convention. The Court has already, in previous judgments, expounded the principles governing how this problem should be approached (see notably the Handyside judgment of 7 December 1976, Series A no. 24, pp. 22-24, paras. 48-50, and the Sunday Times judgment of 26 April 1979, Series A no. 30, pp. 35-38, paras. 58-62). We take the liberty of referring also to the dissenting opinion expressed in the latter case by nine judges, a group to which we belonged (paras. 7-9).

According to the well-established case-law of our Court, it is for the national authorities to make the initial assessment of the necessity. In this respect, the Contracting States enjoy a margin of appreciation. The assessment has to be made in good faith, with due care and in a reasonable manner. There is no doubt, in our view, that this was so in the applicant’s case. As to the supervisory role of our Court, the main question for determination is whether the decisions of the German courts were

proportionate to the legitimate aim pursued. The fact that the article in question was not solely devoted to generating publicity or even that its author had not had publicity in view as an objective does not alter this conclusion. The German courts were certainly not acting unreasonably in taking into consideration those aspects of the article which produced a publicity-like effect. Having due regard to the limited scope of the restrictions, we consider that the principle of proportionality was not transgressed. Accordingly, we cannot find a breach of Article 10 (art. 10) in the present case.

CONCURRING OPINION OF JUDGE PETTITI

(Translation)

I have voted with the majority of my colleagues that there has been a breach of Article 10 (art. 10) of the European Convention, and I share their analysis notably as concerns the reasoning (at paragraphs 55 and following of the judgment) holding that the interference complained of went further than the requirements of the legitimate aim pursued and that the criterion applied by the Hanseatic Court of Appeal was not consonant with freedom of expression.

I nonetheless believe that the decision of our Court could have been more explicit with regard to freedom of expression in as much as the approach to the question of commercial advertising was also evoked by the applicant.

The Commission, rightly in my view, drew attention to the advertisement-like effect of the interview which was the cause of complaint against Dr. Barthold.

Doubtless paragraph 39 of the Court's judgment cannot be taken in isolation, and in particular in isolation from paragraphs 42, 43, 51, 55 and following.

The issue of commercial advertising was raised only incidentally in the Barthold case, and the Commission and the Court will be called on to rule more directly and comprehensively on the subject.

As of now, however, one cannot ignore the considerable evolution that has occurred, in Europe as well as in North America, within the professional bodies representing the liberal professions in opening themselves up to certain forms of collective advertising about their activities and even to certain forms of individual advertising, in particular so as to indicate practitioners' specialities.

Standards of professional conduct are thereby undergoing development and, for members of the liberal professions, it is not possible to divorce assessment of professional conduct from the degree of liberty afforded in relation to advertising, which is what happened in Dr. Barthold's case.

Freedom of expression in its true dimension is the right to receive and to impart information and ideas. Commercial speech is directly connected with that freedom.

The great issues of freedom of information, of a free market in broadcasting, of the use of communication satellites cannot be resolved without taking account of the phenomenon of advertising; for a total prohibition of advertising would amount to a prohibition of private broadcasting, by depriving the latter of its financial backing.

Regulation in this sphere is of course legitimate - an uncontrolled broadcasting system is inconceivable -, but in order to maintain the free flow of information any restriction imposed should answer a "pressing

social need" and not mere expediency. Even if it were to be conceded that the State's power to regulate is capable of being more extensive in relation to commercial advertising, in my view it nevertheless remains the case that "commercial speech" is included within the sphere of freedom of expression. Such was the import of a decision by the Commission (Church of Scientology v. Sweden, Decisions and Reports, vol. 16, pp. 72-74); such is the case-law of the Supreme Court of the United States under the First Amendment (Virginia Pharmacy Board, Bates - Bar of Arizona, Central Hudson, etc.), albeit that commercial communications are afforded a different degree of protection to that granted in respect of the press.

In the Barthold case, the submission of the applicant was, in part, that the rule of professional conduct obliging veterinary surgeons to refrain from advertising and publicity was in itself inconsistent with Article 10 (art. 10) (see paragraph 37 of the judgment).

The Court has above all concentrated on examining the principal complaints and, in this context, on analysing whether the interference had a basis in domestic law and was necessary in a democratic society.

The Court has concluded on the facts of the case that there was indeed a breach of Article 10 (art. 10).

The Court could perhaps have pushed its reasoning a little further, even though it may not have been indispensable to do so, and thereby have given a fuller statement of its approach in regard to the links between interference and freedom of expression, between communication of ideas and information, and commercial speech.

To the extent that both these aspects can be considered to be so intimately connected as to be incapable of being dissociated, the Barthold judgment makes a further contribution to the movement that is reflected in legal writings towards freedom of expression, its content and its projection in the world of broadcasting and communications.

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

THIRD SECTION

CASE OF *BERGENS TIDENDE* AND OTHERS v. NORWAY

(Application no. 26132/95)

JUDGMENT

STRASBOURG

2 May 2000

FINAL

02/08/2000

In the case of *Bergens Tidende* and Others v. Norway,

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

Sir Nicolas BRATZA, *President*,
Mr J.-P. COSTA,
Mrs F. TULKENS,
Mr W. FUHRMANN,
Mr K. JUNGWIERT,
Mr K. TRAJA, *judges*,
Mr S. EVJU, ad hoc *judge*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 9 November 1999 and 6 April 2000,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 26132/95) against the Kingdom of Norway lodged on 13 September 1994 with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by *Bergens Tidende*, a Norwegian newspaper and two Norwegian nationals, Mr Einar Eriksen, the newspaper's former editor-in-chief, and Mrs Berit Kvalheim, a journalist employed by the paper ("the applicants").

The applicants complained that a judgment by the Norwegian Supreme Court in defamation proceedings instituted by a cosmetic surgeon, requiring them to pay him approximately 4,700,000 Norwegian kroner damages and costs (plus interest), had unjustifiably interfered with their right to freedom of expression under Article 10 of the Convention.

2. On 16 October 1996 the Commission (Second Chamber) decided to give notice of the application to the Norwegian Government ("the Government") and invited them to submit their observations on its admissibility and merits. The Government submitted their observations on 20 December 1996 and 16 June 1997, to which the applicants replied on 21 March and 22 August 1997 respectively.

3. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998 and in accordance with the provisions of Article 5 § 2 thereof, the application was examined by the Court.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted

as provided in Rule 26 § 1. Mrs H.S. Greve, the judge elected in respect of Norway, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr S. Evju to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. By a decision of 29 June 1999 the Chamber declared the application admissible[1]. Furthermore, the Chamber decided to hold a hearing in accordance with Rule 59 § 2.

6. The Registrar received the applicants' claim for just satisfaction on 23 September 1999 and the Government's comments on 18 October 1999. On 27 and 28 October 1999 respectively she received the Government's and the applicants' pre-hearing briefs.

7. The hearing took place in the public in the Human Rights Building, Strasbourg, on 9 November 1999.

There appeared before the Court:

(a) *for the Government*
Mr F. ELGESEM, Attorney, Attorney-General's Office
(Civil Matters), *Agent*,
Mr K. KALLERUD, Senior Public Prosecutor,
Office of the Director of Public Prosecutions,
Mr M. GOLLER, Attorney, Attorney-General's Office
(Civil Matters), *Advisers*;

(b) *for the applicants*
Mr A.C.S. RYSSDAL, *Advokat*,
Mr P.W. LORENTZEN, *Advokat*. *Counsel*.

The Court heard addresses by Mr Ryssdal and Mr Lorentzen for the applicants and Mr Elgesem for the Government, and also their replies to questions put by the Court and by several of its members individually.

8. On 11 and 17 November 1999, the Government and the applicants variously produced additional observations and documents in response to certain questions put at the hearing. Moreover, on 14 and 15 December 1999, the applicants and the Government filed additional observations in the light of the Court's judgment in another case.

1. *Note by the Registry*. The text of the Court's decision is obtainable from the Registry.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

9. The first applicant, *Bergens Tidende*, is a daily newspaper published in Bergen and is the largest regional newspaper of the Norwegian west coast. The second applicant, Mr Einar Eriksen, is its former editor-in-chief and the third applicant, Mrs Berit Kvalheim, is a journalist employed by the newspaper. They were born in 1933 and 1945 respectively and both live in Bergen.

10. Dr R. is a specialist in cosmetic surgery and received his training at Haukeland Hospital in Bergen in the 1970s. As from 1975 he worked in this field from his privately owned practice in Bergen.

11. On 5 March 1986, following the opening of a new clinic by Dr R., *Bergens Tidende* published an article, prepared by the third applicant, which described Dr R.'s work and the advantages of cosmetic surgery.

Subsequently, the newspaper was contacted by a number of women who had undergone such operations by Dr R. and who were dissatisfied with the treatment received.

B. Publications giving rise to the defamation proceedings against the applicants

12. On 2 May 1986, *Bergens Tidende* published on its front page a text entitled “Beautification resulted in disfigurement”, which included the following passage:

> “'We paid thousands of [Norwegian] kroner [NOK] and the only thing we've achieved is to be disfigured and ruined for life.' *Bergens Tidende* has spoken with three women who have an almost identical story to tell about their experiences at a cosmetic surgery clinic in Bergen. All three underwent breast surgery at the clinic, and the results were extremely bad. They are warning other women.”

The caption under a photograph of a woman's bust read:

> “This woman was tormented by her large breasts. Surgery resulted in disfiguring scars and a disproportionate bust.”

The inside of the paper contained, together with a large colour photograph showing a woman's breasts with disfiguring scars, the following article:

> “*Women ruined for life after 'cosmetic surgery'*

'I paid NOK 6,000 and all I achieved was disfigurement.'

'To say that I bitterly regret it is an understatement. I've been ruined for life and I'll never be “my old self” again.'

'The pain was unbearable. I was transformed into an anxious, trembling nervous wreck in the course of a few days, and I thought I was going to die.'

These are the statements of three different women interviewed by *Bergens Tidende*. All of them, aged between 25 and 40 and resident in Bergen, share in common the fact that they have undergone cosmetic breast surgery, performed by Dr R., one of two specialists in plastic surgery with a private practice in Bergen.

The three women – who wish to remain anonymous – describe their ordeal as nightmarish. They all have internal and external scarring which they will have to live with for the rest of their lives.

'I was operated on in May 1984, following a long period of great psychological problems due to a small and sagging bust after I had had several children', said one of the women, who is 29 years old.

Swollen bust

'Immediately after the operation, I noticed there was something quite wrong. One of my breasts had swollen up and become hard and painful. When I consulted Dr R., he trivialised the whole matter, saying that it was nothing to worry about. It would pass. And I was told that under no circumstances should I contact another doctor.

For a whole week I lay at home in a dazed state of pain, swallowing Paralgin Forte[1] tablets as though they were sweets. I have never in my life taken anything stronger than Dispril[2] on the odd occasion. My bust swelled to grotesque proportions and was so sore that the slightest touch was unbearable.

It was impossible to get hold of Dr R. He had gone to Paris, and I didn't dare contact another doctor. It's only now that I realise how foolish I was.'

Squirting prosthesis

The doctor's receptionist finally managed to get in touch with Dr R. on the telephone in Paris, explained the gravity of the situation and made him travel directly from the airport to his office the night he returned home.

'By this stage the pain was unbearable, and both then and later on I reacted strongly to the hard-handed treatment I was subjected to', says the woman. 'As I lay on the operating table, he ripped open the stitches and tore out the implant without any form of anaesthetic, so the contents of the prosthesis squirted over him, his assistant and myself.'

1. Paralgin Forte: strong painkiller, obtainable only on medical prescription.
2. Dispril: mild painkiller, available from chemists without a prescription.

The woman's husband sat in the waiting-room, listening to her cries of pain. The whole treatment took thirteen minutes, and there was no talk of a rest afterwards. It was just a case of getting up from the operating table and walking out.

Three months' sick-leave

'He gave us the feeling the whole time that we were an inconvenience and were taking up his precious time.'

It took a long while for the woman to recover from her traumatic experience. She had to report sick and was away from work for three months. Her husband, too, was obliged to apply for leave from his job to stay at home with her for a period of time.

During this time she had a prosthesis in only one breast, and despite the daunting experiences she had been through, she contacted Dr R. again to have a silicon implant inserted in the empty breast. This was repeatedly postponed, and she finally decided to terminate her relationship as a client of Dr R. and contact another plastic surgeon. In doing so, she demanded her money back for the unsuccessful operation, and after some discussion he agreed to reimburse half of the costs.

No receipt

He did so with the following comment: 'I hope now that we are finished with one another for good. You have never been a patient here, and I have never seen you.'

Since then the woman has also reacted to the financial side of Dr R.'s activities. She had been informed beforehand that she would have to present the money – NOK 6,000 – in cash, on the day of the operation. Even a cheque would be unacceptable, and she was not given a receipt.

Painful infection

A 37-year-old woman tells a similar story.

'I wanted an operation because I have great problems with a disproportionately large, heavy bust that has caused shoulder and back pains. I checked first to see whether it was possible to get this type of operation done at the hospital, but was told that at best it would mean waiting a year. I therefore ended up at Dr R.'s.

The result was four-five months of continuous, painful infection and a bust that looked much uglier than it had done earlier.

I paid NOK 6,000 and the only thing I achieved was to do damage to myself', says the woman.

Disfiguring scars

The infection that occurred immediately after the operation caused the stitches to open, and septic sores developed. Once the wounds had healed, she was left with abnormally large, disfiguring scars, which prompted her to contact Dr R. again and ask for the damage to be repaired.

He agreed to do so, and a new operation was scheduled. The woman, who had asked for three days off work in connection with the surgery, arrived at the agreed time but found the doors to the clinic locked. She returned home with the matter unresolved. When she called him privately later that day he was impertinent and threatened her directly, and the conversation ended with him slamming down the receiver, the woman said.

After this she gave up and she has not had any contact with the doctor since.

Waste

'But it was a bitter feeling when I realised that I had invested a lot of time, money and mental energy in something that turned out to be not only a complete waste, but also did more harm than good.'

This woman, too, says that she was asked to pay cash and was not given any form of receipt.

Deformed

The third woman interviewed by *Bergens Tidende* had a similar experience. The woman, 31, says: 'I had a breast augmentation done and the very first day after the operation I discovered that something was wrong with one of my breasts. It was uneven, pointed to the right, and was rock-hard and sore. It's still hard and uneven almost two years later. I feel completely deformed, and I dare not even think of showing myself on a beach, for example.'

Complications

This woman, too, experienced complications after surgery, chiefly in the form of constantly recurring so-called 'capsules', i.e. part of the prosthesis hardened and had to be broken up again.

'After a few weeks I just couldn't take any more. By then I had lost confidence in Dr R. and his methods of treatment', says the woman, who, like the two other women, reacted to his demand that she pay cash without being given a receipt.

She is also deeply shocked about what she feels is the offhand and nonchalant way in which she was treated on her first visit to the doctor's.

'I had an appointment at 12.30 p.m., but was told that he didn't have time to see me. Would I rather come back another day? But I was so mentally prepared that it would be done that day – and I simply refused to go. It was now or never.'

Bitter regrets

'After three or four hours' wait I finally lay on the operating table, and if there is anything I now regret, then it's precisely that.

The operation was unsuccessful, I understood that immediately. After two or three weeks of repeated “treatment” and half-hearted attempts by the doctor to remedy the blunder, however, I couldn't stand it any more and I gave up.'

Unbearable

The woman has made no effort to get back the money she paid. 'I couldn't bear the thought of fighting – because I knew it would be a struggle.'

Almost two years have passed since the calamitous surgery, but she has not yet been able to collect herself sufficiently after the frightening experience and contact another doctor to have her breasts operated on again.

'I have to do it – because I can't live with this. However, the bad experiences are so ingrained that I haven't collected myself enough to do anything about it', she says."

13. Articles similar to the one of 2 May 1986 quoted above, accompanied by large colour photographs, were published on 3, 5, 7 and 9 May 1986, describing in detail how women had experienced their situation after allegedly failed operations and a lack of care and follow-up by Dr R. Some of the articles invited women to complain to the health authorities and to institute proceedings against the doctor. One article stated that the Health Directorate (*Helsedirektoratet*) would commence an investigation, that Dr R. might lose his licence to practise and that the question of a police investigation had been raised. Brief summaries of the contents of the articles may be found in the judgment of 23 March 1994 of the Norwegian Supreme Court (*Høyesterett)* quoted in paragraph 24 below.

14. In an editorial of 12 May 1986, entitled "Medical power", *Bergens Tidende* stated:

"It is of course with satisfaction that we see health authorities now carry out a thorough investigation of the activities which the Bergen breast doctor has been performing for many years. This is the least that one could expect. It must be in the interest of all – the patient's, the authorities' and also the doctor's – to have clarified whether the methods of treatment applied meet professional standards. The fact that the case has serious implications also because it has aesthetic, moral, but also basically down-to-earth economic consequences, serves to underline the need for a thorough investigation.

It is nevertheless a puzzle that it took a whole series of newspaper articles, powerful notices and assertive journalism to make the medical health bureaucracy react. Complaints to the doctors' own professional association have not produced results and neither the regional nor the municipal health authorities have taken any initiative before the patients, in despair, came out with their stories of suffering to *Bergens Tidende*. Again one wonders what is required in order to break down the strong professional ties within the medical profession and to preserve the interests of patients. In any event, it justifies the reflection that patients, over many years, feel threatened by fear of 'reprisals'. Irrespective of whether this fear is imaginary or real, it is telling of the relationship of power which still exists between doctors and patients.

Breaking down the myths and building confidence are crucial conditions for the process of healing. Therefore it is important to have a full clarification of the case in all its dimensions.

Unfortunately the initiative for this investigation does not originate from the medical milieu, but from the weakest party: the patient."

C. Other articles

15. On 2 May 1986 *Bergens Tidende* had also produced, at the bottom of the page containing the impugned article mentioned in paragraph 12 above, an article containing an interview with Dr Gunnar Johnsen, plastic surgeon at a Bergen hospital, entitled "Demanding form of surgery – Small margins between success and failure". It stated:

" 'There are borderline cases, but generally speaking aesthetic/psychological surgery, what is commonly referred to as "cosmetic surgery", does not fall within the public health-care authorities' responsibility.' ...

– 'Do many have unrealistic expectations and believe that all their problems will be solved if their imperfections are straightened out?'

'It happens and then their problems are more on the psychological than the physical level.'

Information is important

'Not least for this reason it is important that the patients – or the clients ... rather – are properly informed in advance. Frequently, information must be provided in order to reduce the expectations – so that the person concerned does not feel disappointed with the result. But having said this, most people are satisfied with their new appearance ...

You have the same problems, primarily with respect to the dangers of bleeding and infection, in this field as in any other field of surgery, and the general requirements as to precautionary measures and medical safety are as strict.'

Technically demanding

'Aesthetic surgery can be technically demanding and there are often small margins between success and failure. Not least for this reason it is important to possess wide experience of plastic surgery from ordinary hospitals before one starts one's own private business as a specialist. But the transfer of experience may be occurring in both directions.' ..."

The issue of 2 May 1986 also contained an interview with Dr R. entitled "There will always be dissatisfied patients", which read:

" 'I cannot comment on these particular cases, in part because I am bound by the general obligation of confidentiality, in part because I do not know the details of the cases. All I can say is that within plastic surgery, like in any other field of surgery, there is a certain margin of error and there will always be dissatisfied patients.'

It is Dr R. who states this to *Bergens Tidende* in his comments to the complaints from the three women.

> 'Complications in the form of hardened breasts ... occur in about 15 to 20% of all breast operations and the risks of bleeding and infection are the same in plastic surgery as in any other form of operation. But I should like to emphasise that all patients are informed in advance of the possible dangers and of the fact that the result of the operation is not always as successful as one might expect', says Dr R., who moreover underlines that three dissatisfied patients is a relatively small number when compared to the great size of his business which he has been running over the past few years ..."

According to the third applicant's statement to the High Court in the proceedings mentioned below, when approaching Dr R. in connection with the above interview, she had invited him to comment on the three women's allegations and had informed him that they had given their consent to release him from his duty of confidentiality. He had replied that he was bound by his general duty of medical confidentiality, which applied irrespective of whether the patient had given such consent. Dr R., in those proceedings, denied the third applicant's version of the facts, stating that he was absolutely sure that she had not informed him that the patients had lifted his duty of secrecy.

16. On 14 May 1986 *Bergens Tidende* published two articles commenting on the critical articles published earlier that month.

In the first article, entitled "The press – the pillory of today", Ms K. Thue recalled the history of witch-hunts during the Middle Ages and described *Bergens Tidende*'s coverage of the accounts by Dr R.'s dissatisfied patients as a modern form of witch-hunt conducted by the press. She stated that the doctor was unable to reply; being prevented by his duty of secrecy he could not refer to the large group of patients who were satisfied and could not substantiate that they constituted the vast majority of patients.

The second article, written by Mr R. Steinsvik and entitled "There are always two sides to a case", stated:

> "We are concerned with the recent focusing on Dr R.'s business. We are a group of thirty persons who all have in common that we are or have been patients of Dr R. We are satisfied with the treatment received, not least the service and care provided during post-surgery treatment and follow-up.
>
> A case always has two sides and by these words we hope that we have conveyed our views on and experiences of this doctor."

D. Administrative complaints by former patients of Dr R.

17. Following the publication of the articles by *Bergens Tidende*, seventeen former patients submitted complaints against Dr R. to the health authorities. On 8 October 1986 Mr Eskeland, the medical expert appointed to evaluate the situation, concluded that there was no reason to criticise Dr R.'s surgical treatment of the patients. Mr Eskeland stated that the complications complained of were common in surgery and were bound to

occur from time to time, but were not due to shortcomings in Dr R.'s surgery. In one case, he criticised Dr R. for having travelled abroad without informing a relatively newly operated patient. Mr Eskeland observed that, in the light of the large number of patients treated by Dr R. – approximately 8,000 between 1975 and 1986 – the number of complaints had been moderate. Bearing in mind that the articles published by *Bergens Tidende* had invited Dr R.'s former patients to complain, it was surprising that not more patients had done so.

18. On 3 November 1986 the Health Directorate decided not to take any further action, finding that Dr R. had not performed improper surgery.

E. Defamation proceedings brought by Dr R.

19. After the publication of the newspaper articles, Dr R. received fewer patients and experienced financial difficulties. He had to close down his business in April 1989.

20. In the meantime, on 22 June 1987, Dr R. instituted defamation proceedings against the applicants, claiming damages. By judgment of 12 April 1989 the Bergen City Court ordered the applicants to pay Dr R. a total of NOK 1,359,500 in respect of pecuniary and non-pecuniary damages and costs. The court considered that Dr R.'s economic loss would amount to several million kroner and that an assessment had to be made on a discretionary basis. It observed that, while the criticism against Dr R. had been made in an unjustified manner, destroying the public's confidence in him as a surgeon, the criticism had been caused mainly by his own conduct. The court deemed it appropriate to make an award corresponding to 75% less than the amounts claimed.

21. The applicants and Dr R. appealed against the judgment to the Gulating High Court (*lagmannsrett*), which found for the applicants, stating, *inter alia*:

> "After hearing the evidence, the High Court finds that the articles give an essentially correct rendering of the women's experiences as they themselves lived through them. As witnesses, they gave the impression to some extent that the newspapers had moderated their accounts. The High Court finds them credible and finds no reason to believe that their subjective experiences are not commensurate with what objectively took place – in other words they had reasonable grounds for feeling the way they did and as described by the newspaper. The High Court does not exclusively base itself on these three women's statements. It finds it also proven that the newspaper was contacted by a number of other women giving similar stories. Subsequently, after the article of 3 May [1986] had been published together with an appeal by N.H. to women to join in filing an action, many more women got in touch. The High Court finds it established that the number of women [who did so] was more than one hundred. This is based mainly on statements taken from [the second and third applicants] and N.H., and some of these women have also appeared as witnesses before the High Court and have given statements. These constitute only a minor part of all the women who contacted *Bergens Tidende* and N.H. A total of fourteen dissatisfied women have

given statements, as has the husband of one woman. However, it is largely the same story that is repeated again and again in the statements: complications did occur or the result was bad and the follow-up treatment provided by Dr R. was felt to be unsatisfactory and seemed rushed with little interest, some irritation and unwillingness. Several women told how Dr R. seemed insensitive to their mental as well as physical pain and discomfort. Some had the feeling that Dr R. would rather be finished with them after he had operated and had not organised post-operative treatment properly. Some of the women were worried that Dr R. might not have given them proper post-operative treatment. What is also being repeated by many of the women is that they were struck by the fact that Dr R. was keen when it came to the financial side; he wanted payment in advance, was unwilling to take cheques, and gave no receipt unless especially asked to do so ...

On the basis of the above the High Court finds it proven that Dr R. ran his practice in such a way that many of the women who suffered complications had experiences that gave them reasonable grounds to feel themselves exposed to poor care and to feel anxiety about the treatment they were given, and in several instances had reason to feel offended by Dr R.'s behaviour. Moreover, the High Court finds that the experiences described in the article of 2 May [1986] are representative of those made by many other women.

Thus the High Court finds that the three women referred to in the article of 2 May [1986] had not been especially sensitive and had not had exaggerated expectations, but that their stories were sober and reasonably subjective accounts of what had happened. Having regard to the information at hand about complaints made by other women, the High Court also finds that this is not simply a case of one or two odd exceptions. As far as Dr R. is concerned, it can reasonably be established that it is a question of unsatisfactory behaviour, which occurred quite often in the cases where something happened to necessitate an extra effort after the operations. That is not to say that he behaved in an unsatisfactory way in most cases or in a particularly large number of them. It is hardly a question of more than a minority of the cases. And it must be stressed that nothing has been said to prove that there really was a failure as regards R.'s surgical competence.

But the fact that the unsatisfactory behaviour occurred in a number of cases must provide a basis for allowing criticism of Dr R. to come to light in the newspaper. Reference is made to what has been said above about the right of the general public and the consumer to be kept informed and their right to react by staying away to be on the safe side. It should be pointed out that the people who contacted the newspaper at the outset did so as a reaction to *Bergens Tidende*'s article on 5 March [1986], an article which presented a picture of R.'s business without mentioning the drawbacks. *Bergens Tidende* claims that, in view of the article of 5 March, it felt obliged to let their criticism be heard, which the High Court finds very understandable.

On 3 May [1986], *Bergens Tidende* ran an article in which N.H. described her own experience of treatment at Dr R.'s clinic and urged women in a similar situation to join forces in suing the doctor. The High Court finds it proven, in the same way as for the three women who were described on 2 May, that N.H.'s experiences were recounted correctly and that her subjective feelings were reasonably grounded on what had occurred. The same applies to what was stated on 5 May about the experience of a '26-year-old Bergen lady'. The High Court is also satisfied that what was stated on the same day about telephone calls to N.H. ('Storm of telephone calls') is correct ...

As far as the rendering of the women's experiences is concerned, what was stated in *Bergens Tidende* is thus in all essentials correct. And their subjective experiences were liable to give a picture of how treatment by Dr R. could turn out, not only in rare exceptional cases ...

The striking part about the statements that Dr R. has challenged is that they report in strong language on the results of treatment provided by Dr R.: 'disfigurement', 'ruined for life', 'mutilated' and the like. It is sufficiently clear that the statements are here describing the result of Dr R.'s treatment. But there is nothing in the statements suggesting a lack of surgical ability on Dr R.'s part. And one must assume that newspaper readers were aware that a poor result of an operation need not be due to a lack of surgical skill. It has been submitted that the use of expressions like 'ruined', 'was disfigured', etc., brings to mind actions that are aimed at ruining and disfiguring and that the reader is therefore immediately made to believe that some person – i.e. Dr R. – is guilty of such conduct. The High Court does not find that, from a linguistic point of view, the statements apply to anything other than the purely objective result.

Another question is whether the statements are misleading, because they give the impression that the consequences were more serious than they actually were. The High Court cannot see that this is the case – especially when bearing in mind that it is the manner of reporting of the women's subjective opinions which is at stake. 'Disfigured' means having an ugly mark of some significance on one's body, and in the opinion of the High Court the women who use this expression according to *Bergens Tidende* had good reason for doing so. Much the same can be said about 'mutilated'. Presumably, 'ruined' must be understood as bearing a somewhat stronger expression, but must be justified in the case of women whose breasts have large scars or have become lopsided, hard, different, or tender to touch, in view of the effect this must have had, not only on the woman's relationship with her husband but also in many other respects – one can imagine what it must mean not to be able to give one's child or grandchild a hug because of tender or hard breasts. According to what the Court finds established on the witness evidence, it was, amongst other elements, against the background of such results that the newspaper had used the expressions.

While the statements thus could not be said to amount to a direct allegation that Dr R. lacked surgical abilities, *Bergens Tidende* did not make it clear either that there was no lack of ability. And both the individual statements and the articles in their entirety give the impression that it is being questioned whether Dr R. always provided treatment which was medically up to standard. In the light of the women's information, however, this was a natural question to ask; several of the women mentioned it, and anyone who reads the accounts alone would be inclined to ask that question. It can therefore not be unlawful for *Bergens Tidende* to air this question.

Dr R. also complains that *Bergens Tidende* conducted a veritable campaign and persecution against him. The High Court does not consider this to be the case. In particular, the newspaper should have the right to believe that women should think twice about consulting Dr R. and to write articles with this in mind ...

In brief, the opinion of the High Court can be summarised as follows:

In Dr R.'s practice there were a not inconsiderable number of cases of poor follow-up and behaviour and the like, which gave many women reasonable grounds for feeling disappointed and badly treated. The High Court bases this assessment of evidence essentially on the women's statements and comportment in court. *Bergens*

> *Tidende* was entitled to write about this and to repeat the women's subjective experiences of the treatment. The newspaper did this in a manner which in all essentials was correct. In so far as the newspaper articles might have given the impression that there could be reason to question Dr R.'s professional ability, this was no more than a suspicion for which his behaviour gave reasonable grounds, and which it must therefore have been right to report on. If this led to financial losses for Dr R., it was because of the extremely sensitive nature of the activities he was engaged in.
>
> [The applicants] are therefore discharged from liability to pay damages, and the High Court will not go into the question of the extent of Dr R.'s financial losses.
>
> Moreover, the High Court does not find it possible to allow the claim for non-pecuniary damage and, referring to what has been stated above, does not find that any of the coverage of Dr R. by *Bergens Tidende* was unlawful."

22. Dr R. appealed against the above judgment to the Supreme Court. In his submission, the City Court's judgment was in principle correct, except that no reduction should have been made of the award on grounds of shortcomings on his part. In his opinion, even if the High Court's assessment of the evidence concerning lack of care and follow-up were to be accepted, this could only have a marginal effect on the amount of compensation. He maintained, *inter alia*, that the newspaper articles had amounted to a public execution of him as a plastic surgeon, by their strong emphasis on unsuccessful operations and by giving the readers the impression that he was incompetent. Furthermore, he had not been given a proper opportunity to reply to the criticism before the publications were printed. In his view, the defendants' conduct had been grossly negligent.

The applicants emphasised that the impugned news coverage concerned above all the situation of quite a large number of women with whom the newspaper had been in contact, directly or indirectly, and who had complained about lack of care and follow-up after unsuccessful operations. They had also complained about a lack of information before the operations. The articles conveyed the women's feelings and frustrations as expressed in their own words. Whether Dr R. was a good or a bad surgeon had not been decisive.

23. On 22 December 1992 the Appeals Selection Committee (*kjæremålsutvalget*) of the Supreme Court dismissed the appeal in so far as it concerned the High Court's assessment of the evidence relating to the issue of Dr R.'s lack of care and follow-up of his patients, and allowed the appeal for the remainder to proceed.

24. In a judgment of 23 March 1994 the Supreme Court found in favour of Dr R. and awarded him amounts totalling NOK 4,709,861 in respect of damages and costs. Mr Justice Backer stated, *inter alia*, on behalf of a unanimous court:

> "By way of introduction I note that newspapers, of course, have a right to emphasise questionable aspects of cosmetic surgery and to illustrate their presentation with information about unfortunate incidents. They should also be able to pinpoint critical

aspects of an individual surgeon's business and here the journalist in question must be granted a wide leeway for subjective considerations. But outright incorrect factual information of a negative character must be considered defamatory. The fact that the newspaper just repeats the accusations made by others will, according to established case-law, not in principle constitute a defence.

Accordingly, it will be necessary to consider the individual articles in order to establish their contents in relation to the rules on defamation. In interpreting the articles one should take as a starting-point the impression which they, as a whole, will make on the ordinary reader, while attaching greater weight to the headlines and the introductions than to the text presented in normal characters. The High Court considered that the particularly interested reader would read the entire news report meticulously and thereby obtain a more balanced view than the reader who only takes a cursory look at the news report. I find it difficult to attach particular importance to this consideration. Even those who read the news report as a whole would easily be influenced by value judgments in headlines etc. Furthermore, the news report addresses the general public and will thus affect the doctor's reputation as such. Unlike the High Court, I cannot see that one can generally assume that readers would be aware that a bad result of an operation is not necessarily due to a lack of surgical skills ...

The news report of 2 May 1986 was based on the positive articles of 5 March and the comments [the newspaper] had received from dissatisfied patients. It describes the situation of three women who had undergone a breast operation involving silicon implants and who had subsequently experienced problems. On page one there is a two-column headline 'Beautification resulted in disfigurement' followed by a picture of a woman's breasts disfigured by scars. In quotation marks it reads: 'We paid thousands of kroner and the only thing we've achieved is to be disfigured and ruined for life.' Inside the newspaper an entire page is reserved for the news report. There is a headline covering seven columns 'Women ruined for life after cosmetic surgery'. The same picture as on the front page is printed over five columns. Below the picture it is written: 'Enormous scars, wrinkled breasts and a long painful inflammation were the consequences of the cosmetic surgery on this woman'. The article commences with three points in bold print, which read:

'I paid NOK 6,000 and all I achieved was disfigurement.'

'To say that I bitterly regret it is an understatement. I've been ruined for life and I'll never be “my old self” again.'

'The pain was unbearable. I was transformed into an anxious, trembling nervous wreck in the course of a few days, and I thought I was going to die.'

In the article it appears from the women's statements that they contacted Dr R. following an inflammation and other complications and that they were unhappy with the treatment they received. I understand this to relate both to the service and the result of the treatment.

At the bottom of the page there is an interview with Dr R. with the headline 'There will always be dissatisfied patients'. In the course of the proceedings, it has been submitted that [the third applicant] had contacted Dr R. on 30 April and had asked him to comment, stating that the three women had told her that they had released Dr R.

from his obligation to observe professional secrecy. However, referring to this obligation, Dr R. had refused to comment on specific cases.

At the bottom of the page there is furthermore an interview with another specialist in cosmetic surgery ... with the headline 'Demanding form of surgery – Small margins between success and failure'.

The following day, on 3 May [1986], a new article appeared. On the front page a headline covering two columns reads 'Action against the breast doctor'. Inside the newspaper there is a headline covering five columns 'Institute proceedings against the doctor'. It is the former patient [N.H.] who appears and explains about experiences similar to the three women from the articles published the day before. She invites everybody in the same situation to get together in a case against Dr R. There is also an interview with the Chief County Physician [*Fylkeslegen*] who states that dissatisfied patients may complain to him. Furthermore, there is an article covering five columns with the headline 'The doctor must provide receipts'. Here the complaint is made that Dr R. allegedly requested payment without providing receipts therefor. It is indicated that this might interest both the tax authorities and the social authorities.

In the article of 5 May [1986] the front page contains a one-column headline 'NOK 12,000 – breasts ruined'. The headline is repeated over seven columns inside the newspaper with a small amendment without importance to its contents. Here a woman explains how she underwent two breast operations by Dr R. with a bad result. Further, there is a headline covering four columns 'Control virtually impossible' followed by an article in which the Chief County Tax Inspector [*Fylkesskattesjefen*] is interviewed. Covering two columns there is a framed article with the headline 'Telephone storm: to the extent I could not sleep'. It is N.H. who recalls how she received telephone calls from a number of women who recounted very 'strong' stories about their experiences with Dr R.

In the articles of 7 May [1986] this is followed up. The front page shows a headline covering four columns 'Telephone storm from the persons operated on'. Furthermore there is a picture covering two columns of one of the breasts of a former patient, G.S., where the point is that the stitches were not removed, in addition to disfiguring scars. Inside the newspaper there is a headline covering five columns 'Telephone storm following criticism against fashion doctor. Had no idea we were so many'. N.H. recalls in an interview that she has talked to at least fifty persons who all have frightening experiences to contribute. Three of these cases are explained. Further, there is a three-column picture of G.S.'s breasts. Connected thereto is a four-column headline 'G.S. (28) was operated on in 1984. The stitches are still there'. The article explains that she contacted Dr R.'s office after the operation in order to have the stitches removed but was told to do this herself, as a pair of appropriate pincers was not available. Further, there is an article with the headline covering three columns 'Probably no investigation', in which the State Prosecutor is interviewed.

In the last articles of 9 May the front page contains a headline covering four columns 'Breast doctor is being investigated'. It is stated that, according to the acting health director, the Health Directorate would immediately contact the Chief County Physician in order to carry out a thorough investigation of Dr R. and his practice, and the newspaper draws attention to the question whether the doctor may lose his licence. Inside the newspaper there is a four-column headline related to the same operation. Furthermore, there is a similar headline 'Cannot do anything': *Advokat* Å.H. of the Norwegian Doctors' Association tells the newspaper that the association cannot

examine complaints about the doctor's medical practice but only complaints which relate to the doctor's behavioural and humane treatment of patients.

The first question, which arises when evaluating the series of articles, is whether the criticism of Dr R. may be characterised as an accusation and what its contents may be. On the one hand, Dr R. maintains that he is accused of malpractice and that insufficiencies in respect of his work as a surgeon will be of central importance. The defendants maintain on the other hand that the criticism does not concern this but relates to a lack of information, care and follow-up treatment which is a part of the medical treatment. The High Court found that evidence had been submitted proving that deficiencies in care and follow-up treatment had occurred. Since the appeal concerning the evaluation of evidence on this point has been refused, the Supreme Court is bound by the evaluation made by the High Court.

The articles concern the situation of women who have experienced complications after an operation or when the original operation failed. They are in despair due to the result of the treatment and complain about the reluctance and carelessness on the part of Dr R. as regards rectifying what went wrong. In my opinion the articles in [the newspaper] appear at the same time to be a strong attack on Dr R.'s qualifications as a cosmetic surgeon without taking sufficiently into account the usual risk of unsuccessful operations. The statements that the women were disfigured and ruined for life and the many other strong statements, in particular in the articles of 2 May 1986, which set the tone for the other articles, can hardly be understood otherwise than as referring to a great extent to the result of the treatment where the surgical element is essential. This is also how the Chief County Physician, the Health Directorate and Professor E. understood the articles. Initially it appears that [the newspaper] was of the same opinion. In an editorial of 12 May 1986 satisfaction is accordingly expressed with the fact that the health authorities would now make a thorough examination of a 'breast doctor from Bergen' in order to 'clarify whether the methods of treatment which are used comply with professional standards'. Since it must have been apparent that the articles would completely destroy his business, it may also be questioned whether [the newspaper's] series of articles concerning Dr R. could be explained in any other way than that they reflected [the newspaper's] opinion that the circumstances involved reckless surgical activity which ought to be brought to the attention of the public.

In these circumstances – contrary to the findings of the High Court – I have reached the conclusion that the articles contain an accusation against Dr R. that he performed his surgical activities in a reckless way – an accusation which I must hold to be incorrect.

The next question is whether the resulting defamation should, for special reasons, not be considered to be unlawful. Among other things the newspaper has referred to its particular duty to attend to the interests of consumers and to the fact that the accusation against Dr R. as a whole concerning improper treatment was nevertheless to a great extent correct. However, Dr R. has criticised the newspaper's handling of the case and has furthermore referred to Article 249 § 2 of the Penal Code.

When a newspaper makes such strong criticism as in this case I consider that Dr R. ought to have had the possibilities of a proper defence. No time element prevented this. When approached on 30 April, Dr R. could not make any statements about the concrete cases without being released by the patients themselves from his duty to maintain professional secrecy, and he did not have a duty to contact the patients

himself for that purpose. I also find that [the third applicant] – and the newspaper – must be criticised for a lack of balance in the articles and for using unnecessarily strong and, to some extent, misleading expressions. That [the third applicant] was quoting the interviewees is no excuse for completely disregarding Dr R.'s right to the protection of privacy. That the women had a subjective and strong emotional point of view to what they had experienced is understandable. But it is another matter to publish their statements to a large group of readers who would expect that these, at least in their essentials, covered the objective truth. Even though there is reason to give a wide scope to freedom of expression in order to enable newspapers to fulfil their function in society, I cannot but reach the conclusion that the line has been overstepped. ... I see no reason to go into the issue of Article 249 § 2.

The submission that the main content of the accusation has been proven is based on the High Court's assessment of the evidence as far as lack of care and follow-up are concerned.

The High Court's assessment of the evidence on this point can be seen from remarks spread over several pages of its judgment, especially at pp. 11 to 14. On p. 12 it stated:

> 'On the basis of the above the High Court finds it proven that Dr R. ran his practice in such a way that many of the women who suffered complications had experiences that gave them reasonable grounds to feel themselves exposed to poor care and to feel anxiety about the treatment they were given, and in several instances had reason to feel offended by Dr R.'s behaviour.'

Furthermore, at p. 13 it held:

> 'As far as Dr R. is concerned, it can reasonably be established that it is a question of unsatisfactory behaviour, which occurred quite often in the cases where something happened to necessitate an extra effort after the operations. That is not to say that he behaved in an unsatisfactory way in most cases or in a particularly large number of them. It is hardly a question of more than a minority of the cases. And it must be stressed that nothing has been said to prove that there really was a failure as regards R.'s surgical competence.'

In these circumstances I must conclude that the essential elements of the accusations to be found in the articles concerning Dr R. have not been proven, since the alleged deficiencies as regards the surgical activities, as set out in the articles, clearly overshadow the deficiencies concerning care and follow-up treatment. Furthermore, the accusations are unlawful.

In my opinion there can be no doubt that the articles have caused considerable financial losses, in addition to non-pecuniary damage, for Dr R. It would have been strange if [his clinic] had survived the very negative comments in the articles of [the newspaper]. From a commercial point of view cosmetic surgery is very sensitive to anything which might shatter the potential patients' faith in the operating doctor. The defendants must have been aware of this.

The calculation of Dr R.'s loss involves many elements of uncertainty. In no circumstances could he automatically rely on continuing a thriving and profitable business as a private cosmetic surgeon for the rest of his life until reaching the age of retirement. Even a neutral, objective and, from any point of view, appropriate criticism would have been very damaging to him ...

Dr R. shall be granted compensation under section 3-6 of the Damage Compensation Act 1969 [*Skadeserstatningsloven* – Law no. 26 of 13 June 1969] from [the first applicant] in respect of damage, loss of future income and suffering. As regards the two last points, the Court has a wide discretion according to [the applicable legislation]. But also as regards the first point, Dr R.'s own conduct may be taken into consideration ...

... I have reached the conclusion that the compensation for the damage done, i.e. loss of income plus interest from 1986 until this judgment, ought to be fixed at NOK 2,000,000. As regards the other requests for damages submitted by Dr R. ... I consider that this should be fixed on an equitable basis at NOK 200,000.

Compensation in respect of loss of future income is fixed at NOK 500,000. Further, the non-pecuniary damage to be paid by [the first applicant] is fixed at NOK 1,000,000. When fixing reparation, regard has been had to the exceptional pressure which Dr R. has endured over a long period of time due to the series of articles.

The non-pecuniary damage to be paid by [the second and third applicants] is fixed at NOK 25,000 each."

Finally, the Supreme Court ordered that the first applicant pay Dr R. NOK 929,861 and that the second and third applicants each pay him NOK 15,000 for his costs in the domestic proceedings, plus certain interest with respect to Dr R.'s costs in the City Court. In accordance with the latter, the first applicant paid an additional NOK 218,728, and the second and third applicants each paid NOK 4,383 in interest.

II. RELEVANT DOMESTIC LAW AND PRACTICE

25. Under Norwegian defamation law, there are three kinds of responses to unlawful defamation, namely the imposition of a penalty under the provisions of the Penal Code, an order under Article 253 of that Code declaring the defamatory allegation null and void (*mortifikasjon*) and an order under the Damage Compensation Act 1969 (*Skadeserstatningsloven* – Law no. 26 of 13 June 1969) to pay compensation to the aggrieved party. Only the latter was at issue in the present case.

26. Section 3-6 of the aforementioned Act reads:

"A person who has injured the honour or infringed the privacy of another person shall, if he has displayed negligence or if the conditions for imposing a penalty are fulfilled, pay compensation for the damage sustained and such compensation for loss of future earnings as the court deems reasonable, having regard to the degree of negligence and other circumstances. He may also be ordered to pay such compensation for non-pecuniary damage as the court deems reasonable.

If the infringement has occurred in the form of printed matter, and the person who has acted in the service of the owner or the publisher thereof is responsible under the first subsection, the owner and publisher are also liable to pay compensation. The

same applies to any redress imposed under the first subsection unless the court finds that there are special grounds for dispensation ..."

27. Conditions for holding a defendant liable for defamation are further set out in Chapter 23 of the Penal Code, Articles 246 and 247 of which provide:

"Article 246. Any person who by word or deed unlawfully defames another person, or who is accessory thereto, shall be liable to fines or imprisonment for a term not exceeding six months.

Article 247. Any person who, by word or deed, behaves in a manner that is likely to harm another person's good name and reputation or to expose him to hatred, contempt, or loss of the confidence necessary for his position or business, or who is accessory thereto, shall be liable to fines or imprisonment for a term not exceeding one year. If the defamation is committed in print or in broadcasting, or otherwise under especially aggravating circumstances, imprisonment for a term not exceeding two years may be imposed."

28. A limitation to the applicability of Article 247 follows from the requirement that the expression must be unlawful (*rettstridig*). While this is expressly stated in Article 246, Article 247 has been interpreted by the Supreme Court to include such a requirement.

In a civil case concerning pre-trial reporting by a newspaper, the Supreme Court found for the newspaper, relying on the reservation of lawfulness (*rettsstridsreservasjonen*), even though the impugned expressions had been deemed defamatory. It held that, in determining the scope of this limitation, particular weight should be attached to whether the case was of public interest, having regard to the nature of the issues and to the kind of parties involved. Regard should be had to the context in which, and the background against which, the statements had been made. Moreover, it was of great importance whether the news item had presented the case in a sober and balanced manner and had been aimed at highlighting the subject matter and the object of the case (*Norsk Retstidende* 1990, p. 640).

29. Further limitations on the application of Article 247 are contained in Article 249, the relevant part of which reads:

"1. Punishment may not be imposed under Articles 246 and 247 if evidence proving the truth of the accusations is adduced ..."

FINAL SUBMISSIONS TO THE COURT

30. At the hearing on 9 November 1999 the Government invited the Court to hold that, as submitted in their written observations, there had been no violation of Article 10 of the Convention.

31. On the same occasion the applicants reiterated their request to the Court to find a violation of Article 10 and to make an award of just satisfaction under Article 41.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

32. The applicants complained that the Supreme Court's judgment of 23 March 1994, requiring them to pay Dr R. approximately 4,700,000 Norwegian kroner (NOK) for damages and costs, unjustifiably interfered with their right to freedom of expression under Article 10 of the Convention. This provision reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

33. The Court considers, and this was not disputed by the parties, that the impugned measure constituted an "interference by [a] public authority" with the applicants' right to freedom of expression as guaranteed under the first paragraph of Article 10, that the interference was "prescribed by law", namely section 3-6 of the Damage Compensation Act 1969 (see paragraphs 25-29 above), and pursued the legitimate aim of protecting "the reputation or rights of others". It thus fulfilled two of the three conditions of justification envisaged by the second paragraph of Article 10.

The dispute in the present case relates to the third condition – whether the interference was "necessary in a democratic society".

A. Arguments of those appearing before the Court

1. The applicants

34. The applicants argued that, while the High Court had found in favour of *Bergens Tidende* because it had truthfully rendered the reactions of Dr R.'s former patients, the Supreme Court, without disputing or reviewing this central finding, had found for the plaintiff and for quite a different reason. Without being able to pinpoint a single expression but relying on a general and rather vague proposition about the "impression" an ordinary reader would get, the Supreme Court had mistakenly interpreted the press coverage made by *Bergens Tidende* as having been principally aimed at destroying the public's confidence in Dr R.'s professional skills. It had based itself on an unfounded assumption that the news reports amounted to a full-scale attack on his professional competence as a surgeon in the narrow sense, although there was nothing in the articles to this effect. On the contrary, even the first newspaper issue in question contained two articles making it clear that unsuccessful surgery need not be due to substandard surgery.

In their opinion, the only reasonable interpretation that could be made of the articles was that supported by the High Court's findings, namely that the newspaper had sought to present to its readers a truthful rendering of the information received from a large number of female patients who had suffered mentally and physically as a result of their treatment at Dr R.'s clinic. It followed from the High Court's conclusion that the newspaper had proved that there was evidence justifying the criticism against Dr R., given that the patients' stories – as recounted by the newspaper – were true. The fine distinction adopted by the Supreme Court between, on the one hand, lawful coverage of patients' dissatisfaction with Dr R.'s shortcoming in post-surgery care and follow-up treatment and, on the other hand, "unlawful" coverage of alleged surgical incompetence, was in reality simply untenable.

As a consequence of its drawing the above distinction, the Supreme Court had subjected the applicants' value judgments to a stringent requirement of proof.

35. The applicants stressed that their case concerned not only freedom of the press to cover matters of public interest but also the women's freedom to express their own situation and feelings. The latter could only have been exercised effectively through the media. Issues relating to breast enlargements and adjustments were of the most intimate character and many women would not feel at ease to discuss such matters even with close family or friends. There was thus a need for a public channel of communication to make the information available. Had *Bergens Tidende* not reported the matter, the unfortunate experiences of a large number of patients of Dr R. would not have been conveyed to a wider audience and

more women would have suffered. There could be no doubt that the press coverage at issue involved matters of human health, calling for strong protection under Article 10 of the Convention. Account should also be taken of the context in which the articles had been published, the careful journalistic investigations carried out prior to publication and the fact that the women concerned had formed a representative selection of those who had contacted the paper. Moreover, the impugned newspaper coverage had not invaded Dr R.'s privacy as an individual but had only concerned his practices as a professional.

36. The applicants further argued that since the newspaper had truthfully reported the women's reactions, no criticism could be levelled against them for the way in which they had presented the subject. The 2 May 1986 issue had presented a full picture of the situation of three women, together with a reply by Dr R. and an interview with a chief surgeon at the largest hospital in Bergen, making it clear that the poor treatment which the women had received need not have been due to substandard surgery. The women's reactions and experiences had been represented in a balanced manner.

Moreover, in the applicants' view, it was not correct to say that Dr R. had been unable to comment because of his duty of confidentiality. The journalist had repeatedly contacted Dr R. to have his comments. His lawyer at the time had advised him not to comment on the allegations made by the patients, thereby preparing the ground for the subsequent legal proceedings. While Dr R. did comment on the general risks involved in cosmetic surgery, his “no comment” policy with regard to specific cases could of course not silence the newspaper. In any event his comments would have been of no consequence since the High Court, which later undertook a close examination of his conduct at the clinic, found for the applicants.

37. In the applicants' opinion, even if one were to accept the Supreme Court's interpretation of the articles, the facts of the present case suggested that the medical results were poor for a large number of Dr R.'s former patients and that there were reasons for criticising him. Moreover, the applicants had acted in good faith in accordance with the ethics of journalism.

38. Finally, the applicants emphasised that the Supreme Court's decision to award Dr R. amounts totalling nearly NOK 5,000,000 – the largest financial penalty ever imposed by a Norwegian court in a defamation case – had a chilling effect on the exercise of press freedom in Norway.

39. In the light of the foregoing considerations, the applicants requested the Court to hold that the respondent State had transgressed its margin of appreciation, which ought to be limited in the instant case, and had violated their right to freedom of expression as guaranteed by Article 10 of the Convention.

2. The Government

40. The Government stressed that the present case concerned highly derogatory accusations against a private individual, not a public figure. The articles had publicly "executed" Dr R. as a cosmetic surgeon and had, as a consequence, ruined his business as a plastic surgeon and his private life. The interpretation of the articles made by the Supreme Court to the effect that they represented a full-scale attack on Dr R.'s professional competence as a surgeon was amply supported by a plain reading of the articles and was wholly reasonable, falling within the discretion to be afforded to domestic courts in such matters. The applicants' contention that the accusations were limited to a lack of care and follow-up was untenable. From the statements published on 2 May 1986 there was an inescapable inference, accusing Dr R. of unacceptable surgery, which fact was made even clearer in the articles of 3 May 1986 calling for legal action to be taken against the doctor. The criticism in question struck at the core of his professional reputation and was disastrous to the public's trust in him as a plastic surgeon. Whereas shortcomings regarding care and follow-up could easily be improved, a lack of surgical skill was a far more serious and lasting lacuna in a plastic surgeon's professional performance.

41. The allegations implying that Dr R. had carried out his surgical activities in an unacceptable manner did not constitute a value judgment but a factual allegation susceptible of proof. However, the applicants had not proved that there had been substandard surgery in any of the specific cases referred to in the articles.

42. Since *Bergens Tidende* took no steps to have Dr R. relieved of his professional duty of confidentiality, he was not afforded a proper opportunity to defend himself against the accusations. Nor did the newspaper investigate whether the accusations were well-founded.

43. The Government further disputed that the dissatisfaction voiced by the women was a matter of serious public concern. As a rule, such grievances were a matter solely between the doctor and his patients. Compared to the 8,000 or so patients on whom Dr R. had carried out operations, the number of patients who came forward was insignificant. Only seventeen patients had complained to the Chief County Physician, and five of these had later withdrawn their complaints. With one exception, which concerned poor follow-up treatment rather than surgery itself, the Chief County Physician had found the complaints to be without merit. The individual patients' grievances against Dr R. did not have any public interest beyond the need for consumer protection. It was not in the consumers' interest to be misinformed, but to receive reliable information based on adequate research. The information on surgical malpractice had not been verified by the newspaper and was inaccurate. Thus it did not raise any health matters of public interest.

44. The aim of the publications was not to contribute to an ongoing debate on cosmetic surgery, but rather to persecute Dr R. by launching a massive attack against him on account of his services, including his surgery.

45. The applicants were to be criticised, as held by the Supreme Court, for a lack of balance in the manner of reporting and for using unnecessarily strong and, to some extent, misleading expressions.

46. In the view of the Government, the restriction on the applicants' freedom of expression was not capable of discouraging the applicants' participation in a debate on a matter of legitimate public concern. It would have been possible for the newspaper to provide information on the risks of cosmetic surgery without resorting to attacks against a named surgeon. Even if the dissemination of information on the performance of a named surgeon might be justified in the interests of consumer protection, the national authorities should be left a wide margin of appreciation as to what was required in order to protect such interests.

47. In these circumstances, the award of damages made by the Supreme Court, which was only one-third of the amounts claimed, could not be deemed excessive. In the Government's opinion, the interference could not be viewed as disproportionate to the legitimate aims pursued, but was necessary in a democratic society. They invited the Court to hold that there had been no violation of Article 10 of the Convention in the present case.

B. The Court's assessment

1. General principles

48. According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no “democratic society”. This freedom is subject to the exceptions set out in Article 10 § 2, which must, however, be construed strictly. The need for any restrictions must be established convincingly.

The test of “necessity in a democratic society” requires the Court to determine whether the “interference” complained of corresponded to a “pressing social need”, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see the *Sunday Times* v. the United Kingdom (no. 1) judgment of 26 April 1979, Series A no. 30, p. 38, § 62). In assessing whether such a “need” exists and what measures should be

adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 (see, among the most recent authorities, Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III, and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

49. The Court further recalls the essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds, particularly as regards the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see the Jersild v. Denmark judgment of 23 September 1994, Series A no. 298, pp. 23-24, § 31, the De Haes and Gijsels v. Belgium judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 233-34, § 37, and the Bladet Tromsø *and Stensaas* judgment cited above, § 59). In addition, the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see the Prager and Oberschlick v. Austria judgment of 26 April 1995, Series A no. 313, p. 19, § 38, and the Bladet Tromsø *and Stensaas* judgment cited above, § 59). In cases such as the present one, the national margin of appreciation is circumscribed by the interests of a democratic society in enabling the press to exercise its vital role of "public watchdog" by imparting information of serious public concern (ibid., § 59).

50. The Court's task in exercising its supervisory function is not to take the place of the national authorities, but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (ibid., § 60).

2. Application of the above principles

51. The Court observes at the outset that the impugned articles, which recounted the personal experiences of a number of women who had undergone cosmetic surgery, concerned an important aspect of human health and as such raised serious issues affecting the public interest (see the Hertel v. Switzerland judgment of 25 August 1998, *Reports* 1998-VI, p. 2330, § 47). In this regard, the Court cannot accept the Government's submission that the grievances of a few patients concerning the standard of health care afforded by a particular surgeon are private matters between the patient and surgeon themselves and are not matters in which the community at large has an interest. Nor is the Court able to agree that the fact that the articles were not published as part of an ongoing general debate on the issues attached to cosmetic surgery, but were specifically focused on the

standard of treatment provided at a single clinic, means that the articles did not relate to matters of general public interest. The Court notes, in this connection, that the articles concerned allegations of unacceptable health care provided at a private cosmetic surgery clinic in Bergen by Dr R. who, according to the evidence, had been responsible for carrying out over 8,000 operations in a period of some ten years, and as such raised matters of consumer protection of direct concern to the local and national public. Moreover, the publication of the articles must be seen against the background of an article published in *Bergens Tidende* some two months earlier, which described Dr R.'s work and the advantages of cosmetic surgery. As the High Court pointed out, it was in reaction to this article, which presented a favourable picture of Dr R.'s business without mentioning the drawbacks, that women who had undergone cosmetic surgery at Dr R.'s clinic were prompted to contact the applicant newspaper.

52. Where, as in the present case, measures taken by the national authorities are capable of discouraging the press from disseminating information on matters of legitimate public concern, careful scrutiny of the proportionality of the measures on the part of the Court is called for (see the Jersild judgment cited above, pp. 25-26, § 35).

53. However, the Court further observes that Article 10 of the Convention does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article, the exercise of this freedom carries with it "duties and responsibilities" which also apply to the press. As the Court pointed out in the Bladet Tromsø *and Stensaas* judgment cited above, § 65, these "duties and responsibilities" assume significance when, as in the present case, there is question of attacking the reputation of private individuals and undermining the "rights of others". By reason of the "duties and responsibilities" inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see the Goodwin v. the United Kingdom judgment of 27 March 1996, *Reports* 1996-II, p. 500, § 39, and *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I).

54. The impugned articles consisted essentially of reported and highly critical accounts given by a number of women of their experiences as former patients of Dr R. The Court notes that to a large extent the criticisms of Dr R. which were expressed in the articles were found to be justified by the national courts, which also found that this justified criticism had significantly and adversely affected his professional reputation. The High Court, after having taken extensive evidence including statements from fourteen dissatisfied women, found that the women were credible, that the newspaper had given an essentially accurate account of their respective

experiences, and that deficiencies in care and follow-up treatment had occurred at Dr R.'s clinic in a "not insignificant number" of cases. The High Court found it established that Dr R. ran his practice in such a manner that many of the women who suffered complications had had experiences giving them reasonable grounds to feel that they had been subjected to poor care, to feel anxiety about the treatment they were given and, in several instances, to feel offended at Dr R.'s behaviour. Moreover, the High Court found that the experiences described in the articles of 2 May 1986 were representative of those made by many other women.

55. The Supreme Court's Appeals Selection Committee subsequently dismissed Dr R.'s appeal against the High Court's assessment of the evidence and findings relating to the issue of lack of care and follow-up, and the Supreme Court accordingly considered itself bound by this assessment. The difference of view between the High Court and the Supreme Court related to the question whether the articles conveyed to the ordinary reader not only that Dr R. had been guilty of poor after-care in cases where complications had arisen, but that the unsuccessful breast operations described in the articles and depicted in the photographs were the result of a lack of surgical skill on Dr R.'s part. While it was the view of the High Court that, although reported in strong language, there was nothing in the statements suggesting a lack of surgical skill, it was the view of the Supreme Court that statements such as that the women were "disfigured" and "ruined for life" could hardly be understood in any other way than referring to the result of treatment where the surgical element was criticised and amounted to an accusation that Dr R. carried on his surgical activities in a reckless way.

While the Court accepts that the view of the Supreme Court was one which was reasonably open to it and proceeds on the assumption that that view was correct, it does not find it necessary to resolve the dispute between the national courts as to how the newspaper articles would be interpreted by the ordinary reader. Its function is rather to determine whether, considering the impugned articles in the wider context of the *Bergen Tidende*'s coverage as a whole, the measures applied by the Supreme Court, including the substantial award of damages, were proportionate to the legitimate aim served.

56. The Court attaches considerable weight to the fact that in the present case the women's accounts of their treatment by Dr R. were found not only to have been essentially correct but also to have been accurately recorded by the newspaper. It is true that, as pointed out by the national courts, the women had expressed themselves in graphic and strong terms and that it was these terms which were highlighted in the newspaper articles. However, the expressions used reflected the women's own understandable perception of the appearance of their breasts after the unsuccessful cosmetic surgery, as shown in the accompanying photographs. Moreover, in none of the articles

was it stated that the unsatisfactory results were attributable to negligent surgery on the part of Dr R. This meaning was one derived by the Supreme Court, not from the express terms but from the general tenor of the articles, whose common sting, however, lay in the true allegation that Dr R. had failed in his duties as a cosmetic surgeon in not providing proper or adequate post-surgical treatment to remedy the results of unsuccessful operations. Reading the articles as a whole, the Court cannot find that the statements were excessive or misleading.

57. The Court is further unable to accept that the reporting of the accounts of the women showed a lack of any proper balance. Admittedly, the applicant newspaper did not make it explicitly clear in the articles themselves that the accounts given by the women were not to be taken as suggesting a lack of surgical skills on the part of Dr R. However, the Court recalls that news reporting based on interviews constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog". The methods of objective and balanced reporting may vary considerably, depending among other things on the medium in question; it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists (see the Jersild judgment cited above, pp. 23-25, §§ 31 and 34). Moreover, the Court notes that the issue of *Bergens Tidende* of 2 May 1986 contained, on the same page as the first impugned article, an article quoting the views of another cosmetic surgeon, emphasising the small margins between success and failure in the technically demanding field of cosmetic surgery, as well as an interview with Dr R. himself, drawing attention to the fact that complications occurred in about 15 to 20% of all breast operations and that patients were informed in advance of the possible dangers. It is also to be noted that, in the subsequent issue of 14 May 1986, *Bergens Tidende* published two further articles defending Dr R., in one of which former patients of his expressed satisfaction with the treatment they had received, including the service and care provided during post-surgical treatment and follow-up.

58. Reliance was placed by the Supreme Court on the fact that Dr R. was not given the possibility of a proper defence, it being said that, when approached on 30 April 1986, Dr R. was unable to make any statements about the concrete cases without being released by the patients themselves from his duty of professional secrecy. It was the Supreme Court's view that Dr R. was not under any duty to contact patients himself for that purpose. The applicants contend that the third applicant had informed Dr R. that the patients had agreed to release him from his duty of professional secrecy. This was, however, disputed by Dr R. himself. The Court does not find it necessary to resolve this dispute of fact, since, even if such information had not been passed on to Dr R., the Court is unable to find that Dr R. was not given the chance to defend himself. The Court observes in this regard that,

as noted above, Dr R. was invited to comment on the allegations made in the interviews with the newspaper. Dr R. commented generally on the complaints made. Moreover, there is nothing to suggest that Dr R. took any steps to establish whether the patients, who had already published details of their individual cases, had any objections to his commenting on their specific complaints. In these circumstances, in which the Court acknowledges that Dr R. was under no duty so to do, it cannot agree that Dr R. was denied the opportunity of properly defending himself.

59. The Court accepts that publication of the articles had serious consequences for the professional practice of Dr R. However, as expressly recognised by the national courts, given the justified criticisms relating to his post-surgical care and follow-up treatment, it was inevitable that substantial damage would in any event be done to his professional reputation. Dr R.'s role was not limited to surgery in the narrow sense but encompassed all aspects of cosmetic surgery.

60. In the light of the above, the Court cannot find that the undoubted interest of Dr R. in protecting his professional reputation was sufficient to outweigh the important public interest in the freedom of the press to impart information on matters of legitimate public concern. In short, the reasons relied on by the respondent State, although relevant, are not sufficient to show that the interference complained of was "necessary in a democratic society". The Court considers that there was no reasonable relationship of proportionality between the restrictions placed by the measures applied by the Supreme Court on the applicants' right to freedom of expression and the legitimate aim pursued.

Accordingly, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

62. The applicants did not seek compensation for non-pecuniary damage, considering that the finding of a violation by the Court would in itself constitute adequate just satisfaction. However, under the head of pecuniary damage they requested compensation for the economic loss

which they had suffered as a result of the Supreme Court's judgment of 23 March 1994 ordering the first applicant to pay Dr R. 4,848,589 Norwegian kroner (NOK) and the second and third applicants each to pay him NOK 44,383.

63. Subject to the Court's finding a violation of the Convention, the Government did not contest the above claim.

64. The Court is satisfied that there is a causal link between the damage claimed and the violation found of the Convention, and awards the totality of the sum sought under this head.

B. Costs and expenses

65. The applicants did not claim anything for costs and expenses incurred in connection with the proceedings before the Convention institutions but requested the reimbursement of NOK 263,450, NOK 303,245 and NOK 312,250 for their costs and expenses incurred respectively before the City Court, the High Court and the Supreme Court.

66. The Government did not contest the applicants' claim on this point either.

67. The Court is satisfied that the costs and expenses were actually and necessarily incurred in order to obtain redress for or prevent the matter found to constitute a violation of the Convention and were reasonable as to quantum. In accordance with the criteria laid down in its case-law, it awards the applicants the totality of the sums claimed under this head.

C. Interest pending the proceedings before the Convention institutions

68. The applicants in addition claimed simple interest, at estimated average rates (ranging from approximately 4 to 6%) applied by domestic commercial banks at the material time, on the sums they had paid in respect of damages and domestic costs and expenses.

69. The Government contested the above claims as being excessive.

70. The Court finds that some pecuniary loss must have been occasioned by reason of the periods that elapsed from the time when the various sums were paid and costs incurred until the Court's present award of just satisfaction (see, for example, the Bladet Tromsø *and Stensaas* judgment cited above, § 83, and the *Nilsen and Johnsen* judgment cited above, § 65). Deciding on an equitable basis and having regard to the rates of inflation in Norway during the relevant period, it awards the first applicant NOK 740,000 and the second and third applicants NOK 5,700 each with respect to their claims under this head.

D. Default interest

71. According to the information available to the Court, the statutory rate of interest applicable in Norway at the date of adoption of the present judgment is 12% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;

2. *Holds* that the respondent State is to pay, within three months of the judgment becoming final,
   (a) in respect of pecuniary damage
      (i) NOK 4,848,589 (four million eight hundred and forty-eight thousand five hundred and eighty-nine Norwegian kroner) to the first applicant;
      (ii) NOK 44,383 (forty-four thousand three hundred and eighty-three Norwegian kroner) each to the second and third applicants;
   (b) in respect of costs and expenses NOK 878,945 (eight hundred and seventy-eight thousand nine hundred and forty-five Norwegian kroner) to the applicants together;
   (c) in respect of additional interest
      (i) NOK 740,000 (seven hundred and forty thousand Norwegian kroner) to the first applicant;
      (ii) NOK 5,700 (five thousand seven hundred Norwegian kroner) each to the second and third applicants;

3. *Holds* that simple interest at an annual rate of 12% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 2 May 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

N. BRATZA
President

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

CASE OF *BLADET TROMSØ* AND STENSAAS v. NORWAY

(Application no. 21980/93)

JUDGMENT

STRASBOURG

20 May 1999

In the case of *Bladet Tromsø* and Stensaas v. Norway,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr A. PASTOR RIDRUEJO,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr R. TÜRMEN,
Mr J.-P. COSTA,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr W. FUHRMANN,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mrs S. BOTOUCHAROVA,

and also of Mrs M. DE BOER-BUQUICCHIO, *Deputy Registrar*,

Having deliberated in private on 27 and 28 January and on 21 April 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") on 24 September 1998 and by the Norwegian Government ("the Government") on 29 October 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 21980/93) against the Kingdom of Norway lodged with the Commission under former Article 25 by a limited liability company established under Norwegian law, Bladet Tromsø A/S,

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Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

which publishes the newspaper *Bladet Tromsø*, and its former editor, Mr Pål Stensaas, who is a Norwegian national, on 10 December 1992.

The Commission's request referred to former Articles 44 and 48 and to the declaration whereby Norway recognised the compulsory jurisdiction of the Court (former Article 46); the Government's application referred to former Articles 44 and 48. The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention.

2. In response to the enquiry made in accordance with Rule 35 § 3 (d) of former Rules of Court B[1], the applicants designated the lawyers who would represent them (former Rule 31).

3. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mrs H.S. Greve, the judge elected in respect of Norway (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mr R. Türmen, Mrs F. Tulkens, Mrs V. Strážnická, Mr V. Butkevych, Mr J. Casadevall, Mr A.B. Baka, Mr R. Maruste and Mrs S. Botoucharova (Rule 24 § 3 and Rule 100 § 4). Subsequently, Mr W. Fuhrmann, substitute judge, replaced Mr Kūris, who was unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

4. Mr Wildhaber, acting through the Deputy Registrar, consulted the Agent of the Government, the applicants' lawyers and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicants' memorial and the Government's memorial on 5 January 1999. On 15 January 1999 the Secretary to the Commission indicated that the Delegate would submit his observations at the hearing.

On various dates between 29 January and 17 March 1999 the Government and the applicants submitted additional observations under Article 41 of the Convention.

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1. *Note by the Registry*. Rules of Court B, which came into force on 2 October 1994, applied until 31 October 1998 to all cases concerning States bound by Protocol No. 9.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 27 January 1999.

There appeared before the Court:

(a) *for the Government*
Mr F. ELGESEM, Attorney, Attorney-General's Office
(Civil Matters), *Agent*,
Mr T. STABELL, Assistant Attorney-General (Civil Matters),
Mr K. KALLERUD, Senior Public Prosecutor,
Office of the Director of Public Prosecutions, *Advisers*;

(b) *for the applicants*
Mr K. BOYLE, Barrister-at-Law,
Mr S. WOLLAND, *Advokat*, *Counsel*;

(c) *for the Commission*
Mr A.S. ARABADJIEV, *Delegate*.

The Court heard addresses by Mr Arabadjiev, Mr Wolland, Mr Boyle, Mr Elgesem and Mr Stabell.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

6. The first applicant is a limited liability company, Bladet Tromsø A/S, which publishes the daily newspaper *Bladet Tromsø* in the town of Tromsø. The second applicant, Mr Pål Stensaas, was its editor. He was born in 1952 and lives at Nesbrua, near Oslo.

Tromsø is a regional capital of the northern part of Norway. It is the centre of the Norwegian seal hunting industry and has a university which includes an international polar research centre.

At the relevant time *Bladet Tromsø* had a circulation of about 9,000 copies. Like other local newspapers in Norway, it was used as a regular source by the Norwegian News Agency ("NTB").

7. Mr Odd F. Lindberg had been on board the seal hunting vessel *M/S Harmoni* ("the *Harmoni*") during the 1987 season as a freelance journalist, author and photographer. Several of his articles pertaining to that season had been published by *Bladet Tromsø*. These had not been hostile to seal hunting. On 3 March 1988 Mr Lindberg applied to the Ministry of Fisheries to be appointed seal hunting inspector for the 1988 season on board the *Harmoni*. Following his appointment on 9 March 1988 he served on board the *Harmoni* from 12 March to 11 April 1988, when the vessel returned to its port in Tromsø. Thereafter, and until 20 July 1988, *Bladet Tromsø* published twenty-six articles on Mr Lindberg's inspection.

8. On 12 April 1988 *Bladet Tromsø* printed an interview with Mr Lindberg in which he stated, *inter alia*, that certain seal hunters on the *Harmoni* had violated the 1972 Seal Hunting Regulations (*forskrifter for utøvelse av selfangst*) – as amended in 1980 – issued by the Ministry of Fisheries. The headline of the article read (all quotes below are translations from Norwegian):

> "Research reveals crude hunting methods in the West Ice
>
> Deplorable violations of the regulations"

The introduction to the article quoted Mr Lindberg as follows (in bigger print):

> " 'If seal hunting is to be permitted to continue, certain sealers have to stop killing the seals in the way they do. During the last two winters, which I have spent in the Arctic Ocean, I have uncovered a great deal which is clearly inconsistent with acceptable seal hunting methods. However, I should like to emphasise: Only a few of the hunters are guilty of [such behaviour] and those few do the [seal hunting] industry a disservice and provide Greenpeace with good arguments. It is really regrettable and completely unnecessary!' "

The interview continued, *inter alia*, as follows:

> " 'If seal hunting is to be permitted to continue – and I am of the opinion that it should – there ought to be an inspector on every vessel. One that makes sure that the animals are killed in a proper manner and are not subjected to unnecessary suffering.
>
> ... But let me emphasise: I am in favour of seal hunting, though it has to be carried out in an exemplary manner.'
>
> ...
>
> Mr Lindberg states that he has been threatened by hunters to remain silent about his observations and experiences during the seal hunting on the West Ice. He does not wish to go into details ...

'That will be covered in the report I am going to write ...' "

The article did not mention any seal hunter by name or provide any details of the allegedly illegal hunting methods.

9. In order to defend themselves against the accusations contained in the above article of 12 April 1988 the skipper on the *Harmoni* and three of its crew members gave interviews which *Bladet Tromsø* published on 13 April. The introduction to the main interview stated (in bigger print), *inter alia*:

"The crew on ... the *Harmoni* is really furious. The allegations made by 'researcher' Mr Lindberg regarding ... seal hunters' beastly killing methods are too much to swallow. 'Mr Lindberg is expressing a blatant lie. He pretends to be a researcher but has no clue of what he is talking about', says Mr Kvernmo [crew member]. "

A separate interview with Mr Kvernmo entitled "They feel themselves blackened" quoted him (in an introduction reproduced in bigger print) as follows:

" 'I do not know what Mr Lindberg is trying to achieve with his accusations of bestial killing of seals. But we feel ourselves blackened and do not want to have this hanging over us.' "

Later in the interview Mr Kvernmo was quoted as saying:

" '... Mr Lindberg describes us as blood-thirsty murderers but we follow the rules and are humane ...' "

10. Mr Lindberg's official report on the hunting expedition was completed on 30 June 1988, two and a half months after the expedition. This was significantly later than the normal time allotted to the preparation of such reports and after the Ministry of Fisheries had enquired about it. The Ministry received it on 11 July 1988 and, because of the holiday period, did not review it immediately.

In his report, Mr Lindberg alleged a series of violations of the seal hunting regulations and made allegations against five named crew members. He stated, *inter alia*:

"I have also noticed that [seals] which have been shot in such a manner that they appear to be dead have 'awakened' during the flaying ... I experienced several times that animals which were being flayed 'alive' showed signs that their brains' electric activity had not been terminated."

Mr Lindberg recommended that there should be a seal hunting inspector on every vessel and that compulsory training should be organised for all first-time hunters. Their knowledge of the regulations should also be tested. Finally, Mr Lindberg recommended an amendment to the regulations as regards the killing of mature seals in self-defence.

B. Order of non-disclosure of the report

11. The Ministry of Fisheries decided temporarily (see paragraph 14 below) to exempt Mr Lindberg's report from public disclosure relying on section 6, item 5, of a 1970 Act relating to Access of the Public to Documents in the Sphere of the Public Administration (*lov om offentlighet i forvaltningen*, Law no. 69 of 19 June 1970). Under this provision, the Ministry was empowered to order that the report not be made accessible to the public, on the ground that it contained allegations of statutory offences.

An article published by *Bladet Tromsø* on 15 July 1988 contained the following observations on the Ministry's decision:

> " 'The report is of such a nature that we have exempted it from public disclosure', says [a counsellor in the Ministry]. 'So far we have merely read through it. When we have had time to study it closely, it will be sent to the Fishing Inspectorate and to the Seal Hunting Council. But first we shall examine all the information provided by inspector Mr Lindberg, in particular as regards any incidents that might be relevant to the Penal Code. Everyone who is personally mentioned in the report will be given an opportunity to explain and defend himself.' "

C. The impugned articles published on 15 and 20 July 1988

12. In the above-mentioned article of 15 July 1988 *Bladet Tromsø*, having received a copy of the report which Mr Lindberg had transmitted to the Ministry of Fisheries, reproduced some of his statements concerning the alleged breaches of the seal hunting regulations by members of crew of the *Harmoni*. The headlines on the front page read:

> "Shock report"
>
> " 'Seals skinned alive' "

The text on the front page stated:

> "Seal hunting inspector Mr Lindberg is criticising Norwegian seal hunters in a shock report on the last ... season. [He] refers to illegal methods of killing, drunken crew members and the illegal start of the hunt before the opening of the hunting season. Not least the report includes an account of his being beaten up by furious hunters, who also threatened to hit him on the head with a gaff [*hakapik*] if he did not keep quiet. 'The report is of such a character that we have exempted it from public disclosure', said a spokesperson for the Ministry of Fisheries."

13. On 19 and 20 July 1988 *Bladet Tromsø* published the entire report in two parts. The introduction to the first part stated:

> "... During the last days [Mr Lindberg's report] has created considerable turbulence within the seal hunting [profession]. Most consider it a particularly severe attack on a profession which has already met with opposition, both nationally and

internationally. In several responses to *Bladet Tromsø* it is clearly alleged that Mr Lindberg is an agent of Greenpeace.

Mr Lindberg has given us access to his notes from the [expedition]. The report has since been treated as confidential by the Ministry, given, *inter alia*, that various persons have been named and associated with breaches of the regulations. We have deleted the names ...

The report ... does not contain one-sided criticism ... Mr Lindberg also compliments a number of crew members ... [He] in addition writes that he is a sympathiser of seal hunting. But not with the manner in which it was conducted on the West Ice this year."

The second part of Mr Lindberg's report, which was published by *Bladet Tromsø* on 20 July 1988, contained the following statements **(**while deleting with black ink the names of the crew members referred to in square brackets below):

"At 11.45 [a crew member] beat to death a female harp seal which was protecting her pup."

"At 14.40 [a crew member] beat to death a female harp seal which was protecting her pup."

"At 15.00 [a crew member] beat to death a female harp seal."

"The same day [I] pointed out to the skipper that [a crew member] did not kill cubs in accordance with the regulations (i.e. he ... hit it with the spike [of the gaff] and then dragged the cub after him)."

"At 15.00 [a crew member] beat to death a female harp seal which was protecting her pup."

"At 19.00 [a crew member] killed a female [harp seal] which was protecting her pup."

The hunting of harp seals had been legal in 1987.

D. Related publications by Bladet Tromsø during the period from 15 to 20 July 1988

14. In a commentary of 15 July 1988 *Bladet Tromsø* stated:

"Poor working conditions?

Are the authorities in proper control of seal hunting as conducted at present? Do the ... inspectors of the Ministry ... enjoy working conditions enabling them to deliver unbiased reports about seal hunting or do they become too dependent on having a good relationship with the seal hunters? In other words, are the sealing inspectors sufficiently independent in their supervision on board the sealing vessels?

> These are questions which *Bladet Tromsø* has received from persons who know the industry well but, for various reasons, do not wish to come forward in public. The background to these questions is the report which Mr Lindberg has transmitted to his employer, the Ministry of Fisheries. Mr Lindberg was assigned as seal hunting inspector on board the Tromsø-registered vessel *Harmoni* ... during the 1988 season. The report is so critical that the Ministry has decided to keep it 'confidential' for the time being. ..., a counsellor in the Ministry ... admits that he has never before received a report from a seal hunting inspector which was 'so unkind as this one'. "

15. On 18 July 1988 *Bladet Tromsø* published a further interview with crew member Mr Kvernmo, entitled "Severe criticism against the seal hunting inspector: The accusations are totally unfounded". The caption under a photograph on the front page stated:

> "Sheer lies. 'Judging from what has transpired in the media regarding [Mr Lindberg's] report, I would characterise his statements as sheer lies', says Mr Kvernmo. [He] ... demands that the report be handed over immediately [to the crew]. In this he is supported by two colleagues, Mr [S.] and Mr [M.] …"

The interview with Mr Kvernmo continued inside the newspaper and bore the headline " 'Mr Lindberg is lying' ".

The newspaper in addition published a letter on the same topic from Mr Kvernmo to the editor. According to Mr Kvernmo, Mr Lindberg's presence on board the *Harmoni* in 1987 had not been appreciated. When he turned up at the departure of the 1988 expedition, this was after having made a number of unsuccessful requests to the shipowner and the crew. As a last resort, he had bluffed the Ministry into believing that he was to go with the *Harmoni* to the West Ice and that he could take on, on a voluntary basis, the task of inspector. Without further ado, the Ministry had appointed him inspector because he had offered to do the job free of charge. Consequently, the Ministry sent an inspector whose knowledge about seal hunting and hunting regulations was extremely weak and who was psychologically unsuited for the job. He had carried out his tasks in an utterly strange and poor manner.

16. In an editorial, also published on 18 July 1988, the newspaper stated:

> "Some people are of the view that Norwegian seal hunting will again suffer from severe criticism from nature activists after the seal hunting inspector has revealed a number of objectionable circumstances in connection with an expedition. We believe this report will strengthen [Norway's reputation] as a serious seal hunting nation, provided that the contents of the report are used in a constructive manner. In all professions there are certain persons who will abuse the confidence which society has placed in them and who will operate on the edge of the law. The fisheries authorities must react strongly against all abuse. The authorities now have a unique opportunity to

clarify the purpose of Norwegian seal hunting and how it should be conducted in an internationally acceptable manner.

...

What is revealed by the fresh report ... has to be perceived as a single, regrettable episode warranting ... a closer scrutiny of the manner in which Norwegian seal hunting should be carried out in the years to come ...”

17. On 19 July 1988 *Bladet Tromsø* published an article entitled:

“The Sailors’ Federation is furious and brands the seal report as:

‘A work commissioned by Greenpeace!’ ”

Two representatives of the Norwegian Sailors’ Federation were quoted, *inter alia*, as follows:

“ ‘We know our seal hunters and also have a certain knowledge of ... inspector Mr Lindberg. In the light of this we dare to say: We do not believe a word of what is stated in [his] report! Nor do we doubt for a second that [he] was placed on board the *Harmoni* by Greenpeace. We will therefore demand that the Ministry provide all the information surrounding [his] appointment ...

... We are also greatly surprised that the writer of *Bladet Tromsø*’s editorial [of 18 July 1988] really dares to take a stand in this matter without having any better knowledge of seal hunting. We consider that frightening ...’ ”

18. On the same date *Bladet Tromsø* published an interview with Mr Lindberg, in which he stressed that his report had included positive statements concerning ten crew members, whom he named.

19. In an interview published by *Bladet Tromsø* on 20 July 1988 a representative of Greenpeace denied that it had been involved in any way in producing Mr Lindberg’s report.

E. Other related publications, contemporaneous with or post-dating the impugned publications

1. Press release issued by the Ministry of Fisheries

20. In a press release dated 20 July 1988, the Ministry of Fisheries stated that because of its peculiar contents and form, the Lindberg report had been exempted from public disclosure until further notice. According to veterinary expertise, it was practically impossible to flay a seal alive, whilst it was usual that reflex movements in the animal’s muscles occur during slaughter. As regards the appointment of Mr Lindberg as an inspector, the Ministry stated that he had referred in his application to the fact that he had attended the seal hunt in 1987 in order to study all aspects of the hunt and to

carry out research for the University of Oslo. He intended to attend also the 1988 season. The purpose of his research was to write a book on seal hunting and to carry out scientific work. In addition he had indicated that, since at all events he was to go with the *Harmoni* during the 1988 season, he was prepared to carry out the inspection without remuneration. The Ministry had had several telephone conversations with Mr Lindberg, during which he said that he had studied biology and was affiliated to several scientific associations, particularly in the area of polar research. In view of the fact that Mr Lindberg was willing to do the job free of charge and, especially, his research background, the Ministry decided to appoint him. While seeking to attend the hunting expedition, he had offered his services to the Institute of Biology at the University of Oslo. As a result, during the expedition, he had collected for the University certain parts of seal bodies. Later investigations had revealed that the inspector had no formal higher education and no competence as a researcher, nor any experience with the killing of animals. His strong reactions and comments on the killing of the animals were characterised by the fact that he did not have the required background for being an inspector. His report could not be regarded as a serious and adequate inspection report.

2. Publications by Bladet Tromsø

21. On 21 July 1988 *Bladet Tromsø* published an article entitled "The Ministry of Fisheries rejects Mr Lindberg's report", which quoted a senior official of the Ministry as having said:

> " '[Mr Lindberg's] report cannot be regarded as a serious ... inspection report; it is characterised by the fact that he lacks the professional background which an inspector should have …' "

22. Another article published by *Bladet Tromsø* on the same day quoted Mr Kvernmo as follows:

> " 'We are genuinely pleased that Mr Lindberg's allegations that we violated legal laws and regulations during this year's seal hunting ... have been rejected by the Ministry ... We would never accept allegations that we were, among other things, flaying seals alive ...' "

23. A further article published by *Bladet Tromsø* on 23 July 1988 bore the following headline:

> "The seal hunters are being bullied – The Sailors' Federation wants to involve the police: 'Have the whole seal matter investigated' "

On the same day *Bladet Tromsø* published a further interview with a senior official of the Ministry of Fisheries, quoting the latter as having stated:

> " 'In my view the media have now harassed the seal hunting profession enough. Imagine if you, working in the media, were to be harassed in the same manner. I can

tell you that there are now seal hunters who cannot sleep and who are receiving telephone calls day and night.'

Yesterday [the official] seemed more or less overcome, not least after [the newspaper] *Aftenposten* had published photographs taken by Mr Lindberg during this year's seal hunting showing how seals are being killed with a gaff. [The official] had no compliment to spare for *Bladet Tromsø* either: 'You were the ones who started this craziness!'... "

24. In a further article published by *Bladet Tromsø* on 25 July 1988 two former seal hunting inspectors were quoted as follows:

" 'We cannot claim that Mr Lindberg has not witnessed and experienced what he describes in his report ... But he has drawn completely wrong conclusions. Norwegian [seal hunters in the Arctic Ocean] are diligent and responsible and have much higher morals than regular Norwegian hunters when it comes to killing animals ...' "

3. Other media coverage

25. On 15 July 1988 the Norwegian News Agency issued a news bulletin reiterating some of the information provided by *Bladet Tromsø* on the same date as to Mr Lindberg's allegations (see paragraph 12 above). It stated that the Ministry of Fisheries was of the view that violations of the seal hunting regulations might have occurred. This bulletin was dispatched to its approximately 150 subscribers and various newspapers published articles which were based on it.

26. In a bulletin of 18 July 1988 the Norwegian News Agency – using *Bladet Tromsø* as its source – affirmed, firstly, that the crew had demanded that the report immediately be made accessible to the public ("*straks … offentliggjort*") and, secondly, that the Association of Fishing Vessel Companies had also called for the report to be made public. The Government submitted that the first statement had been based on *Bladet Tromsø*'s article of 18 July 1988 (see paragraph 15 above), misrepresenting, however, the fact that the crew had only requested that the report be handed over to it. In another news bulletin of the same date, the Agency reported the Ministry as having stated that veterinary experts would consider the controversial Lindberg report; that the Ministry would issue further information on the outcome and possibly also on the circumstances of his recruitment as inspector but would not comment any further until it had collected more information. It further stated that, on that date, both the Association of Fishing Vessel Companies and the crew had requested that the report be made accessible to the public. *Bladet Tromsø* received the bulletin on the same day.

According to a news bulletin of 19 July 1988, the Ministry of Fisheries had stated that, when appointing him inspector, it had relied on information supplied by Mr Lindberg himself to the effect that he was carrying out

research projects. The Agency understood the Ministry to mean that his research and links to the University of Oslo were thought to be far more extensive than they had been in reality.

In a further news bulletin issued later on the same day, the Agency stated that Mr Lindberg had refused to meet with officials of the Ministry to discuss his report.

On 19 July 1988 the newspaper *Adresseavisen*, referring to the news bulletins issued by the Norwegian News Agency, stated that the seal hunters had requested that Mr Lindberg's report be made public.

27. Mr Lindberg's report continued to receive a wide coverage in other media as well. On 29 July and 3 August 1988 extensive excerpts from the report were published in *Fiskaren*, a bi-weekly for fishermen. One of the articles published on 29 July 1988 bore the following headline:

> "Mr Lindberg in the report on seal hunting:
>
> 'It happens that animals are being flayed while their eyes are rolling and they are yelping' "

The introduction to the article read as follows:

> " 'During the last part of the hunting period the animals, once shot, are rarely examined so as to verify that the shots have been lethal ... The animals are thereafter lifted on board, often alive. Animals are therefore often flayed while ... their eyes are rolling and they are yelping.'
>
> These are some of the occurrences which Mr Lindberg claims to have observed while acting as a seal hunting inspector on board the *Harmoni* ... Such ... statements have made the Ministry ... and professionals consider that Mr Lindberg's report is 'not serious' and wish not to make it accessible to the public.
>
> In [his] report Mr Lindberg makes very strong accusations against named hunters. In the excerpts published by *Fiskaren* we have consistently deleted all names."

28. The excerpt published by *Fiskaren* on 3 August 1988 included the observations which Mr Lindberg had made in the report as reproduced by *Bladet Tromsø* on 20 July 1988.

29. Over the following months the debate about Mr Lindberg's report died out until 9 February 1989, when he gave a press conference in Oslo. A film entitled "Seal Mourning" (containing footage shot by Mr Lindberg from the *Harmoni*) showed certain breaches of the seal hunting regulations. Clips from the film were broadcast by the Norwegian Broadcasting Corporation later the same day and the entire film was broadcast by a Swedish television channel on 11 February 1989. During the next days scenes from the film were broadcast by up to twenty broadcasting companies worldwide, including CNN and the British Broadcasting Corporation.

F. The Commission of Inquiry report

30. In view of the various reactions to the film, both within Norway and internationally, the Minister of Fisheries was recalled while on an official journey abroad. Seal hunting was debated in Parliament on 14 February 1989 and, on 24 February 1989, the government announced that it would set up a Commission of Inquiry. The government also banned with immediate effect the killing of baby seals or pups.

31. On 5 September 1990 the Commission of Inquiry submitted an extensive report based on various evidence, including, *inter alia*, Mr Lindberg's inspection report, his footage as well as a book written by him. For the purposes of the inquiry Mr Lindberg had been examined as a witness by the Sarpsborg City Court (*byrett*). The Commission had also heard several of the crew members of the *Harmoni* as well as other seal hunting inspectors.

In its report the Commission of Inquiry found that the truth of most of Mr Lindberg's allegations relating to specifically named individuals had not been proved. It found no basis for the allegation that seals had been skinned alive or that pups had been kicked or flayed alive (p. 8).

On the other hand, the Commission identified several breaches of the hunting regulations (p. 69), which it deemed had been established by the footage presented by Mr Lindberg. For instance, one seal had been killed with the sharp end of a gaff without previously having been hit with its dull end. Another seal had been killed with an axe, whereas a third seal had been lifted on board the *Harmoni* whilst still alive. The Commission published those parts of Mr Lindberg's report which pertained to the *Harmoni*'s hunting expedition, after deleting the crew members' names. The Commission further recommended various amendments to the hunting regulations, to their implementation and to the training of hunters. These recommendations were in line with some of the suggestions Mr Lindberg made in his report, notably as to the training of hunters on killing methods, the dissemination to hunters of information on the applicable rules and obligatory presence of an inspector on board every hunting vessel.

G. Defamation proceedings against Mr Lindberg

32. In March 1989 the crew of the *Harmoni* had instituted defamation proceedings against Mr Lindberg before the Sarpsborg City Court, referring to statements which he had made about them in respect of the 1987 and 1988 hunting seasons. By judgment of 25 August 1990 the City Court declared five statements in his inspection report null and void under

Article 253 § 1 of the Penal Code. Two other statements made by Mr Lindberg in another context were also declared null and void.

Moreover, the City Court prohibited Mr Lindberg from showing in public any of the footage pertaining to the *Harmoni* and ordered him to pay to the crew compensation (10,000 Norwegian kroner (NOK)) under the Damage Compensation Act 1969 and costs. His request for leave to appeal against the judgment was rejected by the Appeals Selection Committee of the Supreme Court (*Høyesteretts Kjæremålsutvalg*) on 16 May 1991.

33. Being resident in Sweden, Mr Lindberg opposed the execution in Sweden of the Sarpsborg City Court's judgment of 25 August 1990, on the ground that it violated his right to freedom of expression under Article 10 of the Convention.

In a decision of 16 December 1998, the Swedish Supreme Court (*Högsta Domstolen*) upheld a decision by the Court of Appeal (*Hovrätten*) of Western Sweden of 25 April 1997, rejecting Mr Lindberg's claim. While noting that it was not its role to carry out a full review of the Norwegian judgment, the Swedish Supreme Court found that the latter did not entail any breach of Mr Lindberg's rights under Article 10. This provision did not, therefore, constitute an obstacle to execution. Nor did the fact that the film in question had been shown in Sweden mean that it would run counter to Swedish public-order interests to execute the Norwegian judgment.

H. Defamation proceedings giving rise to the applicants' complaint under the Convention

34. On 15 May 1991 the crew members of the *Harmoni* also instituted defamation proceedings against the applicants, seeking compensation and requesting that certain statements appearing in Mr Lindberg's report and reproduced by *Bladet Tromsø* on 15 and 20 July 1988 be declared null and void.

35. On 4 March 1992, after having heard the parties to the case and witnesses over a period of three days, the Nord-Troms District Court (*herredsrett*) gave its judgment in which it unanimously found the following statements defamatory under Article 247 of the Penal Code and declared them null and void (*død og maktesløs; mortifisert*) under Article 253 § 1 (the numbering in square brackets below follows that appearing in the Court's reasoning):

(Statements appearing in the part of the Lindberg report published by *Bladet Tromsø* on 20 July 1988)

> [1.1] "At 11.45 [a crew member] beat to death a female harp seal which was protecting her pup."

[1.2] "At 14.40 [a crew member] beat to death a female harp seal which was protecting her pup."

[1.3] "At 15.00 [a crew member] beat to death a female harp seal."

[1.6] "At 19.00 [a crew member] killed a female which was protecting her pup."

(Statements appearing in one of the articles published by *Bladet Tromsø* on 15 July 1988)

[2.1] "Seals skinned alive"

[2.2] "Not least the report includes an account of his (Mr Lindberg) being beaten up by furious hunters, who also threatened to hit him on the head with a gaff if he did not keep quiet."

On the other hand, the District Court rejected the seal hunters' claim with respect to the following statements published on 20 July 1988:

[1.4] "The same day [I] pointed out to the skipper that [a crew member] did not kill cubs in accordance with the regulations (i.e. he ... hit it with the spike [of the gaff] and then dragged the cub after him)."

[1.5] "At 15.00 [a crew member] beat to death a female harp seal which was protecting her pup."

The District Court provided the following reasons:

"As regards the statements concerned, it is a basic condition for declaring these null and void that they be defamatory. This question must be considered in the light of how the statements were perceived by the ordinary newspaper reader. Moreover, the statements must not be interpreted separately. The decisive factor must be how they were understood when the articles were read as a whole. The position is somewhat different, however, as far as justification is concerned. The Court will revert to this matter below. Even though the statements are to be considered on the basis of an overall assessment, it would nevertheless be correct to accord weight to the fact that the matter was splashed across the front page in bold type. The first impression given was thus that something serious had occurred. This impression was not appreciably lessened or altered by the more detailed article inside the newspaper. This factor must be deemed particularly significant.

The Court finds it clear that both statements in question of 15 July 1988 are defamatory. One of them read: 'Seals skinned alive' ('*sel levende flådd*'). This assertion must be understood to mean that the seal hunters committed acts of cruelty to the animals. It goes without saying that skinning an animal alive causes severe pain to it. When read as a whole, the statement must be understood to apply not only to one seal, but to several. It gives the impression that the seal hunters not infrequently skinned seals while they were still alive.

The other statement reads: 'Not least the report includes an account of his being beaten up by furious hunters, who also threatened to hit him on the head with a gaff if he did not keep quiet'. This statement must imply that the seal hunters had assaulted

Mr Lindberg, which, objectively speaking, amounts to a criminal act, cf. Article 228 of the Penal Code. The threat to hit him on the head with their gaffs if he did not keep quiet comes within the objective description of the offence set out in Article 227 of the Penal Code. The allegation must therefore be understood to mean that the seal hunters had committed two offences. Such a statement must clearly be considered defamatory.

As regards the statements concerning female harp seals, it is not disputed that such seal hunting was not permitted in 1988. Reference is made to items 1.1, 1.2, 1.3 and 1.6 of the allegations ...

Item 1.4 also concerns a violation of the seal hunting regulations. In this regard, reference is made to Article 8 b of the regulations, according to which the seal shall first be struck with the blunt end of the gaff and then with the spike. The reason for this is that the animals are to be knocked unconscious before they are killed with the spike. The statement must imply that the blows with the blunt end had been omitted.

A breach of the regulations constitutes a criminal offence. It is regarded as a misdemeanour and may be punished by a fine. Generally speaking, an allegation of such a violation must also be considered to be defamatory ...

In the Court's view, the statements relating to the killing of female harp seals must be regarded as defamatory.

Hunting for this species of seal was not permitted at all in 1988. The statements do not differ from allegations of illegal hunting in general and imply that the crew behaved in a morally reprehensible manner. The Court will deal below with the question as to whether the statements can be regarded as substantiated and thus lawful.

The Court is, however, in doubt as regards the statement quoted in item 1.4. It is not alleged that the seal pups were made to suffer, but simply that the killing methods used were not in accordance with the regulations. Given that it is not alleged that the seal pups were made to suffer, the statement can hardly be interpreted as implying strong moral condemnation of the seal hunter. ... The decisive question is whether the killing is carried out in a responsible manner. The statement cannot be understood to mean that it was not. At any rate, given the fact that it was not suggested that the pups had been made to suffer, the matter must be regarded as trivial. The court has, with some doubt, reached the conclusion that the statement cannot be considered defamatory.

Accordingly, with the exception of item 1.4, the statements must fall within two of the situations described in Article 247 of the Penal Code, i.e. 'to harm another person's good name or reputation', and 'to expose him to ... loss of the confidence necessary for his position or business'. There can be no doubt that the statements were capable of having such effects. In this regard, the defendants have pointed out that considerable sympathy was shown to the crew during the ensuing public debate. The legal requirement is, however, that the statements were 'capable' of doing harm. The ensuing debate revealed that opinions about the hunting process differed.

There has been considerable opposition to seal hunting for a number of years, particularly at the international level. Although many people in Norway, especially in northern Norway, were opposed to Mr Lindberg, this did not automatically mean that there was a corresponding support for the seal hunters. The latter received media coverage because of their hunting methods, for which they are being remembered. Apart from this, the crew members were not much involved in the debate about other aspects of seal hunting, in particular, the ecological aspect of the debate was especially heated during the so-called seal invasions at the end of the 1980s.

It is undisputed that the group of persons to whom the statements apply is not so wide as to leave unaffected the individuals concerned. The defendants have thus not argued that deletion [of names] ensured sufficient anonymity. Even though the names of individual seal hunters had been deleted, it was clear that the *Harmoni* was the vessel at issue. Therefore, everyone who was on board must be seen as having been aggrieved by the statements ... In fact the deletion had an effect which was contrary to its purpose. In the report only four of the crew are named as having committed offences. If the newspaper had not deleted the names, the group of persons targeted would have been reduced correspondingly ...

Although the statements objectively fall within the scope of Article 247 of the Penal Code, it is also a requirement that they be 'unlawful' [*rettsstridig*]. In this regard the defendants have submitted several arguments. Firstly, it is argued that the seal hunting matter in Norway was probably the biggest news story in 1988. It is argued that in such a situation the press must enjoy a great deal of latitude in order to enable it to highlight all aspects of the matter (the 'public interest' point of view) ...

The Court accepts that an extensive freedom of expression must apply to discussion on matters of general public interest. This consideration is precisely the linchpin of Article 100 of the Norwegian Constitution and it is essential in a democratic society ... In spite of this, however, there are some limitations. Firstly, the Court has in mind that certain requirements relating to privacy and truth must be taken into account. ... All the statements complained of must be understood to mean that the crew of the *Harmoni* committed unlawful acts. This is the main theme of the newspaper articles of 15 and 20 July 1988.

It hardly appears to the Court that the newspaper's presentation of the matter, particularly on 15 July, was primarily intended to promote a serious debate on matters of public interest. It focused on the criminal aspects. The public debate for and against seal hunting definitely remained in the background. The form in which the material was presented must also be taken into consideration. The affair was splashed across the front page in bold type. Words such as 'lie' are used in one of the headings of the articles that follow. The Court is definitely of the impression that the primary motive of the newspaper was to be the first to print the story. In particular the front-page article is of a sensational nature. Sufficient attention was not paid to the protection of other persons in this disclosure. The newspaper was also aware that the material was sensitive and had thus particular reason to proceed with caution. The journalist, Mr Raste, had been told, presumably on 13 July, during a telephone conversation with the Ministry of Fisheries, that the report was exempt from public disclosure. In the light of this, the Court cannot see that the newsworthiness of the matter could justify the manner in which it was presented.

Secondly, it has been argued that the publication concerns an official document. According to the newspaper, such documents are reliable sources which one should be able to trust. In this regard, reference is being made to Article 253 § 3 of the Penal Code. Generally speaking, the Court agrees that official documents must normally be considered as good journalistic sources. How good they are, however, depends on the circumstances. In the present case, the newspaper was aware that the report had been exempt from public disclosure and the reasons therefor. The Ministry wished to investigate the matter more closely before deciding whether to make the report public. Mr Raste was also aware that the allegation that seals had been skinned alive would sound like a tall story. Mr Raste himself kept sheep and had some insight into the killing of animals. In spite of this, the matter was given wide coverage. In the circumstances, the newspaper clearly should have investigated the matter more closely before printing the material. On the evidence adduced, the Court finds that no investigation had been made. In his testimony, Mr Gunnar Gran, Secretary General of the Norwegian Press Association, stated that, as a matter of press ethics, it was objectionable to print the allegation that seals had been skinned alive if Mr Raste was aware that it was untrue.

Statements based on an inspection report clearly fall outside the ambit of Article 253 § 3. This provision is exhaustive ...

... The defendants have invoked Article 10 of the Convention. In this connection what is called the 'public interest' point of view has been stressed. This may be described as the doctrine of unrestricted freedom of expression with regard to matters of public interest. Although the Court has in fact already dealt with this point, it sees reason to comment that the present case differs from the *Sunday Times* case and the Lingens v. Austria case.

The latter case concerned in particular the expression of political opinions. Mr Lingens, the editor, had used such expressions as 'the basest opportunism', 'immoral' and 'undignified' to describe certain aspects of Chancellor Bruno Kreisky's character. These are value judgments and are not, like the statements in the present case, linked to facts ...

A defamatory statement which is true is not unlawful, cf. Article 253 § 1 and Article 249 § 1 of the Penal Code. In the present case, the defendants have admitted that, except in the case of one female harp seal, no proof has been adduced. However, it has been argued that Mr Lindberg produced photos showing that several female harp seals had been killed. Notwithstanding the said admission by the defence, the Court will assess the matter for itself. As regards item 2.1 of the allegations, it has clearly not been proved that the statement was true or probably true. On the contrary, Mr Raste was of the opinion that the statement had to be inaccurate. Mr Lindberg and Mr K. have submitted two different versions. As to item 2.2 there is no reason for the Court to give greater credence to Mr Lindberg than to Mr K. The Court cannot see that there are other circumstances that would support this statement. Thus there is no evidence to substantiate the statement.

As regards the killing of female harp seals the Commission of Inquiry states at p. 84 of its report: 'Our conclusion is that we must regard the allegations about the killing of five female harp seals as highly improbable.' It is, however, a fact that the *Harmoni* was carrying the skin of a female harp seal when it returned from the West Ice. [Crew

member S.'s] explanation was that [crew member H.] had killed a harp seal pup. Its mother had been nowhere in sight. She had turned up afterwards and had attacked [H.]. He had become frightened and had tried to hit her on the nose with his gaff. He had, however, hit her too hard, so that she had started bleeding. The mother had been killed because of the blood. This is the matter referred to in item 1.5. The Court cannot see that the statement gives an objectively incorrect impression of what occurred. This does not imply that the Court finds that [H.] acted unlawfully. If he acted in self-defence, his action was not unjustified. This question the Court does not need to determine. Against this background the expression will not be declared null and void.

The other statements concerning female harp seals have not ... been substantiated by documentary evidence. The seal hunters deny that more than one female harp seal had been killed. In his testimony Mr Lindberg referred to photos which, in his view, substantiated the statements. He refused to produce the photos so that they could be assessed by experts. The day after [his] testimony ... an article appeared in ... *Bladet Tromsø*, accompanied by a photo of female harp seals. According to the seal hunters, the photo dated back to 1987, when such seal hunting had been permitted. The Court cannot base its decision on newspaper articles but only on what has taken place during the main hearing. Therefore it must be obvious that the other statements cannot be regarded as having been proved. Moreover, the Court is somewhat surprised by Mr Lindberg's refusal to produce the photos in court.

To sum up, the Court observes that the conditions have been fulfilled for declaring null and void the statements cited in items 1.1, 1.2, 1.3, 1.6, 2.1 and 2.2 of the allegations. The expression cited in item 1.4 is not deemed to be defamatory, whereas that cited in item 1.5 is deemed to have been proved true.

It is not a requirement for declaring the statements null and void that the conditions for imposing a penalty have been fulfilled ... The Court will consider the question of liability when discussing the claim for damages.

The conditions for awarding damages are set out in sections 3-6, subsection one, of the Damages Compensation Act 1969 (*Skadeerstatningsloven*, 13 June 1969, no. 26) … Only [compensation for non-pecuniary damage] has been claimed. It is being specifically argued that the newspaper must be deemed to have acted negligently and that it would be reasonable if the Court were to make an award for non-pecuniary damage. In its assessment, the Court will attach weight to the existence of negligence as well as other circumstances. Thus, a number of factors are relevant to its determination of the compensation issue. In the Court's view, the newspaper has behaved negligently. It had made no further investigation prior to the publication of the material in question, despite this having been called for in the circumstances. The Court has expressed its views on this point above. As regards the compensation claim, it must nevertheless consider the significance of the measures taken to preserve anonymity. The deletion of names did not mean that the crew members could not be identified. As the name of the vessel, *Harmoni*, was clearly stated, it was easy to find out the identity of the crew. The individual seal hunters were known to their neighbours, acquaintances, families, etc. The newspaper must have been aware of this. In any event, it ought to have known that there was a real risk that the persons in question would be identified.

The Court finds it reasonable that the plaintiffs be awarded compensation. The newspaper coverage caused such inconvenience to the crew members and damage to

their reputation as to justify upholding their claim. A total of 2,999 seals were caught during the expedition to the West Ice. Even though it is probable that some violations of the seal hunting regulations occurred, the rendering of Mr Lindberg's report gave a grossly distorted picture. The main impression is that the regulations were essentially complied with.

As far as [the second applicant] is concerned, sections 3-6 must be read in conjunction with Article 431 of the Penal Code. The editor was at his cottage at the time and was not fully aware of the contents of the matters printed. Nonetheless, he did consent to the material being printed. Mr Stensaas has not invoked the exception clause on freedom from liability. Accordingly, [he] must also be considered liable for the newspaper articles. This in turn will have a bearing on the compensation issue.

...

There are factors militating in favour of awarding a substantial amount in compensation: in the first place, certain statements in the preparatory work and, secondly, the degree of abusiveness of the material and the extent to which it was disseminated. In this connection it should be noted that Mr Lindberg has been ordered to pay each of the plaintiffs NOK 10,000 in compensation for non-pecuniary damage [see paragraph 32 above]. … In determining the amount, importance has been attached to the fact that the statements were widely disseminated. Given that this factor has already been taken into account, it must carry a little lesser weight in the case against the newspaper. Otherwise the crew would to some extent receive double compensation.

Moreover, the newspaper was aware that the material was sensitive and that one of the allegations was false. A further factor is the form in which the material was presented, as is the fact that no investigations had been made. In addition, the newspaper did not apologise for having printed the material.

A factor pointing in the opposite direction is, in particular, the fact that the crew members were permitted to express their views. Generally speaking, the seal hunting matter was one of the biggest news stories in 1988. This fact must be accorded some weight, although it does not free the newspaper from liability. In the light of the circumstances, the Court cannot see that importance should be attached to the fact that inspector reports are normally public documents. Mr Lindberg's report had been exempt from public disclosure. Nor is it significant that the report was eventually also published by *Fiskaren*. This fact was only mentioned but was not elaborated upon during the main hearing. The Court has no knowledge of the context, circumstances, etc. The financial standing of [the first applicant] is of significance. The Court finds that the newspaper has been in somewhat strained circumstances for several years. Still its gross annual turnover is said to be approximately NOK 30 million.

Accordingly, each of the plaintiffs is to be paid NOK 11,000 in compensation, of which NOK 10,000 are to be paid by the newspaper, and NOK 1,000 by the editor. The newspaper is also jointly and severally liable with the editor for the amount he has to pay."

36. On 18 March 1992 the applicants sought leave to appeal to the Supreme Court (*Høyesterett*), alleging that the District Court had made an error of law. On 18 July 1992, the Appeals Selection Committee of the

Supreme Court decided not to allow the appeal, finding it obvious that the appeal would not succeed.

I. Defamation proceedings against other media companies

37. The crew of the *Harmoni* also brought defamation proceedings against other media companies, including the newspaper *Aftenposten*, its editor and journalist, in respect of an article published on 22 July 1988 on the seal hunting issue. The action did not relate to an article of 16 July 1988 in which *Aftenposten* reproduced Mr Lindberg's statements, published by *Bladet Tromsø,* to the effect that seals had been flayed alive.

In a judgment of 1 February 1993 the Oslo City Court dismissed the action. The City Court found that, although the impugned article had contained several allegations that seal hunting regulations had been violated, the manner of journalistic reporting at issue could not be considered "unlawful" ("*rettsstridig*").

The City Court stated, *inter alia*:

> "*Bladet Tromsø* received the report from Mr Lindberg in July and published a major article on 15 July 1988, in which it was claimed that seals had been 'skinned alive'. The article aroused great media interest. The Norwegian Telegram Agency ... issued bulletins on the seal hunting affair on 15, 18, 20 and 21 July. *Aftenposten* also followed up the affair, but most of its coverage was based on [those] bulletins. *Aftenposten*'s first article, published on 16 July, stated in an introductory paragraph: 'Strong criticism of seal hunters'. In an evening issue on the same date it was stated: 'Seal hunters must explain'. In the morning issue on 18 July the seal hunters had their say at p. 4, under the heading: 'Seal hunters: never flayed seals alive'. Mr Kvernmo had stated to the newspaper that 'we are shocked about Mr Lindberg's allegations that we have skinned seals alive. ... He is of the view that Mr Lindberg has misunderstood the situation during the seal hunt and deplores that the crew has been blamed in his report to the Ministry of Fisheries.' Furthermore, it is stated that 'the allegation is so grotesque and removed from reality that a number of seal hunters have reacted very strongly against these. 'Flaying seals alive has never occurred during the sixty seal hunt seasons in which I have participated', says arctic shipowner, Mr Jacobsen. … On 19 July *Aftenposten* published an interview with seal inspector, Mr Nilssen, under the headline 'Disagreement on killing methods applied to seal'. On 21 July it published an article entitled: 'Seal hunting report without substantiated allegations' …
>
> To sum up, the Court considers the seal hunting case, as it stood on the evening of 21 July as follows:
>
> Mr Lindberg's report had aroused a great deal of interest. Its contents had been disputed by the seal hunters, a shipowner and the Ministry of Fisheries. All the different points of view had been reported in *Aftenposten*. Despite the refutations of

the report made by the seal hunters and the Ministry of Fisheries, its contents had not been effectively and objectively refuted …

Aftenposten's report on 22 July amounted to a continuation of the seal hunting debate which had already started. Attacks had been made against the report and these Mr Lindberg wished to counter, through the newspaper article – together with photographs. The debate was going on and it was only natural that *Aftenposten* allowed Mr Lindberg to present his version of the matter … The Court considers that *Aftenposten*'s article enabled the discussion to progress.

Aftenposten's presentation is an objective, balanced account in defence of Mr Lindberg's report. The article presents the evidence put forward by Mr Lindberg in support of the accuracy of the report and is an important element in the current seal hunting debate. *Aftenposten* focuses on the lawfulness of the existing seal hunting methods and has no intention of exposing the seal hunters to public contempt by means of malicious coverage ... The coverage clearly cannot be compared to the article printed in ... *Bladet Tromsø* on 15 July. The Court would also point out that *Aftenposten* fairly consistently refers to Mr Lindberg as its source. Although the heading, when seen together with the photos, suggests that there have been violations of the regulations and cruelty to animals, these violations are not particularly highlighted. The newspaper focuses on the seal hunting case. It should also be noted that on the following day the sealers were given an opportunity, in a conspicuous place, to refute the inspector's report. This indicates that there was an ongoing debate on a matter of public interest in which the parties involved were, in a proper manner, given an opportunity to express their views. *Aftenposten*'s coverage of the seal hunting case is characterised precisely by reciprocity: *Aftenposten* maintained that, from a journalistic point of view, the coverage of 22 July was exemplary. The Court agrees with the newspaper's view, particularly as regards the situation that obtained prior to the article published on 22 July.

The Court does not see any reason to examine whether *Aftenposten* has adduced proof. The Commission of Inquiry report … concludes that the regulations have clearly been breached. At p. 101, the Commission states:

> 'We cannot avoid mentioning that during the period under consideration the implementation of the hunting regulations has been characterised by several defects which on the whole are not insignificant.'

The ensuing circumstances thus demonstrate that *Aftenposten* to a large degree could substantiate the allegations that the rules had been breached. Mr Lindberg's report was not a serious work and suffered from a number of shortcomings, but parts of it proved later to be accurate.

Accordingly, the Court concludes that *Aftenposten*'s coverage was not unwarranted. It does not contain any unlawful defamatory statements ..."

The crew members' appeal to the Supreme Court was not allowed. Their claim for compensation for non-pecuniary damage was further rejected by the Eidsivating High Court (*lagmannsrett*) in a judgment of 6 March 1995.

38. On 4 August 1993, in further defamation proceedings instituted by

the crew of the *Harmoni*, the Oslo City Court declared null and void a statement to the effect that seals had been skinned alive, which had been transmitted by the Norwegian Broadcasting Corporation on 16 and 18 July 1988.

II. RELEVANT DOMESTIC LAW AND PRACTICE

39. Under Norwegian defamation law, there are three kinds of response to unlawful defamation, namely the imposition of a penalty under the provisions of the Penal Code, an order under its Article 253 declaring the defamatory allegation null and void (*mortifikasjon*) and an order under the Damage Compensation Act 1969 to pay compensation to the aggrieved party. Only the latter two were at issue in the present case.

40. Under Article 253 of the Penal Code, a defamatory statement which is unlawful and has not been proved true may be declared null and void by a court. In so far as relevant this provision reads:

> "1. When evidence of the truth of an allegation is admissible and such evidence has not been produced, the aggrieved person may demand that the allegation be declared null and void unless otherwise provided by statute."

> *"1. Når det har vært adgang til å føre bevis for sannheten av en beskyldning og beviset ikke er ført, kan den fornærmete forlange at beskyldningen blir erklært død og maktesløs (mortifisert) dersom ikke annet følger av lov."*

Such a declaration is applicable only with regard to factual statements, the truth of value judgments not being susceptible of proof.

Although the provisions on orders declaring a statement null and void are contained in the Penal Code, such an order is not considered a criminal sanction but a judicial finding that the defendant has failed to prove its truth and is thus viewed as a civil-law remedy.

In recent years there has been a debate in Norway as to whether one should abolish the remedy of null and void orders, which has existed in Norwegian law since the sixteenth century and which may also be found in the laws of Denmark and Iceland. Because of its being deemed a particularly lenient form of sanction, the Norwegian Association of Editors has expressed a wish to maintain it**.**

41. The conditions for holding a defendant liable for defamation are set out in Chapter 23 of the Penal Code, Article 247 of which provides:

> "Article 247. Any person who, by word or deed, behaves in a manner that is likely to harm another person's good name and reputation or to expose him to hatred, contempt, or loss of the confidence necessary for his position or business, or who is accessory thereto, shall be liable to fines or imprisonment for a term not exceeding one year. If the defamation is committed in print or in broadcasting or otherwise under especially aggravating circumstances, imprisonment for a term not exceeding two years may be imposed."

"§ 247. Den som i ord eller handling optrer på en måte som er egnet til å skade en annens gode navn og rykte eller til å utsette ham for hat, ringeakt eller tap av den for hans stilling eller næring fornødne tillit, eller som medvirker dertil, straffes med bøter eller med fengsel inntil 1 år. Er ærekrenkelsen forøvet i trykt skrift eller i kringkastingssending eller ellers under særdeles skjerpende omstendigheter, kan fengsel inntil 2 år anvendes."

42. A limitation to the applicability of Article 247 follows from the requirement that the expression must be "unlawful" ("*rettsstridig*"). While this is expressly stated in Article 246, Article 247 has been interpreted by the Supreme Court to include such a requirement.

In a civil case concerning pre-trial reporting by a newspaper, the Supreme Court found for the newspaper, relying on the reservation of lawfulness (*rettsstridsreservasjonen*), even though the impugned expressions had been deemed defamatory. It held that, in determining the scope of this limitation, particular weight should be attached to whether the case was of public interest, having regard to the nature of the issues and to the kind of parties involved. Furthermore, regard should be had to the context in which, and the background against which, the statements had been made. Moreover, it was of great importance whether the news item had presented the case in a sober and balanced manner and had been aimed at highlighting the subject-matter and the object of the case (*Norsk Retstidende* 1990, p. 636, at p. 640).

43. Further limitations to the application of Article 247 are contained in Article 249, which, in so far as is relevant, reads:

"Article 249

1. Punishment may not be imposed under Articles 246 and 247 if evidence proving the truth of the accusations is adduced.

…"

"*§ 249.*

1. Straff efter §§ 246 og 247 kommer ikke til anvendelse dersom det føres bevis for beskyldningens sannhet.

..."

44. As regards the requirement of proof under Article 249 § 1, the same standard which applies to the author of a libellous statement applies in principle also to a person who disseminates it. It is not clear under Norwegian law whether the criminal-law standard of proof beyond reasonable doubt or the civil-law standard of balance of probability applies. The applicants have referred to a judgment of the Supreme Court, in which it accepted the standard applied by the lower court in a criminal libel case concerning allegations made in a television programme and a newspaper

that a private practising lawyer had recommended his spouse to commit tax offences in connection with a property sale. In view of the seriousness of the accusation, it was found appropriate in that case to apply the same standard of proof as would apply to a public prosecutor in criminal proceedings on tax evasion. Leading legal writers are of the opinion that the truth of a defamatory accusation of theft must, in order to discharge the defendant from liability, be proved according to the same standard as would apply to the prosecution in a theft case**.** According to Professor Mæland, it would be reasonable to increase the burden of proof according to the seriousness of the defamatory statement. Professor Andenæs and Professor Bratholm have expressed the view that, although there may be good reasons for imposing a strict burden of proof in libel cases, in certain circumstances it may be justified to apply a somewhat less strict standard than in criminal cases, for instance where the victim of the libel has behaved in a particularly reprehensible manner (see, H.J. Mæland, *Ærekrenkelser*, *Universitetsforlaget*, 1986, pp. 178-79; and J. Andenæs and A. Bratholm, *Spesiell strafferett*, *Universitetsforlaget*, 1983, p. 196).

PROCEEDINGS BEFORE THE COMMISSION

45. Bladet Tromsø A/S and Mr Pål Stensaas lodged an application (no. 21980/93) with the Commission on 10 December 1992. They complained that the District Court's judgment constituted an unjustified interference with their right to freedom of expression under Article 10 of the Convention, which provision had therefore been violated.

46. The Commission declared the application admissible on 26 May 1997. In its report of 9 July 1998 (former Article 31 of the Convention), it expressed the opinion that there had been a violation of

Article 10 (twenty-four votes to seven). The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

47. At the hearing on 27 January 1999 the Government invited the Court to hold that, as submitted in their memorial, there had been no violation of Article 10 of the Convention.

48. On the same occasion the applicants reiterated their request to the Court to find a violation of Article 10 and to make an award of just satisfaction under Article 41.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

49. The applicants complained that the Nord-Troms District Court's judgment of 4 March 1992, against which the Supreme Court refused leave to appeal on 18 July 1992, had constituted an unjustified interference with their right to freedom of expression under Article 10 of the Convention, which reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

50. It was common ground between those appearing before the Court that the impugned measures constituted an "interference by [a] public

1. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

authority" with the applicants' right to freedom of expression as guaranteed under the first paragraph of Article 10. Furthermore, there was no dispute that the interference was "prescribed by law" and pursued a legitimate aim, namely "the protection of the reputation or rights of others" and thus fulfilled two of the conditions for regarding the interference as permissible under the second paragraph of this Article. The Court arrives at the same conclusion on these issues.

The dispute in the case under consideration relates to the third condition, that the interference be "necessary in a democratic society". The applicants and the Commission argued that this condition had not been complied with and that Article 10 had therefore been violated. The Government contested this contention.

A. Arguments of those appearing before the Court

1. The applicants and the Commission

51. For the Commission, with which the applicants essentially agreed, the impugned statements in *Bladet Tromsø*, which had all been based on Mr Lindberg's report, bore on a matter of serious public concern. The essential aim of the various articles had not been to damage the reputation of those engaged in the seal hunting industry but to initiate a debate as to the proper means of ensuring its survival through compliance with the relevant regulations and, where necessary, by amending those rules so as to improve seal hunting and its image.

The allegations in issue had effectively been directed against only seven out of the seventeen members of the *Harmoni*'s crew and their names had been deleted in the report as reproduced. The reproduction of Mr Lindberg's report in *Bladet Tromsø* had been preceded by the crew members' own appeal that the report be disclosed to the public.

In a spirit of dialogue, the applicants had invited the crew members and various representatives of the government and the seal hunting industry to comment on Mr Lindberg's statements both before and after his report was published in *Bladet Tromsø.*

The Commission further emphasised that, as representatives of the press, the applicants were entitled to rely on, and could not be expected to verify, the observations which Mr Lindberg had conveyed to them in his capacity as a ministry-appointed official and which related directly to his mission on board the *Harmoni* (see paragraph 7 above). In so far as the applicants were required to establish the truth of Mr Lindberg's statements (see paragraph 35 above), they were faced with an unreasonable, if not impossible, task.

The contested measures could not afford any significant further protection of the seal hunters' reputation and rights, since, firstly, at the time of the District Court's judgment the contents of Mr Lindberg's report had already been in the public domain for a year and a half and had been divulged (without disclosing the seal hunters' identities) through a number of other publications, including the Commission of Inquiry report (see paragraph 31 above); secondly, the seal hunters had successfully challenged various passages in Mr Lindberg's report in defamation proceedings against him (see paragraph 32 above).

52. The applicants maintained that the District Court's judgment was inadequate in that it failed to place the statements in question in the larger context of the controversy about the hunting expedition (see paragraphs 29-30 above). Rather than causing harm to their reputation, the effect of the Lindberg report had been to increase public support for seal hunters.

The impugned statements did not concern the private affairs of private persons. The burden of proof of a defendant facing a claim for a null and void order was quite strict (see paragraph 44 above). None of the impugned statements had been proved untrue (see paragraph 35 above).

2. The Government

53. The Government stressed that the present case concerned a conflict between two human rights – on the one hand, the right to freedom of expression and, on the other hand, the right of an individual to protection against unlawful attacks on his or her honour and reputation, the latter being expressly guaranteed under Article 17 of the 1966 International Covenant on Civil and Political Rights.

The Government argued mainly that *Bladet Tromsø* had launched a serious attack on the reputation and honour of the seal hunters by breaking the news about the report in a sensational manner on 15 July 1988 and reproducing very serious accusations of cruel and unlawful behaviour during the hunt (see paragraph 12 above). While not contesting that seal hunting was an issue of public interest, the Government pointed out that it would have been possible for the newspaper to take part in public discussion on the matter without attacking the crew members of the *Harmoni* personally. The impugned allegations had been directed against a small group of persons who could easily be identified because of the newspaper's reference to the crew of the *Harmoni* (see paragraph 12 above). These persons could not be regarded as public figures.

In the view of the Government, the newspaper could hardly be said to have acted in good faith. The applicants were aware that Mr Lindberg's

report had been exempted from public disclosure and that this decision had been taken temporarily in order to protect the individuals who had been accused of having committed inhuman and criminal acts, by giving them an opportunity to reply to the accusations (see paragraph 11 above). This measure must be seen in the light of the right of every person, including the seal hunters, under Article 6 § 2 to be presumed innocent of any criminal offence until proved guilty. It also suggested that the report did not necessarily present the Government's official view. Moreover, as found by the District Court, even the journalist in question had considered the allegation that seals had been flayed alive too unreasonable to be true (see paragraph 35 above).

54. The Government further disputed that the news coverage had been based on an accurate factual basis. The District Court, having assessed the evidence, found it obvious that the statements had not been proved (see paragraph 35 above).

Nor could the applicants reasonably consider that the information derived from Mr Lindberg's report was reliable, as they were aware of the fact that his qualifications had been questioned when it was published (see paragraphs 15, 20 and 26 above).

55. Furthermore, it could not be said that *Bladet Tromsø* complied with ethics of journalism. Under the Norwegian Code of Press Ethics, a person who is subject to serious criticism should as far as possible have an opportunity to reply simultaneously. The journalist has a duty to verify the truth of the information, which task would have been neither impossible nor unreasonable in the instant case. The allegations that seals had been skinned alive could have been verified by consulting an expert. However, no investigation had been undertaken by the newspaper (see paragraph 35 above).

The finding by the Commission that the publication of the report by *Bladet Tromsø* had been preceded by the crew members' own appeal to this effect was not correct (see paragraph 15 above). In any event, their demand was put forward after most of the damaging information had been made public, namely on 15 July 1988 (see paragraph 12 above). Nor was it correct that, prior to its being published, the applicants had invited the crew to comment on Mr Lindberg's report.

56. Finally, the Government pointed out that the impugned interference had not been of a criminal-law character; rather, the domestic court's finding had entailed a civil liability for the applicants to pay damages and meant that they had been unable to prove the truth of the allegations (see paragraph 40 above).

57. In the light of the foregoing, the Government were of the view that the domestic court had acted within its margin of appreciation and that there was a reasonable relationship of proportionality between the legitimate aim pursued and the interference complained of.

B. The Court's assessment

1. General principles

58. According to the Court's well-established case-law, the test of "necessity in a democratic society" requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see the *Sunday Times* (no. 1) v. the United Kingdom judgment of 26 April 1979, Series A no. 30, p. 38, § 62). In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10.

59. One factor of particular importance for the Court's determination in the present case is the essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see the Jersild v. Denmark judgment of 23 September 1994, Series A no. 298, p. 23, § 31; and the De Haes and Gijsels v. Belgium judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 233-34, § 37). In addition, the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see the Prager and Oberschlick v. Austria judgment of 26 April 1995, Series A no. 313, p. 19, § 38). In cases such as the present one the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of "public watchdog" in imparting information of serious public concern (see the Goodwin v. the United Kingdom judgment of 27 March 1996, *Reports* 1996-II, p. 500, § 39).

60. In sum, the Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken

pursuant to their power of appreciation (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).

2. Application of those principles to the present case

61. In the instant case the Nord-Troms District Court found that two statements published by *Bladet Tromsø* on 15 July 1988 and four statements published on 20 July were defamatory, "unlawful" and not proved to be true. One statement – "Seals skinned alive" – was deemed to mean that the seal hunters had committed acts of cruelty to the animals. Another was understood to imply that seal hunters had committed criminal assault on and threat against the seal hunting inspector. The remaining statements were seen to suggest that some (unnamed) seal hunters had killed four harp seals, the hunting of which was illegal in 1988. The District Court declared the statements null and void and, considering that the newspaper had acted negligently, ordered the applicants to pay compensation to the seventeen plaintiffs (see paragraph 35 above).

The Court finds that the reasons relied on by the District Court were relevant to the legitimate aim of protecting the reputation or rights of the crew members.

62. As to the sufficiency of those reasons for the purposes of Article 10 of the Convention, the Court must take account of the overall background against which the statements in question were made. Thus, the contents of the impugned articles cannot be looked at in isolation of the controversy that seal hunting represented at the time in Norway and in Tromsø, the centre of the trade in Norway. It should further be recalled that Article 10 is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population (see the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 23, § 49). Moreover, whilst the mass media must not overstep the bounds imposed in the interests of the protection of the reputation of private individuals, it is incumbent on them to impart information and ideas concerning matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Consequently, in order to determine whether the interference was based on sufficient reasons which rendered it "necessary", regard must be had to the public-interest aspect of the case.

63. In this connection the Court has noted the argument, relied on by the District Court (see paragraph 35 above), that *Bladet Tromsø*'s manner of presentation, in particular in the article of 15 July 1988 (see paragraph 12 above), suggested that the primary aim, rather than being the promotion of a

serious debate, was to focus in a sensationalist fashion on specific allegations of crime and to be the first paper to print the story.

In the Court's view, however, the manner of reporting in question should not be considered solely by reference to the disputed articles in *Bladet Tromsø* on 15 and 20 July 1988 but in the wider context of the newspaper's coverage of the seal hunting issue (see paragraphs 8-9, 12-19, 21-24 above). During the period from 15 to 23 July 1988 *Bladet Tromsø*, which was a local newspaper with – presumably – a relatively stable readership, published almost on a daily basis the different points of views, including the newspaper's own comments, those of the Ministry of Fisheries, the Norwegian Sailors' Federation, Greenpeace and, above all, the seal hunters (see paragraphs 12-19, 21-24 above). Although the latter were not published simultaneously with the contested articles, there was a high degree of proximity in time, giving an overall picture of balanced news reporting. This approach was not too different from that followed three months earlier in the first series of articles on Mr Lindberg's initial accusations and no criticism appears to have been made against the newspaper in respect of those articles. As the Court observed in a previous judgment, the methods of objective and balanced reporting may vary considerably, depending among other things on the medium in question; it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists (see the Jersild judgment cited above, p. 23, § 31).

Against this background, it appears that the thrust of the impugned articles was not primarily to accuse certain individuals of committing offences against the seal hunting regulations or of cruelty to animals. On the contrary, the call by the paper on 18 July 1988 (see paragraph 16 above) for the fisheries authorities to make a "constructive use" of the findings in the Lindberg report in order to improve the reputation of seal hunting can reasonably be seen as an aim underlying the various articles published on the subject by *Bladet Tromsø*. The impugned articles were part of an ongoing debate of evident concern to the local, national and international public, in which the views of a wide selection of interested actors were reported.

64. The most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern (see the Jersild judgment cited above, pp. 25-26, § 35).

65. Article 10 of the Convention does not, however, guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article the exercise of this freedom carries with it "duties and

responsibilities", which also apply to the press. These "duties and responsibilities" are liable to assume significance when, as in the present case, there is question of attacking the reputation of private individuals and undermining the "rights of others". As pointed out by the Government, the seal hunters' right to protection of their honour and reputation is itself internationally recognised under Article 17 of the International Covenant on Civil and Political Rights. Also of relevance for the balancing of competing interests which the Court must carry out is the fact that under Article 6 § 2 of the Convention the seal hunters had a right to be presumed innocent of any criminal offence until proved guilty. By reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see the Goodwin judgment cited above, p. 500, § 39, and *Fressoz and Roire* cited above, § 54).

66. The Court notes that the expressions in question consisted of factual statements, not value-judgments (cf., for instance, the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, p. 28, § 46). They did not emanate from the newspaper itself but were based on or were directly quoting from the Lindberg report, which the newpaper had not verified by independent research (see the Jersild judgment cited above, pp. 23 and 25-26, §§ 31 and 35). It must therefore be examined whether there were any special grounds in the present case for dispensing the newspaper from its ordinary obligation to verify factual statements that were defamatory of private individuals. In the Court's view, this depends in particular on the nature and degree of the defamation at hand and the extent to which the newspaper could reasonably regard the Lindberg report as reliable with respect to the allegations in question. The latter issue must be determined in the light of the situation as it presented itself to *Bladet Tromsø* at the material time (see paragraphs 7-19, 25-26 above), rather than with the benefit of hindsight, on the basis of the findings of fact made by the Commission of Inquiry a long time thereafter (see paragraph 31 above).

67. As regards the nature and degree of the defamation, the Court observes that the four statements (items 1.1, 1.2, 1.3 and 1.6) to the effect that certain sealers had killed female harp seals were found defamatory, not because they implied that the hunters had committed acts of cruelty to the animals, but because the hunting of such seals was illegal in 1988, unlike the year before (see paragraphs 13 and 35 above). According to the District

Court, "the statements [did] not differ from allegations of illegal hunting in general" (see paragraph 35 above). Whilst these allegations implied reprehensible conduct, they were not particularly serious.

The other two allegations – that seals had been skinned alive and that furious hunters had beaten up Mr Lindberg and threatened to hit him with a gaff (items 2.1 and 2.2) – were more serious but were expressed in rather broad terms and could be understood by readers as having been presented with a degree of exaggeration (see paragraph 12 above).

More importantly, while *Bladet Tromsø* publicised the names of the ten crew members whom Mr Lindberg had exonerated, it named none of those accused of having committed the reprehensible acts (see paragraphs 13 and 18 above). Before the District Court each plaintiff pleaded his case on the basis of the same facts and the District Court apparently considered each of them to have been exposed to the same degree of defamation, as is reflected in the fact that an equal award was made to each of them (see paragraph 35 above).

Thus, while some of the accusations were relatively serious, the potential adverse effect of the impugned statements on each individual seal hunter's reputation or rights was significantly attenuated by several factors. In particular, the criticism was not an attack against all the crew members or any specific crew member (see the Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239, p. 28, § 66).

68. As regards the second issue, the trustworthiness of the Lindberg report, it should be observed that the report had been drawn up by Mr Lindberg in an official capacity as an inspector appointed by the Ministry of Fisheries to monitor the seal hunt performed by the crew of the *Harmoni* during the 1988 season (see paragraph 7 above). In the view of the Court, the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research. Otherwise, the vital public-watchdog role of the press may be undermined (see, *mutatis mutandis*, the Goodwin judgment cited above, p. 500, § 39).

69. The Court does not attach significance to any discrepancies, pointed to by the Government, between the report and the publications made by Mr Lindberg in *Bladet Tromsø* one year before in quite a different capacity, namely as a freelance journalist and an author.

70. The newspaper was, it is true, already aware from the reactions to Mr Lindberg's statements in April 1988 that the crew disputed his competence and the truth of any allegations of "beastly killing methods" (see paragraph 9 above). It must have been evident to the paper that the Lindberg report was liable to be controverted by the crew members. Taken on its own, this cannot be considered decisive for whether the newspaper had a duty to verify the truth of the critical factual statements contained in

the report before it could exercise its freedom of expression under Article 10 of the Convention.

71. Far more material for this purpose was the attitude of the Ministry of Fisheries, which had appointed Mr Lindberg to carry out the inspection and to report back (see paragraph 7 above). As at 15 July 1988 *Bladet Tromsø* was aware of the fact that the Ministry had decided to exempt the report from public disclosure with reference to the nature of the allegations – criminal conduct – and to the need to give the persons named in the report an opportunity to comment (see paragraph 11 above). It has not been suggested that, by publishing the relevant information, the newspaper was acting in breach of the law on confidentiality. Nor does it appear that, prior to the contested publication on 15 July 1988, the Ministry had publicly expressed a doubt as to the possible truth of the criticism or questioned Mr Lindberg's competence. Rather, according to a bulletin of the same date by the Norwegian News Agency, the Ministry had stated that it was possible that illegal hunting had occurred (see paragraph 25 above).

On 18 July 1988 the Norwegian News Agency reported the Ministry as having stated that veterinary experts would consider the controversial Lindberg report and that the Ministry would issue information of the outcome and possibly also of the circumstances of Mr Lindberg's recruitment as inspector; and, moreover, that the Ministry would not comment any further until it had collected more information (see paragraph 26 above). On 19 July the News Agency reported that the Ministry had believed, on the basis of information provided by Mr Lindberg himself, that his research background was far more extensive than it was in reality. It was on 20 July, the same date as the last of the disputed publications, that the Ministry expressed doubts as to Mr Lindberg's competence and the quality of the report (see paragraph 20 above).

In the Court's opinion, the attitude expressed by the Ministry before 20 July 1988 does not constitute a ground for considering that it was unreasonable for the newspaper to regard as reliable the information contained in the report, including the four statements published on 20 July to the effect that specific but unnamed seal hunters had killed female harp seals (see paragraph 13 above). In fact, the District Court later found that one such allegation (item 1.5) had been proved true (see paragraph 35 above).

72. Having regard to the various factors limiting the likely harm to the individual seal hunters' reputation and to the situation as it presented itself to *Bladet Tromsø* at the relevant time, the Court considers that the paper could reasonably rely on the official Lindberg report, without being required to carry out its own research into the accuracy of the facts reported. It sees no reason to doubt that the newspaper acted in good faith in this respect.

73. On the facts of the present case, the Court cannot find that the crew members' undoubted interest in protecting their reputation was sufficient to outweigh the vital public interest in ensuring an informed public debate over a matter of local and national as well as international interest. In short, the reasons relied on by the respondent State, although relevant, are not sufficient to show that the interference complained of was "necessary in a democratic society". Notwithstanding the national authorities' margin of appreciation, the Court considers that there was no reasonable relationship of proportionality between the restrictions placed the applicants' right to freedom of expression and the legitimate aim pursued. Accordingly, the Court holds that there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. Bladet Tromsø A/S and Mr Pål Stensaas sought just satisfaction under Article 41 of the Convention, which provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

75. Under the head of pecuniary damage, the applicants requested compensation for the economic loss which they had suffered as a result of the District Court's judgment of 4 March 1992 ordering them to pay 187,000 Norwegian kroner (NOK) in damages to the plaintiffs and NOK 136,342 to cover the latter's costs before the District Court.

76. Subject to the Court finding a violation of the Convention, the Government did not contest the above claim. The Delegate of the Commission did not offer any comment.

77. The Court, being satisfied that there was a causal link between the damage claimed and the violation found of the Convention, awards the totality of the sum sought under this head.

B. Costs and expenses

78. The applicants further claimed reimbursement of costs and expenses, totalling NOK 652,229 in respect of the following items:

(i) NOK 138,887 for their costs and expenses in the proceedings before the District Court;

(ii) NOK 29,560 for their costs and expenses in the appeal to the Supreme Court;

(iii) NOK 150,000 for work (128 hours at NOK 1,000 and 20 hours at NOK 1,100) by Mr Wolland in the proceedings before the Strasbourg institutions until 28 August 1998;

(iv) NOK 79,200 for work (60 hours at 100 pounds sterling (GBP) per hour) by Mr Boyle during the aforementioned period;

(v) NOK 23,840 for expenses incurred in the Strasbourg proceedings until 28 August 1998;

(vi) NOK 104,500 for work (95 hours at NOK 1,100) by Mr Wolland from 29 August 1998 until and including the Court's hearing on 27 January 1999;

(vii) NOK 26,481 in expenses (travel, accommodation and miscellaneous) incurred by Mr Wolland in connection with the above;

(viii) NOK 68,330 for work (46 hours at GBP 100 per hour) by Mr Boyle and expenses (travel, accommodation and miscellaneous) incurred by him from 29 August 1998 until and including the Court's hearing on 27 January 1999;

(ix) NOK 17,551 for travel and accommodation expenses incurred in connection with Mr Y. Nielsen's (current chief editor of *Bladet Tromsø*) attendance at the hearing;

(x) NOK 13,880 for travel and accommodation expenses incurred in connection with Mr Stensaas's attendance at the hearing.

79. The Government contested the above claim, arguing that the number of hours and the rates were excessive. The Delegate of the Commission also in this context left the matter to the Court's discretion.

80. The Court, in accordance with its case-law, will consider whether the costs and expenses were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for instance, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, p. 83, § 77). It is satisfied that the hourly rates charged in the Strasbourg proceedings were reasonable but finds the number of hours claimed excessive. Making an assessment on an equitable basis the Court awards the applicants NOK 80,000 with respect to the work by Mr Wolland and NOK 40,000 with regard to the work by Mr Boyle in the Strasbourg proceedings. The remainder of the claim for costs and expenses is to be reimbursed in its entirety.

C. Interest pending the proceedings before the national courts and the Convention institutions

81. The applicants in addition claimed NOK 515,337 in interest (18% per year until 1 January 1994 and then 12% per year until 1 November 1998) on the amounts claimed in respect of pecuniary damage and of costs and expenses incurred until 28 August 1998.

82. The Government observed that it was difficult, on the basis of the breakdown of the applicants' claim to verify the accuracy of the calculations of interest. The latter had been based on the Act on Default Interest 1976 (*morarenteloven*, Law no. 100 of 17 December 1976). It included a penalty element and clearly exceeded the ordinary level of interest in Norway. The said Act could not, in their submission, constitute a basis for the assessment of an award under Article 41 of the Convention.

83. The Court finds that the applicants must have suffered some pecuniary loss by reason of the periods that elapsed from the times when the various costs were incurred until the Court's award (see, for instance, the Darby v. Sweden judgment of 23 October 1990, Series A no. 187, p. 14, § 38, and the *Observer* and *Guardian* v. the United Kingdom judgment of 26 November 1991, Series A no. 216, p. 38, § 80 (d)) . It does not consider itself bound by the national law on the calculation of interest nor does it propose to undertake a precise quantification of the loss sustained by the applicants in the present case. Deciding on an equitable basis and having regard to the rates of inflation in Norway during the relevant period, it awards the applicants NOK 65,000 with respect to their claim under this head.

D. Default interest to apply with respect to the Court's award

84. According to the information available to the Court, the statutory rate of interest applicable in Norway at the date of adoption of the present judgment is 12% per annum. The Court, in accordance with its established case-law, deems this rate appropriate with regard to the sums awarded in the present judgment.

FOR THESE REASONS, THE COURT

1. *Holds* by thirteen votes to four that there has been a breach of Article 10 of the Convention;

2. *Holds* unanimously that the respondent State is to pay the applicants, within three months,
   (a) for pecuniary damage, 323,342 (three hundred and twenty-three thousand three hundred and forty-two) Norwegian kroner;
   (b) for costs and expenses, 370,199 (three hundred and seventy thousand one hundred and ninety-nine) Norwegian kroner;
   (c) for additional interest, 65,000 (sixty-five thousand) Norwegian kroner;

3. *Holds* unanimously that simple interest at an annual rate of 12% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 May 1999.

Luzius WILDHABER
President

Maud DE BOER-BUQUICCHIO
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinions are annexed to this judgment:

(a) joint dissenting opinion of Mrs Palm, Mr Fuhrmann and Mr Baka;
(b) dissenting opinion of Mrs Greve.

L.W.
M.B.

JOINT DISSENTING OPINION OF JUDGES PALM, FUHRMANN AND BAKA

We disagree with the majority opinion that there has been a violation of Article 10 of the Convention on the facts of this case.

It is clear from the structure of Article 10 and from the Court's case-law that the exercise of freedom of expression "carries with it duties and responsibilities" and that restrictions on freedom of the press may be justified where it is necessary in a democratic society for the protection of the reputation of others. As the Court has stated in its De Haes and Gijsels v. Belgium judgment of 24 February 1997, "Although [the press] must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest …" (*Reports of Judgments and Decisions* 1997-I, pp. 233-34, § 37).

It is the right to the protection of reputation aspect of the present case which has been given insufficient attention in the Court's judgment and which motivates the present dissent. The crucial watchdog role of the press in a democratic society has been positively asserted and defended by this Court in the course of a large corpus of cases concerning freedom of expression which have stressed not only the right of the press to impart information but also the right of the public to receive it. In so doing the Court has played an important role in laying the foundations for the principles which govern a free press within the Convention community and beyond. However, for the first time the Court is confronted with the question of how to reconcile the role of newspapers to cover a story which is undoubtedly in the public interest with the right to reputation of a group of identifiable private individuals at the centre of the story. In our view the fact that a strong public interest is involved should not have the consequence of exonerating newspapers from either the basic ethics of their trade or the laws of defamation. As the Grand Chamber of the Court stated in *Fressoz and Roire v. France* ([GC], no. 29183/95, ECHR 1999-I) – the first judgment of the new Court – Article 10 "protects journalists' rights to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism" (§ 54).

It is also central to our position that the present case does not involve a situation where a government has sought, by way of prior restraint, to suppress a newspaper story which was embarrassing to it or indeed a complaint of a general nature not involving specific individuals as in the Thorgeir Thorgeirsson v. Iceland case (judgment of 25 June 1992, Series A no. 239) despite the Court's veiled attempt to suggest otherwise (see

paragraph 67 of the judgment). The present case is brought by a group of aggrieved private individuals as part of a predominantly civil process. Of course, as the Court has often held – most recently in *Janowski v. Poland* ([GC], no. 25716/94, § 33, ECHR 1999-I) – the limits of acceptable criticism are wider as regards politicians or public figures than they are as regards private persons. However, it cannot be doubted that the seal hunters involved in these proceedings are private persons *par excellence*. The fact that they are involved in as unpopular an activity as seal hunting does not remove their status as private individuals.

In the present case a Norwegian District Court, after a careful examination of the evidence, concluded that the seal hunters on board the *Harmoni*, who were clearly identifiable from the impugned press articles published by *Bladet Tromso*, had been defamed. The court had held a hearing which lasted three days and heard relevant witnesses. It subsequently delivered a well-reasoned judgment applying Norwegian law of defamation to the facts of the case (see paragraph 35 of the judgment). The finding of defamation was based on the allegations that the crew members had killed female harp seals which, at the time, amounted to a criminal offence, that Mr Lindberg had been assaulted and that a seal had been skinned alive (ibid). It should be recalled that, prior to these proceedings, Mr Lindberg had been held liable in defamation with regard to these allegations, in a suit brought by the crew members, by the Sarpsborg City Court and that the Swedish Supreme Court, in proceedings brought by Mr Lindberg to oppose execution of the judgment abroad, has found in a decision of 16 December 1998 that the Norwegian judgment did not entail a breach of Article 10 of the Convention (see paragraph 33 of the judgment). In addition the accusations had also been held to be unfounded by a

Commission of Inquiry which had been set up to investigate the issues (see paragraph 31).

In our view the findings of the District Court cannot be faulted. It has been held by the European Court in numerous cases that it falls in principle to the national courts to interpret and apply national law and that the European Court's role is limited to examining whether the decisions of the national authorities were arbitrary and whether they applied standards which were in conformity with the principles embodied in Article 10 and based themselves on an acceptable assessment of the relevant facts (see, for instance, the Jersild v. Denmark judgment of 23 September 1994, Series A no. 298, p. 24, § 31). In the present case it cannot be said in any respect that the decision of the District Court failed to meet this test, was arbitrary or even unreasonable or that the reasons given were not "sufficient" for the purposes of Article 10 § 2. It is not disputed by the parties that the article implicated identifiable members of the crew even including some of those who had not participated in the voyage. Moreover, the findings of the District Court are supported by the conclusions of an independent Commission of Inquiry which had carried out an extensive investigation into the allegations prior to the proceedings and found them to be unfounded as well as the findings of the Sarpsborg City Court in the Lindberg proceedings (see paragraphs 31-33 of the judgment). It thus must be taken as accepted that the seal hunters were defamed in the articles published by *Bladet Tromsø*. We do not accept the Court's reasoning that the defamation was of a lesser nature because no specific crew member was named in the articles (see paragraph 67 of the judgment). On the contrary, the weight of the remarks was heavier precisely because they implicated the entire crew of the *Harmoni* without exception and irrespective of whether they were actually on board the ship at the relevant time.

Nor can the Norwegian law of defamation or the decision of the District Court be open to criticism from the standpoint of freedom of the press on the grounds that they were over-protective of the reputations of private individuals or failed to attach sufficient weight to the public interest . The holding that the accusations were null and void amounts merely to a finding that the applicant had not been able to establish the truth of the statements. It does not carry any criminal stigma or amount to a penalty as the words might suggest. The requirement to prove the truth of the allegations as a defence to a defamation action is an elementary feature of defamation proceedings in most legal systems and as such cannot be criticised. Indeed,

in one case the Court found that the unavailability of the defence of *exceptio veritatis* to a defendant gave rise to a violation of Article 10 of the Convention (see the Castells v. Spain judgment of 23 April 1992, Series A no. 236, pp. 22-24, §§ 40-50).

Moreover, under Norwegian law the defamation must also be unlawful. This development in Norwegian case-law – described in the judgment of the District Court as "the linchpin of Article 100 of the Norwegian Constitution and … essential in a democratic society" (see paragraph 35 of the judgment) – gives the court the possibility to weigh in the balance the respective interests and to find that the public interests involved in publication outweigh the private one in a given case. Norwegian law has thus developed in a manner which has taken into account the principles of Strasbourg case-law. Indeed the District Court followed this approach in the present case but found against the applicants essentially on the grounds that the newspaper focused its attention on sensational headlines and that "sufficient attention was not paid to the protection of other persons in this disclosure" and that the newspaper was well aware that the report had been exempted from public disclosure precisely because of the accusations of wrongdoing. Neither of these factual points can be seriously contested. The *Aftenposten* judgment shows that the test of "unlawfulness" is an important guarantee of press freedom under Norwegian law since it was exactly on this basis that the court found for the defendant newspaper, contrasting that paper's balanced coverage with that of *Bladet Tromsø* in the present case.

Against this background is it for the European Court to say that the District Court's assessment on this point was wrong? Even if the Strasbourg Court should substitute its judgment in this way for that of the national court, on what grounds could this balancing of the interests be called into question? We observe that the Court has previously stated that it is in the first place for the national authorities to determine the extent to which the individual's interest in full protection of his or her reputation should yield to the interests of the community (as regards the investigation of the affairs of large public companies) – *a fortiori* where the reputation of private persons is at stake (see the Fayed v. the United Kingdom judgment of 21 September 1994, Series A no. 294-B, p. 55, § 81). Is this not the essence of the margin of appreciation in a case like the present one?

The crux of the Court's reasoning involves essentially a new test that newspapers can be dispensed from verifying the facts of a story depending on (1) the nature and degree of the defamation and (2) whether it was reasonable in the circumstances to rely on the details of the Lindberg report (see paragraphs 66-73 of the judgment). On both points we find the Court's reasoning to be flawed.

The majority has tried hard to minimise the extent of the defamation in the present case but eventually considers that "some of the accusations were relatively serious" (see paragraph 67). However it reaches the rather vague conclusion that "the criticism was not an attack against all the crew members or any specific crew member". This is obviously unsupported by the facts and tends to suggest that the complaint of defamation was lacking in any real substance. We must ask whether it is at all appropriate for the Court to seek to reassess the extent of the harm caused by the defamatory remarks and in effect to retry the issues on this point. Surely the Court should accept that this is a matter best left to the judgment of the national courts which heard at first hand and carefully assessed the evidence in the light of standards which are in conformity with Article 10? This approach of the majority illustrates the main fault-line running through the judgment, namely that the Court does not give sufficient weight to the reputation of the seal hunters. The effort to balance the respective public and private interests is thus defective from the start.

The reasoning is equally unconvincing in its treatment of the question concerning the "reasonableness" of the paper's reliance on the Lindberg report. How could it have been "reasonable" to rely on this report when the newspaper was fully aware that the Ministry had ordered that the report not be made public immediately because it had contained possibly libellous comments concerning private individuals? It was thus temporarily not in the public domain and rightly so. The question of whether the Ministry believed or disbelieved Lindberg's claims (see paragraph 71 of the judgment) is simply not relevant to this issue. The Court's finding on this point also ignores the calling into question of the good faith of the paper's journalist (Mr Raste) by the District Court. How then can reliance on the details of the Lindberg report be judged to be reasonable when a national court has found in effect that the paper has not only indulged in sensationalism but must have been aware that some of the details were entirely false?

We accept that if the case concerned the publication of an official report which had been made public by the competent authorities, a newspaper would in principle be entitled to publish it under Article 10 of the Convention without carrying out any further investigation as to the accuracy or precision of the details of the report even if it was damaging to the reputation of private individuals. All that could be expected of a newspaper in such a situation would be to check that the published text corresponded to the official published text.

But the present case does not concern an official public report. On the contrary the report had not immediately been made public by the Ministry precisely because it contained allegations of wrongdoing against the crew members and it was considered only fair and proper to afford them an opportunity to defend themselves and to verify the information (see paragraph 11 of the judgment). The subsequent series of defamation proceedings and the Commission of Inquiry report vindicated such a cautious approach. Moreover it is clear that the newspaper was aware of this decision but decided nevertheless to go ahead and publish (see paragraph 35 of the judgment). It was also aware that Mr Lindberg had previously worked as a freelance journalist on seal hunting issues, having published several of his articles, and did not have the traditional profile of a Ministry inspector.

In our view, judged against this background, the newspaper knew that it was taking the risk of exposing itself to legal action by publishing the articles without taking any steps whatsoever to check the veracity of the claims being made. The action taken by the crew members cannot have come as a surprise, since the newspaper must have known that it should have exercised caution before printing accusations that private persons had committed criminal offences or other forms of wrongdoing. The fact that the report was drawn up by a person who was officially appointed by the Ministry, or that the report was potentially a public report, does not assist the applicants any more than it could justify the publication of secret material harmful to the national interest obtained in the same manner. The key fact is that the contents of the report were not in the public domain or accessible to the public (see paragraph 11 of the judgment) and not (as the majority consider) whether the applicant was contravening the law on confidentiality. *Bladet Tromsø* knew this and the reasons for it.

We are not persuaded either by the argument that the newspaper could not realistically have checked the claims and that it was entitled to rely on the details of the report since they concerned matters – e.g. the killing of female harp seals during the *Harmoni*'s sea voyage – which by their nature were unverifiable. We observe, in passing, that newspapers can generally be expected to carry out checks on controversial stories before rushing into print. But what could *Bladet Tromsø* have been expected to do? We accept, in keeping with the Court's previous holdings (see, for example, the Fayed judgment cited above, p. 55, § 81), that it would have been unreasonable to expect the paper to suspend publication until it had carried out a serious investigation of the matter. Equally it did not have to prove the story to be true before printing. The story was obviously too pressing to bury in time-consuming investigatory procedures. But as the District Court found, the newspaper did nothing at all to check the story, even when one of its journalists must have known from his own experience that the allegation concerning the flaying of seals alive must have been "a tall story" (see paragraph 35 of the judgment). In other words, the paper published the story without caring whether the allegations were true or false, relying entirely on the "official" nature of the report as their cover. They could have been expected, at the very least, to ask the crew members for their version of the events and their reaction to the various accusations made by Mr Lindberg and given them an opportunity to answer the accusations at the same time as the impugned articles were printed. After all, they were also witnesses to what had happened on board the *Harmoni* and were the persons directly implicated in the accusations. The paper would then have discovered – if nothing else – that some of the crew members could not have been concerned by the claims since they had stayed on dry land. That the paper carried a story concerning the reactions of a crew member subsequent to the publication of the entire report (see paragraphs 12-15 of the judgment) when the damage to reputation had already occurred can hardly be regarded as sufficient.

Bladet Tromsø took a risk in publishing the Lindberg report. They had the real possibility to cover this important story in a manner which would have enabled Lindberg's claims to have been aired in a general way without implicating the crew of the *Harmoni*. In fact, other publications, notably *Aftenposten*, had been able to cover the story properly but in a manner which was more respectful of the reputations of the seal hunters (see paragraph 37 of the judgment). Of course, in a small fishing community even a general report might have enabled the crew members to have been

identified by some. However, this cannot excuse the absence of any concern to attempt to protect the reputation of the seal hunters. Moreover, it should not be forgotten that the paper had a 9,000-strong readership. If this is deemed to miss the point, in that the only concern of the paper was to carry the precise details of the Lindberg report, then the reputation of the hunters is legitimately protected by the law of defamation and the paper, having assumed the risk, is not well placed to complain of the inevitable outcome.

The present judgment's conclusion, that the newspaper was exonerated from the verification of basic factual information by virtue of the degree of defamation involved and the supposedly "official" nature of the Lindberg report, appears to suggest an exceptionally low threshold for the protection of the right to reputation of others where there is an important public interest involved and no public figures. Such an elevation of the public interest in the freedom of the press at the expense of the private individuals caught up in the seal hunting story in this case pays insufficient attention to the national laws on defamation and the balanced freedom of the press-conscious judgments of the domestic courts. It is abundantly clear from the decision of the District Court that the factual basis of the story was inaccurate and that the ethics of journalism were not respected as they ought to have been. Our Court should not, against such a background, reach a different conclusion on these points.

The present judgment thus departs significantly from the above-mentioned cautious wording in the Court's *Fressos and Roire* judgment elucidating the scope of the journalist's freedom to disclose information on issues of general interest. In so doing the judgment sends the wrong signal to the press in Europe. Few stories can be so important in a democratic society or deserving of protection under Article 10 of the Convention, that the basic ethics of journalism – which require, *inter alia*, journalists to check their facts before going to press with a story in circumstances such as the present – can be sacrificed for the commercial gratification of an immediate scoop. We are not persuaded that the Court's approach in this case which has exonerated the applicant newspaper from this elementary requirement will actually advance the cause of press freedom since it undermines respect for the ethical principles which the media voluntarily adhere to. Article 10 may protect the right for the press to exaggerate and provoke but not to trample over the reputation of private individuals.

DISSENTING OPINION OF JUDGE GREVE

Together with my colleagues in the minority – Judges Palm, Fuhrmann and Baka – I find no violation of Article 10 of the Convention in the present case and I basically share their reasoning. Moreover, I attach particular significance to the following considerations.

In my view, the case under review is essentially an ordinary defamation case concerning restrictions placed on accusations of criminal conduct made in the press against private individuals. It is vital that the assessment of the necessity of the interference in a democratic society not be obscured by the sensitive nature of the seal hunting issue.

I agree with the majority that the manner of reporting by *Bladet Tromsø* should not be considered solely by reference to the disputed articles on 15 and 20 July 1988 but in the wider context of the newspaper's coverage of the seal hunting issue. *Bladet Tromsø* carried altogether twenty-six articles about the controversy between 11 April 1988 – when the newspaper broke the story – and 19 and 20 July 1988 when it published Mr Lindberg's report.

In my opinion the majority do not give sufficient weight to the fact that, under Article 6 § 2 of the Convention, the seal hunters had a right to be presumed innocent of any criminal offence until proved guilty. I fully accept the majority's view that *Bladet Tromsø* had a "public-watchdog" function in disseminating information derived from the Lindberg report about alleged irregularities and crimes committed during seal hunting – a highly controversial activity. However, the restrictions imposed on the newspaper's freedom of expression in the wake of the impugned statements related solely to allegations of crimes committed by identifiable individuals, allegations which were not proved true. Normally, a newspaper would in such a situation issue a disclaimer, which also would benefit the general readership who have a right to receive correct and complete information where possible. Since *Bladet Tromsø* did not issue a disclaimer, it ought to be recognised that the seal hunters had a legitimate need for recourse to defamation proceedings in order to protect their reputation and rights.

While it can hardly be argued that the identification of the persons concerned corresponded to any public interest, it would have been possible for *Bladet Tromsø* to protect the seal hunters' reputation simply by leaving out any reference to the *Harmoni*. Had information enabling readers to identify the alleged perpetrators been omitted from the relevant articles, this would, in my opinion, not really have affected the newspaper's exercise of its freedom of expression. To oblige a paper to take such measures in the circumstances could, to my mind, not be viewed as a measure capable of discouraging the participation of the press in debates over matters of legitimate public concern. In this respect it is indicative that no argument has been presented suggesting that there was a need to identify the alleged perpetrators.

On the other hand the majority seem to lay much emphasis on the official nature of Mr Lindberg's report, in finding that the newspaper could rely on this source without taking any steps to verify the veracity of the impugned accusations. In so doing, the majority do not, in my view, take necessary account of the particular relationship which existed between Mr Lindberg and *Bladet Tromsø.*

As a freelance journalist, Mr Lindberg had covered the *Harmoni*'s seal hunting expedition for *Bladet Tromsø* in 1987. *Bladet Tromsø* must have been aware of his background when it contacted him in April 1988 as the vessel returned to port in Tromsø. It cannot, in my opinion, be considered acceptable that an officially appointed inspector let himself be approached by the media at his duty station and be photographed and then proceed to give the media a first-hand report about his inspection findings – allegations of crimes against private individuals included – without even having made a prior report to his principal, the Ministry of Fisheries. Such lack of professionalism would be comparable to, for instance, a police officer reporting criminal charges directly to the media in order first to have a trial by the press. In this connection it is significant that Mr Lindberg made himself immediately available to *Bladet Tromsø* after his return from the expedition, whereas almost three months elapsed before he made his first report to the Ministry that had appointed him.

In the light of the above, *Bladet Tromsø* must have been aware at the relevant time not only of Mr Lindberg's apparent lack of professionalism, but also of a conflict of interests between his official role and his relationship with the newspaper. *Bladet Tromsø* exploited both these aspects.

To *Bladet Tromsø* the printing of Mr Lindberg's report was only one and a late phase in the newspaper's co-operation with Mr Lindberg. The publication of the report was not intended to break the story. This had already been done in the first of the series of twenty-six articles which *Bladet Tromsø* had published on the issue. The report seems rather to have been utilised as a kind of final and official imprimatur on *Bladet Tromsø*'s wider coverage of the seal hunting issue, in which context Mr Lindberg had been their main informant all along. In these circumstances, I do not find that the newspaper could, as a matter of good faith, pray in aid their argument that Mr Lindberg's report was an official document on which it was entitled to rely without further inquiry.

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

COURT (CHAMBER)

CASE OF CASADO COCA v. SPAIN

(Application no. 15450/89)

JUDGMENT

STRASBOURG

24 February 1994

In the case of Casado Coca v. Spain[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr Thór VILHJÁLMSSON,
Mr A. SPIELMANN,
Mr N. VALTICOS,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr J.M. MORENILLA,
Sir John FREELAND,
Mr F. BIGI,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 29 October 1993 and 26 January 1994,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 19 February 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 15450/89) against the Kingdom of Spain lodged with the Commission under Article 25 (art. 25) by a Spanish national, Mr Pablo Casado Coca, on 25 May 1989.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Spain recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and to present his own case. On 30 April 1993 the President

[*] Note by the Registrar: The case is numbered 8/1993/403/481. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

of the Court granted his request and also gave him leave to use the Spanish language during the proceedings (Rules 27 para. 3 and 30).

3. The Chamber to be constituted included ex officio Mr J.M. Morenilla, the elected judge of Spanish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 February 1993, in the presence of the Registrar, Mr R. Bernhardt, the Vice-President of the Court, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr A. Spielmann, Mr N. Valticos, Mrs E. Palm, Mr I. Foighel, Sir John Freeland and Mr F. Bigi (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Spanish Government ("the Government"), the applicant and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Registrar received the applicant's memorial on 29 April 1993 and the Government's memorial on 13 July. On 7 September the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

On 24 August and 15 September 1993 the Commission produced various documents which the Registrar had sought on instructions from the President, acting at the Government's request. In October the Government and the applicant likewise filed several documents.

5. In accordance with the decision of the President, who had also given the Agent of the Government leave to use the Spanish language at the hearing (Rule 27 para. 2), the hearing took place in public in the Human Rights Building, Strasbourg, on 26 October 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr J. BORREGO BORREGO, Head of the Human Rights Legal Service,
Ministry of Justice, *Agent*;

- for the Commission

Mr L.F. MARTÍNEZ, *Delegate*;

- the applicant,

Mr P. CASADO COCA, abogado.

The Court heard addresses by them and also replies to its questions. The Agent of the Government produced certain documents.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. Mr Pablo Casado Coca, a Spanish national, lives at Valldoreitx, near Barcelona, and practises as a lawyer (abogado) in Barcelona.

7. After setting up his practice in 1979, he regularly placed notices advertising it in the "miscellaneous advertisements" pages of several Barcelona newspapers and the Revista alemana de España ("German Journal of Spain"). He also wrote to various companies offering his services.

8. The Barcelona Bar Council (Junta de Govern del Col.legi d'Advocats) brought disciplinary proceedings against him four times on this account, and in 1981 and 1982 these led to the imposition of penalties, namely two reprimands and two warnings. The applicant lodged internal appeals against these penalties but did not apply to the competent courts.

A. The Bar Council proceedings

9. From October 1982 notices giving details of the applicant's legal practice were published in the newsletter of the Valldoreitx Residents' and Property Owners' Association. They took up approximately one-third of a page and gave the applicant's name, with the title "lawyer" (letrado), and his office address and telephone number.

10. The Barcelona Bar Council brought further disciplinary proceedings against Mr Casado Coca on this account. On 6 April 1983 he again received a written warning for disregarding the ban on professional advertising (Article 31 of Royal Decree no. 2090/82 of 24 July 1982, laying down the Statute of the Bar - see paragraph 22 below).

11. On 3 June 1983, following an internal appeal by the applicant, the National Bar Council (Consejo general de la Abogacía) upheld the penalty imposed. Referring to Article 31 of the Statute of the Bar as amplified in the relevant rules of the Barcelona Bar Council (see paragraphs 22, 24 and 27 below), it held that, given their nature, the notices in question went beyond the defined limits. It also pointed out that the applicant had recently incurred other disciplinary penalties for the same reason, and these had to be taken into consideration when ruling on the appeal.

B. Proceedings in the competent courts

12. Mr Casado Coca then applied to the Barcelona Audiencia Territorial. He argued in particular that the purpose of his notice was to inform the

public and that the warning infringed Article 20 of the Constitution, which guaranteed the right to freedom of expression. He also alleged that the principle that only a statute could define offences and lay down penalties had been contravened because the provisions which prohibited advertising by members of the Bar and attached disciplinary penalties were regulatory in nature.

The court dismissed his application on 11 May 1987, holding that the notice in question was a vehicle for advertising and not simply an announcement of information. It appeared beside similar announcements by a driving school and an old people's home and went beyond the limits laid down in the Bar's rules, which allowed notices only to announce the setting up of a practice or a change of address; this was not the applicant's case.

13. On 23 September 1988 the Supreme Court dismissed an appeal on points of law by Mr Casado Coca and at the same time refused to refer the case to the Constitutional Court on grounds of unconstitutionality.

It rejected the ground of appeal based on disregard of the principle that only a statute could define offences and lay down penalties. It did so by reference to the case-law of the Constitutional Court, according to which Article 36 of the Constitution (see paragraph 18 below) makes it permissible for statute law to provide that the rules governing professional associations and the practice of the professions may be laid down by means of regulations. It held that Article 20 did not protect advertising as a fundamental right, because advertising was not a matter of expressing thoughts, ideas or opinions but of announcing the existence of a profit-making business activity.

Moreover, the ban on professional advertising by members of the Bar had legitimate aims, namely to uphold free competition and to protect clients' interests. In such a case the right in question could be subject to restrictions.

C. Proceedings in the Constitutional Court

14. The applicant then lodged an appeal (recurso de amparo) with the Constitutional Court. He again maintained that it was contrary to the principle of statutory definition of offences and prescription of penalties enshrined in the Constitution to lay down administrative penalties by means of a decree, and that since the notice set out genuine information, i.e. his name, address and telephone number, the penalty imposed contravened Article 20 of the Constitution.

15. On 17 April 1989 the Constitutional Court declared the appeal inadmissible.

It held that the penalty complained of did not infringe the fundamental right to communicate genuine information. The aim of the advertising was connected with the "carrying on of a commercial, industrial, craft or

professional activity"; it consisted in "directly or indirectly promoting the conclusion of contracts relating to movable or immovable property, services, rights or obligations", whereas the purpose of the fundamental right defined in Article 20 para. 1 (d) was to enable citizens to "form their beliefs by weighing different or even diametrically opposed opinions and thus taking part in the discussion of public affairs". The ban on advertising professional services did not infringe the fundamental right in question.

II. RELEVANT DOMESTIC LAW

A. General provisions

1. The 1978 Constitution

16. Article 20 of the Constitution guarantees the right to freedom of expression:

> "1. The following rights shall be recognised and protected:
>
> (a) the right freely to express and disseminate thoughts, ideas and opinions by word of mouth, in writing or by any other means of reproduction;
>
> ...
>
> (d) the right to receive and communicate true information by any means of dissemination. The right to invoke the conscience clause and that of professional confidentiality shall be governed by statute.
>
> 2. The exercise of these rights may not be restricted by any prior censorship.
>
> ...
>
> 4. These freedoms shall be limited by respect for the rights secured in this Part, by the provisions of the implementing Acts and in particular by the right to honour and to a private life and the right to control use of one's likeness and to the protection of youth and children."

17. Article 25 enshrines the principle that only a statute can define offences and lay down penalties:

> "1. No one may be convicted or punished for any act or omission which at the time it was committed did not constitute, under the legislation in force at that time, a criminal offence, whether serious or petty, or an administrative offence.
>
> ..."

18. Article 36 deals with professional associations:

"The special features of the legal status of professional associations and the practice of professions requiring a university degree shall be laid down by statute. The internal structure and functioning of associations must be democratic."

According to the case-law of the Constitutional Court, this Article does not preclude a statutory provision that rules governing professional associations and the practice of the professions are to be laid down in administrative regulations (judgments of 20 February and 24 September 1984).

19. The Constitution states that any previous provisions contrary to it are repealed.

2. Law no. 2/1974 on professional associations

20. Law no. 2/1974, which was published in the Spanish Official Gazette of 15 February 1974, governs the functioning and organisation of professional associations. Section 1 provides:

"Professional associations are public-law corporations, protected by law and recognised by the State, enjoying legal personality and having full capacity to act in pursuit of their objectives."

21. Section 5 (i) makes the professional associations responsible for regulating their members' professional activities, for ensuring that professional ethics and dignity are upheld and that the rights of private individuals are respected, and for exercising disciplinary powers in professional and internal matters. To these ends, the relevant national councils adopt statutes, which are approved by the Government. These statutes lay down the rights and duties of the members of each profession and the disciplinary rules applicable to them.

B. Special provisions governing Bars

1. The Statute of the Spanish Bar

(a) Regime applicable at the material time

22. Royal Decree 2090/82 laying down the Statute of the Spanish Bar (Estatuto general de la Abogacía Española) was published in the Spanish Official Gazette on 2 September 1982.

Article 31

"Members of the Bar are not allowed to

(a) announce or circulate information about their services directly or through advertising media, ... or express opinions free of charge in professional journals or other publications or media without permission from the Bar Council;

..."

Articles 107-112 govern the disciplinary powers of Bar councils. An appeal against penalties lies to the National Bar Council (Article 96 para. 1) and subsequently to the competent courts (Article 99).

(b) Proposed new regime

23. At sessions held on 5-6 March, 21-22 May and 25 June 1993 the Assembly of the Chairmen of the Spanish Bars adopted the draft of a new national Statute, which has been submitted to the Government for approval. Article 31 of the draft Statute provides:

"1. Members of the Bar may advertise their services and practices in accordance with the legislation in force, this Statute and other rules and decisions of the Bar.

2. Direct or indirect advertising of individual members of the Bar and their services and participation by the former in legal advice programmes in the media shall be subject to certain conditions. Members of the Bar must

(a) comply with the special provisions applicable to practice at the Bar as well as with the current legislation on advertising;

(b) show regard for truth, rigour and exactness without detracting from other members' advertisements by imitating them or inviting confusion with them, without lapsing into self-praise and comparisons with or denigration of their colleagues and without citing their own professional successes, their clientele or the financial terms on which they provide services; and

(c) request the relevant Bar council's prior authorisation for the proposed advertisement, specifying its content and the way in which it will be published.

The Bar council may grant authorisation, make it subject to certain amendments or refuse it. In all cases, it shall give a reasoned decision that can be challenged in accordance with the procedure laid down in Articles 130 et seq. of this Statute and shall be communicated to the member of the Bar making the request within not more than thirty days of that request, failing which the council shall be deemed to have given its tacit consent.

3. Notwithstanding the above, members of the Bar may, without seeking prior authorisation,

(a) use a letterhead stating their name, profession and university degrees, or those of their partners, and the name, telephone number and other particulars of their chambers, in the form customarily used by members of the Bar;

(b) affix to the outside of the building in which they have their chambers or their private residence and to the door of their chambers or nearby, a sign or plate announcing their practice, of the size and kind usual in the area of the Bar;

(c) have their status as a member of the Bar included in telephone, fax, telex and other directories;

(d) announce by letter or in the press any changes of address, telephone number or other particulars of their chambers, likewise in the form customarily used by members of the Bar to which they belong; and

(e) take part in conferences and symposia, mentioning their membership of the Bar, publish articles in the specialist and non-specialist press and make statements on radio or television.

4. Members of the Bar who continuously or occasionally provide services to individuals or companies must require them to refrain from any advertising that does not comply with the provisions of this Statute.

5. The Bar council shall rule on allegedly doubtful or unforeseen cases and violations of provisions governing advertising or any misuse of rights derived from the rules in this Statute. It may expressly prohibit practices it deems contrary to the spirit of this Statute and punish any breaches of such prohibitions."

2. The rules specific to the Barcelona Bar

(a) Regime applicable at the material time

(i) The 1947 Statute of the Barcelona Bar

24. At the time when the penalty was imposed on the applicant, the 1947 Statute of the Barcelona Bar (Estatutos del Colegio de Abogados de Barcelona) was still in force. Article 18 quite simply prohibited members of the Bar from advertising, in the following terms:

Article 18

"Members of the Bar are forbidden to publish notices relating to the practice of their profession as a means of advertising or propaganda."

(ii) The decision of 24 February 1981

25. Being of the view that the ban on advertising was an important rule of professional conduct, the Barcelona Bar Council adopted a decision on 24 February 1981 on "Members of the Bar and advertising" (Acord sobre "Els advocats i la publicitat"), which provided, inter alia:

"1. General principle

It is forbidden for members of the Bar to undertake any direct or indirect personal advertising intended to attract clients.

...

2. Authorised notices

Members of the Bar may publish small notices in local daily newspapers in order to announce the setting up of their practices or changes in membership or of address, telephone number or telex number.

The size and content of notices must be approved in advance by the Bar Council. They may not appear more than three times during a maximum period of two months.

...

6. Professional directories

Members of the Bar may publish their names, addresses, telephone numbers and telex numbers, with a brief indication of the type of professional services offered, in professional directories, provided that all members of the Bar have the same access to these.

..."

(b) Subsequent regime

(i) The 1985 Statute of the Barcelona Bar

26. A new Statute of the Barcelona Bar (Estatuts del Il.lustre Col.legi d'Advocats de Barcelona) was published in the Catalonia Official Gazette of 5 June 1985.

Article 19 provides:

"1. It is forbidden for members of the Bar to undertake any personal advertising intended to secure clients, whether directly or indirectly.

2. It is also forbidden for members of the Bar to consent either expressly or tacitly to any form of advertising offered to them.

3. The foregoing prohibition shall cover both advertising by word of mouth and written or graphic advertising in any form and of any kind. It shall also apply to advertising by means of radio or television broadcasts.

...

5. The Bar Council may adopt rules to deal in greater detail with the matters covered in this Article."

Failure to comply with the provisions of the Statute constitutes serious or minor misconduct, depending on the circumstances, and may lead to penalties being imposed (Articles 94 to 96 of the Statute).

(ii) The 1985 decision of the Barcelona Bar Council

27. On 5 February 1985 the Bar Council amended the rules laid down in its 1981 decision (see paragraph 25 above) by forbidding members of the Bar to send press releases involving personal advertising to the media.

(iii) The rules adopted by the Council of the Catalonia Bars in 1991

28. On 4 July 1991 the Council of the Catalonia Bars (Consell dels Col.legis d'Advocats de Catalunya) adopted new rules on advertising. These superseded the earlier rules included in the statutes and decisions of the Catalonia Bars (Rule 6).

The preamble states:

"Advertising by members of the Bar is traditionally considered to be more or less incompatible with professional ethics. However, it is obvious that advertising, provided it does not go beyond certain limits, does not offend the vital principles of the profession's code of ethics, namely probity and independence. Today information is one of the foundations of democratic countries and a right for users of a service.

..."

Rules 2 and 3 make a distinction in this field:

"Rule 2

Authorised advertising

Members of the Bar may

...

(b) publish documents, circulars or articles on legal subjects, even in publications not specialising in law, bearing their signature and indicating the author's status as a member of the Bar;

(c) express their personal opinions in the media on subjects of public interest or on cases in which they are involved professionally, taking care at all times to maintain professional secrecy;

(d) publish brochures giving details of their practices, the members of the Bar who work there and the types of case handled. This publicity material must be approved in advance by the Bar Council. They may also publish information circulars on legal topics. The brochures and circulars referred to in this paragraph may be distributed only to clients and not to third parties;

... "

"Rule 3

Unauthorised advertising

Members of the Bar may not advertise otherwise than as allowed under the terms of the preceding Rule. In particular, they may not

(a) advertise their services by making known their professional successes, giving the names of their clients or comparing themselves with other members of the Bar or by allowing others so to act without objecting;

(b) send brochures, circulars or other documents or offer their services to persons other than clients;

...

(e) advertise in the press or on radio or television except as allowed under Rule 2."

PROCEEDINGS BEFORE THE COMMISSION

29. Mr Casado Coca applied to the Commission on 25 May 1989. He alleged several breaches of the Convention: (a) Article 7 (art. 7), in that the disciplinary rules of the Spanish Bars were laid down by decree and not by a Law; (b) Article 10 (art. 10), because the Barcelona Bar Council had given him a warning for publishing a notice in a local newsletter; (c) Article 4 para. 2 (art. 4-2), because members of the Spanish Bar could not choose to specialise; (d) Article 14 taken together with Article 10 (art. 14+10), in that the members of other professions had more scope to advertise.

30. On 2 December 1991 the Commission declared the application (no. 15450/89) admissible in respect of the complaint relating to Article 10 (art. 10) but inadmissible as to the remainder. In its report of 1 December 1992 (made under Article 31) (art. 31), the Commission expressed the opinion by nine votes to nine, with the President's casting vote, that there had been a breach of Article 10 (art. 10). The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment[*].

GOVERNMENT'S FINAL SUBMISSIONS TO THE COURT

31. In their memorial of 13 July 1993 the Government requested the Court to hold

"1. that this case does not come within the scope of Article 10 (art. 10); and

2. that if Article 10 (art. 10) does apply in this case, the Kingdom of Spain has not failed to fulfil its obligations under the Convention".

[*] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 285-A of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

32. Mr Casado Coca complained of the disciplinary sanction imposed on him by the Barcelona Bar Council on 6 April 1983 for having published a notice about his practice in several issues of a local newsletter. He relied on Article 10 (art. 10) of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Applicability of Article 10 (art. 10)

33. The Government disputed the applicability of Article 10 (art. 10). They contended that the applicant's notices did not in any way constitute information of a commercial nature but were simply advertising. He had paid for them with the sole aim of securing more clients. Advertising as such did not come within the ambit of freedom of expression; an advertisement did not serve the public interest but the private interests of the individuals concerned. Applying the guarantees of Article 10 (art. 10) to advertising would be tantamount to altering the scope of that Article (art. 10).

34. According to the applicant, the information given in his notices had indeed been intended for the general public; assuming it had succeeded in attracting an influx of clients, this would have been because the public had found it useful and necessary. Advertising was, moreover, a general concept comprising several categories according to the political or commercial content of the information or ideas in question. Furthermore, the protection of human rights did not necessarily have to further the public interest; it could serve private interests.

35. The Court would first point out that Article 10 (art. 10) guarantees freedom of expression to "everyone". No distinction is made in it according to whether the type of aim pursued is profit-making or not (see, mutatis mutandis, the Autronic AG v. Switzerland judgment of 22 May 1990, Series A no. 178, p. 23, para. 47) and a difference in treatment in this sphere might fall foul of Article 14 (art. 14).

In its Barthold v. Germany judgment of 25 March 1985 (Series A no. 90, pp. 20-21, para. 42) the Court left open the question whether commercial advertising as such came within the scope of the guarantees under Article 10 (art. 10), but its later case-law provides guidance on this matter. Article 10 (art. 10) does not apply solely to certain types of information or ideas or forms of expression (see the markt intern Verlag GmbH and Klaus Beermann v. Germany judgment of 20 November 1989, Series A no. 165, p. 17, para. 26), in particular those of a political nature; it also encompasses artistic expression (see the Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133, p. 19, para. 27), information of a commercial nature (see the markt intern Verlag GmbH and Klaus Beermann judgment previously cited, ibid.) - as the Commission rightly pointed out - and even light music and commercials transmitted by cable (see the Groppera Radio AG and Others v. Switzerland judgment of 28 March 1990, Series A no. 173, p. 22, paras. 54-55).

36. In the instant case the impugned notices merely gave the applicant's name, profession, address and telephone number. They were clearly published with the aim of advertising, but they provided persons requiring legal assistance with information that was of definite use and likely to facilitate their access to justice.

37. Article 10 (art. 10) is therefore applicable.

B. Compliance with Article 10 (art. 10)

1. Whether there was an interference by a "public authority"

38. The Government submitted that if there was an interference, it did not come from a "public authority" within the meaning of Article 10 para. 1 (art. 10-1). The Barcelona Bar Council's written warning (see paragraph 10 above) could be regarded as an internal sanction imposed on Mr Casado Coca by his peers. The Spanish State had merely ratified, in the form of a royal decree, the statute drawn up by the members of the Bar themselves, under Article 31 of which professional advertising was banned (see paragraph 22 above).

39. Like the applicant and the Commission, the Court notes, however, that section 1 of the 1974 Law on professional associations states that they are public-law corporations (see paragraph 20 above). In the case of the Bars, this status is further buttressed by their purpose of serving the public

interest through the furtherance of free, adequate legal assistance combined with public supervision of the practice of the profession and of compliance with professional ethics (see, in the case of a Bar, the Van der Mussele v. Belgium judgment of 23 November 1983, Series A no. 70, p. 15, para. 29 in fine, and the H. v. Belgium judgment of 30 November 1987, Series A no. 127-B, pp. 27-28, paras. 24-29; see also, mutatis mutandis, in the case of a medical association, the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, pp. 26-27, para. 64). Furthermore, the impugned decision was adopted in accordance with the provisions applicable to members of the Barcelona Bar and an appeal against it lay to the competent courts (see paragraph 22 above). These courts and the Constitutional Court, all of which are State institutions, upheld the penalty (see paragraphs 12, 13 and 15 above). That being so, it is reasonable to hold that there was an interference by a "public authority" with Mr Casado Coca’s freedom to impart information.

2. Whether the interference was justified

40. Such an interference contravenes Article 10 (art. 10) unless it was "prescribed by law", had an aim that was legitimate under Article 10 para. 2 (art. 10-2) and was "necessary in a democratic society" for the aforementioned aim (see, in particular, the Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239, p. 25, para. 56).

(a) "Prescribed by law"

41. The applicant contended that the penalty complained of lacked a valid basis in law. The 1974 Law had become null and void after the 1978 Constitution came into force, under which any earlier provisions contrary to it were repealed (see paragraph 19 above). Since the Statute of the Spanish Bar had been adopted pursuant to that Law, it had been affected in the same way.

42. It was common ground between the Government and the Commission that the disciplinary measure was based on the ban on advertising imposed on members of the Bar by Article 31 of the Statute of the Spanish Bar and by the Statute of the Barcelona Bar and its council’s decisions (see paragraphs 22, 24 and 25 above).

43. It is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, inter alia, the Thorgeir Thorgeirson v. Iceland judgment previously cited, Series A no. 239, p. 25, para. 58). In the instant case, in rejecting the ground of appeal based on violation of the principle that only a statute can define offences and lay down penalties, the Supreme Court took as its authority the Constitutional Court’s case-law on the subject (see paragraphs 13 and 18 above). In the light of the wording of the provisions in question (see, mutatis mutandis, the Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 21, para. 37) and the state

of its own case-law at the time, the Court finds this interpretation to be reasonable and likewise the Constitutional Court's interpretation of Article 20 of the Constitution in its decision of 17 April 1989 (see paragraphs 15 and 16 above). In short, the interference was "prescribed by law".

(b) Legitimate aim

44. The Government and the Commission considered on the whole that the main aim of the ban on professional advertising by members of the Bar was the "protection of the rights of others", in particular the rights of the public and other members of the Bar. The Government also pointed out that advertising had always been found to be incompatible with the dignity of the profession, the respect due to fellow members of the Bar and the interests of the public.

45. In the applicant's view, the Commission's opinion could only be held in cases where the advertising was comparative or untruthful, but not where a notice simply gave information about a practice. The impugned ban made it possible to perpetuate discrimination between members of the Bar in independent practice and those practising as employees, civil servants or university teachers. For the former, advertising was the only possible means of reaching potential clients, whereas the positions held by the latter afforded them greater scope for making themselves known. Furthermore, the ban did not apply to the big legal consulting firms active on an international scale or to insurance companies which also offered legal assistance. Far from being a measure protecting the independent practitioner, the ban was a way of safeguarding the interests of certain privileged members of the profession.

46. The Court does not have any reason to doubt that the Bar rules complained of were designed to protect the interests of the public while ensuring respect for members of the Bar. In this connection, the special nature of the profession practised by members of the Bar must be considered; in their capacity as officers of the court they benefit from an exclusive right of audience and immunity from legal process in respect of their oral presentation of cases in court, but their conduct must be discreet, honest and dignified. The restrictions on advertising were traditionally justified by reference to these special features. In the case of the decision in issue, there is nothing to show that the Bar Council's intention at the time did not correspond to the acknowledged aim of the legislation. Furthermore, the factors alluded to by Mr Casado Coca relate primarily to the way in which the legislation in question was applied and are therefore relevant to assessing the need for the disciplinary measure.

(c) "Necessary in a democratic society"

47. The applicant contended that the penalty complained of was not "necessary in a democratic society", because it constituted a

disproportionate interference with his right to impart commercial information, a right which members of the Bar, like other citizens, were guaranteed under Article 10 (art. 10). He added that such a restriction was permissible only if it reflected a freely and democratically accepted willingness to exercise self-restraint; that was not so in the instant case.

48. The Government considered that the impugned rules of the Spanish Bar possessed those characteristics. They reflected the conception that members of the Bar themselves had of their profession as officers of the court, which excluded practising the profession on a purely commercial basis. Furthermore, in 1982 they corresponded to the common general practice of European Bars, even if a degree of relaxation of the rules in this area has been noted since.

In any case, the penalty imposed on Mr Casado Coca was almost a token one in nature. It in fact sanctioned repeated advertising by Mr Casado Coca, who had already received warnings and reprimands in respect of the notices he had placed in the "miscellaneous advertisements" sections of several newspapers and the circulars he had sent to companies (see paragraphs 7 and 8 above). That being so and where commercial speech was concerned, the Government claimed a considerable margin of appreciation for the relevant authorities.

49. In the Commission’s view, banning practically all advertising by members of the Bar appeared to be excessive and scarcely compatible with the right to freedom of expression, which includes the freedom to impart information and its corollary, the right to receive it. The applicant’s notice set out particulars that were wholly neutral (his name, occupation and business address and telephone number) and did not contain information that was untrue or offensive to fellow members of the Bar. He was therefore entitled to impart that information, just as his potential clients were entitled to receive it.

50. Under the Court’s case-law, the States parties to the Convention have a certain margin of appreciation in assessing the necessity of an interference, but this margin is subject to European supervision as regards both the relevant rules and the decisions applying them (see, inter alia, the markt intern Verlag GmbH and Klaus Beermann judgment previously cited, Series A no. 165, p. 20, para. 33). Such a margin of appreciation is particularly essential in the complex and fluctuating area of unfair competition (ibid.). The same applies to advertising. In the instant case, the Court’s task is therefore confined to ascertaining whether the measures taken at national level are justifiable in principle and proportionate (see, inter alia, ibid. and the Barthold judgment previously cited, Series A no. 90, p. 25, para. 55).

51. For the citizen, advertising is a means of discovering the characteristics of services and goods offered to him. Nevertheless, it may sometimes be restricted, especially to prevent unfair competition and

untruthful or misleading advertising. In some contexts, the publication of even objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions. Any such restrictions must, however, be closely scrutinised by the Court, which must weigh the requirements of those particular features against the advertising in question; to this end, the Court must look at the impugned penalty in the light of the case as a whole (see, mutatis mutandis, the markt intern Verlag GmbH and Klaus Beermann judgment previously cited, Series A no. 165, p. 20, para. 34).

52. In the present case, Mr Casado Coca received a written warning from the Barcelona Bar Council on 6 April 1983 for having contravened the ban on professional advertising (see paragraphs 10 and 22 above). In confirming the penalty, the National Bar Council held that, given their nature, the notices in question went beyond the limits permitted by the relevant rules of the Barcelona Bar; the Barcelona Audiencia Territorial gave the same ground for its judgment (see paragraphs 11, 12, 24 and 25 above). The Court notes that those rules allowed advertising in certain cases - namely when a practice was being set up or when there was a change in its membership, address or telephone number - and under certain conditions (see paragraph 25 above). The ban was therefore not an absolute one.

53. The applicant and the Commission argued that commercial undertakings such as insurance companies are not subject to restrictions on advertising their legal consulting services.

54. In the Court's opinion, however, they cannot be compared to members of the Bar in independent practice, whose special status gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar and also the monitoring and supervisory powers vested in Bar councils.

Nevertheless, the rules governing the profession, particularly in the sphere of advertising, vary from one country to another according to cultural tradition. Moreover, in most of the States parties to the Convention, including Spain, there has for some time been a tendency to relax the rules as a result of the changes in their respective societies and in particular the growing role of the media in them. The Government cited the examples of the Code of Conduct for Lawyers in the European Community (Strasbourg, 28 October 1988) and the conclusions of the Conference of the European Bars (Cracow, 24 May 1991); while upholding the principle of banning advertising, these documents authorise members of the Bar to express their views to the media, to make themselves known and to take part in public debate. In accordance with these guidelines, the new rules on advertising issued by the Council of the Catalonia Bars (4 July 1991) allow the publication of circulars or articles, including in the press (see paragraph 28

above). More recently, the Government have begun to study the draft of the new Statute of the Spanish Bar (see paragraph 23 above), which permits somewhat greater freedom in this sphere.

55. The wide range of regulations and the different rates of change in the Council of Europe's member States indicate the complexity of the issue. Because of their direct, continuous contact with their members, the Bar authorities and the country's courts are in a better position than an international court to determine how, at a given time, the right balance can be struck between the various interests involved, namely the requirements of the proper administration of justice, the dignity of the profession, the right of everyone to receive information about legal assistance and affording members of the Bar the possibility of advertising their practices.

56. In view of the above, the Court holds that at the material time - 1982-83 - the relevant authorities' reaction could not be considered disproportionate to the aim pursued.

57. In conclusion, no breach of Article 10 (art. 10) has been made out.

FOR THESE REASONS, THE COURT

1. Holds unanimously that Article 10 (art. 10) applied in the instant case.

2. Holds by seven votes to two that there has not been a breach of it.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 February 1994.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the joint dissenting opinion of Mr Thór Vilhjálmsson and Mrs Palm is annexed to this judgment.

R.R.
M.-A. E.

JOINT DISSENTING OPINION OF JUDGES THÓR VILHJÁLMSSON AND PALM

We agree with the majority of the Chamber that Article 10 (art. 10) of the Convention is applicable in this case and that there has been an interference, which was prescribed by law and had a legitimate aim.

However, with regard to the necessity, we agree with what is said in paragraphs 54-65 of the Commission's report. Accordingly we find that there has been a violation of Article 10 (art. 10) of the Convention.

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

COURT (CHAMBER)

CASE OF CASTELLS v. SPAIN

(Application no. 11798/85)

JUDGMENT

STRASBOURG

23 April 1992

In the case of Castells v. Spain[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[**] and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr Thór VILJHÁLMSSON,
Mr R. MACDONALD,
Mr J. DE MEYER,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J.A. CARRILLO SALCEDO, *ad hoc Judge*,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 29 November 1991 and 26 March 1992,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Kingdom of Spain ("the Government") on 8 and 21 March 1991 respectively, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11798/85) against Spain lodged with the Commission under Article 25 (art. 25) by a Spanish national, Mr Miguel Castells, on 17 September 1985.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Spain recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article

[*] The case is numbered 2/1991/254/325. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

10 (art. 10) of the Convention, taken alone or in conjunction with Article 14 (art. 14+10).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and sought leave, as a lawyer, to present his own case, assisted by two Spanish fellow lawyers (Rule 30 para. 1).

The President granted this request on 15 April 1991 and authorised the applicant to use the Spanish language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr J.M. Morenilla, the elected judge of Spanish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 22 March 1991, Mr F. Matscher, having been duly delegated by the President, drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr R. Macdonald, Mr J. De Meyer, Mr S.K. Martens, Mrs E. Palm, Mr R. Pekkanen and Mr A.N. Loizou (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

By a letter to the President of 15 March, Mr Morenilla had declared his intention of withdrawing from the case pursuant to Rule 24 para. 2 because he had represented the Spanish Government before the Commission as Agent. On 26 April the Government notified the Registrar that Mr Juan Antonio Carrillo Salcedo, professor at Seville University, had been appointed ad hoc judge (Article 43 of the Convention and Rule 23) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicant on the organisation of the procedure (Rules 37 para. 1 and 38). Pursuant to the President's orders and instructions, the Registrar received the memorials of the Government and the applicant on 29 July and 29 August 1991 respectively. On 25 September the Secretary to the Commission produced various documents at the Registrar's request, then on 5 November submitted the Delegate's observations.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 27 November 1991. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr J. BORREGO BORREGO, Head
of the Legal Department for Human Rights, Ministry of Justice, *Agent*,
Mr J.M. VILLAR URIBARRI, Ministry of Justice, *Counsel*;

- for the Commission

Mr L. LOUCAIDES, *Delegate*;

- for the applicant

Mr M. CASTELLS, abogado, applicant,

Mr J.M. MONTERO, abogado,
Mr E. VILLA, abogado, *Counsel*,
Mr J. VERVAELE, Professor,
Mr D. KORFF, assistants.

The Court heard addresses by Mr Borrego Borrego for the Government, by Mr Loucaides for the Commission and, for the applicant, by Mr Castells himself, by Mr Montero, by Mr Villa and by Mr Vervaele, as well as their replies to its questions and to the question of a judge.

AS TO THE FACTS

6. Mr Miguel Castells, a Spanish national, resides at San Sebastián (Guipúzcoa), where he is a lawyer. At the material time he was a senator elected on the list of Herri Batasuna, a political grouping supporting independence for the Basque Country.

A. The particular circumstances of the case

1. The disputed article

7. In the week of 4 to 11 June 1979, the weekly magazine "Punto y Hora de Euskalherria" published an article entitled Insultante Impunidad (Outrageous Impunity) and signed by the applicant. The article read as follows:

> "In a few days, at the San Fermín holiday, a year will have gone by since the murders of Germán Rodríguez atPamplona (Iruna) and of Joseba Barandiarán at San Sebastián(Donosti). The authorities have not identified the perpetrators of these crimes. They have not even acknowledged to which organisations they belong. Nor have they identified the persons who killed, between 12 and15 May 1977, Gregorio Marichalar Ayestarán, aged 63, and Rafael Gómez Jaúregui, aged 78, at Rentería, José Luis Canoat Irun and Manuel Fuentes Mesa at Ortuella; on 14 May,again in 1977, José Luis Aristizábal at San Sebastián, and,at around the same date, in the same town, IsidroSusperregui Aldekoa, over 70 years old; at the beginning ofJune, still in 1977, Javier Núñez Fernández at Bilbao;Francisco Aznar Clemente, Pedro María Martínez Ocio,Romualdo Barroso Chaparro, Juan José Castillo and Bienvenido Pereda Moral, on 3 March 1976 at Gasteiz, and,in the same year, on 7 March at Basauri, Vicente AntónFerrero, on 9 May at Montejurra, Aniano Jiménez and RicardoPellejero, in June Alberto Romero Soliño at Eibar, in September Jesús María Zabala at Fuenterrabía, in November Santiago Navas and José Javier Nuin at Santesteban and on10 July Normi Menchaka at Santurce; José Emilio Fernández Pérez, 16 years old, and Felipe Carro Flores, 15 years old, on 24 July and 25 July 1978, one at Apatomonasterio and the other at Sestao. I only mention the dead ones and the list is far from being exhaustive. These are only examples. Not one, I repeat, not one of the murders, of the interminable list of fascist murders carried out in the Basque Country (Euzkadi), has shown the slightest sign of being cleared up by the authorities. Will the individuals

who assassinated Emilia Larrea, Roberto Aramburu, JosemariIturrioz, Agurtzane Arregui, Argala, José Ramon Ansa and Gladys del Estal, the most recent murders, be identified? And when I say most recent I should specify the date -9 June 1979 - because tomorrow there will be others.

And there remain the hundreds of cases, for there are hundreds of them, in which people burst in, pistols at the ready, to the bars of the villages and the suburbs (Amorebieta, Durango, Eguía, Loyola, etc.) or simply run through the streets wounding and beating up everyone they come across; the bombs left in popular meeting places(Punto y Hora, Bordatxo, Alay Bar, Santi Bar, Askatasunaetc.) or in cars, attacks whose survivors suffer the consequences for life etc.

The perpetrators of these crimes act, continue to work and remain in posts of responsibility, with total impunity. No warrant has been issued for their arrest. The description of the persons who carried out these acts has been neither drawn up or published; nor have there been any lists of suspects in the newspapers, or photokit pictures, and, far less, rewards offered to the public, or arrests, or inspections or searches of their homes. The public's help has not been sought through the media, as has happened in other cases. Indeed it is significant that such help is not even accepted in connection with these crimes. No link has been established, there have been no official communiqués full of explicit accusations and reprobation inthe press, as in other cases.

The right-wing, who are in power, have all the means at their disposal (police, courts and prisons) to seek out and punish the perpetrators of so many crimes. But don't worry, the right will not seek itself out.

Extreme right-wing organisations? Before Franco's death no one in the Basque Country thought that it was possible to secure the arrest or conviction for "unlawful association" of a single member, and far less one of the leaders, of the "Triple A", of the "Batallón Vasco-Español", of the "Batallón Guezalaga", of the ATE, of the Adolf Hitler commando, of the Francisco Franco commando, ofthe Mussolini commando, of the New Order, of Omega, of the"Movimiento Social Español", of "Acción Nacional Española"or of the "Guerrilleros de Cristo Rey". No one can believe it now either.

"ETA" members held as prisoners? Hundreds of them havebeen to prison. Persons suspected of being members of "ETA"? Thousands of them have been detained in police stations. Sympathisers? One could go on with the list forever. Yet not a single leader or member of the Triple A has been bothered.

Those responsible for public order and criminal prosecutions are the same today as they were before. And here in the Basque Country nothing has changed as far as impunity and questions of liability are concerned.

The period when Ibanez Freire was Director General of the Civil Guard, and Fraga was Minister of the Interior, wasalso a time when there was a great increase in so-called extreme right-wing activities in the Basque Country. The same phenomenon, the same coincidences are recurring now.

The increase in the activities of groups free to act asthey will is generally accompanied in the Basque Country byan increase in the strength of the security forces.

These commandos, because we have to call them something, seem totally at home in the Basque Country, in the middle of a community completely hostile to them. This is too inexplicable for there not to be an obvious explanation. They have precise information to carry out their attacks, often more detailed than that available to local people.

They have substantial files which are kept up to date. They have a considerable supply of weapons and of money. They have unlimited material and resources and operate with complete impunity. Considering the timing of their operations and the conditions in which they are carried out it can be said that they are guaranteed legal immunity in advance. Forbidding people to see this is futile.

This is important to the people. In the Basque Country it is more important than all the provisional schemes for self-government, democratic consensus and other meaningless or abstract nonsense, because it is a visible, tangible reality which confronts people on a daily basis.

Frankly, I do not believe that the fascist associations which I cited earlier have any independent existence, outside the State apparatus. In other words I do not believe that they actually exist. Despite all these different badges, it is always the same people.

Behind these acts there can only be the Government, the party of the Government and their personnel. We know that they are increasingly going to use as a political instrument the ruthless hunting down of Basque dissidents and their physical elimination. If they want to be so lacking in a sense of political vision that's their problem! But for the sake of the next victim from our people, those responsible must be identified right away with maximum publicity."

2. The criminal proceedings against the applicant

(a) The judicial investigation

8. On 3 July 1979 the prosecuting authorities instituted criminal proceedings against Mr Castells for insulting the Government (Article 161 of the Criminal Code; see paragraph 20 below). The court with competence for the investigation procedure, the Supreme Court, requested the Senate to withdraw the applicant's parliamentary immunity, which it did by a majority on 27 May 1981.

9. On 7 July 1981 the Supreme Court charged the applicant with having proffered serious insults against the Government and civil servants (Articles 161 para. 1 and 242 of the Criminal Code). It further ordered his detention on remand, taking into account the sentences laid down for the offences in question (six to twelve years' imprisonment; see paragraph 20 below), but allowed his release on bail in view of his status as a senator and the "lack of alarm" (falta de alarma) caused by the alleged offences.

On 28 September 1981 the court varied its previous decision. It allowed the applicant's provisional release subject solely to the obligation to report to the judge at regular intervals. In addition to the circumstances already cited, it stressed that, during his questioning, Mr Castells had shown a co-

operative attitude and had declared that his article had been intended merely as a political denunciation and not to insult or threaten the Government or its members.

10. On 12 December 1981 the applicant's defence counsel challenged four of the five members of the relevant division of the Supreme Court. It was submitted that their political convictions and the posts which they had held under the previous political regime disqualified them from hearing a case concerning the freedom of opinion of an individual who, like the applicant, had been a notorious opponent of the regime in question. They relied on Article 54 para. 9 of the Code of Criminal Procedure.

After several interlocutory applications, including one which resulted in a decision of the Constitutional Court on 12 July 1982 enjoining the Supreme Court to find the challenge admissible, the latter court, sitting in plenary session, dismissed the challenge on its merits on 11 January 1983. The Supreme Court took the view that although the judges had indeed sat in the Criminal Division of the Supreme Court under the previous political regime and one of them had, from 1966 to 1968, been the presiding judge in the Public Order Court, they had at that time merely applied the legislation in force.

On 4 May 1983 the Constitutional Court dismissed an appeal (amparo) which Mr Castells had lodged alleging a violation of Article 24 para. 2 of the Constitution (right to an impartial tribunal). It found that the fact that the judges in question might have political convictions differing from those of the applicant could not be regarded as being of direct or indirect relevance (interés directo o indirecto) to the solution of the dispute within the meaning of Article 54 para. 9 of the Code of Criminal Procedure.

11. In the meantime the investigation of the case had progressed. On 3 February 1982 the public prosecutor had concluded that the facts constituted an offence of proffering serious insults against the Government and demanded a prison sentence of six years and a day.

In their memorial (conclusiones provisionales) of 2 April 1982, the defence lawyers contended that the disputed article contained accurate information and did not express the accused's personal opinion, but the views of the general public. They offered to adduce evidence to establish the truth of the information. In particular they suggested that the competent authorities should produce reports on any police inquiries, detentions, prosecutions or other measures undertaken against the members of the extreme right-wing groups responsible for the attacks denounced in the article; as the facts reported were common knowledge they could not be said to be insulting. In addition, the defence lawyers requested that evidence be taken from fifty-two witnesses, including members of the Belgian, Italian, French, English, Irish and Danish parliaments and of the European Parliament, on the matter of parliamentary practice regarding the freedom of political criticism; they argued that the accused had acted in his capacity as

an elected representative and in conformity with the obligations attaching thereto.

12. By decision (Auto) of 19 May 1982, the Supreme Court refused to admit the majority of the evidence put forward by the defence, on the ground that it was intended to show the truth of the information disseminated.

There were divergences in academic opinion and even in its own case-law as to whether the defence of truth (exceptio veritatis) could be pleaded in respect of insults directed at the State institutions, but the reforms of the Criminal Code then under way clarified the question: those institutions fell outside the scope of that defence and Article 461 of the Criminal Code (see paragraph 21 below) authorised it only where civil servants were involved. The evidence which the defence proposed to adduce was not therefore admissible in the proceedings pending, without prejudice to the possibility available to the accused of instituting criminal proceedings as he considered fit.

Mr Castells filed an appeal (recurso de súplica), but on 16 June 1982 the Supreme Court confirmed its decision on the ground that the accuracy of the information was not decisive for a charge of insulting the Government.

The applicant then filed an appeal (amparo) in the Constitutional Court, alleging that the rights of the defence had been disregarded. That court dismissed it on 10 November 1982, holding that the question could be resolved only in the light of the proceedings in their entirety and after the decision of the trial court.

(b) The trial

13. The Criminal Division of the Supreme Court held a hearing on 27 October 1983 and gave judgment on 31 October. It sentenced the applicant to a term of imprisonment of one year and a day for proffering insults of a less serious kind (menos graves) against the Government; as an accessory penalty he was also disqualified for the same period from holding any public office and exercising a profession and ordered to pay costs.

It found in the first place, with regard to the objective element of the offence, that the expressions used in the article were sufficiently strong to damage the reputation of the injured parties and to reveal an attitude of contempt. As far as the subjective element was concerned, it considered that, as a senator, Mr Castells had available to him very obvious means of expression, provided for in the Assembly's rules of procedure, through which to carry out his duties of monitoring and criticising the Government's activities; as he had failed to use these means, he could not claim to have acted on behalf of his electorate. The defence's second argument, based on the aim of political criticism (animus criticandi), did not remove its defamatory purpose (animus injuriandi), but reduced the importance thereof. In the case under examination, the insults proffered with the aim of political

criticism had exceeded the permissible limits of such criticism and attacked the Government's honour. It was therefore preferable to apply Article 162 of the Criminal Code, which provided for the offence of proffering less serious insults against the Government, rather than Article 161. On the question of the constitutional right to freedom of expression (Article 20 of the Constitution; see paragraph 19 below) there were limits to that right, in particular in relation to the right to honour and to a private life and the right to control use of one's likeness. Furthermore, the fact that the insult appeared in a press article suggested that it was the fruit of a more complicated intellectual process and a degree of reasoning which made it more clear and precise.

Finally, the Supreme Court confirmed its decision of 19 May 1982 regarding the admissibility of the defence of truth.

The applicant again indicated in the Supreme Court his intention of filing an appeal (amparo) against the judgment, relying inter alia on Articles 14, 20, 23 and 24 of the Constitution. He lodged his appeal on 22 November 1983.

14. On 6 December 1983 the Supreme Court, having regard to the circumstances of the case, stayed for two years the enforcement of the prison sentence (Article 93 of the Criminal Code), but left in place the accessory penalty. The enforcement of the latter measure was nevertheless stayed by the Constitutional Court on 22 February 1984.

3. The appeal (amparo) to the Constitutional Court

15. In his appeal (amparo) of 22 November 1983, Mr Castells complained that he had not been able to have the Supreme Court's judgment examined by a higher court and of the length of the proceedings.

He maintained further that the court had violated the principle of the presumption of innocence by refusing to allow him to adduce evidence. He considered it contrary to the most elementary rules of justice to convict someone - and in this case a senator - for making statements which were accurate and sufficiently important for it to be necessary to bring them to the attention of the community as a matter of urgency and in detail, without having allowed him to establish their truth.

He alleged, in addition, a breach of the principle of equality before the law (Article 14 of the Constitution), taken alone or in conjunction with the right to freedom of expression (Article 20), as other persons had published similar articles without encountering difficulties. Furthermore, he claimed that he had been the victim of a violation of his right to formulate political criticism, which he argued was inherent in Article 23 as it applied to him in his capacity as a senator. According to him, that provision, which guarantees the right to participate in public affairs, entitled him to carry out his parliamentary duties of scrutiny through any organ or means generally available.

The applicant made a further reference to Article 20 of the Constitution in the summary of his complaints (suplico).

16. In his observations of 22 March 1984, the public prosecutor noted that Article 14 guaranteed equality before the law and not equality outside the law. As regards the complaint based on Article 23, it overlapped with the preceding complaint or was based on a misunderstanding: clearly a member of parliament did not carry out his duties only in the assembly, but outside it he did not enjoy any immunity; although he could, like any citizen, criticise the action of the Government, he should not forget that the freedom of expression had its limits, fixed by the Constitution.

For his part, Mr Castells, by a letter of 21 May 1984, again offered to prove the truth of his statements, because that demonstrated "the violation by the contested judgment of the right to `receive and communicate true information by any means of dissemination', referred to in Article 20 of the Constitution". He also mentioned this right in his appeal (recurso de súplica) against the rejection of this offer by the Constitutional Court (20 July 1984) and in his observations of 21 February 1985.

17. The Constitutional Court dismissed the appeal on 10 April 1985.

In summarising the applicant's complaints at point 2 of the "As to the Law" part of its judgment, it took together, like the public prosecutor, those relating to Articles 14 and 23, without referring to Article 20: alleged violation of the right to equality before the law, guaranteed under Article 14 taken alone or in conjunction with Article 23, inasmuch as the contested decision restricted the powers of monitoring, scrutiny and criticism of a senator.

At point 6 it stated that parliamentary privileges were to be interpreted strictly as otherwise they could become instruments for infringing the rights of others; they lapsed when their holder had acted as a mere citizen, even in his capacity as a politician.

At points 9 and 10 it considered the central issue: the right to rely on relevant evidence in presenting the defence case, and in particular to plead the defence of truth in respect of an offence of the type in question. The court noted in this connection:

> "In order to assess whether evidence which it is sought to adduce is relevant, it is necessary to establish a link between that evidence and the thema decidendi, which must first be determined on the basis of the parties' allegations. Except in the case of facts which are manifest or common knowledge, the court must not intervene in this regard, otherwise it will prejudge the merits, if only in part ... . It is preferable for the courts to avoid [such a preliminary assessment]; it does not however in itself infringe constitutional rights provided that the other defence rights are respected. Even though in the present case the court ought perhaps not to have anticipated its opinion on the defence of truth when assessing the relevance of the evidence, [that irregularity] therefore infringes the constitutional right to use relevant evidence - particularly where as here the decision is taken at a single level of jurisdiction - only if there has been a breach of a substantive right in issue.

... "

Article 161 of the Criminal Code had given rise to criticism among academic writers because it restricted the freedom of expression. In any event, it should be read in conjunction with Article 20 which guaranteed that freedom. In this connection it had to be accepted that criminal legislation could constitute an adequate means of regulating the exercise of fundamental rights provided that it respected the essential content of the right in question. The limits of the freedoms of information and of opinion were beyond question to be found in the area of State security, which could be jeopardised by attempts to discredit democratic institutions. In conclusion the question whether the defence of truth was or was not admissible in this field was purely one of statutory interpretation and the specific application of Article 161 in the case under review was a matter falling within the exclusive jurisdiction of the Supreme Court.

18. On 1 April 1986 the Supreme Court ruled that the term of imprisonment had been definitively served. Subsequently, the record of the conviction was annulled in accordance with Article 118 of the Criminal Code. It could therefore no longer be disclosed by investigation of the applicant's criminal record unless the request came from judges or courts in connection with a new criminal inquiry.

B. Relevant legislation

1. Constitution of 1978

19. The relevant articles of the Constitution provide as follows:

Article 14

"All Spanish citizens are equal before the law. Any discrimination based on birth, race, sex, religion, opinion or any other condition or personal or social circumstances shall be prohibited."

Article 18

"1. The right to honour, to a private life and to a family life and the right to control use of one's likeness shall be protected.

..."

Article 20

1. The following rights shall be recognised and protected:

(a) the right freely to express and disseminate thoughts, ideas and opinions by word of mouth, in writing or by any other means of reproduction;

...

(d) the right to receive and communicate true information by any means of dissemination. The right to invoke the conscience clause and that of professional confidentiality shall be governed by statute.

2. The exercise of these rights may not be restricted by any prior censorship.

...

4. These freedoms shall be limited by respect for the rights secured in this Title, by the provisions of the implementing Acts and in particular by the right to honour and to a private life and the right to control use of one's likeness and to the protection of youth and children."

Article 23

"1. Citizens shall have the right to participate in public life directly or through their representatives freely elected at periodically held elections by universal suffrage.

..."

2. The Criminal Code

20. The Institutional Act 8/1983 of 25 June 1983 reformed the Criminal Code. It provides that the offences of insulting the Government shall be punishable by the following penalties:

Article 161

"The following shall be liable to long-term prison sentences [from six years and a day to twelve years - Article 30 of the Criminal Code]:

1. Those who seriously insult, falsely accuse or threaten ... the Government ...;

2. ..."

Article 162

"When the insult or threat referred to in the preceding Article is not serious, it shall be punishable by a short- term prison sentence [from six months and a day to six years - Article 30 of the Criminal Code]."

These provisions appear in a separate chapter of the Criminal Code. The chapter in question is based on the principle of authority (decision of the Supreme Court of 19 May 1982; see paragraph 12 above) and provides for a strengthened protection for the life, freedom and honour of the senior

officials of the State. The offence of falsely accusing the Government was not introduced until 1983.

21. Title X of Book II of the Criminal Code defines the offences of proffering insults and making false accusations. The latter consists of accusing a person wrongly of an offence coming within the category of those which have to be prosecuted even without a complaint (Article 453 of the Criminal Code). On the other hand, an insult is any expression or action which discredits a person or exposes him to contempt, in particular by accusing him of an offence of the kind which may be prosecuted only if a complaint is laid (Articles 457 and 458 of the Criminal Code). The practical importance of the distinction is that the defence of truth is admissible for the offence of false accusation (Article 456) but not for the offence of proffering insults, except where the insults are directed against civil servants in respect of acts relating to the performance of their duties (Article 461 of the Criminal Code).

By the judgment of 31 October 1983 the Supreme Court specified that the defence of truth could not be pleaded in connection with the offence of insulting one of the senior institutions of the State: in the first place no official as such was concerned and, secondly, the institutions in question enjoyed extra protection in this field under the criminal law (see paragraphs 12 and 13 above).

PROCEEDINGS BEFORE THE COMMISSION

22. In his application of 17 September 1985 to the Commission (no. 11798/85), Mr Castells relied on Articles 6, 7, 10 and 14 (art. 6, art. 7, art. 10, art. 14) of the Convention.

By a partial decision of 9 May 1989, the Commission dismissed the complaints based on Articles 6 and 7 (art. 6, art. 7) as inadmissible. On 7 November 1989 it found the remainder of the application admissible. In its report of 8 January 1991 (Article 31) (art. 31), it expressed the opinion that there had been a violation of Article 10 (art. 10) (nine votes to three) and that no separate question arose under Article 14 (art. 14) (unanimously). The full text of its opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment[*].

[*] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 236 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

23. Mr Castells claimed to be a victim of a violation of his right to freedom of expression as guaranteed under Article 10 (art. 10) of the Convention, which is worded as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Government contested this assertion, whereas the Commission agreed with it.

A. The Government's preliminary objection

24. The Government contended, as they had done before the Commission, that the applicant had failed to exhaust his domestic remedies (Article 26 of the Convention) (art. 26). Probably "for tactical reasons", he had not specifically raised in the Constitutional Court the complaint concerning the alleged breach of the right to freedom of expression protected under Article 20 of the Constitution. In his amparo appeal he had referred to this provision only indirectly, complaining of discrimination in the exercise of that freedom; in addition, he had made no mention of Article 10 (art. 10) of the Convention or of similar provisions in other international instruments. According to the Institutional Act governing the amparo appeal procedure (no. 2/1979), he ought to have indicated clearly both the facts and the provisions allegedly infringed. It followed that Mr Castells had not given the Constitutional Court the opportunity to rule on the question which was now before the Court.

25. In reply the applicant maintained that he had expressly invoked Article 20 of the Constitution in the Constitutional Court. In the first place the facts set out in his amparo application established that what was at stake was a typical example of the exercise of the right to freedom of expression and showed evidently that there had been an interference. Furthermore, in the suplico he had cited, among other provisions, the article in question and in the legal argument he had alleged a violation of Article 20, taken together

with Article 14 (equality before the law). It was true that he had argued on the more limited basis of the right of an elected representative to formulate political criticism, under Article 23, but it was sufficient to read point 10 of the "As to the Law" part of the judgment of 10 April 1985 to see that the problem had indeed been raised. In that passage the Constitutional Court examined in detail the compatibility of Article 161 of the Criminal Code, the basis for the contested prosecution and conviction, with the freedom of expression (see paragraphs 15 and 17 above).

26. While expressing its agreement with the applicant, the Commission primarily invited the Court to find that it lacked jurisdiction to entertain the objection.

27. On this point the Court confines itself to referring to its consistent case-law, confirmed most recently in its B. v. France judgment of 25 March 1992 (Series A no. 232-C, p.45, paras. 35-36).

As regards the merits of the submission, it observes that Article 26 (art. 26) must be applied "with some degree of flexibility and without excessive formalism"; it is sufficient that "the complaints intended to be made subsequently before the Convention organs" should have been raised "at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law" (see the Guzzardi v. Italy judgment of 6 November 1980, Series A no. 39, p. 26, para. 72, and the Cardot v. France judgment of 19 March 1991, Series A no. 200, p. 18, para. 34).

28. The applicant relied on Article 10 (art. 10) of the Convention in two respects: he had, he claimed, been prosecuted and convicted for making statements which were true, but whose accuracy he had been prevented from establishing; in addition, the contested article came within the sphere of the political criticism which it was the duty of any member of parliament to engage in.

29. It appears that Mr Castells had raised both of these points in the Supreme Court. The judgment of 31 October 1983 refused to admit the defence of truth in relation to the offence of insulting the Government and ruled that the applicant had overstepped the bounds of acceptable political criticism (see paragraph 13 above).

30. The submissions in support of the amparo appeal of 22 November 1983 made only an indirect and brief reference to Article 20 of the Constitution (see paragraph 15 above); they did however set out the complaints discussed above.

While basing his case on a narrower provision, Article 23 of the Constitution, the applicant claimed the right, in his capacity as a senator, to criticise the Government’s action, a right which is manifestly inherent in the freedom of expression in the specific case of elected representatives. Moreover the Constitutional Court recognised this in its summary of the complaints; it took together the complaint concerning Articles 14 and 20 and that relating to Article 23 (see paragraph 17 above).

The applicant also invoked both his right to be presumed innocent and his right to adduce evidence capable of establishing the accuracy of his statements. In so doing, he was formulating a complaint which was plainly linked to the alleged violation of Article 10 (art. 10) of the Convention. Indeed that was how the Constitutional Court construed the complaint; it joined the question of the relevance of the evidence to that of the merits of the case, namely the offence provided for in Article 161 of the Criminal Code, whose compatibility with the freedom of expression it examined (points 9 and 10 of the "As to the Law" part of the judgment of 10 April 1985; see paragraph 17 above).

31. The Court notes finally, like the Commission, that Mr Castells cited Article 20 of the Constitution both in his notice of the amparo appeal, filed in the Supreme Court, and in the suplico of his application of 22 November 1983 (see paragraphs 13 and 15 above). Subsequently, in a number of written communications to the Constitutional Court, he also referred, in connection with the defence of truth, to his right "to receive and communicate true information" (see paragraph 16 above).

No doubt the reason why the appeal failed in this respect is to be found in the limits which at the time the Constitutional Court set to its jurisdiction. In its view, the problem of the admissibility of the defence of truth in relation to the offence of insulting the Government raised a question of statutory interpretation rather than an issue of compliance with the Constitution, and the application of Article 161 of the Criminal Code in the case under review was exclusively a matter for the ordinary courts (see paragraph 17 above; and, mutatis mutandis, the Guzzardi v. Italy judgment, cited above, Series A no. 39, p. 27, para. 72).

32. Accordingly, the Court considers that the applicant did invoke before the Constitutional Court, "at least in substance", the complaints relating to Article 10 (art. 10) of the Convention. The objection that Mr Castells failed to exhaust domestic remedies must therefore be dismissed.

B. Merits of the complaint

33. In Mr Castells's submission, the criminal proceedings brought against him, and his subsequent conviction for insulting the Government, interfered with his freedom of expression, in particular because he was not allowed to establish the truth of the statements contained in his article.

34. The restrictions and penalties of which he complained are undeniably an "interference" with the exercise of the freedom in question. For such an interference to avoid infringing Article 10 (art. 10), it must be "prescribed by law", carried out in pursuit of one or more of the legitimate aims set out in Article 10 para. 2 (art. 10-2) and "necessary in a democratic society" in order to attain such an aim or aims.

1. "Prescribed by law"

35. There can be no doubt that the contested prosecution had a legal basis, namely Articles 161 and 162 of the Criminal Code. The applicant did not dispute this, but he alleged that he could not have expected that his defence of truth would be held to be inadmissible, in particular following the adoption of the 1978 Constitution. He maintained that, until 19 May 1982, the Supreme Court had never ruled on the question in relation to the offence of insulting the Government and the admissibility of such a defence for offences of this nature (Article 240) was the subject of differing opinions both among academic writers and in the case-law.

36. In the Government's contention, on the other hand, it is clear from the Spanish legislation, and in particular from Article 461 of the Criminal Code, that in the field in question the defence of truth is admissible only where the insults are directed against civil servants in the performance of their duties; neither before nor after 1978 had the Supreme Court ever allowed the exceptio veritatis for insults which were not directed against individuals. Mr Castells, however, had accused the Government as a whole.

37. In the light of the wording of Article 461 of the Criminal Code, the Court considers this interpretation to be reasonable. There was apparently no precedent - hence the hesitation shown by the Supreme Court in its decision of 19 May 1982 (see paragraph 12 above) -, but that is immaterial here: it was a text which covered in a general fashion several possible types of insult and which had inevitably to be capable of being brought into play in new situations; the above-mentioned decision confined itself to applying it to different circumstances (see, mutatis mutandis, the Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 27-28, para. 53).

The Court therefore finds, like the Commission, that the rules governing the contested interference were sufficiently foreseeable for the purposes of Article 10 para. 2 (art. 10-2) of the Convention.

2. Was the aim pursued legitimate?

38. According to the applicant, neither the charge laid against him nor his subsequent conviction pursued a legitimate aim under paragraph 2 of Article 10 (art. 10-2). The acts of which he was accused, as the Supreme Court itself admitted, had not engendered any alarm (see paragraph 9 above); in addition, it appeared from the judgment of 31 October 1983 that the object of the interference had been not to protect public order and national security, but in fact to preserve the respondent Government's honour.

39. However, in its decision of 10 April 1985 - on which the Government relied - the Constitutional Court stressed that the security of the State could be threatened by attempts to discredit democratic institutions (see paragraph 17 above). In his article Mr Castells did not merely describe a very serious

situation, involving numerous attacks and murders in the Basque Country; he also complained of the inactivity on the part of the authorities, in particular the police, and even their collusion with the guilty parties and inferred therefrom that the Government was responsible.

It may therefore be said, and this conforms to the view held by the Government and the Commission, that in the circumstances obtaining in Spain in 1979 the proceedings instituted against the applicant were brought for the "prevention of disorder", within the meaning of Article 10 para. 2 (art. 10-2), and not only for the "protection of the reputation ... of others".

3. Necessity of the interference

40. Mr Castells noted his agreement with the Commission and emphasised the crucial importance of freedom of expression for an elected representative, as the spokesman for the opinions and anxieties of his electorate. In addition, that freedom required extra guarantees when the discussion related to a matter of public interest. This had indeed been the case in this instance; the contested article was part of a wide debate on the climate of insecurity which had prevailed in the Basque Country since 1977. The applicant's conviction had been intended to protect the authorities against the attacks of the opposition rather than the Government against unjustified and defamatory accusations; although embarrassing for the Government, the revelation of the facts in question had served the public interest.

41. The Government stressed that freedom of expression was not absolute; it carried with it "duties" and "responsibilities" (Article 10 para. 2 of the Convention) (art. 10-2). Mr Castells had overstepped the normal limits of political debate; he had insulted a democratic government in order to destabilise it, and during a very sensitive, indeed critical, period for Spain, namely shortly after the adoption of the Constitution, at a time when groups of differing political persuasions were resorting to violence concurrently.

42. The Court recalls that the freedom of expression, enshrined in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. Subject to paragraph 2 of Article 10(art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, inter alia, the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 23, para. 49, and the Observer and Guardian judgment, cited above, Series A no. 216, p. 30, para. 59 (a)).

While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate,

draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court.

43. In the case under review Mr Castells did not express his opinion from the senate floor, as he might have done without fear of sanctions, but chose to do so in a periodical. That does not mean, however, that he lost his right to criticise the Government.

In this respect, the pre-eminent role of the press in a State governed by the rule of law must not be forgotten. Although it must not overstep various bounds set, inter alia, for the prevention of disorder and the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest (see, mutatis mutandis, the Sunday Times v. the United Kingdom judgment of 26 April 1979, Series A no. 30, p. 40, para. 65, and the Observer and Guardian judgment, cited above, Series A no. 216, p. 30, para. 59 (b)).

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society (see the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, p. 26, para. 42).

44. In its judgment of 31 October 1983, the Supreme Court took the view that the contested article had crossed over the line between political criticism and insult, albeit only slightly, by its use of certain terms (see paragraph 13 above).

45. The Court observes, like the Commission, that Mr Castells began by denouncing the impunity enjoyed by the members of various extremist groups, the perpetrators of numerous attacks in the Basque Country since 1977. He thereby recounted facts of great interest to the public opinion of this region, where the majority of the copies of the periodical in question were sold. In his conclusion, however, he levelled serious accusations against the Government, which in his view was responsible for the situation which had arisen (see paragraph 7 above).

46. The freedom of political debate is undoubtedly not absolute in nature. A Contracting State may make it subject to certain "restrictions" or "penalties", but it is for the Court to give a final ruling on the compatibility of such measures with the freedom of expression enshrined in Article 10 (art. 10) (see, mutatis mutandis, the Observer and Guardian judgment, cited above, Series A no. 216, para. 59 (c)).

The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be

subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media. Nevertheless it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.

47. In this instance, Mr Castells offered on several occasions, before the Supreme Court and subsequently in the Constitutional Court, to establish that the facts recounted by him were true and well known; in his view, this deprived his statements of any insulting effect (see paragraphs 11 and 16 above).

On 19 May 1982 the Supreme Court declared such evidence inadmissible on the ground that the defence of truth could not be pleaded in respect of insults directed at the institutions of the nation (see paragraphs 12 and 21 above); it confirmed this interpretation in its judgment of 31 October 1983 (see paragraph 13 above). The Constitutional Court took the view that it was a question of ordinary statutory interpretation and as such fell outside its jurisdiction (see paragraph 17 above).

The applicant could not therefore, in the criminal proceedings brought against him under Article 161 of the Criminal Code, plead the defences of truth and good faith.

48. In the Government's contention, because Mr Castells's allegations were not sufficiently precise, their truth could not be demonstrated; in addition, they were to be regarded as value judgments, in relation to which the defence of truth was irrelevant.

This argument is not convincing. The article which appeared in Punto y Hora de Euskalherria (see paragraph 7 above) must be considered as a whole. The applicant began by drawing up a long list of murders and attacks perpetrated in the Basque Country, then stressed that they had remained unpunished; he continued by alleging the involvement of various extremist organisations, which he named, and finally attributed to the Government the responsibility for the situation. In fact many of these assertions were susceptible to an attempt to establish their truth, just as Mr Castells could reasonably have tried to demonstrate his good faith.

It is impossible to state what the outcome of the proceedings would have been had the Supreme Court admitted the evidence which the applicant sought to adduce; but the Court attaches decisive importance to the fact that it declared such evidence inadmissible for the offence in question (see paragraph 12 above). It considers that such an interference in the exercise of

the applicant's freedom of expression was not necessary in a democratic society.

49. The Government also relied on the relatively lenient nature of the sanction imposed, but in the light of the foregoing conclusion the Court does not have to examine this argument.

50. In sum, there has been a violation of Article 10 (art. 10).

II. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 10 (art. 14+10)

51. Mr Castells also claimed to be the victim of discrimination because other persons had expressed similar views without any criminal sanctions being imposed on them. He relied on Article 14 (art. 14), which is worded as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Government denied this assertion.

52. As this question is not a fundamental aspect of the case, the Court does not consider it necessary to deal with it separately (see, inter alia, the Airey v. Ireland judgment of 9 October 1979, Series A no. 32, p. 16, para. 30).

III. APPLICATION OF ARTICLE 50 (art. 50)

53. According to Article 50 (art. 50):

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

54. The applicant sought in the first place the publication of a summary of the Court's judgment in the newspapers of the Basque Country, of Madrid and the rest of the State, and the removal of any reference to his conviction in the central criminal records (Registro Central de Penados y Rebeldes).

The Court points out that it does not have jurisdiction to make such orders (see, mutatis mutandis, the Manifattura FL v. Italy judgment of 27 February 1992, Series A no. 230-B, p. 21, para. 22).

A. Pecuniary damage

55. Mr Castells also claimed 375,000 pesetas in respect of loss of earnings. As an accused on bail, he had to appear fifty- two times before the court of his place of residence (San Sebastián) and three times before the Supreme Court of Madrid (see paragraphs 8-9 above), which resulted in a loss of time and opportunity in the exercise of his professional activity as a lawyer.

The Court takes the view that this constraint can have caused him hardly any loss since, as a lawyer, he frequently attended the courts in question. That he sustained pecuniary damage is therefore not established.

B. Non-pecuniary damage

56. The applicant also claimed, without giving any figures, compensation for non-pecuniary damage. The Court does not rule out the possibility that he may have sustained such damage, but in the circumstances of the case the finding of a violation set out in the present judgment constitutes in itself sufficient just satisfaction.

C. Costs and expenses

57. In respect of his costs and expenses incurred in the Spanish courts, Mr Castells claimed 2,181,476 pesetas. The Court awards him only 1,000,000 of this amount, since some of the sums in question related to amparo appeals unconnected with the complaints found admissible by the Commission.

58. Finally the applicant sought 3,328,000 pesetas for his costs and expenses before the Convention organs, together with 20,000 DM for the fees of Mr Korff and Mr Vervaele.

Like the Government, the Court considers excessive the number of lawyers representing Mr Castells, who appeared before it with four lawyers; it should also be borne in mind that the Commission declared inadmissible some of the complaints raised initially.

Making an assessment on an equitable basis, the Court awards Mr Castells an overall amount of 2,000,000 pesetas.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that it has jurisdiction to consider the Government’s preliminary objection, but dismisses it;

2. Holds that there has been a violation of Article 10 (art. 10);

3. Holds that it is not necessary to consider the case also under Article 14, taken together with Article 10 (art. 14+10);

4. Holds that, as regards the non-pecuniary damage alleged, the present judgment constitutes sufficient just satisfaction for the purposes of Article 50 (art. 50);

5. Holds that the Kingdom of Spain is to pay to the applicant, within three months, 3,000,000 (three million) pesetas for costs and expenses;

6. Dismisses the remainder of the applicant's claims.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 April 1992.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr De Meyer;

(b) concurring opinion of Mr Pekkanen;

(c) concurring opinion of Mr Carillo Salcedo, ad hoc judge.

R. R.
M.-A. E.

CONCURRING OPINION OF JUDGE DE MEYER

(Translation)

In the disputed article Mr Castells drew up a long list of murders and attacks carried out in the Basque Country[1] and denounced the impunity, described by him as outrageous (insultante impunidad), enjoyed by their perpetrators[2]. He complained of the inaction of the authorities[3], who, he alleged, had done nothing to identify them, although the same authorities had displayed great diligence "in other cases" (en otros supuestos)[4]. He saw this as evidence of collusion with the guilty parties[5] and attributed responsibility for "these acts" (estas acciones) to the Government and its supporters[6].

These were undoubtedly serious accusations[7].

In levelling them, however, he was merely legitimately exercising his right to freedom of opinion and of expression. This right was infringed in the case before the Court because Mr Castells was prosecuted and convicted for having written and published his views on a question of general interest; in a "democratic society" it is not acceptable that a citizen be punished for doing this.

In this connection it makes no difference whether Mr Castells was right or wrong. The question of the defence of truth was not relevant in relation to his assessment of the situation[8]; this is especially so because the murders and attacks referred to in the article really occurred and the impunity of their perpetrators does not even seem to have been denied.

It may be worth adding that as far as insults, false accusation and defamation are concerned there are no grounds for affording better protection to the institutions than to individuals, or to the Government than the oppposition[9].

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[1] Paragraph 48 of the judgment. See the first and second paragraphs of the article (paragraph 7 of the judgment).
[2] Title of the article and paragraphs 45 and 48 of the judgment.
[3] Paragraph 39 of the judgment.
[4] See in particular the third and sixth paragraphs of the article.
[5] Paragraph 39 of the judgment.
[6] Last paragraph of the article and paragraphs 39 and 45 of the judgment.
[7] Paragraph 45 of the judgment.
[8] See on this point the separate opinion of Mr Pekkanen, p. 29 below, and, mutatis mutandis, the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, pp. 27-28, paras. 45 and 46.
[9] I cannot therefore approve the "strengthened protection" afforded the Government under Articles 161 and 162 of the Spanish Criminal Code (paragraph 20 of the judgment).

CONCURRING OPINION OF JUDGE PEKKANEN

In his article Mr Castells firstly enumerated a list of murders and attacks carried out in the Basque Country and stressed that they still remained unsolved and unpunished. He also evoked the involvement of various extreme right-wing organisations. From these facts he then drew the conclusion that: "Behind these acts there can only be the Government, the party of the Government and their personnel".

Mr Castells was sentenced by the Supreme Court for proffering insults of a less serious kind against the Government. The Supreme Court found inter alia that the insults proffered with the aim of political criticism had exceeded the permissible limits of such criticism and attacked the Government's honour. The Supreme Court was also of the opinion that the defence of truth (exceptio veritatis) was not admissible in such cases under Spanish law.

The Court attached decisive importance to the fact that the Supreme Court of Spain declared the defence of truth inadmissible for the offence in question. Unfortunately I am unable to accept this opinion. The decisive fact for a violation of Article 10 (art. 10) of the Convention is, in my view, that Mr Castells was punished for holding the opinion that the Government was responsible for the incidents in question and publishing it.

With regard to the question of exceptio veritatis, which is discussed at length in the judgment, I consider that it was not possible for Mr Castells to prove the truthfulness of his opinion, an opinion expressed as part of a political debate and affirming that the Government was behind the murders and attacks in question. Exceptio veritatis is therefore not relevant in the instant case. For a finding of a violation of Article 10 (art. 10) of the Convention it is sufficient that Mr Castells was punished for criticising the Government when he had done so in a way which should be allowed in a democratic society.

CONCURRING OPINION OF JUDGE CARRILLO SALCEDO

I fully share the views expressed by the Court at paragraph 46 of the judgment. I should like to stress that freedom of expression constitutes one of the essential foundations of a democratic society. But I must also emphasise that the exercise of that freedom "carries with it duties and responsibilities" (Article 10 para. 2 of the Convention) (art. 10-2), and that, in a situation where politically motivated violence poses a constant threat to the lives and security of the population, it is particularly difficult to strike a fair balance between the requirements of protecting freedom of expression and the imperatives of protecting the democratic State.

By providing, in Article 10 para. 2 (art. 10-2), that the exercise of the freedom of expression and the freedom to hold opinions and to receive and impart information and ideas "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society", the Convention recognises that these freedoms are not absolute. Moreover, the Convention also recognises the principle that no group or person has the right to pursue activities which aim at the destruction of any of the rights and freedoms enshrined in it (Article 17) (art. 17); that implies in addition, in my view, positive obligations for the States parties.

Therefore, it remains open to the States to adopt measures, even of a criminal law nature, intended to react appropriately and without excess, that is, in conformity with the Convention requirements, to defamatory accusations devoid of factual foundation or formulated in bad faith.

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

SECOND SECTION

CASE OF ÇETIN AND OTHERS v. TURKEY

(Applications nos. 40153/98 and 40160/98)

JUDGMENT
[Extracts]

STRASBOURG

13 February 2003

FINAL

13/05/2003

In the case of Çetin and Others v. Turkey,

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

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr GAUKUR JÖRUNDSSON,
Mr L. LOUCAIDES,
Mr R. TÜRMEN,
Mr C. BÎRSAN,
Mr M. UGREKHELIDZE, *judges*,
and Mr T.L. EARLY, *Deputy Section Registrar*,

Having deliberated in private on 6 November 2001 and 28 January 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in two applications (nos. 40153/98 and 40160/98) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eight Turkish nationals ("the applicants"): Mr Vedat Çetin, who lodged application no. 40153/98 on 5 January 1998, and Mr Mehmet Kaya, Mr Ismet Bakaç, Mr Ahmet Sünbül, Mr Zeynel Bagir, Mr Metin Dag, Mr Kemal Sahin and Mr Naif Kiliç, who jointly lodged application no. 40160/98 on 5 February 1998.

2. The applicants were represented before the Court by Mr S. Tanrikulu, of the Diyarbakir Bar. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. The object of the applications was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention.

4. The applications were transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The applications were allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber which would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

7. After deciding to join the applications the Chamber declared them partly admissible in a decision of 6 November 2001.

8. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

9. The applicants are Turkish nationals and live in Diyarbakir. At the material time, they worked as journalists on *Ülkede Gündem*, a Turkish-language daily newspaper based in Istanbul. Publication of the newspaper ceased on 24 October 1998 and it was replaced initially by *Özgür Bakis* and subsequently, on 27 April 2000, by another daily newspaper, *2 Binde Yeni Gündem*. That newspaper was replaced on 31 May 2001 by a weekly periodical called *Yedinci Gündem*.

10. At the material time one of the applicants, Mr Çetin, an independent journalist, wrote a column entitled "Notes from Diyarbakir" (*Diyarbakir'dan Notlar*), which was published on Tuesdays in *Ülkede Gündem*. Mr Bakaç was *Ülkede Gündem*'s representative in Diyarbakir. He currently works as a press officer for the Diyarbakir Urban District Council.

11. As for the other applicants, Mr Bagir is now the mayor of Lice, Mr Kaya is a lawyer and Mr Sahin and Mr Kiliç both teach in schools in eastern Turkey. Mr Sünbül continues to work as a journalist with the weekly publication *7. Gündem*, while Mr Dag currently works as a press officer for Kayapinar Town Council.

12. The main point at issue in the present case is a ban that was imposed on 1 December 1997 by the governor of the state of emergency region on the distribution of *Ülkede Gündem* in that region.

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the governor of the state of emergency region's decision

13. According to the applicants, the distribution of *Ülkede Gündem* was impeded by the security forces in the period from September to November 1997, and the governor of the state of emergency region subsequently imposed a ban on its publication and distribution in the region where the state of emergency had been declared (see paragraph 24 below). On 13 November 1997 the proprietor of *Ülkede Gündem* sent a letter to the Ministry of the Interior informing it of the disruption caused to the

distribution of the newspaper and demanding an end to these unlawful acts. He also sought compensation for the loss sustained.

14. On 19 November 1997 the governor of the state of emergency region wrote to the proprietor of *Ülkede Gündem* to say that his office was not responsible for the acts mentioned in the letter. He enclosed the seizure orders that had been made by the relevant authorities.

15. The Government have produced to the Court seventy-two warrants issued by judges of the Istanbul National Security Court for the seizure of various issues of the newspaper in the months of September, November and December 1997.

16. On 4 November 1997 Mr Bakaç and Mr Bagir lodged a criminal complaint with the Diyarbakir public prosecutor's office because of the alleged disruption to the distribution of the newspaper.

17. On 25 November 1997 the public prosecutor's office ruled that it had no power to deal with the complaint and referred it to the Diyarbakir Administrative Council under the Prosecution of Civil Servants Act.

18. On 5 February 1998 the Diyarbakir Administrative Council held that there was no case to answer in view of the seizure warrants that had been issued by the Istanbul National Security Court. Its decision was upheld by the Supreme Administrative Court on 3 March 2000.

B. The ban on the publication and distribution of *Ülkede Gündem* in the state of emergency region

19. On 1 December 1997 the governor of the state of emergency region imposed a ban on the publication and distribution of *Ülkede Gündem* in that region.

20. On 4 December 1997 the Diyarbakir Security Directorate wrote to Mr Bakaç, in his capacity as *Ülkede Gündem*'s representative in Diyarbakir, informing him of the ban. Its letter read as follows:

> "Regard being had to Directive no. 1344 issued by the governor's office of the state of emergency region on 1 December 1997,
>
> With effect from 1 December 1997 the publication and distribution of the daily newspaper *Ülkede Gündem* in the provinces in which a state of emergency has been declared under the aforementioned directive (Diyarbakir, Hakkari, Siirt, Sirnak, Tunceli and Van) shall be prohibited."

21. Likewise, on 5 December 1997 the Tunceli Security Directorate wrote a letter to the company responsible for distributing the newspaper, Birlesik Basim Dagitim A.S., based in Adana, in the following terms:

> "Regard being had to Directive no. 1344 issued by the governor's office of the state of emergency region on 1 December 1997,

With effect from 1 December 1997 the publication and distribution of the Istanbul daily newspaper *Ülkede Gündem* in the provinces in which a state of emergency has been declared under the aforementioned directive (Diyarbakir, Hakkari, Siirt, Sirnak, Tunceli and Van) shall be prohibited, pursuant to Article 1 of Legislative Decree no. 430 and section 11(e) of the State of Emergency Act."

C. The bans imposed on the successor publications to *Ülkede Gündem*

22. On 7 May 1999 the governor of the state of emergency region imposed a ban pursuant to Article 11 (e) of Legislative Decree no. 285 on the publication and distribution of *Özgür Bakis*, the daily newspaper that had replaced *Ülkede Gündem*.

Similarly, on 1 June 2000 he issued an order prohibiting the publication and distribution of the daily newspaper *2 Binde Yeni Gündem* in the state of emergency region.

Lastly, on 27 June 2001 the weekly publication *Yedinci Gündem*, which had replaced *2 Binde Yeni Gündem*, met the same fate, with a ban being imposed on its publication and distribution in the region.

23. The applicants have produced a notice dated June 2000 which shows that at different times the governor of the state of emergency region imposed bans on the publication and distribution of seventeen periodicals, including *Ülkede Gündem*, *Özgür Bakis* and *2 Binde Yeni Gündem*.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The state of emergency region

24. The governor's office of the state of emergency region was set up with special powers after the state of siege was officially declared to be over on 19 July 1987 by Legislative Decree no. 285 of 10 July 1987. A state of emergency was thus decreed in the provinces of Bingöl, Diyarbakir, Elazig, Hakkari, Mardin, Siirt, Tunceli and Van. On 19 March 1994 the state of emergency was extended to the province of Bitlis, but lifted in the province of Elazig. It was declared to be over in the provinces of Batman, Bingöl and Bitlis on 2 October 1997, in the province of Van on 30 July 2000 and in the provinces of Tunceli and Hakkari on 1 August 2002. In July 2002 it was extended by four months in the provinces of Diyarbakir and Sirnak.

B. The powers of the governor of the state of emergency region

25. The powers of the governor of the state of emergency region (*Olaganüstü Hal Bölge Valisi*) are set out in the State of Emergency Act

(Law no. 2935 of 25 October 1983) and various legislative decrees that were issued after the state of emergency was declared (Legislative Decrees nos. 313, 387, 413, 421, 425, 426, 427, 428, 430, 432 and 481).

26. Section 11(e) of the State Emergency Act reads as follows:

> "... If a state of emergency is decreed, the following measures may be imposed with a view to maintaining general security, safety and public order and to preventing any escalation in the violence ...:
>
> ...
>
> (e) An order prohibiting, either absolutely or without prior permission, the editing, dissemination, publication or distribution of newspapers, reviews, brochures, pamphlets, posters or any similar publications, or the publication or distribution of any such [publications] which have been printed or disseminated outside the state of emergency region ..."

27. Article 1 (a) of Legislative Decree no. 430 provides:

> "The printing, dissemination, publication or distribution of books, reviews, newspapers, brochures, posters or other similar publications liable seriously to undermine public order in the region, to cause agitation among the local population or to obstruct the security forces in the course of their duties by giving a false account of operations being conducted in the region shall be prohibited, either absolutely or without the prior permission of the governor of the region to which the state of emergency applies or the governors of the provinces concerned. [Likewise,] the publication or distribution of [any publication of the same type] that has been printed and published outside the state of emergency region shall be prohibited, either absolutely or without the prior permission of the governor of the region to which the state of emergency applies or the governors of the provinces concerned ..."

C. Judicial scrutiny of legislative decrees on the state of emergency and of measures taken by the governor of the state of emergency region

1. Constitutional review of legislative decrees on the state of emergency

28. The relevant part of Article 148 § 1 of the Constitution provides:

> "... There shall be no right of appeal to the Constitutional Court to contest the form or substance of legislative decrees issued during a state of emergency, a state of siege or in wartime."

2. Judicial scrutiny of measures taken by the governor of the state of emergency region

29. Article 7 of Legislative Decree no. 285, as amended by Legislative Decree no. 425 of 9 May 1990, precludes any application in the

administrative courts to have an administrative act performed pursuant to Legislative Decree no. 285 set aside.

30. Article 8 of Legislative Decree no. 430 reads as follows:

> "No criminal, financial or civil liability may be asserted against ... the governor of the state of emergency region or provincial governors in that region in respect of decisions taken, or acts performed, by them in the exercise of the powers conferred on them by this legislative decree, and no application shall be made to any judicial authority to that end. This shall be without prejudice to the rights of individuals to claim reparation from the State for damage which they have been caused without justification [*sebepsiz*]."

3. The case-law of the Constitutional Court

31. The Constitutional Court has reviewed the constitutionality of Article 7 of Legislative Decree no. 285, as amended by Legislative Decree no. 425 of 9 May 1990, in a judgment of 10 January 1991, which was published in the Official Gazette on 5 March 1992. It stated:

> "It is not possible to reconcile that provision [which precludes any judicial scrutiny of acts performed by the governor of the state of emergency region] with the concept of the rule of law ... The system of government when a state of emergency has been declared is not an arbitrary one that escapes all judicial scrutiny. There can be no doubt that individual and regulatory acts performed by the competent authorities while the state of emergency continues must be subject to judicial review. Contravention of this principle is inconceivable in countries run by democratic regimes and founded on freedom. However, the impugned provision is contained in a legislative decree that cannot be the subject of constitutional review ... Consequently, the application for an order quashing that provision must be dismissed as being incompatible *ratione materiae* [*yetkisizlik*] ..."

32. As regards Article 8 of Legislative Decree no. 430, in two judgments delivered on 3 July 1991 and 26 May 1992 (published in the Official Gazette on 8 March 1992 and 18 December 1993 respectively), the Constitutional Court followed that decision in dismissing as incompatible *ratione materiae* applications for orders quashing the relevant provisions.

THE LAW

...

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

40. The applicants complained that the ban imposed by the governor on 1 December 1997 on the distribution of the daily newspaper *Ülkede Gündem* in the state of emergency region constituted an unjustified interference in the exercise of their right to impart information or ideas.

They relied in that connection on Article 10 of the Convention, the relevant part of which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

...

3. "Necessary in a democratic society"

48. It remains to be examined whether the measure concerned was "necessary in a democratic society" to achieve those aims.

...

(b) The Court's assessment

57. The Court would first point out that Article 10 guarantees freedom of expression to "everyone". No distinction is made in it according to the nature of the aim pursued or the role played by natural or legal persons in the exercise of that freedom (see, *mutatis mutandis*, *Casado Coca v. Spain*, judgment of 24 February 1994, Series A no. 285-A, pp. 16-17, § 35). It applies not only to the content of information but also to the means of dissemination, since any restriction imposed on the latter necessarily interferes with the right to receive and impart information (see, *mutatis mutandis*, *Autronic AG v. Switzerland*, judgment of 22 May 1990, Series A no. 178, p. 23, § 47). In the present case, the Court considers that the applicants' ability to exercise their right to freedom to impart ideas and information to the inhabitants of the state of emergency region was directly at stake, as the ban affected *Ülkede Gündem*, which reported and commented on, among other things, items of regional news gathered by journalists – the applicants in this instance.

58. The Court considers that the only way it can examine whether the interference was necessary is by looking at the wording of section 11(e) of the State of Emergency Act (Law no. 2935) and Article 1 (a) of Legislative Decree no. 430, and the arguments put to it by the Government, as the impugned measure escaped judicial scrutiny by the domestic courts and the governor of the state of emergency region did not give any reasons for his decision.

59. The Court observes that section 11(e) of the State of Emergency Act and Article 1 (a) of Legislative Decree no. 430 are drafted in very broad

terms and grant the governor of the state of emergency region vast powers to impose administrative bans on the publication and distribution of publications. Such prior restrictions are not, in principle, incompatible with the Convention. However, they may only be imposed if a particularly strict framework of legal rules regulating the scope of bans and ensuring the effectiveness of judicial review to prevent possible abuse is in place.

60. As regards, firstly, the scope of the governor's powers, the Court notes that the relevant provisions enable him to prohibit the circulation and distribution of any written material considered liable seriously to undermine public order in the region, cause agitation among the local population or obstruct the security forces in the course of their duties by giving a false account of operations being conducted in the region (see paragraphs 26-27 above).

61. Having carefully examined the extent of what it accepts are exceptional powers, which by their nature may only be justified by very special circumstances, the Court must seek to determine what safeguards existed against their possible abuse in practice. In that connection, it observes that, although it is possible to counterbalance and limit powers of this type by strict and effective judicial scrutiny, both the provisions conferring the powers on the governor of the state of emergency region and the manner in which the rules are applied escape such scrutiny. In that regard, the Court can but share the concern expressed by the Constitutional Court in these terms (see paragraph 31 above):

> "It is not possible to reconcile that provision [which precludes any judicial scrutiny of acts performed by the governor of the state of emergency region] with the concept of the rule of law ... The system of government when a state of emergency has been declared is not an arbitrary one that escapes all judicial scrutiny. There can be no doubt that individual and regulatory acts performed by the competent authorities while the state of emergency continues must be subject to judicial review. Contravention of this principle is inconceivable in countries run by democratic regimes and founded on freedom. However, the impugned provision is contained in a legislative decree that cannot be the subject of constitutional review ..."

62. The Court is obviously prepared to take into account the background to cases before it and, in particular, the difficulties inherent in the fight against terrorism. In that regard, it notes that the Commission declared inadmissible two applications concerning a ministerial order imposing restrictions on broadcasting media in circumstances similar to those in the present case (see *Purcell and Others v. Ireland*, no. 15404/89, Commission decision of 16 April 1991, Decisions and Reports (DR) 70, p. 262, and *Brind and Others v. the United Kingdom*, no. 18714/91, Commission decision of 9 May 1994, DR 77-A, p. 42). However, the present case is distinguishable from the aforementioned applications, which concerned restrictions on broadcasting media, whose impact is often far more immediate and powerful than that of the press. In addition, the regulations examined by the Commission described in considerable detail the type of

programme to which the ban applied (interviews with the spokespersons of certain organisations). Lastly, the decisions imposing the bans had been subjected to judicial scrutiny.

63. The Court observes in passing that it is unable to accept the Government's assertion that the reason the governor of the state of emergency region decided to ban the newspaper was that certain articles published in it, which had resulted in various issues being seized because they were liable to incite the population to riot or sought to vindicate criminal acts by terrorists, might have serious repercussions for public order in the region. The Court considers that the political tension caused by terrorist acts in the region concerned at the material time is a factor to be taken into account (see, *mutatis mutandis*, *Piermont v. France*, judgment of 27 April 1995, Series A no. 314, p. 26, § 77). While it is certainly possible that the articles that led to the seizure of the newspapers would have exacerbated an already tense situation, the decision to impose the ban contained no reasons and made no reference to the seizure warrants issued by the judges in Istanbul. In addition, the ban was not a preventive measure taken as a result of the seizures to which the Government refer, since the seizure of a publication as a preventive measure may only be ordered by a judge in criminal proceedings of a different kind to those which were brought in the present case. Accordingly, in the absence of detailed reasoning accompanied by proper judicial scrutiny, the decision to implement such a measure lays itself open to various interpretations. Thus, the ban could be perceived by the applicants as a response to heavy criticism in *Ülkede Gündem* of the security forces' operations in the region.

64. As to the Government's arguments that the local population had numerous sources of ideas and information available and that, as journalists, the applicants were involved in the publication of various newspapers and thus had been able to impart their ideas and information along with the rest of the country, the Court reiterates that the press plays an essential role in a democratic society. In view of their passive role as recipients of information, citizens must be permitted to receive a variety of messages, to choose between them and reach their own opinions on the various views expressed, for what sets democratic society apart is this plurality of ideas and information.

65. Furthermore, contrary to what the Government have asserted, the ban did not end after fifty-three days. The case file shows that although *Ülkede Gündem* ceased publication on 24 October 1998, the measure was still very much in force in June 2000. In addition, the successor publications to *Ülkede Gündem*, and various other publications, were unable to escape the same fate (see paragraphs 22-23 above). Lastly, since there is no right to seek judicial review in the administrative courts, such measures can only be lifted by a unilateral discretionary act on the part of the governor of the state of emergency region.

66. In conclusion, the Court notes that, because the courts have no power to review administrative bans on publications, the applicants were deprived of sufficient safeguards to protect against abuse. Accordingly, in the light of these considerations, it finds that the interference caused by section 11(e) of the State of Emergency Act and Article 1 (a) of Legislative Decree no. 430, and the way in which those provisions were applied in the instant case, cannot be regarded as having been "necessary in a democratic society" and went beyond the requirements of the legitimate aim pursued. There has therefore been a violation of Article 10 of the Convention.

...

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;

...

Done in French, and notified in writing on 13 February 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence EARLY	Jean-Paul COSTA
Deputy Registrar	President

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

CASE OF CEYLAN v. TURKEY

(Application no. 23556/94)

JUDGMENT

STRASBOURG

8 July 1999

In the case of Ceylan v. Turkey,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr A. PASTOR RIDRUEJO,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mr J.-P. COSTA
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mr K. TRAJA,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,

and also of Mr P.J. MAHONEY and Mrs M. DE BOER-BUQUICCHIO, *Deputy Registrars*,

Having deliberated in private on 1 March and 16 June 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") on 17 March 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 23556/94) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Münir Ceylan, on 10 February 1994.

Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

The Commission's request referred to former Articles 44 and 48 and to. the declaration whereby Turkey recognised the compulsory jurisdiction of the Court. The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention, taken either alone or together with Article 14.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of former Rules of Court A[1], the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (former Rule 30). The lawyer was given leave by the President of the Court at the time, Mr R. Bernhardt, to use the Turkish language in the written procedure (former Rule 27 § 3).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal, in particular, with procedural matters that might arise before the entry into force of Protocol No. 11, Mr Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 15 July 1998 and the Government's memorial on 31 July 1998. On 7 September 1998 the Government filed documents to be appended to their memorial and on 25 February 1999 they filed observations on the applicant's claims for just satisfaction.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The President of the Court, Mr L. Wildhaber, decided that, in the interests of the proper administration of justice, a single Grand Chamber should be constituted to hear the instant case and twelve other cases against Turkey, namely: Karataş v. Turkey (application no. 23168/94); Arslan v. Turkey (no. 23462/94); Polat v. Turkey (no. 23500/94); Okçuoğlu v. Turkey (no. 24246/94); Gerger v. Turkey (no. 24919/94); Erdoğdu and İnce v. Turkey (nos. 25067/94 and 25068/94); Başkaya and Okçuoğlu v. Turkey (nos. 23536/94 and 24408/94); Sürek and Özdemir v. Turkey (nos. 23927/94 and 24277/94); Sürek v. Turkey (no. 1) (no. 26682/95); Sürek v. Turkey (no. 2) (no. 24122/94); Sürek v. Turkey (no. 3) (no. 24735/94); and Sürek v. Turkey (no. 4) (no. 24762/94).

5. The Grand Chamber constituted for that purpose included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr Wildhaber, the

1. *Note by the Registry.* Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States not bound by that Protocol.

President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mrs F. Tulkens, Mrs V. Strážnická, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr A.B. Baka, Mr R. Maruste and Mrs S. Botoucharova (Rule 24 § 3 and Rule 100 § 4).

On 19 November 1998 Mr Wildhaber exempted Mr Türmen from sitting after his withdrawal from the case in the light of the decision of the Grand Chamber taken in accordance with Rule 28 § 4 in the case of Ogŭr v. Turkey. On 16 December 1998 the Government notified the Registry that Mr F. Gölcüklü had been appointed *ad hoc* judge (Rule 29 § 1).

Subsequently, Mrs Botoucharova, who was unable to take part in the further consideration of the case, was replaced by Mr K. Traja, substitute judge (Rule 24 § 5 (b)).

6. At the Court's invitation (Rule 99), the Commission delegated one of its members, Mr H. Danelius, to take part in the proceedings before the Grand Chamber.

7. In accordance with the decision of the President, who had also given the applicant's counsel leave to address the Court in Turkish (Rule 34 § 3), a hearing took place in public in the Human Rights Building, Strasbourg, on 1 March 1999, the case being heard simultaneously with those of Arslan v. Turkey and Sürek v. Turkey.

There appeared before the Court:

(a) *for the Government*

Mr D. TEZCAN,
Mr M. ÖZMEN, *Co-Agents*,
Mr B. ÇALIŞKAN,
Ms G. AKYÜZ,
Ms A. GÜNYAKTI,
Mr F. POLAT,
Ms A. EMÜLER,
Mrs I. BATMAZ KEREMOĞLU,
Mr B. YILDIZ,
Mr Y. ÖZBEK, *Advisers*;

(b) *for the applicant*

Mr H. KAPLAN, of the Istanbul Bar, *Counsel*;

(c) *for the Commission*
Mr H. DANELIUS, *Delegate*.

The Court heard addresses by Mr Danelius, Mr Kaplan, Mr Tezcan and Mr Özmen.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The article in the weekly newspaper *Yeni Ülke*

8. The applicant, who was at the time the president of the petroleum workers' union (*Petrol-İş Sendikası*), wrote an article entitled "The time has come for the workers to speak out – tomorrow it will be too late" ("*Söz işçinin, yarın çok geç olacaktır*") in the 21-28 July 1991 issue of *Yeni Ülke* ("New Land"), a weekly newspaper published in Istanbul. The article read:

> "The steadily intensifying State terrorism in eastern and south-eastern Anatolia is nothing other than a perfect reflection of the imperialist-controlled policies being applied to the Kurdish people on the international plane.
>
> In order to destroy the Kurdish movement in Iraq, US imperialism first stirred up the Kurds against Saddam's regime and then set that regime on them, having left it strong enough to crush their movement.
>
> As a result, the whole world has been confronted with the heartbreaking sight of tens of thousands of Kurds dying of hunger, exposure and epidemics, tens of thousands more wiped out by the Iraqi army and hundreds of thousands forced to leave their homes and their country.
>
> After shedding crocodile tears over these scenes, which they themselves had created, the imperialists are now sitting back with their arms folded, for the whole world to see, as genocide in Turkey continues to intensify.
>
> The constant increase in the south-east in the numbers of persons executed without trial, of mass arrests and of persons disappearing while in detention, particularly since the passing of the new Prevention of Terrorism Act, is a harbinger of difficult times ahead.
>
> The recent murder in police custody of the president of the Diyarbakır branch of the HEP [People's Labour Party], probably by anti-guerrilla forces, and the further killings (three according to the police, ten according to local people) at his funeral (the

police opened fire on the crowd, injuring hundreds, and took over a thousand people into custody) are the latest examples of State terrorism.

Anyone who examines the Prevention of Terrorism Act closely can easily see that it is aimed at crushing not only the struggle of the Kurdish people, but the struggle of the whole working class and proletariat for subsistence, for freedom and for democracy.

Consequently, not only the Kurdish people but the whole of our proletariat must stand up against these laws and the 'State terrorism' currently being practised.

From the trade-union point of view, too, the problem is too important and too vital to be dealt with simply in a few interviews and declarations.

The political authorities and the forces of monopolistic capital use a few vague concepts to enable every action to be presented as a terrorist offence and every organisation as a terrorist group. When they feel the time is right, they will not hesitate to turn that weapon against the working class.

As we have always said, the Turkish working class and its economic and democratic organisations must bring not only their economic, but also their political and democratic demands to the fore and play an effective role in this struggle.

Despite all the hurdles erected by the law, we must unite in action with the democratic mass organisations, political parties and every individual or body with which it is possible to work; we must oppose the bloody massacres and State terrorism, using all our powers of organisation and coordination.

If we fail to do so, the circles of monopolistic capital, which, under imperialist orders, aim to gag and suffocate the Kurdish people, will inevitably turn on the working class and proletariat.

In saying 'tomorrow it will be too late', we are calling on all our people and all the forces of democracy to take an active part in this struggle."

B. The proceedings against the applicant

1. The charges against the applicant

9. On 16 September 1991, the public prosecutor at the Istanbul National Security Court (*İstanbul Devlet Güvenlik Mahkemesi*) indicted the applicant on charges of non-public incitement to hatred and hostility contrary to Article 312 §§ 1 and 2 of the Turkish Criminal Code (see paragraphs 15-16 below).

2. The proceedings in the Istanbul National Security Court

10. In the proceedings in the Istanbul National Security Court, the applicant denied the charges. He submitted that the article was about human rights violations in the south-east of Turkey and maintained that he had not

intended to promote separatism or to sow discord or strife amongst the population. According to him, in a democratic society, any subject should be able to be discussed without restriction. He also argued that it was his responsibility as a trade-union leader to express his opinion on the problem of democracy in south-east Turkey.

11. In a judgment of 3 May 1993, the National Security Court found the applicant guilty of an offence under Article 312 §§ 2 and 3 of the Turkish Criminal Code and sentenced him to one year and eight months' imprisonment, plus a fine of 100,000 Turkish liras.

The court held that in his article the applicant had alleged that the Kurdish people were being oppressed, massacred and silenced in Turkey. In particular, the court interpreted parts of the fourth and thirteenth sentences of the article as meaning, respectively, that "... genocide [was] being carried out against the Kurds in Turkey ..." and that an attempt was being made to "... gag and suffocate the Kurdish people".

It reached the conclusion that the applicant had incited the population to hatred and hostility by making distinctions based on ethnic or regional origin or social class.

3. The Court of Cassation proceedings

12. The applicant appealed to the Court of Cassation, contesting, *inter alia*, the National Security Court's interpretation of his article and arguing that it should have obtained an expert opinion as to its meaning. He also submitted that he should have been given only a suspended sentence.

13. On 14 December 1993 the Court of Cassation dismissed the appeal, upholding the National Security Court's assessment of the evidence and its reasons for rejecting the applicant's defence.

14. The applicant served his sentence in full. As a consequence of his conviction, he also lost his office as president of the petrol workers' union as well as certain political and civil rights (see paragraph 17 below).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal law

15. Article 312 of the Criminal Code provides:

> "Non-public incitement to commit an offence
>
> A person who expressly praises or condones an act punishable by law as an offence or incites the population to break the law shall, on conviction, be liable to between six months' and two years' imprisonment and a heavy fine of from six thousand to thirty thousand Turkish liras.

A person who incites the people to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions, shall, on conviction, be liable to between one and three years' imprisonment and a fine of from nine thousand to thirty-six thousand liras. If this incitement endangers public safety, the sentence shall be increased by one-third to one-half.

The penalties to be imposed on those who have committed the offences defined in the previous paragraph shall be doubled when they have done so by the means listed in Article 311 § 2."

16. Article 311 § 2 of the Criminal Code provides:

"Public incitement to commit an offence

...

Where incitement to commit an offence is done by means of mass communication, of whatever type – whether by tape recordings, gramophone records, newspapers, press publications or other published material – by the circulation or distribution of printed papers or by the placing of placards or posters in public places, the terms of imprisonment to which convicted persons are liable shall be doubled …"

17. The conviction of a person pursuant to Article 312 § 2 entails further consequences, particularly with regard to the exercise of certain activities governed by special legislation. For example, persons convicted of an offence under that Article may not found associations (Law no. 2908, section 4(2)(b)) or trade unions, nor may they be members of the executive committee of a trade union (Law no. 2929, section 5). They are also forbidden to found or join political parties (Law no. 2820, section 11(5)) and may not stand for election to Parliament (Law no. 2839, section 11(f3)).

B. Criminal case-law submitted by the Government

18. The Government supplied copies of six decisions given by the prosecutor attached to the Istanbul National Security Court withdrawing charges. One of the cases concerned a person suspected of non-public incitement, contrary to Article 312 of the Criminal Code, to hatred or hostility based in particular on a distinction between religions. The other five concerned persons suspected of making separatist propaganda aimed at undermining the indivisible unity of the State contrary to section 8 of the Prevention of Terrorism Act (Law no. 3713). In three of those cases, in which the offences had been committed by means of publications, one of the reasons given for the prosecutor's decision was that some of the elements of the offence could not be made out.

Furthermore, the Government submitted a number of National Security Court judgments as examples of cases in which defendants accused of the offences referred to above had been found not guilty. The judgments in question are: for 1996, no. 428 of 19 November and no. 519 of

27 December; for 1997, no. 33 of 6 March, no. 102 of 3 June, no. 527 of 17 October, no. 541 of 24 October and no. 606 of 23 December; and for 1998, no. 8 of 21 January, no. 14 of 3 February, no. 56 of 19 March, no. 87 of 21 April and no. 133 of 17 June. The judgments acquitting authors of works dealing with the Kurdish problem were based, *inter alia*, on the absence of "propaganda", one element of the offence.

PROCEEDINGS BEFORE THE COMMISSION

19. Mr Ceylan applied to the Commission on 10 February 1994. He alleged that his conviction amounted to a breach of Articles 9 and 10 of the Convention, which guarantee the right to freedom of thought and of expression. He also claimed to have been discriminated against on the grounds of his political opinions, contrary to Article 14 read in conjunction with Article 10.

20. The Commission declared the application (no. 23556/94) admissible on 15 April 1996. In its report of 11 December 1997 (former Article 31 of the Convention), it examined the first complaint under Article 10 alone. It expressed the opinion that there had been a violation of that provision and that no separate issue arose under it read in conjunction with Article 14 (thirty votes to two). Extracts from the Commission's opinion and the dissenting opinion contained in the report are reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

21. In his memorial, the applicant requested the Court to find that there had been a violation of Articles 6 § 1, 9, 10 and 14 of the Convention and to award him certain sums under Article 41.

22. The Government for their part asked the Court to

> "find that there has been no violation of the Convention Articles relied on by the applicant and to dismiss the application accordingly".

1. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 9 AND 10 OF THE CONVENTION

23. In his application, Mr Ceylan submitted that his conviction under Article 312 of the Turkish Criminal Code had infringed Articles 9 and 10 of the Convention. At the hearing before the Court, however, he did not object to his complaint being examined under Article 10 alone, as the Government and the Commission had proposed (see, among other authorities, the Incal v. Turkey judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1569, § 60). Article 10 provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

24. Those appearing before the Court agreed that the applicant's conviction as a result of the publication of his article "The time has come for the workers to speak out – tomorrow it will be too late" amounted to an "interference" with the exercise of his right to freedom of expression. Such an interference is in breach of Article 10 unless it satisfies the requirements laid down in paragraph 2 of that provision. The Court must therefore determine whether it was "prescribed by law", was motivated by one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" for achieving such aim or aims.

1. "Prescribed by law"

25. It was not disputed that the applicant's conviction was based on Article 312 §§ 2 and 3 of the Turkish Criminal Code and it must therefore be regarded as "prescribed by law" for the purposes of the second paragraph of Article 10.

2. Legitimate aim

26. The applicant did not make any submissions on this point.

27. The Government maintained that the aim of the interference in question had been not only to maintain "national security" and "prevent

disorder" (as the Commission had found), but also to preserve "territorial integrity".

28. Article 312 of the Criminal Code makes it a punishable offence to incite others to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions. It provides that the penalty shall be increased where such incitement endangers public safety (see paragraph 15 above).

Having regard to the sensitivity of the security situation in south-east Turkey (see the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, p. 2539, § 10) and to the need for the authorities to be alert to acts capable of fuelling additional violence, the Court accepts that the applicant's conviction can be said to have been in furtherance of the aims cited by the Government. This is certainly true where, as in south-east Turkey at the time of the circumstances of this case, there was a separatist movement having recourse to methods relying on the use of violence.

3. "Necessary in a democratic society"

(a) Arguments of those appearing before the Court

(i) The applicant

29. The applicant stated that his article did not contain any call for violence, did not refer to any illegal organisation and did not promote secessionism. According to him, the Turkish authorities abused Article 312 of the Criminal Code, which was in itself already contrary to the freedoms of thought and expression.

(ii) The Government

30. The Government submitted that offences similar to that set out in Article 312 of the Turkish Criminal Code were to be found in the legislation of other member States of the Council of Europe, citing, by way of example, Article 130 of the German Criminal Code. They argued that such provisions helped to preserve those States as democracies. Lastly, they submitted that it was not for the Strasbourg institutions to substitute their view for that of the Turkish courts as to whether there had been a "danger" capable of justifying the application of Article 312.

(iii) The Commission

31. The Commission recalled the reference to "duties and responsibilities" in Article 10 § 2, inferring this to mean that it was important for persons expressing themselves in public on sensitive political issues to take care not to condone "unlawful political violence". Freedom of expression did, however, comprise the right to engage in open discussion of

difficult problems such as those facing Turkey, in order – for example – to analyse the root causes of a situation or to express opinions on possible solutions.

The Commission noted that the article had aimed to provide a political explanation for the recrudescence of violence over the previous few years, and that, in it, the applicant had expressed his ideas in relatively moderate terms, not associating himself with recourse to violence or inciting the population to use illegal means. In its view, the applicant's conviction constituted a form of censorship which was incompatible with the requirements of Article 10.

(b) The Court's assessment

32. The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out, for example, in the Zana judgment (cited above, pp. 2547-48, § 51) and in *Fressoz and Roire v. France* ([GC], no. 29183/95, § 45, ECHR 1999-I).

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10.

(iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

33. The article in issue took the form of a political speech, both in its content and in the kind of terms employed.

Using words with Marxist connotations, the applicant offers an explanation of the renewal of violence in eastern and south-eastern Anatolia over the previous few years. The core of his argument appears to be that the Kurdish movement is part of – or at least should be part of – a general struggle for freedom and democracy being waged by "the Turkish working class and its economic and democratic organisations". The article's message is that, "[d]espite all the hurdles erected by the law, we must unite in action with the democratic mass organisations, political parties and every individual or body with which it is possible to work", for the purposes of opposing the "bloody massacres" and "State terrorism", "using all our powers of organisation and coordination".

The style is virulent and the criticism of the Turkish authorities' actions in the relevant part of the country acerbic, as demonstrated by the use of the words "State terrorism" and "genocide" (see paragraph 8 above).

34. The Court recalls, however, that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see the Wingrove v. the United Kingdom judgment of 25 November 1996 *Reports* 1996-V, pp. 1957-58, § 58). Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks (see the Incal judgment cited above, pp. 1567-68, § 54). Finally, where such remarks incite to violence against an individual, a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

35. The Court takes into account the background to cases submitted to it, particularly problems linked to the prevention of terrorism (see the Incal judgment cited above, pp. 1568-69, § 58). It takes note of the Turkish authorities' concern about the dissemination of views which they consider might exacerbate the serious disturbances which have been going on in Turkey for some fifteen years (see paragraph 28 above). In this regard, it should be noted that the article in issue was published shortly after the Gulf

war, at a time when a large number of persons of Kurdish origin, fleeing repression in Iraq, were thronging at the Turkish border.

36. The Court observes, however, that the applicant was writing in his capacity as a trade-union leader, a player on the Turkish political scene, and that the article in question, despite its virulence, does not encourage the use of violence or armed resistance or insurrection. In the Court's view, this is a factor which it is essential to take into consideration.

37. The Court also notes the severity of the penalty imposed on the applicant – one year and eight months' imprisonment plus a fine of 100,000 Turkish liras (see paragraph 11 above). It is mindful, further, of the fact that, as a result of his conviction, the applicant lost his office as president of the petroleum workers' union as well as a number of political and civil rights (see paragraphs 14 and 17 above).

In this connection, the Court points out that the nature and severity of the penalty imposed are also factors to be taken into account when assessing the proportionality of the interference.

38. In conclusion, Mr Ceylan's conviction was disproportionate to the aims pursued and accordingly not "necessary in a democratic society". There has therefore been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 10

39. The applicant submitted that he had been prosecuted on account of his article merely because it was the work of a person of Kurdish origin and concerned the Kurdish question. He argued that he was therefore a victim of discrimination contrary to Article 14 of the Convention read in conjunction with Article 10. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

40. The Government did not submit any arguments on this issue.

41. The Commission expressed the opinion that no separate issue arose under Article 14 read in conjunction with Article 10.

42. Having regard to its conclusion that there has been a violation of Article 10 taken alone (see paragraph 38 above), the Court does not consider it necessary to examine the complaint under Article 14.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

43. Before the Court, the applicant also complained that Article 6 § 1 of the Convention had been violated (see paragraph 21 above). The Court finds however that, since Mr Ceylan did not take the opportunity to raise this issue when the Commission was examining the admissibility of his application, he is now estopped from doing so.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. The applicant sought just satisfaction under Article 41 of the Convention, which provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. Pecuniary damage

45. The applicant claimed the sum of 850,000 French francs (FRF) by way of compensation for pecuniary damage comprising loss of earnings as a result of his imprisonment and his legal costs and disbursements in the domestic proceedings. In support of his claims he provided a certificate signed by the General Secretary of the *Petrol-İş* trade union showing that his gross annual salary had been FRF 189,927.25 in 1994 and FRF 145,500.36 in 1998.

46. The Government argued that there was no causal relationship between the alleged violation of the Convention and the pecuniary damage claimed. In any event, they submitted, Mr Ceylan had not substantiated his alleged earnings and expenses.

47. The Court finds that no causal relationship has been satisfactorily established between the applicant's alleged loss of earnings and the violation of Article 10. Moreover, the loss which the applicant claims to have suffered has not been sufficiently proved. Accordingly, the Court dismisses this part of the claim.

The Court will examine the applicant's claim in respect of the costs and expenses incurred by him in the domestic courts together with those incurred in the proceedings before the Strasbourg institutions.

2. Non-pecuniary damage

48. Mr Ceylan claimed FRF 150,000 in respect of non-pecuniary damage.

49. The Government asked the Court to hold that the finding of violation constituted in itself sufficient just satisfaction.

50. The Court considers that the applicant must have suffered a certain amount of distress in the circumstances of the case. Deciding on an equitable basis, it awards him the sum of FRF 40,000 under this head.

B. Costs and expenses

51. The applicant claimed FRF 120,000 in respect of his legal costs and expenses before the Strasbourg institutions, comprising FRF 45,000 for translation, fax, telephone and stationary expenditure and FRF 75,000 in lawyers' fees. He supplied a number of documents in support of his claims.

52. The Government submitted that the sums claimed were excessive. In particular, they maintained that the receipts furnished by the applicant did not support the precise amounts claimed and that they concerned expenses unrelated to these proceedings. They also argued that the sums claimed in respect of translation costs and legal fees were exaggerated by normal Turkish standards.

53. The Court notes that the applicant's lawyer has been associated with the preparation of other cases before the Court concerning complaints under Article 10 of the Convention based on similar facts. Deciding on an equitable basis and according to the criteria laid down in its case-law (see, among many other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II), the Court awards the applicant a total sum of FRF 15,000.

C. Default interest

54. The Court deems it appropriate to apply the statutory rate of interest applicable in France at the date of adoption of the present judgment, which is 3.47% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by sixteen votes to one that there has been a breach of Article 10 of the Convention;

2. *Holds* unanimously that no separate issue arises under Article 10 of the Convention read in conjunction with Article 14;

3. *Holds* unanimously that the applicant is estopped from bringing a complaint under Article 6 § 1 of the Convention;

4. *Holds* by sixteen votes to one
   (a) that the respondent State is to pay the applicant, within three months, the following amounts to be converted into Turkish liras at the rate applicable on the date of settlement:
      (i) 40,000 (forty thousand) French francs for non-pecuniary damage;
      (ii) 15,000 (fifteen thousand) French francs in respect of costs and expenses;
   (b) that simple interest at an annual rate of 3.47% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 1999.

Luzius WILDHABER
President

Paul MAHONEY
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Mrs Palm, Mrs Tulkens, Mr Fischbach, Mr Casadevall and Mrs Greve;

(b) concurring opinion of Mr Bonello;

(c) dissenting opinion of Mr Gölcüklü.

L.W.
P.J.M.

JOINT CONCURRING OPINION OF JUDGES PALM, TULKENS, FISCHBACH, CASADEVALL AND GREVE

We share the Court's conclusion that there has been a violation of Article 10 in the present case although we have reached the same result by a route which employs the more contextual approach set out in Judge Palm's partly dissenting opinion in *Sürek v. Turkey (no. 1)* ([GC], no. 26682/95, ECHR 1999-IV).

In our opinion the majority assessment of the Article 10 issue in this line of cases against Turkey attaches too much weight to the form of words used in the publication and insufficient attention to the general context in which the words were used and their likely impact. Undoubtedly the language in question may be intemperate or even violent. But in a democracy, as our Court has emphasised, even "fighting" words may be protected by Article 10.

An approach which is more in keeping with the wide protection afforded to political speech in the Court's case-law is to focus less on the inflammatory nature of the words employed and more on the different elements of the contextual setting in which the speech was uttered. Was the language intended to inflame or incite to violence? Was there a real and genuine risk that it might actually do so? The answer to these questions in turn requires a measured assessment of the many different layers that compose the general context in the circumstances of each case. Other questions must be asked. Did the author of the offending text occupy a position of influence in society of a sort likely to amplify the impact of his words? Was the publication given a degree of prominence either in an important newspaper or through another medium which was likely to enhance the influence of the impugned speech? Were the words far away from the centre of violence or on its doorstep?

It is only by a careful examination of the context in which the offending words appear that one can draw a meaningful distinction between language which is shocking and offensive – which is protected by Article 10 – and that which forfeits its right to tolerance in a democratic society.

CONCURRING OPINION OF JUDGE BONELLO

I voted with the majority to find a violation of Article 10, but I do not endorse the primary test applied by the Court to determine whether the interference by the domestic authorities with the applicant's freedom of expression was justifiable in a democratic society.

Throughout these, and previous Turkish freedom-of-expression cases in which incitement to violence was an issue, the common test employed by the Court seems to have been this: if the writings published by the applicants supported or instigated the use of violence, then their conviction by the national courts was justifiable in a democratic society. I discard this yardstick as insufficient.

I believe that punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create "a clear and present danger". When the invitation to the use of force is intellectualised, abstract, and removed in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail.

I borrow what one of the mightiest constitutional jurists of all time had to say about words which tend to destabilise law and order: "We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[1]

The guarantee of freedom of expression does not permit a State to forbid or proscribe advocacy of the use of force except when such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action[2]. It is a question of proximity and degree[3].

In order to support a finding of clear and present danger which justifies restricting freedom of expression, it must be shown either that immediate serious violence was expected or was advocated, or that the past conduct of the applicant furnished reason to believe that his advocacy of violence would produce immediate and grievous action[4].

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1. Justice Oliver Wendell Holmes in *Abrahams v. United States* 250 U.S. 616 (1919) at 630.
2. *Brandenburg v. Ohio* 395 U.S. 444 (1969) at 447.
3. *Schenck v. United States* 294 U.S. 47 (1919) at 52.
4. *Whitney v. California* 274 U.S. 357 (1927) at 376.

It is not manifest to me that any of the words with which the applicant was charged, however pregnant with mortality they may appear to some, had the potential of imminently threatening dire effects on the national order. Nor is it manifest to me that instant suppression of those expressions was indispensable for the salvation of Turkey. They created no peril, let alone a clear and present one. Short of that, the Court would be subsidising the subversion of freedom of expression were it to condone the conviction of the applicant by the criminal courts.

In summary, "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose, through discussion, the falsehood and the fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence"[1].

1. Justice Louis D. Brandeis in *Whitney v. California* 274 U.S. 357 (1927) at 377.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Translation*)

To my great regret, I cannot agree with the majority of the Court that there has been a violation of Article 10 of the Convention. In my opinion, there is no valid reason to find that the interference in this case was not necessary in a democratic society and, in particular, not proportionate to the aim of preserving national security.

The general principles which emerge from the judgment of 25 November 1997 in the case of Zana v. Turkey (*Reports of Judgments and Decisions* 1997-VII) and which I recall in my dissenting opinion annexed to *Gerger v. Turkey* ([GC], no. 24919/94, 8 July 1999) are relevant to, and hold good in, the instant case. To avoid repetition, I refer the reader to paragraphs 1-9 of that dissenting opinion.

The case of Ceylan v. Turkey cannot be distinguished from either the Zana case or the cases of Gerger, Sürek, etc. In his article, the applicant writes of "genocide ... intensify[ing]" in Turkey; of a "constant increase … in the numbers of persons executed without trial, ... and ... disappearing while in detention, particularly since the passing of the new Prevention of Terrorism Act"; of the "murder ... of the president of the Diyarbakır branch of the HEP [People's Labour Party], probably by anti-guerrilla forces" and of the crushing "not only [of] the struggle of the Kurdish people, but the struggle of the whole working class and proletariat ...". "Consequently", says the applicant, "not only the Kurdish people but the whole of our proletariat must stand up against these laws and the State terrorism currently being practised". And in conclusion, the applicant calls on all his fellow citizens and all democratic forces to "take an active part in this struggle" before it is too late. In my view, the quoted passages can in all good faith be construed as an incitement to hatred and extreme violence. Taking into account the margin of appreciation which must be left to the national authorities, I therefore conclude that the interference in issue cannot be described as disproportionate – with the result that it can be regarded as having been necessary in a democratic society.

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

SECOND SECTION

CASE OF CHAUVY AND OTHERS v. FRANCE

(Application no. 64915/01)

JUDGMENT

STRASBOURG

29 June 2004

FINAL

29/09/2004

In the case of Chauvy and Others v. France,

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

Mr A.B. BAKA, *President*,
Mr J.-P. COSTA,
Mr L. LOUCAIDES,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mr M. UGREKHELIDZE, *judges*,
and Mr T.L. EARLY, *Deputy Section Registrar*,

Having deliberated in private on 23 September 2003 and 8 June 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 64915/01) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two French nationals, Mr Gérard Chauvy and Mr Francis Esmenard, and the French publishing company Albin Michel ("the applicants"), on 13 December 2000.

2. The applicants were represented by Mr C. Bigot of the Paris Bar (from the Bauer, Bigot & Felzenszwalbe law firm). The Government ("the Government") were represented by Mr R. Abraham, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. The applicants alleged a breach of their right to freedom of expression within the meaning of Article 10 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

6. By a decision of 23 September 2003, the Chamber declared the application partly admissible.

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The first applicant, Gérard Chauvy, was born in 1952 and lives in Villeurbanne. The second applicant, Francis Esmenard, was born in 1936 and lives in Paris. Both are French nationals. The third applicant, Editions Albin Michel, is a limited company formed under French law that has its registered office in Paris.

9. The first applicant, who is a journalist and writer, is the author of a book entitled *Aubrac, Lyon 1943* which was published in 1997 by Editions Albin Michel (the third applicant), a company chaired by the second applicant.

10. In his book, the first applicant reconstructed the chronology of events involving the Resistance movements in Lyons in 1943 and took stock of the various archive materials that were available on that period. One of the principal mysteries surrounding this period is the Caluire meeting, an event of particular significance to the history of the French Resistance and a major episode of the Second World War. On 21 June 1943 Klaus Barbie, the regional head of the Gestapo, arrested the main Resistance leaders at a meeting in Caluire in the Lyons suburbs. Among those arrested were Jean Moulin, General de Gaulle's representative in France and the leader of the internal Resistance, and Raymond Aubrac, a member of the Resistance movement who managed to escape in the autumn of 1943. The truth about how the Resistance leaders came to be arrested in Caluire has still not been established. A member of the Resistance, René Hardy, who is now dead, was accused of being the "traitor" and put on trial. However, he was not convicted after two separate trials. A majority of the court voted in favour of a conviction in one of the trials, but the rules of criminal procedure in force at the time required a majority of at least two votes for a guilty verdict to be returned.

11. The first applicant recounted this major event "using the Aubracs as a prism". He claimed that his book put to the test "the official truth as related at length in the media, notably by the Aubracs, and in a film that sings their praises".

12. The book sparked off a fierce public debate in France and the newspaper *Libération* organised a round-table conference at which historians were invited to discuss the issue in the presence of Mr and Mrs Aubrac.

13. An unabridged version of the written submissions – known as the "Barbie testament" – which were signed by Klaus Barbie and lodged by Mr Vergès, his lawyer, on 4 July 1990 with the judge investigating Barbie's treatment of members of the Lyons Resistance was appended to the book.

Many of the questions raised by the first applicant were based on a comparison of that document with the "official" version of history. In the conclusion to his book, he said that there was no evidence in the archives to substantiate the accusation of treachery made by Klaus Barbie against Raymond Aubrac, but that their examination had shown that "unreliable accounts [had] been given at times". He followed this up with two pages of questions that cast doubt on Raymond Aubrac's innocence.

14. On 14 May 1997 Mr and Mrs Aubrac brought a private prosecution by direct summons in the Seventeenth Division of the Paris *tribunal de grande instance*. The summons contained fifty extracts from the book (eighteen from Barbie's written submissions and thirty-two from the first applicant's own text). The three applicants were summoned in their capacities as author, accomplice and a party liable for defamation under the civil law. Mr and Mrs Aubrac relied on section 31 of the Freedom of Press Act of 29 July 1881 and the Court of Cassation's judgment of 4 October 1989 in *Pierre de Bénouville*. The relevant parts of the summons read as follows:

> "When ... Klaus Barbie was brought to France in 1983 he chose to defend himself by seeking to discredit those of his victims who had survived and were still able to make accusations against him by accusing them of treachery. He suggested that Raymond and Lucie Aubrac might be among their number. However, when Raymond Aubrac attended Barbie's trial after being called as a witness by him, neither Barbie, nor his counsel Mr Vergès, asked him the slightest question, made the least remark or produced any document capable of supporting this vile accusation which remained extremely vague.
>
> At the same time, by a judgment of 30 April 1987 followed by a judgment of 10 February 1988 which has become final, Raymond Aubrac secured Mr Vergès's conviction for defamation after Mr Vergès had chosen to relay and even to back up his client's insinuations in a film by Mr Claude Bal. ...
>
> The [first applicant's] book was published in March 1997 with the title 'Aubrac, Lyon 1943'. A banner wrapped around the cover proclaimed: 'A legend put to the test of history.'
>
> There cannot, therefore, be any doubt that this book is aimed almost exclusively at the Aubracs and purports to use rigorous historical method to destroy their so-called 'legend' as members of the Resistance."

15. Mr and Mrs Aubrac then set out those of the applicants' allegations which they considered defamatory and their reasons for so considering them:

> "A. The circumstances of Raymond Aubrac's arrest in March 1943
>
> The first falsehood of which the Aubracs are accused is that Raymond Aubrac was arrested on 13 March 1943 and not on 15 March; this enables Barbie to assert on the basis of this 'established fact' that the only way Raymond Aubrac, who had been

arrested on 13 March, was able to attend the meeting on 15 March in the rue de l'hôtel de ville in Lyons was under the control of the French police. ...

B. The allegations relating to Raymond Aubrac's release in May 1943

An order for Raymond Aubrac's release was made on 10 May 1943. However, in an autobiographical account published in 1984, his wife puts the date of his release at 14 May while Raymond Aubrac himself hesitates between 14 and 15 May in a deposition made on 21 August 1948 in connection with the second Hardy trial.

... For [the first applicant], there can be but one explanation for this discrepancy between the dates: Raymond Aubrac spent four days collaborating with the divine Barbie who compelled the French judicial authorities to release him. This was confirmed by Lucie Aubrac's assertion that she had warned the public prosecutor not to oppose release, while [the first applicant] feigns surprise at the lack of concrete evidence of the application. ...

C. Escape from L'Antiquaille Hospital

... this entire chapter returns to the alleged statement by Lucie Aubrac that she secured her husband Raymond's inclusion not only among the four members of the Resistance who were arrested on 15 March 1943, but also among those who were freed on 24 May, with the sole aim of challenging the account of those who took part in that escape and branding them liars. ...

... [The first applicant's] inability to rank the documents he cites in order of importance is a cause for consternation here. He considers it a near certainty that Aubrac's wife 'hid' her husband following his release by Barbie, but chooses to ignore the fact that [the circumstances of] his release [were] immediately examined by Frenay, head of the 'Combat' movement and subsequently, as was to be expected, subjected to close scrutiny at General de Gaulle's headquarters in London, and, in particular, the remark made by Frenay – despite its inclusion in the record of his interview in London on 30 June 1943 – that 'there is no doubt that Aubrac is a fellow who is beyond all suspicion'. ...

D. The defamatory allegations about Caluire

...

Although the debate still rages over the extent to which René Hardy was a willing collaborator and the unnecessary risks taken by the leaders of the 'Combat' movement in sending Hardy to Caluire to defend the prerogatives of their leader, prior to Barbie in 1989 no one had ever suggested that Raymond and Lucie Aubrac had played the slightest role in Jean Moulin's arrest on 21 June, or his identification by René Aubry on 25 June after four days of torture, it again being stressed that Hardy did not know Jean Moulin.

... [The first applicant] had no hesitation in asserting (page 130):

'It is certain that Raymond Aubrac appears no longer to recollect the meeting with Lassagne and Aubry at Lonjaret's home on 19 June 1943, although in 1948 he fully admitted that such a meeting had taken place.'

In so doing, [the first applicant] lends credence to the notion that on 19 June 1943 Raymond Aubrac knew all about the proposed meeting in Caluire ...

E. The deliberate confusion between Hardy and Aubrac

In two transitional chapters (Chapters XI and XII), [the first applicant], without citing a single piece of documentary evidence, seeks to cause deliberate confusion by recounting the misfortunes of René Hardy (who, once again, no one doubts helped the Germans although it is not known to what extent he did so voluntarily) and Raymond and Lucie Aubrac, whom no one has ever accused of such collaboration, for good reason. ...

... [The first applicant's] aim is still the same: to lead people to believe that Aubrac is lying and that what he clearly stated at the material time no longer matters, as he does not repeat it in identical terms fifty years on. ...

F. The offences of defamation are made out

Both the publication of the 'Barbie testament' and the comments of [the first applicant] in support of that document render [the applicants] liable for defamatory statements in the form of precise allegations, although sometimes in the form of innuendo, against two specific persons, Raymond and Lucie Aubrac, whose honour and reputation have been considerably tarnished by the said allegations.

The most harmful allegations in a book whose entire content is defamatory are as follows:

A. Allegations against Raymond Aubrac

1. Raymond Aubrac was the French officer whom the Germans used to infiltrate the leaders of the Secret Army upon its formation.

2. Raymond Aubrac was a member of the Resistance whom Barbie turned into one of his department's agents on his arrest in March 1943.

3. Raymond Aubrac lied about the date of his first arrest: it took place on 13, not 15, March 1943 .

4. Raymond Aubrac, who was controlled by the French police, was not in fact arrested on 15 March 1943, when the French police went to one of his homes.

5. Raymond Aubrac was responsible for the 'mousetraps' that were set for members of the Resistance movement in Lyons between 13 and 15 March 1943.

6. Raymond Aubrac was not released on 10 May 1943 pursuant to a freely made decision of the investigating judge ..., but because the German authorities had compelled the French judicial authorities to release him.

7. Raymond Aubrac lied about the date of his release following his first arrest in order to hide the fact that for four days, between 10 and 14 May 1943, he had remained at the disposal of Barbie, the head of the Gestapo.

8. After being informed on Saturday 19 June 1943 of the time and venue of the meeting due to take place in Caluire of various Resistance leaders including Jean Moulin, Raymond Aubrac had informed his wife, who was thus able to inform the head of the Gestapo.

9. Raymond Aubrac was released voluntarily by the Germans on 21 October 1943, when English agents took part in an operation to free one of their agents, Jean Biche, and Barbie, who had been informed of the operation, seized the opportunity to allow his agent Raymond Aubrac to escape.

10. In general, Raymond Aubrac's conduct with regard to the German authorities in Lyons in 1943 was similar to that of René Hardy, whom the Germans were using at that time.

B. Allegations against Lucie Aubrac

1. Lucie Aubrac had concealed the fact that her husband was released on 10 May 1943, not as a result of action she had taken, but by virtue of an order of the investigating judge ... acting on the instructions of Barbie, the head of the Gestapo.

2. It was not Lucie Aubrac who had arranged the operation that had enabled three members of the Resistance, who had been arrested at the same time as Raymond Aubrac, to escape from L'Antiquaille Hospital on 24 May 1943.

3. After being informed by her husband of the time and place of the meeting at Dr Dugoujon's home in Caluire on 21 June 1943, Lucie Aubrac had communicated the information to Barbie, the regional head of the Gestapo, on Sunday, 20 June.

4. Lucie Aubrac, whose controlling officer was Floreck, Barbie's deputy, had agreed to act as liaison officer between her husband and ... Barbie to avoid 'giving her husband away'.

5. Lucie Aubrac could only have gained access to the premises used by the Gestapo if she was a Gestapo agent.

6. It was with the full agreement of the Gestapo, and more specifically Barbie, that Lucie Aubrac was able to arrange her husband's 'escape' in an operation that was organised not by her, but by the Intelligence Service, on 21 October 1943.

Each of these defamatory statements ... must give rise to liability under section 31 of the Act of 29 July 1881.

These defamatory statements, which accuse [the Aubracs] of treachery and of concealing treachery, constitute a direct attack on their status as founding members and organisers of the Freedom (*Libération*) Resistance network and, in Raymond Aubrac's case, as the military commander of the Secret Army.

This reference to section 31 of the Act of 29 July 1881 is inescapable since, as the Criminal Division of the Court of Cassation reiterated in a judgment of 4 October 1989 (in *Pierre de Bénouville*): '... By virtue of a combination of sections 30 and 31 of the Freedom of Press Act and section 28 of the Act of 5 January 1951, the protection against defamation afforded to certain recognised Resistance movements which are

likened to the Army and Navy extends to the members of these movements if the defamatory statement concerns their status or actions as members.' "

16. In a judgment of 2 April 1998, the *tribunal de grande instance* began by examining the various alleged defamatory statements in the chronological order of the underlying events and by comparing Klaus Barbie's signed written submissions with the first applicant's text, as it considered that the very purpose of the first applicant's book was to

"compare the allegations of these 'written submissions' with the account of events given by Mr and Mrs Aubrac on various occasions and the other oral and documentary evidence relating to that period. ... The entire book thereafter focuses on this (major) charge of treachery".

17. The *tribunal de grande instance* thus examined the circumstances of Raymond Aubrac's initial arrest in March 1943, his release in May 1943, the escape from L'Antiquaille Hospital, the Caluire episode, events post-Caluire and the escape from boulevard des Hirondelles, and concluded:

"Thus ..., without formally corroborating the direct accusations made in 'Barbie's written submissions', the [first applicant] sets about sowing confusion by combining a series of facts, witness statements and documents of different types and varying degrees of importance which together serve to discredit the accounts given by the civil parties; he also questions the motives for their deception and lies, and – despite the reservations expressed by the author – surreptitiously renders plausible the accusation of treachery and manipulation made in 'Barbie's written submissions' that constitutes the underlying theme of the entire book. ...

The civil parties are therefore right to consider that the entire book, and particularly the passages [reproduced in the judgment], tarnish their honour and reputation.

The publication of the written submissions signed by Klaus Barbie and the quotation in various parts of the text of extracts from them constitutes defamation by reproduction of libellous accusations or allegations, an offence expressly provided for by section 29, first paragraph, of the Freedom of the Press Act.

As for the author's comments, they constitute defamation by innuendo in that they encourage the reader to believe that very grave questions exist over Mr and Mrs Aubrac's conduct in 1943 that outweigh the certainties that have been hitherto accepted; they thus lend credence to Barbie's accusations."

18. The *tribunal de grande instance* then considered which section of the Freedom of the Press Act was applicable in the case and, referring to the Act of 5 January 1951 and the Court of Cassation's case-law, stated that the likening of recognised Resistance movements to the Army and Navy also applied to members of those movements. It noted that for Convention purposes "law" included both legislation passed by Parliament and judicial interpretation of that legislation, provided it was sufficiently settled and accessible. It accordingly found that section 31 of the Act of 29 July 1881 was applicable.

19. It went on to explain that the defamatory statements were deemed to have been made in bad faith and that the burden of proof was on the accused to provide sufficient justification to establish that they had acted in good faith. They had to show that there had been a legitimate interest in publication unaccompanied by personal animosity, that a proper investigation had been carried out and that the tone was measured:

> "While the work of historians, who must be permitted to go about their work with total liberty if the historical truth is to be established, may on occasion lead them to make critical assessments containing defamatory accusations against the actors – both living and dead – of the events they are studying, it can only be justified if the historian proves that he has complied with his scientific obligations. ...
>
> As soon as they came into the hands of the investigating judge and even though only the specialists knew what they contained, 'Barbie's written submissions' received a degree of publicity that encouraged rumours to spread. There was, therefore, an argument for full publication, provided it was accompanied by an explanation of the historical background and a critical analysis that would enable the reader to form a considered opinion on the weight to be attached to the last statements of the former Nazi officer."

With that requirement in mind, the *tribunal de grande instance* found that the characteristic features of the applicant's book were the excessive importance given to 'Barbie's written submissions', a manifest lack of adequate documentation on the circumstances of Raymond Aubrac's first arrest on 15 March 1943 and his release, a failure to rank the sources of information on the escape from L'Antiquaille Hospital in order of importance, insufficient qualification of his remarks on Caluire and the escape of 21 October, a lack of critical analysis of the German sources and documents as such and its neglect of the statements of those who took part in the events.

The *tribunal de grande instance* set out in detail and gave reasons for each of these assertions and concluded:

> "... judges are required by the nature of their task not to abdicate when confronted with the scholar (or someone claiming to be such) and to decide the case in law, thereby contributing in their own way to the regulation of relations in society.
>
> Thus, judges cannot, in the name of some higher imperative of historical truth, abandon their duty to protect the right to honour and reputation of those who were thrust into the torment of war and were the unwilling but courageous participants therein.
>
> Immortalised by their contemporaries as illustrious myths, these men and women have not for all that become mere subjects of research, shorn of their personality, deprived of sensibility or divested of their own destinies in the interests of science.
>
> Because he has forgotten this and has failed to comply with the essential rules of historical method, *the accused's* [the author of the book's] *plea of good faith must fail.*"

20. The *tribunal de grande instance* therefore found the first two applicants guilty, as principal and accomplice respectively, of the offence under sections 29, first paragraph, and 31, first paragraph, of the Act of 29 July 1881 of public defamation of Mr and Mrs Aubrac in their capacity as members of a recognised Resistance movement.

It sentenced the first applicant, as the principal, to a fine of 100,000 French francs (FRF) and the second, as an accomplice, to a fine of FRF 60,000. It also found them jointly and severally liable with the third applicant to pay Mr and Mrs Aubrac damages of FRF 200,000 each. It dismissed an application for an order for the book's destruction, but made an order for publication of a statement in five daily newspapers and for each copy of the book to carry a warning in like terms. Lastly, it found the third applicant liable under the civil law.

21. The applicants appealed against that decision.

22. In a judgment of 10 February 1999, the Paris Court of Appeal dismissed objections of nullity that had been made by the applicants and, on the merits, examined the following questions in turn: whether the prosecution was lawful, legitimate and necessary, whether the remarks were defamatory, whether the defendants had acted in good faith and whether section 31 of the Act of 29 July 1881 was applicable.

23. As to whether the remarks were defamatory, the Court of Appeal endorsed the reasoning of the court below and added that there were a number of factors which indicated that the author and publisher had decided to make the Aubracs' alleged betrayal the subject of their publication; these included the editorial presentation, the general structure of the book, the wraparound banner that juxtaposed 'legend' and 'history', and the conclusion to the book which was on the same theme.

24. With regard to the question of defamation by innuendo, the Court of Appeal rejected the criticism of the *tribunal de grande instance*'s reasoning:

> "Having thus decided how the book would be balanced: systematic doubt where the Aubracs are concerned and the use of Barbie's document as a reference – albeit one to be treated with caution – [the first applicant] proceeds, in circumstances that are accurately described in the judgment, systematically to refuse to accord any credit to Mr and Mrs Aubrac's account.
>
> To take the two episodes to which the defence refer: as regards the escape from L'Antiquaille, the author is not merely being irreverent but clearly makes accusations of inaccuracy, contradiction (page 268) and of misrepresenting the truth (page 80): there is no better way of insinuating that someone is lying."

25. The Court of Appeal then examined the applicants' plea that they had acted in good faith and rejected it.

It did not deny that there could be an interest in analysing major events in the history of the Resistance and found that although some of the expressions used in the book were unpleasant they did not suffice to establish the existence of personal animosity. However, it concluded that the

first applicant had failed to act with the necessary rigour for the following reasons:

> "Anyone who alleges a specific fact must first seek to verify its accuracy. Although this requirement is general, it is especially justified when the accusation is particularly serious – such as of an act of treachery leading to the death of the main Resistance leader – and when, as a historian, its maker is accustomed to questioning sources."

The Court of Appeal then proceeded to identify the factors from which it had concluded that that requirement had not been complied with: the first applicant's failure to consult the file on the investigation that was conducted after the arrests in March 1943, even though it would have enabled him to establish the date of Raymond Aubrac's arrest and whether he was already in custody when his home was searched; his lack of interest in the testimony of direct witnesses from that period who were still alive when the book was written; and his failure to investigate certain documents. Noting repeated failures by the first applicant to exercise sufficient caution (he had published the Barbie document without subjecting it to genuine critical analysis, had directly accused the civil party of lying and had dismissed the boulevard des Hirondelles operation by members of the Resistance led by Lucie Aubrac as a sham), the Court of Appeal rejected his plea of good faith.

26. As regards the decision to apply section 31 of the Act of 29 July 1881, the Court of Appeal referred to section 28 of the Act of 5 January 1951 and to two judgments of the Court of Cassation and found that the civil parties had been defamed exclusively with regard to their activities as members of the Resistance "since [the first applicant's] entire thesis conveyed to the reader the notion that they were guilty of treachery". It rejected an argument regarding the quality of the statute that had been applied in the case before it, noting that it was some forty years old and had been the subject matter of "settled and unambiguous case-law of the highest court for some twenty years".

27. Finding that the sentences that had been handed down were just and proportionate, the Court of Appeal upheld all the provisions of the judgment of the court below.

28. The applicants appealed to the Court of Cassation, pleading, *inter alia*, Articles 7 and 10 of the Convention on the basis that the statutory provision that had been applied was neither clear nor precise and that its interpretation by the courts was inaccessible, unforeseeable and too wide. In their final two grounds of appeal, they alleged that the Court of Appeal had failed to give reasons for its decision to hold the applicants civilly and criminally liable for public defamation.

29. In a judgment of 27 June 2000, the Court of Cassation dismissed the appeal, holding, *inter alia*, that the court below had properly justified its decision. It found that the Court of Appeal had applied the law correctly:

> "By virtue of a combination of section 28 of the Act of 5 January 1951 and sections 30 and 31 of the Act of 29 July 1881, firstly, these provisions afford protection against

defamation to certain recognised Resistance movements which are likened to the regular Army and, secondly, this protection extends to members of these movements if the defamatory statement concerns their status or actions as members."

It examined the final two grounds of appeal together and dismissed them, holding:

"The Court of Cassation is satisfied from the wording of the judgment and its examination of the procedural documents that the Court of Appeal has, for reasons which are neither insufficient nor self-contradictory, firstly, correctly analysed the meaning and scope of the impugned statements and thus identified all the constitutive elements of fact and intent of the offence of which it found the accused guilty and, secondly, used its unfettered discretion to analyse the special circumstances and concluded that the accused's plea of historical criticism in good faith had to be rejected."

II. RELEVANT DOMESTIC LAW

30. *Freedom of the Press Act of 29 July 1881 (as worded at the material time)*

Section 29

"It shall be defamatory to make any statement or allegation of a fact that damages the honour or reputation of the person or body of whom the fact is alleged. The direct publication or reproduction of such a statement or allegation shall be an offence, even if expressed in tentative terms or if made about a person or body not expressly named but identifiable by the terms of the disputed speeches, shouts, threats, written or printed matter, placards or posters.

It shall be an insult to use any abusive or contemptuous language or invective not containing an allegation of fact."

Section 30

"Anyone who by one of the means set out in section 23 makes a statement that is defamatory of a court of first instance or of appeal, the Army, Navy or Air Force, a constitutional body or a public authority shall be liable on conviction to between eight days' and one year's imprisonment and a fine of between 300 and 300,000 francs, or to one only of these penalties."

Section 31

"Defamation by like means by reference to the functions or capacity of one or more ministers or ministry officials, one or more members of one of the two legislative chambers, a civil servant, a representative or officer of the law, a minister of religion in receipt of a State salary, a citizen temporarily or permanently responsible for a public service or discharging a public mandate, a member of a jury or a witness on the basis of his witness statement shall be punishable by the same penalty.

Defamatory statements about the private lives of the above persons shall be punishable under section 32 below."

Section 32

"Anyone who by any of the means set out in sections 23 and 28 makes a statement that is defamatory of private individuals shall be liable on conviction to between five days' and six months' imprisonment and a fine of between 150 and 80,000 francs, or to one only of these sentences.

..."

Law no. 51-19 of 5 January 1951

Section 28

"For the purposes of section 30 of the Act of 29 July 1881, recognised Resistance movements and networks shall be deemed to form part of the Army and Navy."

Extracts from the Court of Cassation's case-law

Judgment of 12 January 1956

"The originating summons referred only to section 32 of the Act of 29 July 1881, which makes it an offence to make statements that are defamatory of private individuals; the statements which the tribunals of fact found to be defamatory amounted, on the contrary, to offences under sections 30 and 31 of the Act, as the allegations were made against a Resistance group that was likened to the regular Army, or against its leader acting in that capacity and in respect of his functions."

Judgment of 13 November 1978

"When the defamatory accusation is made against the leader of a Resistance group that is likened to the regular Army acting in that capacity and with respect to his functions ..., a charge will lie only under section 31 ..."

Judgment of 4 October 1989 (*Pierre de Bénouville*)

"By virtue of a combination of sections 30 and 31 of the Freedom of Press Act and section 28 of the Act of 5 January 1951, the protection against defamation afforded to certain recognised Resistance movements which are likened to the Army and Navy extends to the members of these movements if the defamatory statement concerns their status or actions as members."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

31. The applicants complained of the lack of quality, foreseeability and accessibility of the statutory provisions that had resulted in the imposition of a penalty that was not "prescribed by law" and was disproportionate. They relied on Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Whether there was an interference

32. The Government did not dispute that there was "interference by public authority" with the exercise of the applicant's freedom of expression.

33. The Court notes that such interference will infringe the Convention unless it satisfies the requirements of paragraph 2 of Article 10. It must therefore determine whether it was "prescribed by law", was directed towards one or more of the legitimate aims set out in that paragraph and "necessary in a democratic society" to achieve them.

B. Justification for the interference

1. "Prescribed by law"

(a) The parties' submissions

34. The applicants submitted, firstly, that the combination of sections 30 and 31 of the Freedom of the Press Act of 29 July 1881 and the Act of 5 January 1951 could not satisfy the requirements as to the quality, foreseeability and accessibility of the law imposed by Article 10 § 2 of the Convention.

35. They maintained that at the time the book was published French legislation did not make it possible to affirm that public defamation of a member of the Resistance fell within section 31 rather than section 32 of the Act of 29 July 1881.

Yet, the court's sentencing powers and the remedies available to the victims depended on which section was applicable. The applicants

considered that it was common ground that no French legislation existed in which a member of the Resistance had been likened to any of the persons referred to in section 31 and that by applying that provision in the instant case the domestic courts had adopted a wide interpretation by analogy.

36. They went on to argue that the decisions in which that wide interpretation had been used were not sufficiently accessible or foreseeable: the Court of Cassation's judgment of 12 January 1956 was indexed in the B*ulletin officiel des arrêts de la Cour de cassation* (official law reports of the Court of Cassation's decisions) with keywords that made no reference to defamation of members of the Resistance or to the Act of 5 January 1951, nor was there any reference to that Act in the text of the judgment; the Court of Cassation's judgment of 13 November 1978 was published in the same set of reports under the reference "leader of a Resistance group", but there was no mention of the Act of 5 January 1951; the judgment of 4 October 1989 was not reported in the *Bulletin officiel des arrêts de la Cour de cassation*. The applicants further submitted that mere publication of an extract of a judicial decision in a review published by a trading company could not be regarded as satisfying the condition as to foreseeability and accessibility.

37. They added that, in terms of quantity, three decisions did not suffice to constitute foreseeable case-law.

38. The Government submitted that, under the Court's case-law, the law had to be sufficiently accessible and foreseeable, which meant that the public had to be able to have an indication that was adequate in the circumstances of the legal rules applicable to a given case and the law formulated with sufficient precision to enable the citizen to regulate his conduct. They referred in that connection to The Sunday Times *v. the United Kingdom (no. 1)* (judgment of 26 April 1979, Series A no. 30, p.31, § 49) and *Goodwin v. the United Kingdom* (judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II, pp. 496-97, § 31).

39. They maintained that the Court of Cassation's construction of sections 30 and 31 of the Act of 29 July 1881 and section 28 of the Act of 5 January 1951 was long-standing and settled and said that, in their view, the applicants must have been aware when they were prosecuted that the Court of Cassation considered that section 31 of the 1881 Act applied to cases in which a member of a Resistance movement or network had been defamed. The Government submitted that the requirement regarding the clarity of the law had therefore been satisfied in the instant case.

40. They further argued that those two Acts and the decisions holding that section 31 of the Act of 29 July 1881 applied to members of Resistance networks, which had been published in various legal journals, satisfied the condition as to accessibility.

41. The Government submitted, lastly, that, through their profession, the applicants must have been aware of the provisions on defamation in the

Freedom of the Press Act, a statute which regulated a substantial part of media law. Furthermore, since the book attacked former members of Resistance networks, the applicants could have acquainted themselves with the case-law that supplemented the Freedom of the Press Act. Each of the applicants had been assisted by a lawyer who would, in principle, have been familiar with that case-law.

42. The Government therefore considered that the law as applied in the present case complied with the conditions of clarity, accessibility and foreseeability required by Article 10 of the Convention.

(b) The Court's assessment

43. The Court reiterates that a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see, among other authorities, The Sunday Times, cited above, § 49, and *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, pp. 2325-26, § 35).

44. The scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed (see *Cantoni v. France*, judgment of 15 November 1996, *Reports* 1996-V, p. 1629, § 35). A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among other authorities, *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B, p. 71, § 37, and *Grigoriades v. Greece*, judgment of 25 November 1997, *Reports* 1997-VII, p. 2587, § 37).

45. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (see *Cantoni*, loc. cit.).

46. With specific regard to the question of the accessibility and foreseeability of the law, the Court notes that the applicants in the instant case are respectively a journalist, a publisher and a publishing company.

47. The relevant law comprised two pieces of legislation (the Acts of 29 July 1881 and 5 January 1951) and three Court of Cassation decisions (of 12 January 1956, 13 November 1978 and 4 October 1989) which interpreted the legislation consistently and which those engaged in the press and publishing sectors must have been aware of.

48. The Court accordingly finds that, as professional book publishers, the publisher and the publishing company must at least have been familiar with the legislation and settled case-law that was applicable in this sphere and could have sought advice from specialist counsel. In view of the nature of the book, they could not have been unaware of the risks to which the author's challenging of previously undisputed historical facts exposed them. They were accordingly in a position to assess the risks and to alert the author to the risk of prosecution if the book was published as it stood.

Furthermore, the publisher and, through him, the author should have known that it was settled case-law that a failure to exercise caution and care when collecting historical evidence and drawing conclusions therefrom could be treated by the domestic courts as a constitutive element of the offence of defamation of persons whose honour or reputation risked being tarnished by publication.

49. In conclusion, the Court considers that the applicants' contention that they were unable to foresee "to a reasonable degree" the consequences publication of the book was liable to have for them in the courts is untenable. It therefore finds that the interference in issue was "prescribed by law" within the meaning of the second paragraph of Article 10 of the Convention.

2. Legitimate aim

50. The applicants expressed no view on this point.

51. The Government argued that the domestic courts' decisions were intended to protect Mr and Mrs Aubrac from defamation in a case in which the damage to their reputation was considerable given the accusation of treachery that had been levelled against them. The decisions were thus aimed at "the protection of the reputation or rights of others" and the interference had pursued a legitimate aim for the purposes of paragraph 2 of Article 10 of the Convention.

52. The Court finds that the aim of the relevant decisions in the present case was indisputably to protect the reputation of Mr and Mrs Aubrac, whose activities as members of the Resistance have made them public figures since the Second World War.

53. Consequently, the interference complained of pursued at least one of the legitimate aims set out in paragraph 2 of Article 10.

3. "Necessary in a democratic society"

(a) The parties' submissions

54. The applicants stressed that the book was a historical work and submitted that the general public's right to know its own history had to be taken into account and entailed different approaches by the journalist and the historian.

55. They criticised the stance taken by the domestic courts which authorised judicial intervention in historical debate and the judicial scrutiny of any historical work, thereby prohibiting all historical conjecture, denying the right to debate the official version of history that was generally accepted in France and depriving the applicants of all freedom of expression on historical matters.

They submitted that the French courts had conclusively decided to regard Mr and Mrs Aubrac as valiant members of the Resistance and refused to permit any historian to examine their conduct in order to assess the role they had played in the events that had culminated in the meeting at Caluire on 21 June 1943. Consequently, the applicants argued that there had been no "pressing social need" that justified removing that episode from the scope of historians' freedom of opinion.

56. The applicants went on to explain that the author of the book had relied on authentic sources that had been cross-checked, and that Klaus Barbie's written submissions had been just one of a number of sources, all of which had been read critically. Their approach had been systematically to treat Klaus Barbie's accusations with caution. They added that they had also taken into account the statements of two members of the Resistance who had been direct witnesses of the matters which they had researched. They stressed, lastly, that the book was written in measured tones and contended that it was legitimate for a historian with doubts about an assertion to regard it as an "unverifiable" accusation if he had not been able to assemble all the documentation on the issue.

57. The applicants submitted that in those circumstances there had been a breach of their rights guaranteed by Article 10 of the Convention on account both of their convictions by the domestic courts and of the severity of the sentences.

58. The Government maintained that the domestic courts had correctly weighed up the various interests at stake by carrying out a detailed examination of the structure of the book and analysing each individual basis for the accusation made against Mr and Mrs Aubrac.

It had become apparent from that examination that the author had devoted the majority of the book to criticism of the Aubracs, his main accusation being their role in Jean Moulin's arrest at Caluire.

59. The point which the domestic courts criticised in their decisions was the central role Klaus Barbie's written submissions had been allowed to

play as a basis for challenging Mr and Mrs Aubrac's version of events – despite the fact that he had been shown to be an unreliable source – without any precaution being taken with regard to presentation, any reference to the official documents or any questioning of those direct witnesses who were still alive when the book was written.

60. The Government submitted that by constructing his argument in that way, the first applicant had failed to comply with a fundamental ethical rule of journalism that required the provision of "information that is accurate and creditworthy in compliance with the journalist's code of conduct".

61. The Government emphasised, lastly, that the penalties imposed on the applicants could not be regarded as particularly severe and that the book containing the author's ideas continued to be accessible to the public.

(b) The Court's assessment

62. The Court reiterates the fundamental principles established by its case-law on Article 10 (see, among many other authorities, The Sunday Times *(no. 1)*, cited above, pp. 40-41, § 65, and *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII).

63. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

64. The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

65. When exercising its supervisory jurisdiction, the Court's task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 10 the decisions they delivered in the exercise of their discretion. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and

whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

66. Article 10 does not in terms prohibit the imposition of prior restraints on circulation or all bans on dissemination, but the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court.

67. The Court has on many occasions stressed the essential role the press plays in a democratic society. It has, *inter alia*, stated that although the press must not overstep certain bounds, in particular in respect of the rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them (see, among many other authorities, Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, §§ 59 and 62, ECHR 1999-III, and *Colombani and Others v. France*, no. 51279/99, § 55, ECHR 2002-V). The national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of "public watchdog" (see, among other authorities, the Bladet Tromsø *and Stensaas*, cited above, § 59).

68. These principles apply to the publication of books or other written materials such as periodicals that have been or are due to be published (see, in particular, *C.S.Y. v. Turkey*, no. 27214/95, § 42, 4 March 2003), if they concern issues of general interest.

69. The Court considers that it is an integral part of freedom of expression to seek historical truth and it is not the Court's role to arbitrate the underlying historical issues, which are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation. As such, and regardless of the doubts one might have as to the probative value or otherwise of the document known as "Barbie's written submissions" or the "Barbie testament", the issue does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision is removed from the protection of Article 10 by Article 17 of the Convention (see *Lehideux and Isorni v. France*, judgment of 23 September 1998, *Reports* 1998-VII, pp. 2885-86, § 51, and *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX; as regards Jean Moulin's arrest at Caluire, see paragraph 10 above). However, the Court must balance the public interest in being informed of the circumstances in which Jean Moulin, the main leader of the internal Resistance in France, was arrested by the Nazis on 21 June 1943, and the need to protect the reputation of Mr and Mrs Aubrac, who were themselves important members of the Resistance. More than half a century after the events, there was a risk that there their honour and reputation would be seriously tarnished by a book that raised the possibility, albeit by way of innuendo, that they had betrayed

Jean Moulin and had thereby been responsible for his arrest, suffering and death.

70. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicants and the context in which they made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see, among many other authorities, *Zana v. Turkey*, judgment of 25 November 1997, *Reports* 1997-VII, pp. 2547-48, § 51).

In addition, in the exercise of its European supervisory duties, the Court must verify whether the authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in this type of case, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right of the persons attacked by the book to protect their reputation, a right which is protected by Article 8 of the Convention as part of the right to respect for private life.

71. In the present case, in order to come to a guilty verdict, the Paris *tribunal de grande instance* performed a three-part examination.

It began by looking at the alleged defamatory accusations in the chronological order of the underlying events and comparing the text of Klaus Barbie's signed written submissions with the text of the first applicant's book, noting that the very purpose of the book was to:

> "compare the allegations of these 'written submissions' with the account of events given by Mr and Mrs Aubrac on various occasions and the other oral and documentary evidence relating to that period. ..."

72. The *tribunal de grande instance* thus examined the circumstances of Raymond Aubrac's initial arrest in March 1943 and his release in May 1943, the escape from L'Antiquaille Hospital, the Caluire episode, events post-Caluire and the escape from boulevard des Hirondelles (see paragraph 17 above):

> "Thus ..., without formally corroborating the direct accusations made in 'Barbie's written submissions', the [first applicant] sets about sowing confusion by combining a series of facts, witness statements and documents of different types and varying degrees of importance which together serve to discredit the accounts given by the civil parties; he also questions the motives for their deception and lies ...
>
> As for the author's comments, they constitute defamation by innuendo in that they encourage the reader to believe that very grave questions exist over Mr and Mrs Aubrac's conduct in 1943 that outweigh the certainties that have been hitherto accepted; they thus lend credence to Barbie's accusations."

73. After considering which statutory provisions were applicable, the *tribunal de grande instance* turned to the issue of the applicants' good faith, which is of central importance in defamation cases.

With regard to that issue, the *tribunal de grande instance* found that the characteristic features of the applicant's book were the excessive importance given to Barbie's written submissions, a manifest lack of adequate documentation on the circumstances of Raymond Aubrac's first arrest on 15 March 1943 and his release, a failure to rank the sources of information on the escape from L'Antiquaille Hospital in order of importance, insufficient qualification of his remarks on Caluire and the escape of 21 October, a lack of critical analysis of the German sources and documents as such and its neglect of the statements of those who took part in the events.

It explained and gave reasons for each of these assertions and concluded that the author's plea of good faith had to be rejected (see paragraph 19 above).

74. The Paris Court of Appeal adopted the Paris *tribunal de grande instance*'s reasoning as regards the defamatory nature of the statements. It added with regard to the question of defamation by innuendo (see paragraph 24 above):

> "Having thus decided how the book would be balanced: systematic doubt where the Aubracs are concerned and the use of Barbie's document as a reference – albeit one to be treated with caution – [the first applicant] proceeds, in circumstances that are accurately described in the judgment, systematically to refuse to accord any credit to Mr and Mrs Aubrac's account."

75. It rejected the plea of good faith on the ground that the first applicant had repeatedly failed to exercise sufficient caution.

76. The Court observes that the domestic courts carried out a detailed and very thorough examination of the book and, in particular, the manner in which the facts and arguments were presented before concluding that the applicants were guilty of public defamation of Mr and Mrs Aubrac, in their capacity as members of a recognised Resistance movement.

77. It considers that the convictions in the instant case were based on relevant and sufficient reasons. In that connection, it finds convincing the evidence and reasoning which persuaded the civil courts, both at first instance and on appeal, to find that the author had failed to respect the fundamental rules of historical method in the book and had made particularly grave insinuations. It refers in particular to the meticulous analysis of the book by both the Paris *tribunal de grande instance* in its judgment of 2 April 1998 and the Court of Appeal in its judgment of 10 February 1999. It therefore sees no reason to disagree with the domestic courts' analysis of the case or to find that they construed the principle of freedom of expression too restrictively or the aim of protecting the reputation and the rights of others too extensively.

78. As to the sentences which were imposed, the Court reiterates that, in assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account (see, for example, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 64, ECHR 1999-IV).

It notes, firstly, that no order was made for the book's destruction or prohibiting its publication (see, *mutatis mutandis* and by converse implication, *Editions Plon v. France*, no. 58148/00, § 53, ECHR 2004-IV).

Further, the Court notes that, contrary to what has been suggested by the applicants (see paragraph 57 above), the levels of the fines and orders for damages (see paragraphs 20 and 27 above) appear to have been relatively modest (see, by converse implication, *Tolstoy Miloslavsky*, cited above) and the sums the applicants were thus required to pay justified in the circumstances of the case. Nor, lastly, does the requirement to publish a statement in five periodicals and to include a warning in like terms in each copy of the book appear unreasonable or unduly restrictive of freedom of expression.

79. In addition, the Court reiterates that just as, by providing authors with a medium for publication, publishers participate in the exercise of freedom of expression, as a corollary thereto they are vicariously subject to the "duties and responsibilities" which authors take on when they disseminate their opinions to the public (see, *mutatis mutandis*, *Sürek (no. 1)*,cited above, § 63).

Thus, the fact that the third applicant was found jointly and severally liable in tort with the first two applicants and ordered to pay damages to the civil parties is not in itself incompatible with the requirements of Article 10 of the Convention.

80. In conclusion, the Court finds that the interference with the applicants' freedom of expression in the instant case was not disproportionate to the legitimate aim pursued. Consequently, there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 10 of the Convention.

Done in French, and notified in writing on 29 June 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Laurence EARLY Deputy Registrar	András BAKA, President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mrs Thomassen is annexed to this judgment.

A.B.B.
T.L.E.

CONCURRING OPINION OF JUDGE THOMASSEN

(Translation)

Along with the other members of the Chamber, I voted in favour of finding that there has been no violation of Article 10 of the Convention in the present case.

However, I do not agree with every aspect of the Chamber's reasoning, in particular the significant importance it attaches to the fact that "the author ... failed to respect the fundamental rules of historical method in the book" (see paragraph 77 of the judgment).

Over and above the fact that the Chamber does not explain which rules of historical method were applicable, in my view such rules cannot in any event be the decisive factor in determining the scope of freedom of expression. Just like anyone else, historians are entitled to freedom of expression. For this reason I also disagree with the applicants' submission (see paragraph 54 of the judgment) that it should be acknowledged that there are "different approaches by the journalist and the historian".

In my opinion, the most decisive factor in determining the scope of freedom of expression is the importance of other interests, which may justify restrictions on any publication. While it is true that the book that was published in the instant case was on a subject of general interest, the Chamber gave precedence to the protection of reputation, which is part of the concept of private life that is protected by Article 8 of the Convention (see paragraph 70 of the judgment). I agree with that conclusion because the book is little more than pure conjecture and constitutes a direct assault on the integrity and identity of Mr and Mrs Aubrac that robs them of their dignity. It is necessary to reaffirm respect for human dignity as one of the most important Convention values and one which historical works must also foster.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF COLOMBANI AND OTHERS v. FRANCE

(Application no. 51279/99)

JUDGMENT

STRASBOURG

25 June 2002

FINAL

25/09/2002

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.

In the case of Colombani and Others v. France,

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

Mr A.B. BAKA, *President*,
Mr J.-P. COSTA,
Mr GAUKUR JÖRUNDSSON,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 4 September 2001 and 4 June 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 51279/99) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two French nationals, Mr Jean-Marie Colombani and Mr Eric Incyan, and the company Le Monde ("the applicants") on 19 April 1999.

2. The applicants were represented by Mr A. Lyon-Caen, of the *Conseil d'Etat* and Court of Cassation Bar. The French Government ("the Government") were represented by their Agent, Mr R. Abraham, Head of Legal Affairs, Ministry of Foreign Affairs.

3. The applicants alleged, in particular, a violation of their freedom of expression, as guaranteed by Article 10 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 4 September 2001 the Chamber declared the application partly admissible.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

7. The Government, but not the applicants, filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The first two applicants were born in 1948 and 1960 respectively and live in Paris.

9. In order to consider an application by Morocco for membership of the European Union, the European Commission decided it would need very precise information on the issue of cannabis production in that State and the measures being taken to eradicate it, that being the avowed political aim of the King of Morocco in person. To that end, the Secretariat General of the Commission requested the Observatoire géopolitique des drogues (OGD – Geopolitical Drugs Observatory) to prepare a report on drug production and trafficking in Morocco. Investigations and reports by the OGD, which closed down in 2000, were considered authoritative. The Paris *tribunal de grande instance* and the Paris public prosecutor's office were among the subscribers to its publications.

10. The OGD delivered its report to the European Commission in February 1994. The report contained the names of people implicated in drug trafficking in Morocco. However, the Commission asked the Observatory for a revised version of the report, with the names of the drug traffickers deleted in order to make it more suitable for the discussions that were scheduled with the Moroccan authorities. This expurgated version of the initial report was published, notably in a book sold by the OGD entitled *Etat des drogues, drogue des Etats* (“State of drugs, drugs of States”) and containing a chapter on Morocco. The book was referred to in the newspaper *Le Monde* on 25 May 1994.

11. After initially remaining confidential, the original version of the report began to circulate. *Le Monde* learnt of its existence in the autumn of 1995. The report contained twelve chapters with the following titles: (1) “Cannabis in Morocco – the historical background”; (2) “General overview of Er Rif”; (3) “The characteristics of cannabis growing”; (4) “The socio-economic impact and areas of production”; (5) “The increase in the land set aside for cannabis production”; (6) “Morocco – the world's leading exporter of hashish”; (7) “Drug-trafficking routes”; (8) “The criminal networks”; (9) “The emergence of hard drugs”; (10) “Drug money”; (11) “The 'war on drugs' ”; and (12) “Conclusion”. It related how, over a period of ten years, there had been a tenfold increase in the area of land that had historically been used for cannabis production in the region of Er Rif and that current levels of production made “the sharif kingdom a serious contender for the title of the world's leading exporter of cannabis”.

12. On 3 November 1995 *Le Monde* published an article by Mr Incyan giving details of the report.

13. The front page of the newspaper carried an introductory article under the main headline: “Morocco, world's leading exporter of cannabis”, and a sub-heading: “King Hassan II's entourage implicated by confidential report.” The article, which was relatively short (it ran to some thirty or so lines in two columns), summarised the terms of the OGD's report. A more detailed article (covering six columns) appeared on page two under the headline: “Moroccan government implicated in cannabis trafficking according to confidential report”, and a sub-heading: “The report, which was commissioned by the European Union from the Geopolitical Drugs Observatory, says Morocco is the world's leading exporter and the European market's main supplier. It points to the direct responsibility of the sharif authorities in these lucrative activities”. A summary of the article also appeared in an introductory passage which read: “Drugs – *Le Monde* has obtained a copy of a confidential report sent to the European Union in 1994 in which the OGD says that 'in just a few years Morocco has become the world's leading cannabis exporter and the European market's main supplier'. The report casts doubt on the sharif authorities' determination to put an end to the trafficking, despite the 'war on drugs' they declared in a blaze of publicity in the autumn of 1992. Corruption guarantees the drug-trafficking rings the protection of officials 'ranging from the humblest customs officer to the King's inner circle ...'.”

14. In a letter of 23 November 1995, the King of Morocco made an official request to the French Minister of Foreign Affairs for criminal proceedings to be instituted against *Le Monde*. The request was forwarded to the Minister of Justice, who referred the matter to the Paris public prosecutor's office, as required by section 48(5) of the Freedom of the Press Act of 29 July 1881.

15. Mr Colombani, the editor-in-chief of *Le Monde*, and Mr Incyan, the author of the article, were summoned to appear in the Paris Criminal Court on charges of insulting a foreign head of State.

16. In a judgment of 5 July 1996, the Criminal Court found that the journalist had merely quoted extracts from what was undisputedly a reliable report, without distorting or misinterpreting it or making groundless attacks and, consequently, had pursued a legitimate aim. It accepted that he had acted in good faith and acquitted both him and Mr Colombani.

17. The King of Morocco and the public prosecutor's office appealed against that decision.

18. In a judgment of 6 March 1997, the Paris Court of Appeal, while recognising that “informing the public about matters such as the international drug trade is obviously a legitimate aim for the press”, found that the desire to draw the public's attention to the involvement of the royal entourage and to “the authorities' accommodating attitude” that pointed to “tolerance on the part of the King ... was not entirely innocent”, since it was “tainted with malicious intent”. The articles in question contained

"accusations of duplicity, artifice and hypocrisy that were insulting to a foreign head of State". The circumstances taken as a whole excluded good faith on the part of the journalist: he had not established that he had "sought to check the accuracy of the OGD's comments"; instead, he had simply reproduced its unilateral account of events, thus "propounding a theory that contained serious accusations", without leaving any room for doubt about the reliability of the source. Nor had he sought to check whether the 1994 report remained valid in November 1995. The Court of Appeal noted that the journalist had not shown that he had "contacted any Moroccan dignitaries, officials, public authorities or services for an explanation for the failure to match words with deeds or even to obtain their observations on the tenor of the OGD's report". In addition, he had refrained from mentioning the existence of the White Paper published by the Moroccan authorities in November 1994 on "Morocco's general policy on the prevention of drug trafficking and the economic development of the northern provinces".

19. The applicants were therefore found guilty of insulting a foreign head of State and sentenced to fines of 5,000 French francs (FRF) each. They were ordered to pay King Hassan II, who had successfully applied to be joined as a civil party to the proceedings, FRF 1 in damages and FRF 10,000 pursuant to Article 475-1 of the Code of Criminal Procedure. The Court of Appeal also ordered *Le Monde* to make additional reparation in the form of a report publishing details of the convictions.

20. The applicants appealed on points of law against that judgment.

21. In a judgment of 20 October 1998, the Criminal Division of the Court of Cassation dismissed their appeal, approving the Court of Appeal's view that "what [made] the article insulting [was] the suspicion with which the King of Morocco's determination to put an end to drug trafficking in his country [was] viewed, and the charge that pernicious statements had been made to dramatic effect solely in order to preserve the country's image", especially as the Court of Appeal had found that the charge of duplicity had been repeated twice and that the insistence on drawing the reader's attention to the King in person, in an article that portrayed Morocco as the world's leading hashish exporter and alleged direct responsibility on the part of the Moroccan government and members of the royal family, was tainted with malicious intent.

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. The statutory basis for the offence (*délit*) of publicly insulting a foreign head of State is section 36 of the Freedom of the Press Act of 29 July 1881 ("the 1881 Act"), which, at the material time, read as follows: "It shall be an offence punishable by one year's imprisonment or a fine of 300,000 francs or both publicly to insult a foreign head of State, a foreign

head of government or the minister for foreign affairs of a foreign government."

23. That provision was amended by the Presumption of Innocence and Victims (Reinforcement of Rights) Act of 15 June 2000, which removed the power to impose a custodial sentence for this offence.

24. The rationale behind making it a criminal offence to insult a foreign head of State is to protect senior foreign political figures from certain forms of attack on their honour or dignity. In that regard, the offence is similar to that established by section 26 of the same Act of insulting the President of the French Republic.

25. Under the case-law, the notion of insulting a foreign head of State is to be construed as meaning abuse, defamatory remarks, or expressions that are insulting or liable to offend the sensibilities of the persons the Act seeks to protect. Thus, the Court of Cassation has ruled: "The *actus reus* of the offence of insulting a head of State ... is constituted by any expression of contempt or abuse or any accusation that is liable to undermine the honour or dignity of the head of State in his or her private life or in the performance of his or her functions" (Court of Cassation, Criminal Division ("*Cass. crim.*"), decision of 17 July 1986).

26. The 1881 Act established a specific legal procedure for the offence. Section 48 introduced a special legal rule by providing that a prosecution will only lie at the request of the person at whom the insults are directed. Requests must be sent to the Minister for Foreign Affairs, who then communicates them to the Minister of Justice. Furthermore, unlike the position with criminal defamation, bad faith is not presumed. It is for the prosecution to prove malice. On the other hand, the defence of justification (*exceptio veritatis*), which is available to a charge of criminal defamation, cannot be pleaded on a charge of insulting a foreign head of State. Lastly, sections 42 and 43 establish a system of different levels of liability, with editors-in-chief and editors being prosecuted as principals, and the authors of the offending articles as accomplices.

27. According to the Government, the French courts have restricted the scope of section 36 by ruling that it is only intended to "prevent abuses of freedom of expression" (Paris Court of Appeal, judgment of 2 October 1997) and have construed the notion of abuse of that freedom narrowly.

28. As to the scope of section 36, they consider that the offence created by that section does not preclude political criticism (Paris Court of Appeal, judgments of 2 October 1997 and 13 March 1998). Section 36 may only be relied on in the event of a personal attack on a foreign head of State. The insult must therefore be directed at the head of State and his or her reputation, not his or her policies (Paris Court of Appeal, judgment of 27 June 1995).

29. The French courts have also held that accusations concerning the conduct of the members of a reigning sovereign's family, even if excessive

in tone, do not amount to an attack on the person of the head of State. They have likewise accepted that the intentionally insulting and sarcastic tone inherent in the satirical form used by the makers of a television programme did not violate the right of foreign public figures to respect for their private life (Paris Court of Appeal, judgment of 11 March 1991). Only particularly virulent attacks, demonstrating a deliberate intention to cause harm, could come within section 36 (Paris Court of Appeal, judgment of 27 June 1995).

30. As regards the intention to cause harm, the French courts have consistently held that no presumption of an intention to insult arises. It is necessary to prove that the maker of the offending remarks intended the insult (Paris Court of Appeal, judgment of 13 March 1998). The defendant is entitled to present his defence in public in adversarial proceedings, without having to go through the complex process of seeking leave to tender evidence (*Cass. crim.*, judgment of 22 June 1999).

31. The Government said that in that respect the rules governing the offence of insulting a head of State contained more safeguards than those governing ordinary criminal defamation, for which bad faith was presumed. In determining whether there was an intention to cause harm, the courts would consider whether the journalists had made proper, objective inquiries (Paris Court of Appeal, judgment of 13 March 1998) and whether there was evidence supporting the allegations (Paris Court of Appeal, judgment of 2 October 1997). The absence of a defence of justification, which was available to a charge of criminal defamation, was therefore compensated for by the manifestly liberal approach adopted by the courts when determining whether an intention to cause harm existed (*Cass Crim.*, judgment of 22 June 1999).

32. The applicants have produced to the Court a judgment of the Seventeenth Division (Press Division) of the Paris *tribunal de grande instance* dated 25 April 2001 in criminal proceedings instituted at the request of three African heads of State, Presidents Idriss Deby, Omar Bongo and Denis Sassou Nguesso, on charges of publicly insulting a foreign head of State through the publication by Les Arènes of a book entitled *Noir Silence. Qui arrêtera la Françafrique ?* (“Black silence. Who will stop Francafrica?”).

33. The *tribunal de grande instance* held: “The offence established by section 36 of the Press Act and the manner in which that provision is applied in the courts does not satisfy all the requirements set out in Article 10 of the European Convention.” It so found for three reasons. Firstly, section 36 had established in favour of foreign heads of State “a special set of rules that rel[ied] on a particularly wide definition of the *actus reus* and exclude[d] any defence based on evidence that the allegations [we]re true, to the point where commentators agree[d] that foreign heads of State enjoy[ed] a higher degree of protection in France than the French head of State himself or the head of the French government”.

34. Secondly, the *tribunal de grande instance* noted that the term "insult" was not defined in the Act and was an elusive expression that was not easily construed. In support of that statement, the *tribunal de grande instance* referred to the definition of "insult" in the case-law: "Any offensive or disparaging expression, or defamatory or abusive insinuation, which is liable to harm the honour, dignity or personal sensibility of the head of State in the performance of his or her functions or in his or her private life." It reasoned that such a general definition introduced "a wide subjective margin of appreciation into the definition of the statutory element of the offence" that prevented journalists and writers from determining the extent of the prohibition with sufficient certainty in advance. Even more significantly, the *tribunal de grande instance* considered that the distinction legal commentators had sought to draw between acceptable criticism (that is to say criticism of the foreign head of State's political acts) and unlawful insults (that is to say insults directed at the foreign head of State personally) was difficult to apply in practice, for, as the relevant case-law showed, the courts considered that "insults proffered at political events necessarily affect[ed] the person [concerned]".

35. Thirdly, the *tribunal de grande instance* found that the offence was not "necessary in a democratic society", as any head of State – or anyone else – whose honour or character was undermined or who found himself insulted had a sufficient remedy through criminal proceedings for criminal defamation or proffering insults under the 1881 Act.

36. Lastly, with reference to Article 6 of the Convention, it noted that defendants to a charge under the 1881 Act were impeded in their defence by the vagueness of the word "insult"; likewise, their inability to adduce evidence of the truth of their allegations deprived them of equality of arms.

37. It is not possible to determine from the case file whether an appeal was lodged against that judgment, or the outcome of any such appeal.

38. On 12 March 2001 a senator introduced a bill proposing the repeal of the offence of insulting foreign heads of State. Again, it is unclear from the case file whether that recent proposal will be implemented.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

39. The applicants alleged a violation of Article 10 of the Convention, the relevant parts of which read:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ..."

A. Arguments of the parties

1. The applicants' submissions

40. The applicants maintained that the interference constituted by section 36 of the Act of 29 July 1881 could not be regarded as necessary in a democratic society or, consequently, to have a legitimate objective, as its sole purpose was to prohibit any criticism of a head of State, even if it related only to his policies and whether or not it was founded. To accept the Government's arguments that the aim pursued was legitimate would be tantamount to recognising that heads of foreign governments were entitled to a veritable privilege affording them immunity from any criticism of their conduct and actions in office, however blameworthy they might be, since such criticism was insulting by definition, as it attacked their character and reputation. The offence was made out even if the remarks proved accurate, since the relevant case-law precluded evidence of the truth of the allegations as a defence to a charge under section 36, in order to avoid embroiling the head of State in a debate that would undermine the respect due to his or her office. Under section 36 freedom of communication on matters of general interest was counterbalanced by the prestige of office and title, with the latter taking precedence.

41. The King of Morocco could have protected his right to be presumed innocent and his reputation by bringing proceedings for criminal defamation; such proceedings struck a balance between freedom of communication and the legitimacy of protecting the rights of others, and a

journalist could escape all criminal liability by proving that the defamatory statements were true. That was not the case with the offence of insulting a foreign head of State, as evidence of the truth of the defamatory statements was inadmissible. The reversal of the burden of proof of good faith under the rules governing prosecutions for insulting foreign heads of State could under no circumstances compensate for the loss of the right to prove the truth of the defamatory statements, since the issue of good faith did not even arise when the allegations were proved true.

42. Furthermore, the Government's objections concerning the manner in which the journalists had set about their task were irrelevant. The right to be able freely to divulge the tenor of reports drawn up by or at the request of public authorities could not, as the Government had suggested, be made subject to restrictions such as a requirement for "additional investigations to verify the relevance of the findings of the body that made the allegations". Indeed, that much had been accepted by the Court in Bladet Tromsø *and Stensaas v. Norway* ([GC], no. 21980/93, ECHR 1999-III). In the instant case, the European Commission had at no stage disavowed the OGD's report and the published report did not, as the Government appeared to believe, constitute a separate version, but simply the original with the names of the people implicated in the trafficking deleted at the Commission's own request to make it more suitable for the discussions the Commission was about to begin with the Moroccan authorities. However, that concern, which was perfectly legitimate on the part of a political body, could not dictate the conduct of the press. The Commission's stance could not be regarded as justifying a ban on the press from divulging the tenor of the first draft of the report as a contribution to an undisputedly legitimate debate.

43. Nor could the interference with freedom of expression be justified by the fact that the article did not set out both sides of the argument. Upholding that grievance would mean that all articles imparting information would have to take the form of an inquiry setting out each point of view. It would, therefore, no longer be possible merely to give details of a report emanating from an official authority. While it was true that the need to ensure adversarial debate was indissociable from the duty to verify information, the scope of that duty was different when the press was merely informing the public of a report which an official authority had commissioned and had not disavowed.

44. Lastly, the applicants observed that under the Court's case-law the fact that an article was controversial in tone was not a circumstance that could serve to justify an interference with freedom of communication. In the instant case, the tone had been measured and the articles concerned had not lapsed into sensationalism. There had been no use of banner headlines to draw attention to the report, while the media presentation had remained moderate in tone and could not be described as controversial.

45. As to the domestic case-law relied on by the Government in support of their arguments, the applicants pointed out that, although it was stated in the judgments of 2 October 1997 and 13 March 1998 that the offence of insulting a foreign head of State did not prevent political criticism, the defendants in those cases had nonetheless been convicted, while the judgment of 27 June 1995 only concerned conduct by a foreign head of State that was wholly unrelated to political activity.

2. The Government's submissions

46. The Government did not dispute that there had been interference in the instant case. They maintained, however, that the convictions and sentences had been justified by certain limitations inherent in the exercise of freedom of communication.

47. Firstly, the interference was prescribed by law, namely section 36 of the Act of 29 July 1881, and pursued a legitimate aim, namely the protection of the reputation and rights of others. The impugned articles had directly called into question the avowed intention of the Moroccan authorities, and in particular the King, to combat the expansion of hashish trafficking from Morocco. The purpose of the report, which had appeared in one of the main national daily newspapers, had been to discredit and damage the character and reputation of the Moroccan authorities at the highest level, including the King.

48. Secondly, the Government said that the interference had been "necessary in a democratic society".

49. The guilty verdicts had been returned after the domestic courts had found certain of the allegations made against the King of Morocco to be defamatory. The intention of the Court of Appeal and Court of Cassation had in fact been to punish the applicants for their malicious accusations and lack of journalistic rigour. In convicting the applicants, they found that the statements were insulting and had been made in bad faith. Both the Criminal Court and the Court of Appeal had pointed out that the articles concerned had targeted the King of Morocco directly and personally, the reader's attention being drawn to him right from the introductory article on the front page. What had made the article insulting was the suspicion with which Hassan II's determination to put an end to drug trafficking in his country was viewed, and the charge that pernicious statements had been made. The Court of Appeal had noted that the impugned articles contained "accusations of duplicity, artifice and hypocrisy that were insulting to a foreign head of State" and found that the journalists had acted in bad faith. The journalists had not discharged their duty to report objectively, having instead manifested a desire to denigrate that was indicative of bad faith. Nor had they carried out the slightest additional investigation to check whether the OGD's findings were relevant.

50. Furthermore, the present case was distinguishable from that of Bladet Tromsø *and Stensaas*, cited above. The Government said that in the present case the applicants had presented the findings of a preliminary report that had been drawn up in 1994 by a private organisation instructed by the European Commission and described as "an independent research body" as accurate, thereby giving readers the impression that the report was official and irrefutable. However, the European Commission had published another version of the report; in this version, the names of public figures connected to the government who had allegedly shielded the networks of dealers had been omitted, on the ground that they were entitled to be presumed innocent. Thus, the document described in the articles was not exactly the same as the official final report that was circulated by the Commission. Furthermore, the media coverage of the Moroccan government's alleged direct responsibility in such trafficking was neither objective nor balanced as the journalists made no reference in their articles to a White Paper that had been published by the Moroccan government in response to the allegations made in the OGD's report.

51. Other further relevant factors that should not be lost sight of were the damage that had undoubtedly been done to the King of Morocco's honour by his being put on trial by the press on charges that had never been brought in a court of law, the fact that he had been publicly accused of an offence without being able to assert his right to be presumed innocent and his right to protection against that attack on his reputation.

52. In order to respond to the accusations that had been made against him in his capacity as sovereign in the impugned articles, the King of Morocco had had no choice but to rely on section 36 of the Freedom of the Press Act of 29 July 1881. That was because there were various forms of criminal defamation under the Act: a general category of defamation of a private individual (section 32), and a series of special categories of defamation – of the State institutions (section 30), the public authorities (section 31), the head of the French State (section 26) and foreign heads of State (section 36) – section 36 being a *lex specialis* and section 32 the general provision.

53. Lastly, the Government pointed out that the fines that had been imposed were modest.

B. The Court's assessment

1. General principles

54. The Court reiterates the following basic principles applicable to freedom of expression.

55. The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation

and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 233-34, § 37). Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, p. 27, § 63, and Bladet Tromsø *and Stensaas*, cited above, § 62).

56. While the press must not overstep the bounds set, *inter alia*, for "the protection of the reputation of others", its task is nevertheless to impart information and ideas on political issues and on other matters of general interest. As to the limits of acceptable criticism, they are wider with regard to a politician acting in his public capacity than in relation to a private individual. A politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism. He is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues, since exceptions to freedom of expression must be interpreted narrowly (see, among other authorities, in particular, *Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, Series A no. 204, pp. 25-26, §§ 57-59, and *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, judgment of 19 December 1994, Series A no. 302, p. 17, § 37).

57. Furthermore, the "necessity" for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In cases concerning the press, such as the present one, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued (see, *mutatis mutandis*, *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports* 1996-II, pp. 500-01, § 40, and *Worm v. Austria*, judgment of 29 August 1997, *Reports* 1997-V, p. 1551, § 47).

58. The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the interference complained of in the light of

the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).

2. Application of the above principles to the instant case

59. In the present case, the applicants were convicted of publishing articles that insulted a head of State – the King of Morocco – by calling into question the avowed determination of the Moroccan authorities and, in particular, the King, to combat the increase in hashish trafficking from Morocco.

60. The conviction incontestably amounted to an interference with the applicants' exercise of their right to freedom of expression.

61. The question arises whether the interference can be regarded as justified for the purposes of paragraph 2 of Article 10. It is therefore necessary to examine whether it was "prescribed by law", pursued a legitimate aim under that paragraph and was "necessary in a democratic society" (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, pp. 24-25, §§ 34-37).

62. The Court notes that the domestic courts relied in their decisions on section 36 of the Freedom of the Press Act of 29 July 1881 and, as the Government have submitted, the reasons given for those decisions disclosed a legitimate aim, namely the protection of the reputation and rights of others, in this instance the reigning King of Morocco.

63. The Court must, however, examine whether that legitimate interference was justified and necessary in a democratic society, and, in particular, whether it was proportionate and whether the reasons given for it by the national authorities were relevant and sufficient. Thus, it must determine whether the national authorities used their discretion properly when they convicted the applicants of insulting a foreign head of State.

64. The Court notes, firstly, that the general public, including the French public, had a legitimate interest in being informed of the European Commissions' views on a problem such as drug production and trafficking in Morocco, a country which had applied for admission to the European Union and which, in any event, enjoyed close relations with the member States, particularly France.

65. The Court reiterates that by reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see *Goodwin*, cited above, p. 500, § 39, and *Fressoz and Roire*, cited above, § 54). Unlike the Court of Appeal and the Court of Cassation, the Court finds that in the instant case the

information contained in the OGD's report was not disputed and its account of the allegations in issue could legitimately be regarded as credible. In the view of the Court, the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the content of official reports without having to undertake independent research. Otherwise, the vital public-watchdog role of the press may be undermined (see, *mutatis mutandis*, *Goodwin*, cited above, p. 500, § 39). The Court thus finds that it was reasonable for *Le Monde* to rely on the OGD's report, without needing to check for itself the accuracy of the information it contained. It sees no reason to doubt that the applicants acted in good faith in that connection and, therefore, finds that the reasons relied on by the domestic courts are not convincing.

66. Furthermore, the reason for the applicants' conviction in the present case was that the article damaged the King of Morocco's reputation and infringed his rights. Unlike the position under the ordinary law of defamation, the applicants were not able to rely on a defence of justification – that is to say proving the truth of the allegation – to escape criminal liability on the charge of insulting a foreign head of State. The inability to plead justification was a measure that went beyond what was required to protect a person's reputation and rights, even when that person was a head of State or government.

67. Furthermore, the Court notes that since the judgment of the Paris *tribunal de grande instance* of 25 April 2001, the domestic courts have started to recognise that the offence under section 36 of the Act of 29 July 1881, as construed by the courts, constitutes a breach of the right to freedom of expression, as guaranteed by Article 10 of the Convention. The domestic courts themselves thus appear to accept that it is not necessary in a democratic society to criminalise such behaviour in order to attain that goal, especially as the offences of criminal defamation and proffering insults – which are proportionate to the aim pursued – suffice to protect heads of State and ordinary citizens alike from remarks that damage their honour or reputation or are insulting.

68. The Court notes that the effect of a prosecution under section 36 of the Act of 29 July 1881 is to confer a special legal status on heads of State, shielding them from criticism solely on account of their function or status, irrespective of whether the criticism is warranted. That, in its view, amounts to conferring on foreign heads of State a special privilege that cannot be reconciled with modern practice and political conceptions. Whatever the obvious interest which every State has in maintaining friendly relations based on trust with the leaders of other States, such a privilege exceeds what is necessary for that objective to be attained.

69. Accordingly, the offence of insulting a foreign head of State is liable to inhibit freedom of expression without meeting any “pressing social need” capable of justifying such a restriction. It is the special protection afforded

foreign heads of State by section 36 that undermines freedom of expression, not their right to use the standard procedure available to everyone to complain if their honour or reputation has been attacked or they are subjected to insulting remarks.

70. In short, although relevant, the reasons relied on by the respondent State are not sufficient to show that the interference complained of was "necessary in a democratic society". Notwithstanding the national authorities' margin of appreciation, the Court considers that there was no reasonable relationship of proportionality between the restrictions placed on the applicants' right to freedom of expression and the legitimate aim pursued. Accordingly, it holds that there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

71. Under Article 41 of the Convention,

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

72. The applicants sought 10,000 French francs (FRF) for the fines imposed on Mr Colombani and Mr Incyan, FRF 10,001 for the compensation awarded to the King of Morocco and FRF 6,870 for the costs of reporting the decision in *Le Monde*, making a total of FRF 26,871, or 4,096.46 euros (EUR).

73. The Government submitted that a finding of a violation would in itself constitute sufficient just satisfaction. They pointed out that the amount awarded to the King of Morocco was FRF 1, the remaining FRF 10,000 having been awarded under Article 475-1 of the Code of Criminal Procedure. The applicants were not entitled to seek a review of penalties imposed by the domestic courts in final decisions or to require the State to pay the sums that had been awarded to the King of Morocco or his lawyer.

74. The Court notes that, under its case-law, a sum paid by way of compensation for damage is recoverable only to the extent that a causal link is established between the violation of the Convention and the damage. Thus, as in the instant case, sums an applicant has had to pay to his or her opponents pursuant to a judicial decision could be taken into account.

75. Consequently, the amount to be awarded to the applicants comes to a total of EUR 4,096.46.

B. Costs and expenses

76. The applicants claimed FRF 1,600 for court fees in the proceedings that had ended with the Paris Court of Appeal's judgment, FRF 54,270 for lawyers' fees in the proceedings at first and second instance, and FRF 42,210 for lawyers' fees in the Court of Cassation proceedings, making a total of EUR 14,952.20. In the proceedings before the Court, the applicants claimed FRF 60,000 for their lawyers' fees and FRF 25,000 for expenses in the event of the Court holding a hearing.

77. The Government noted that the applicants had not adduced any evidence in support of their claims, in particular those concerning the proceedings in the domestic courts. They also pointed out that the Court had turned down the applicants' request for a hearing in the case.

78. The Court reiterates that an award can be made in respect of costs and expenses only in so far as they have been actually and necessarily incurred by the applicant and are reasonable as to quantum. In the present case, the Court finds the claim for costs and fees incurred in the proceedings in the domestic courts reasonable and grants it in full. However, it considers it necessary to reduce the amount to be awarded for the proceedings before the Court and, ruling on an equitable basis, awards the sum of EUR 6,900.

C. Default interest

79. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 4.26% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a breach of Article 10 of the Convention;

2. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:

(i) EUR 4,096.46 (four thousand and ninety-six euros forty-six cents) for pecuniary damage;

(ii) EUR 21,852.20 (twenty-one thousand eight hundred and fifty-two euros twenty cents) for costs and expenses;

(iii) any tax that may be chargeable on the above amounts;

(b) that simple interest at an annual rate of 4.26% shall be payable on those sums from the expiry of the above-mentioned three months until settlement;

3. *Dismisses* the remainder of the claims for just satisfaction.

Done in French, and notified in writing on 25 June 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

A.B. BAKA
President

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

CASE OF CUMPĂNĂ AND MAZĂRE v. ROMANIA

(Application no. 33348/96)

JUDGMENT

STRASBOURG

17 December 2004

In the case of Cumpănă and Mazăre v. Romania,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr I. CABRAL BARRETO,
Mrs V. STRÁŽNICKÁ,
Mr C. BÎRSAN,
Mr P. LORENZEN,
Mr J. CASADEVALL,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mr M. PELLONPÄÄ,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mr M. UGREKHELIDZE,
Mr K. HAJIYEV, *judges*,

and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 1 September and 10 November 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 33348/96) against Romania lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Romanian nationals, Mr Constantin Cumpănă ("the first applicant") and Mr Radu Mazăre ("the second applicant"), on 23 August 1996.

2. The applicants were represented by Mr M. Mocanu-Caraiani, a lawyer practising in Constanța. The Romanian Government ("the Government") were represented by their Agent, Mrs R. Rizoiu, Under-Secretary of State at the Ministry of Foreign Affairs.

3. The applicants alleged, in particular, that there had been unjustified interference with their right to freedom of expression, as guaranteed by Article 10 of the Convention, on account of their conviction following the publication on 12 April 1994 of an article in a local newspaper.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

7. On 10 September 2002 the application was declared partly admissible by a Chamber of that Section, composed of Mr J.-P. Costa, President, Mr L. Loucaides, Mr C. Bîrsan, Mr K. Jungwiert, Mr V. Butkevych, Mrs W. Thomassen, Mrs A. Mularoni, judges, and Mrs S. Dollé, Section Registrar.

8. On 10 June 2003 the Chamber delivered a judgment in which it held by five votes to two (Mr Costa and Mrs Thomassen) that there had been no violation of Article 10 in respect of the applicants.

9. On 2 September 2003 the applicants requested under Article 43 of the Convention and Rule 73 that the case be referred to the Grand Chamber. The request was lodged and signed on behalf of both applicants by the first applicant, Mr Cumpănă.

10. A panel of the Grand Chamber accepted that request on 3 December 2003.

11. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

12. On 15 March 2004 the Government filed submissions on the applicants' referral request.

13. The applicants replied to those submissions in a letter of 17 August 2004. The second applicant appended to the letter a declaration to the effect that he intended to join the first applicant's request for the case to be referred to the Grand Chamber.

14. A hearing took place in public in the Human Rights Building, Strasbourg, on 1 September 2004 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mrs R. RIZOIU, Under-Secretary of State, *Agent*,
Mr R. ROTUNDU, *Co-Agent*,
Ms R. PAŞOI,
Ms A. PRELIPCEAN,
Ms C. ROŞIANU, *Advisers*;

(b) *for the applicants*
Mr M. MOCANU-CARAIANI, *Counsel*,
Mrs D. MOCANU-CARAIANI, *Adviser*.

The Court heard addresses by Mr Mocanu-Caraiani, Mrs Rizoiu and Ms Roşianu, and also their replies to questions from its members.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

15. The applicants, Mr Cumpănă and Mr Mazăre, were born in 1951 and 1968 respectively and live in Constanța.

A. Background to the case

1. The city authorities' partnership contract with the Vinalex company

16. In decision no. 33 of 30 June 1992, Constanța City Council, implementing government decision no. 147 of 26 March 1992, introduced a fine for drivers of illegally parked vehicles and entrusted the task of removing, towing away and impounding such vehicles to S.C. CBN, a company based in Constanța.

17. By order no. 163 of 30 June 1992, the mayor of Constanța authorised a private company, Vinalex, to perform the services of removing, towing away and impounding illegally parked vehicles.

18. A partnership contract was signed on 16 December 1992 by the city authorities and the company in question, the signatories on behalf of the authorities being the deputy mayor (hereinafter "D.M.") and the council's legal expert ("Mrs R.M."). In a letter of 1 April 1994, the mayor of Constanța requested Vinalex to cease its activities under the contract and informed it that it was considering terminating the contract.

2. Content of the article in issue

19. On 12 April 1994 the applicants, who are journalists by profession, published an article in the local newspaper *Telegraf*, of which the second applicant was the editor, with the headline "Former Deputy Mayor [D.M.] and serving judge [R.M.] responsible for series of offences in Vinalex scam". The names of the former deputy mayor and of the city council's

former legal expert, Mrs R.M., who had subsequently become a judge, were printed in full in the headline and in the article itself.

20. The article, which appeared under the byline of both applicants, was worded as follows:

> "In decision no. 33 of 30 June 1992 Constanța City Council entrusted a commercial company, S.C. CBN S.r.l., with the task of impounding illegally parked vehicles or trailers ... It was the duty of the city authorities' specialist departments to lay down the practical arrangements for implementing the council's decision. But things did not turn out that way. Six months after decision no. 33 was adopted, the city authorities, knowingly breaching the provisions of Law no. 69/1991, illegally concluded a partnership contract ... with S.C. Vinalex S.r.l., a company having no connection with the one initially chosen. It is worth noting, however, that the contract in question was signed by the deputy mayor, [D.M.], in place of the mayor, ... and by a certain [M.] instead of the legal expert [M.T.].
>
> By what miracle did S.C. Vinalex enter into a partnership with the city authorities when, in decision no. 33 of 30 June 1992, the city council had authorised CBN S.r.l. to provide a straightforward service? What is striking is that there is no evidence that CBN agreed to give up the task of towing away illegally parked vehicles! ... The crook [D.M.] (the former deputy mayor, now a lawyer) granted Vinalex's irresponsible employees the power to decide when a vehicle is illegally parked – in other words, to treat citizens and their property with contempt. What form did the fraud take? Sections 89 and 29 of Law no. 69/1991 provide that no partnership contract with a commercial company may be signed without a prior decision by the local council, adopted by a two-thirds' majority of the total number of councillors. Before a contract is signed, it must be referred to all the local council's specialist committees for their opinion ... The contract with Vinalex was negotiated and signed illegally, as the signatories based it on the decision [of 30 June 1992], which, as has already been shown, referred to a different company without envisaging any other partnership.
>
> Given that the city authorities had already signed four other contracts before that one, the signatories cannot claim ignorance of the law, but only an intentional breach of it! And because any intentional breach of the law pursues an end in itself – generally that of securing material advantages – it is clear that in this case the former deputy mayor, a lawyer by profession, received backhanders from the partner company and bribed subordinates, including [R.M.], or forced them to break the law.
>
> The Constanța Audit Court detected this blatant fraud, which has generated considerable profits for the briber (S.C. Vinalex) ... The offending company [S.C. Vinalex] has never shown that it had adequate means to impound illegally parked vehicles. This explains why large numbers of privately owned vehicles have been damaged and, as a result, thousands of complaints have been made on the subject.
>
> Furthermore, the alleged partnership contract was valid for one year, until 16 December 1993. From that date [S.C. Vinalex] no longer had any right to interfere with citizens' private property! It has nevertheless continued to tow vehicles away and illegally collect money ... It is incomprehensible how the police could have provided it with assistance for the past four months.
>
> Let us briefly consider the conduct of the council's former legal expert, [R.M.], who is now a judge. Either she was ignorant of the law when she signed the contract, in

which case it is hard to understand how she can subsequently have been appointed as a judge (delivering justice on the basis of the same laws which she does not know), or she accepted bribes and may continue to do so in future! It is no surprise that the same judge should have been investigated by the Audit Court for a further illegal act, also committed while she was at the city council (as we reported at the time). Ironically, the Court's president did not take any action against her on the ground that the sum received was not ... large enough.

Apparently becoming aware that the matter was likely to be uncovered, the city authorities' coordination department ... notified S.C. Vinalex in writing of the possibility of the contract being terminated on the following grounds: ... 'You have not supplied any documents showing that you have purchased the platform-type equipment necessary for carrying out the activity properly' (as stipulated in clause 3 of the contract ...). In the same letter the city authorities informed S.C. Vinalex: 'As you have not proved that you have the appropriate equipment, we would assess your contribution to the partnership at the level of your company's capital, that is 110,000 lei. Your share in the partnership's net income will have to be recalculated in relation to the parties' contributions.'

Facts are facts, and the documents in our possession speak for themselves of the illegal Vinalex scam."

21. The article was accompanied by a photograph of a police car on the scene as an illegally parked vehicle was being towed away, photocopies of extracts from the partnership contract and from Constanța City Council's decision of 30 June 1992, and certain passages of Law no. 69/1991 concerning the responsibilities and powers of mayors, prefects and city and county councils.

22. The article was also accompanied by a cartoon showing a man and a woman arm in arm, carrying a bag marked "Vinalex" which was full of banknotes. The two characters were depicted as saying to each other:

"Hey, [R.] [diminutive form of Mrs R.M.'s first name], you've done a good job there! When I was deputy mayor we made quite a bit, enough to go to America ..."

"[D.] [diminutive form of the former deputy mayor's first name], if you become a lawyer, I'll become a judge and we'll have enough to travel round the world ..."

3. Findings of the Audit Court's auditors

23. In June 1994 the Financial Control Department of the County Audit Court examined a report submitted on 26 May 1994 by several auditors who had conducted a review of Constanța City Council's budget for 1992 and had made the following findings:

(a) The city council's decision of 30 June 1992 to award S.C. CBN the contract for towing away illegally parked vehicles had not been justified by any bid submitted in writing by the company or by the company's aims as set forth in its articles of association.

(b) The city council had not given its opinion on the partnership contract signed between the city authorities and Vinalex, and no expert valuation of

Vinalex's assets had been carried out or submitted to the council for approval, contrary to the provisions of the Local Public Administration Act (Law no. 69/1991).

(c) The distribution of the proceeds among the parties as agreed in the contract – 70% to Vinalex and 30% to the city council – had not corresponded to the partners' respective contributions on the date on which the contract had been signed – 76.4% by the city council and 23.6% by Vinalex – resulting in a loss of income for the city council.

The Financial Control Department considered it necessary to urge the mayor of Constanța, as the official responsible for authorising appropriations, to "ensure compliance with the law" as regards the parties' obligations under the contract and to be more efficient when entering into such partnerships with private entities in future. A formal decision to that effect was adopted on 8 June 1994 by the head of the department.

24. The applicants produced to the Court a report dated 17 March 1994 by the same Audit Court auditors, which likewise referred to the irregularities described in paragraph 23 above in the signing of the partnership contract between the city authorities and Vinalex, and indicated that the contract should be terminated. The applicants did not mention the existence of such a report during the criminal proceedings instituted against them following the publication of the impugned newspaper article.

B. The criminal proceedings against the applicants

1. Proceedings at first instance

25. On 14 April 1994, following the publication of the article, Mrs R.M. instituted proceedings against the applicants in the Constanța Court of First Instance for insult and defamation, offences under Articles 205 and 206 respectively of the Criminal Code. She complained, in particular, of the cartoon accompanying the article, which had depicted her as a "woman in a miniskirt, on the arm of a man with a bag full of money and with certain intimate parts of her body emphasised as a sign of derision". She submitted that the article, the cartoon and the dialogue between the characters had led readers to believe that she had had intimate relations with D.M., and pointed out that she and the former deputy mayor were both married.

26. At a hearing on 13 May 1994, the court adjourned the case as the applicants were not present and, scheduling a further hearing for 27 May 1994, directed that they should be brought before the court on that date.

27. On 27 May 1994 the second applicant stated at the hearing that, as editor, he assumed full responsibility for what had been published in the newspaper. He explained that cartoons were frequently used in the press as a medium for criticism and that he had not intended to damage the claimant's reputation. In reply to a question from the court, he admitted

having known that, by order of the mayor of Constanța, Vinalex had been authorised to tow away illegally parked vehicles. He stated, however, that he had not thought it necessary to publish that information. Lastly, he stressed that he did not intend to reach a settlement with the injured party and that he was prepared to publish an article in her favour provided that she could prove that what he had published was untrue.

28. On 10 June 1994 the applicants applied to have the case transferred to a court in another county. They also requested an adjournment of the proceedings, arguing that because the claimant was a judge it was impossible for them to find a member of the Constanța Bar who would agree to represent them.

29. On an unspecified date the Constanța Bar, in reply to a question from the court, attested that the applicants had not met with a refusal on the part of all of its members and that, in any event, the matter had not been referred to its executive.

30. On 15 June and 1 July 1994 the court adjourned the case as the applicants were not present.

31. In an interlocutory decision of 21 July 1994, the Supreme Court of Justice ordered the referral of the case to the Lehliu-Gară Court of First Instance.

32. On 15 November 1994 the case was entered on that court's list of cases for hearing. Public hearings were held on 21 December 1994 and on 25 January, 27 February, 20 March, 17 April and 17 May 1995.

33. On 21 December 1994 and 25 January 1995 the applicants did not attend the hearings, although they had been duly summoned. The court summoned them to appear at the hearings on 25 January and 27 February 1995. The applicants did not comply with the summonses.

34. At the hearings on 27 February and 20 March 1995, representatives of *Telegraf* applied for an adjournment on behalf of the applicants, who were not present. The court allowed the application.

35. On 20 March 1995 a member of the Bucharest Bar, N.V., agreed to represent the applicants.

36. At the hearing on 17 April 1995 in the morning, N.V. asked the court to consider the case after 11.30 a.m. The court granted his request. However, when it sat to examine the case at 12 noon and, subsequently, at 2.30 p.m. it noted that neither the applicants nor their counsel were present in the courtroom. It accordingly adjourned the case until 17 May 1995.

37. At the hearing on 17 May 1995 the court reserved judgment, after noting that neither the applicants – despite their having been duly summoned – nor their counsel had appeared. In a judgment delivered on the same day, the court found the applicants guilty of insult and defamation – offences under Articles 205 and 206 respectively of the Criminal Code. It sentenced them to three months' imprisonment for insult and seven months' imprisonment for defamation, and ordered them both to serve the heavier

sentence, namely seven months' immediate imprisonment. As well as this main penalty, the court imposed the secondary penalty of disqualification from exercising all the civil rights referred to in Article 64 of the Criminal Code (see paragraph 58 below).

It also prohibited the applicants from working as journalists for one year after serving their prison sentences, a security measure provided for in the first paragraph of Article 115 of the Criminal Code (see paragraph 59 below).

Lastly, it ordered them to pay Mrs R.M. 25,000,000 Romanian lei (ROL) (equivalent to 2,033 euros at the exchange rate applicable at the material time) for non-pecuniary damage.

38. In stating its reasons for the judgment, the court observed, firstly:

> "The Court notes that the injured party has always been present, both in the Constanţa Court of First Instance and in the Lehliu-Gară Court of First Instance, whereas the defendants have generally been absent without justification, despite having been lawfully summoned. In support of her prior complaint, the injured party, Mrs [R.M.], sought leave to produce documentary evidence. Mrs [R.M.] submitted a copy of the 12 April 1994 edition of the local newspaper *Telegraf*, containing the article referred to in her complaint and the cartoon in which she was ridiculed.
>
> The Court notes that the defendants and the party liable to pay damages, despite being lawfully summoned, have not attended any hearings, and that only the injured party has been present.
>
> The Court notes that the defendants R. Mazăre and C. Cumpănă were informed of the charges against them and of the hearing dates, and that they were assisted by a lawyer of their choosing (who asked the Court first for an adjournment and subsequently for consideration of the case to be postponed until the second sitting, after 11.30 a.m.).
>
> The Court observes that the defendant R. Mazăre gave evidence to the Constanţa Court of First Instance at a public hearing on 27 May 1994, and notes the following from his testimony: the defendant considered that it was not compulsory to have studied at journalism college to work as a journalist; he refused to reply when asked whether he had had access to any other documents on which Constanţa City Council's decision no. 33 had been based; he understood by 'series of offences' the fact of committing several offences; he understood by 'a multiple breach of the criminal law' the commission of several offences; he considered that the injured party, in signing the contract in her capacity as a legal expert at the city council, had infringed a number of the provisions of Law no. 69/1991; he pointed out that he could not give the precise legal classification of the offences committed by the injured party, as that did not come within his sphere of competence; he stated that he had said everything there had been to say about the injured party in the newspaper article; he submitted that cartoons were used everywhere and maintained that he had not (through the cartoon) damaged anybody's reputation (specifically, that of the injured party).
>
> [The Court] notes that the defendant R. Mazăre stated that he assumed full responsibility for everything published in his newspaper, as its editor; ... that he stated that he was aware of the constitutional provisions on the right of journalists to impart information to the public; that he had read the government decision in its entirety but

had not published it for lack of space; that he also stated that he had read the full text of the partnership contract entered into by the city authorities and signed by the injured party, Mrs [R.M.], but that he did not know whether the government decision had referred to partnership contracts; ... that the defendant had been aware that the Vinalex company had been authorised by order of the mayor of Constanța to provide the service of towing away illegally parked vehicles, but that he had not thought it necessary to publish that information in the newspaper; and, lastly, that he stated: 'In view of the seriousness of the offences committed, I do not think that it was necessary to discuss the matter with the injured party beforehand. Should any documents prove that my statements are unfounded, I am prepared to publish an article in the injured party's favour.' "

39. With regard to the documentary evidence on which the injured party intended to rely in support of her allegations, the court observed:

"Apart from the article published in *Telegraf*, the injured party, Mrs [R.M.], produced Constanța City Council's decision no. 33 – adopted in accordance with government decision no. 147 of 26 March 1992 – in which it was decided to tow away illegally parked vehicles; order no. 163 of 30 June 1992 by the mayor of Constanța ... authorising the Vinalex company to remove, tow away and impound illegally parked vehicles ('The conditions for the performance of these services shall be laid down in the partnership contract to be drawn up'); government decision no. 147 of 26 March 1992, in which mayors were empowered to order the removal, towing away and impounding of illegally parked vehicles by duly authorised specialist companies; and order no. 369 of 1 July 1994 by the mayor of Constanța, in which Vinalex was authorised to provide such services."

40. With regard more particularly to the article and cartoon in issue, the court held:

"... the article, by the defendants R. Mazăre and C. Cumpănă, was directed at the injured party, tarnishing her honour, dignity and public image and injuring her own self-esteem by means of the (written) accusations conveyed through signs and symbols targeted specifically at her.

The Court considers that these acts took place, that they are punishable under the criminal law, and that they posed a danger to society, not so much because of their practical effect (physical distortion of outward reality) but above all because of the psycho-social consequences resulting from the provision of misleading or incorrect information to the public, giving rise to inaccurate judgments about facts and individuals, establishing a false scale of values in view of the role and public impact of the media, and causing psychological trauma to the injured party. In making its assessment, the Court has had regard to the particular status of the parties to the proceedings: the injured party, Mrs [R.M.], being a lawyer and a representative of the judiciary, and the defendants, Mr R. Mazăre and Mr C. Cumpănă, being representatives of the media.

The Court notes that the defendant R. Mazăre, while realising the seriousness of the acts he had committed, irresponsibly stated that he had been 'aware of the fact that Vinalex had been authorised by order of the mayor, but did not consider it necessary to publish that order (as well)'...

The Court considers that publication of the article in the newspaper cannot have been justified by a 'legitimate interest' in that it was not based on actual facts and the

provision of accurate information to the public. It concludes that the defendants ... 'forgot' the content of Article 30 § 6 of the Constitution: 'Freedom of expression shall not be prejudicial to a person's dignity, honour and private life or to the right to one's own image', and of Article 31 § 4 of the Constitution: 'Public and private media shall be required to provide the public with accurate information.'

It follows from the written submissions filed by the injured party ... that it was always her wish that the criminal proceedings be terminated by a friendly settlement, provided that the defendants agreed to retract the allegations made in the article.

The Court notes that the injured party is a public figure and that, following the publication of the article, her superiors and the authority above them asked her to explain herself regarding the trial, particularly in view of the fact that she was due to take the professional examination to obtain permanent status."

2. Proceedings on appeal

41. On an unspecified date the applicants appealed against the first-instance judgment of 17 May 1995.

42. At a hearing on 2 November 1995, the Călăraşi County Court reserved judgment, having noted that the case was ready for decision and that the applicants had not appeared in court, despite having been duly summoned, and had not stated any grounds for their appeal.

43. In a judgment of 2 November 1995, the court, after examining all the aspects of the case against the applicants, as required by Article 385^6 of the Code of Criminal Procedure, upheld the first-instance judgment, finding it to have been correct. The County Court's judgment, sent to the archives on 23 November 1995, was final and binding and no ordinary appeal lay against it.

3. Proceedings following the Procurator-General's application to have the judgments quashed

44. On 10 April 1996 the Procurator-General applied to the Supreme Court of Justice to have the judgments of 17 May 1995 and 2 November 1995 quashed. He submitted the following arguments.

(a) The courts' legal classification of the facts had been incorrect. Pointing out that in the cartoon the applicants had simply highlighted their allegations of corruption on the part of certain city council officials, he accordingly submitted that the facts in issue did not constitute the *actus reus* of insult as defined in Article 205 of the Criminal Code.

(b) The amount the applicants had been ordered to pay in damages had been extremely high and had not been objectively justified.

(c) Lastly, the requirements of the first paragraph of Article 115 of the Criminal Code, by which the courts could prohibit persons who had committed unlawful acts from practising a particular profession on account of their incompetence, lack of training or any other ground making them

unfit to practise the profession, were not satisfied in the applicants' case, as there was no unequivocal proof that the applicants were incompetent to continue working as journalists or that their doing so entailed a potential danger.

45. In a final judgment of 9 July 1996, the Supreme Court of Justice dismissed the Procurator-General's application as being manifestly ill-founded, for the following reasons:

> "It has been established from the evidence adduced in the present case that on 12 April 1994 the accused, R. Mazăre and C. Cumpănă, published an article in the Constanța newspaper *Telegraf* entitled 'Former Deputy Mayor [D.M.] and serving judge [R.M.] responsible for series of offences in Vinalex scam', in which it was asserted that in 1992, while she was employed as a legal expert at Constanța City Council, the injured party, Mrs [R.M.], had been involved in fraudulent activities on the part of a commercial company, Vinalex.
>
> The Supreme Court further notes that, alongside the above-mentioned article, the accused published a cartoon in which the injured party was depicted in the company of a man carrying a bag full of money on his back, and that this was likely to tarnish the injured party's honour, dignity and public image.
>
> It follows that in publishing the article in *Telegraf*, the accused attributed specific acts to the injured party which, had their allegations been made out, would have rendered her criminally liable; the two lower courts were therefore correct in finding the accused guilty of defamation under Article 206 of the Criminal Code.
>
> The fact that the accused published alongside the above-mentioned article a cartoon in which the injured party was depicted in the company of a man carrying a bag full of money, in such a way as to tarnish her honour and reputation, constitutes the offence of insult as defined in Article 205 of the Criminal Code ..."

46. With regard to the amount which the applicants had been ordered to pay in damages, the Supreme Court held:

> "... the requirement for the accused to pay 25,000,000 lei for non-pecuniary damage was justified, since it is beyond dispute that in publishing the article on 12 April 1994 in a mass-circulation newspaper, the accused seriously offended the dignity and honour of the injured party."

47. The Supreme Court held, lastly, in relation to the alleged unlawfulness of the temporary prohibition on the applicants' working as journalists:

> "... since the application of security measures in circumstances other than those provided for by law does not feature on the exhaustive list of cases in which the law permits the Procurator-General to apply to have a decision quashed, it cannot form a legal basis for quashing the judgments in issue."

C. The applicants' circumstances after being convicted in the final and binding judgment of 2 November 1995

1. Execution of the prison sentence and of the secondary penalty of disqualification from exercising civil rights

48. The applicants did not serve the prison sentence they had received in the judgment of 2 November 1995, since immediately after the judgment had been delivered the Procurator-General suspended its execution for eleven months by virtue of Article 412 of the Code of Criminal Procedure (see paragraph 61 *in fine* below).

49. In a letter of 30 September 1996, the Procurator-General at the Supreme Court of Justice informed the applicants that he had extended the stay of execution until 27 November 1996.

50. On 22 November 1996 the applicants were granted a presidential pardon dispensing them from having to serve their prison sentence. By virtue of Article 71 of the Code of Criminal Procedure, the pardon also waived their secondary penalty of disqualification from exercising their civil rights (see paragraph 58 *in fine* below).

2. Prohibition on working as journalists

(a) The first applicant

51. It appears from the first applicant's employment record (*cartea de muncă*), of which he submitted a copy to the Court, that, following the Călăraşi County Court's judgment of 2 November 1995:

(a) he continued to work for *Telegraf* as editor of the "Events" section until 1 February 1996, when he was transferred for administrative reasons to the C. company, occupying the same position and receiving the same salary as before;

(b) while working for C., he was awarded a pay rise;

(c) he ceased to work for C. on 14 April 1997 on account of staff cutbacks by his employer, a ground for dismissal provided for in Article 130 (a) of the Labour Code as worded at the material time;

(d) thereafter, he was not gainfully employed until 7 February 2000, when he was recruited on a permanent contract by the A. company as deputy editor.

(b) The second applicant

52. Following the final and binding judgment of 2 November 1995, the second applicant continued to work as editor of *Telegraf*, as indicated in a letter he sent to the Court on 19 January 2000.

53. Between 1 September 1997 and 30 November 1999, while he was a member of the Romanian parliament, the sum of ROL 25,000,000 was deducted from his parliamentary allowance and transferred to Mrs R.M.'s bank account, pursuant to the Lehliu-Gară Court of First Instance's judgment of 17 May 1995 (see paragraph 37 *in fine* above).

54. On an unspecified date after that judgment, he was elected mayor of Constanța, a position he still holds.

II. RELEVANT DOMESTIC LAW

A. The Criminal Code

1. Offences against the individual

55. At the material time the relevant provisions were worded as follows:

Article 205 – Insult

"Anyone who tarnishes the reputation or honour of another through words, gestures or any other means shall be liable to imprisonment for between one month and two years or to a fine."

Article 206 – Defamation

"Anyone who makes any statement or allegation in public concerning a particular person which, if true, would render that person liable to a criminal, administrative or disciplinary penalty or expose them to public opprobrium shall be liable to imprisonment for between three months and three years or to a fine."

56. In Resolution no. 1123 of 24 April 1997 on the honouring of obligations and commitments by Romania, the Parliamentary Assembly of the Council of Europe observed that Articles 205 and 206 of the Romanian Criminal Code were unacceptable and seriously compromised the exercise of fundamental freedoms, in particular the freedom of the press. The Assembly therefore called on the Romanian authorities to amend those provisions without delay.

57. Following a process of legislative reform, the New Romanian Criminal Code Act (Law no. 301 of 28 June 2004) provides that the offence of defamation is punishable solely by a fine (Article 225 of the New Criminal Code) and no longer classifies insult as a criminal offence. These legislative amendments will come into force on 29 June 2005.

2. Penalties

58. The relevant provisions are worded as follows:

Article 64 – Additional penalties

"Disqualification from exercising one or more of the rights mentioned below may be imposed as an additional penalty:

(a) the right to vote and to be elected to bodies of a public authority or to public elective office;

(b) the right to occupy a position entailing the exercise of State authority;

(c) the right to perform a duty or practise a profession or activity by means of which the convicted person carried out the offence;

(d) parental rights;

(e) the right to act as a child's guardian or statutory representative."

Article 71 – Secondary penalty

"The secondary penalty shall consist in disqualification from exercising all the rights listed in Article 64.

A life sentence or any other prison sentence shall automatically entail disqualification from exercising the rights referred to in the preceding paragraph from the time at which the conviction becomes final until the end of the term of imprisonment or the granting of a pardon waiving the execution of the sentence ..."

3. Security measures

59. The relevant provision is worded as follows:

Article 115 – Prohibition on performing a duty or practising a profession

"Anyone who has committed an [unlawful] act through incompetence, lack of training or for any other reasons rendering him or her unfit to perform certain duties or to practise a certain profession or activity may be prohibited from performing those duties or practising that profession or activity. Such a measure may be revoked on request after one year if the grounds on which it was imposed are no longer valid.

..."

4. Grounds for negating criminal responsibility or the effects of a conviction

60. The relevant provisions are worded as follows:

Article 120 – Effects of a pardon

"A pardon shall have the effect of waiving the execution of a sentence. ... A pardon shall have no effect on security measures or educational measures."

Article 134 – Rehabilitation

"A person sentenced to a term of imprisonment of less than one year shall be legally rehabilitated if he does not commit any further offences for three years."

B. The Code of Criminal Procedure

61. The relevant provisions are worded as follows:

Article 409

"The Procurator-General may, of his own motion or on an application by the Minister of Justice, apply to the Supreme Court of Justice for any final decision to be quashed."

Article 410

"An application to have a final conviction ... quashed may be made:

I. ...

...

4. where the penalties imposed fell outside the limits prescribed by law;

...

7. where the offence was incorrectly classified in law ..."

Article 412

"Before applying to have a decision quashed, the Procurator-General may order a stay of its execution."

THE LAW

I. PRELIMINARY ISSUE: SCOPE OF THE GRAND CHAMBER'S JURISDICTION

62. In their observations in reply to the applicants' request for referral of the case to the Grand Chamber, the Government submitted that the first applicant had made the request without the second applicant's explicit approval. However, the second applicant had not been represented by the

first applicant on the date on which the latter had sent the request to the Court.

63. The Government submitted that the scope of the Grand Chamber's jurisdiction was limited to the first applicant's allegation of an infringement of his freedom of expression. They accordingly requested the Grand Chamber not to examine the second applicant's complaints under Article 10 of the Convention.

64. The applicants objected to that request and asked the Court to examine the case as a whole on the grounds that their referral request had been lodged on behalf of both of them and that the Convention did not explicitly state the potential consequences of the fact that one of them had not signed the document.

65. In view of this dispute between the parties, the Court must determine the scope of the case brought before it following the applicants' request for referral to the Grand Chamber under Article 43 of the Convention, which provides:

> "1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.
>
> 2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.
>
> 3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment."

66. According to the Court's settled case-law, the "case" referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its judgment, there being no basis for a merely partial referral of the case (see *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-41, ECHR 2001-VII, and *Perna v. Italy* [GC], no. 48898/99, §§ 23-24, ECHR 2003-V). The "case" referred to the Grand Chamber is the application as it has been declared admissible (see, *mutatis mutandis*, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 63, § 157, and *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III), with the parties to the proceedings before the Chamber concerned, including their status on the date on which the application was declared admissible.

67. That approach is, moreover, in keeping with the spirit and the letter of Article 37 § 1 *in fine* of the Convention, by which the Court is entitled to continue the examination of an application if respect for human rights as defined in the Convention and the Protocols so requires, including where the circumstances lead to the conclusion that the applicant does not intend to pursue his application, an eventuality expressly provided for in Article 37 § 1 (a) which may be deemed akin to the second applicant's not having

signed the referral request in the instant case (see, *mutatis mutandis*, *Karner v. Austria*, no. 40016/98, § 28, ECHR 2003-IX).

68. Such a conclusion is all the more appropriate in the present case as Mr Mazăre, in his declaration of 17 August 2004, expressly joined the referral request signed on behalf of both applicants by the first applicant (see paragraphs 9 and 13 above), thereby indicating, albeit retrospectively, his intention to pursue the complaint under Article 10 of the Convention as declared admissible by the Chamber and to submit it to the Grand Chamber for examination.

69. Accordingly, the scope of the case now before the Grand Chamber is not limited in the manner claimed by the Government.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

70. The applicants submitted that their conviction following the publication on 12 April 1994 of an article in a local newspaper amounted to unjustified interference with their right to freedom of expression within the meaning of Article 10 of the Convention, the relevant parts of which provide:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others, ... or for maintaining the authority and impartiality of the judiciary."

A. Submissions of those appearing before the Court

1. The applicants

71. The applicants submitted that the interference with their right to freedom of expression as a result of their conviction by the national courts had not met a "pressing social need" capable of justifying it under the second paragraph of Article 10 of the Convention. They maintained, firstly, that by publishing the impugned article in a local newspaper they had intended to draw public attention to the public and political issues relating to the irregularities committed, in their opinion, by the city authorities in the signing of a public partnership contract with a private company.

72. Pointing out that they had not made any reference in the article to the private life of the injured party, Mrs R.M., and that this attested to their good faith, the applicants argued that the cartoon which had resulted in their

being accused of interfering with the private life of the city council's former legal expert constituted a purely humorous form of satire and that in such circumstances the exaggeration of certain characteristics of people and situations should be tolerated. In their submission, only Mrs R.M.'s vivid imagination could have led her to believe that the cartoon in question was insinuating that she had had intimate relations with the former deputy mayor, and the Government should not have concurred in this malicious interpretation.

They asserted that the national courts had not found anything in the cartoon to suggest that the persons depicted in it had been having an extramarital affair. They added that if they had been aware of any such intimate relations between the two city council officials, they would have had no hesitation in giving a detailed, explicit and direct description of them in the article.

73. They further submitted that they should be regarded as having adequately checked the information they had imparted to the public, seeing that they had based it on a report – whose credibility had not been contested – adopted on 17 March 1994 by the Audit Court, the only public institution authorised to review the management of public finances. They stated that they had also had sources within the city council and the Audit Court, whose identities they could not have disclosed without putting them at risk.

74. The applicants pointed out that the fact that they had not proved the truth of their allegations in the national courts had resulted from objective considerations relating to the principle of protection of sources, and from the attitude of the national courts, which had not actively sought to establish that their allegations were true. They submitted that "journalistic truth" pursued the aim of informing the public speedily about matters of general interest and was accordingly different from "judicial truth", which the national courts established with a view to determining the responsibility of those who acted illegally. The press could not therefore be required to establish the facts with the same precision as was required of the investigating authorities.

75. The applicants submitted that the allegations that had resulted in their conviction, concerning the unlawfulness of the public contract signed by the city authorities, had been confirmed by the Audit Court's report. They justified the fact that they had brought them to the public's attention two years after the contract had been signed by pointing out that they had not had access to the report in question until that date. They also emphasised that the article in issue had been directed at Mrs R.M. in her capacity as a city council official at the time of the events described in it and not in any way in her capacity as a judge on the date on which it had been published.

76. Lastly, they argued that the fact that they had not served their prison sentence did not absolve the respondent State of responsibility in relation to the interference with their freedom of expression, and submitted that the sanctions imposed on them had been excessive and tantamount to subjecting the free discussion of matters of public interest to a form of individual and general censorship.

2. The Government

77. The Government submitted that the applicants' conviction had been necessary in a democratic society, seeing that the publication of the article in issue had amounted to a manifest breach of the ethics of journalism. Contending that the applicants had not imparted reliable and accurate information to the public and had not acted in good faith in asserting that Mrs R.M. was corrupt, they observed that the applicants had not maintained in the national courts that they had checked their information, having merely stated that they had taken into account certain decisions by the city council and the mayor and an order by the government; however, there was nothing in those documents to justify the serious accusations of corruption levelled at Mrs R.M.

78. The Government further pointed out that in the national courts the applicants had never referred to any other documents or information as a source for their article, despite having been aware that there had been another decision by the city authorities authorising Vinalex to perform the public service to which the partnership contract related. Relying in particular on the evidence given by the second applicant in the Constanța Court of First Instance, the Government asserted that the applicants had not considered it necessary or relevant to publish that document, even though it actually contradicted the message conveyed by the article in issue. They further drew attention to what they regarded as unequivocal references to Mrs R.M.'s private life – such as the use of diminutives in the text accompanying the cartoon – which in their submission were wholly inappropriate contributions to a debate on the matter of general interest being brought to the public's attention.

79. The Government went on to argue, firstly, that the applicants had not established the truth of their specific allegations of corruption and complicity on Mrs R.M.'s part in the signing of illegal contracts and secondly, that they had failed to provide the national courts with even the slightest factual basis for their value judgments as to the morality and competence of the city council's former legal expert. They noted in that connection that the courts had found the applicants guilty of insult and defamation after establishing that they had acted in bad faith.

80. With regard more particularly to the Audit Court report, the Government submitted that it could not have formed a basis for the applicants' allegations, seeing that it had not been issued until 26 May 1994,

more than one month after the publication of the article. Furthermore, in the national courts the applicants had not mentioned either the existence of such a report or the fact that reviews by the Audit Court were in progress, thereby depriving the courts of the possibility of requesting the relevant official documents from the supervisory bodies in question.

81. The Government further maintained that the applicants' conviction had met a pressing social need, namely the protection of Mrs R.M.'s private life and reputation and, implicitly, the image of the judiciary, since the injured party's status as a serving judge had repeatedly been emphasised in the article in issue. They considered that the applicants' allegations, far from concerning a debate on a matter of general interest, had in fact consisted of personal insults directed at the judge in question; that, among other things, justified the severity of the penalty imposed on them.

82. In that connection, the Government noted that the order prohibiting the applicants from working as journalists had been a security measure and not a penalty, and had been necessary in view of the smear campaign they had conducted against the injured party; in their submission, such a measure had been designed to prevent any further offences. In any event, they observed that the sanction had had no practical consequences for the applicants' professional activities.

83. Lastly, observing that the applicants had not served the prison sentence imposed on them, the Government asserted that the pardon they had been granted had in fact been in keeping with the Romanian authorities' general policy of opposing the imprisonment of journalists for offences relating to freedom of expression. They noted that Parliament had adopted a similar approach, recent proposals for legislative reform having led to the removal of the offence of insult from the Criminal Code and the abolition of prison sentences for the offence of defamation (see paragraph 57 of "Relevant domestic law" above).

B. The Court's assessment

1. Whether there was interference

84. It was not disputed that the applicants' conviction by the national courts following their publication of an article in a local newspaper of which the second applicant was the editor amounted to "interference" with their right to freedom of expression.

85. Such interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It should therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" in order to achieve those aims.

2. Whether the interference was justified

86. It appears from the decisions taken by the national courts that the interference was indisputably "prescribed by law", namely by Articles 205 and 206 of the Criminal Code as worded at the material time (see paragraph 55 above), whose accessibility and foreseeability have not been contested, and that it pursued a legitimate aim, "protection of the rights of others", and more particularly of the reputation of Mrs R.M., who was a city council official at the time of the events described in the article and a judge on the date of its publication (see paragraphs 40 and 45 above).

87. Those appearing before the court differed as to whether the interference in question had been "necessary in a democratic society". The Court must therefore determine whether this requirement, as set forth in the second paragraph of Article 10, was satisfied in the instant case, after first reiterating the principles established by its relevant case-law.

(a) General principles

88. The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Perna*, cited above, § 39, and *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII).

89. The Court's task in exercising its supervisory function is not to take the place of the competent domestic courts but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole, including the content of the comments held against the applicants and the context in which they made them (see *News Verlags GmbH & Co. KG v. Austria*, no. 31457/96, § 52, ECHR 2000-I).

90. In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient" and whether the measure taken was "proportionate to the legitimate aims pursued" (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI). In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the

relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see, among many other authorities, *Zana v. Turkey*, judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, pp. 2547-48, § 51).

91. The Court must also ascertain whether the domestic authorities struck a fair balance between, on the one hand, the protection of freedom of expression as enshrined in Article 10, and, on the other hand, the protection of the reputation of those against whom allegations have been made, a right which, as an aspect of private life, is protected by Article 8 of the Convention (see *Chauvy and Others*, cited above, § 70 *in fine*). That provision may require the adoption of positive measures designed to secure effective respect for private life even in the sphere of the relations of individuals between themselves (see *Von Hannover v. Germany*, no. 59320/00, § 57, ECHR 2004-VI, and *Stubbings and Others v. the United Kingdom*, judgment of 22 October 1996, *Reports* 1996-IV, p. 1505, §§ 61-62).

(b) Application of the above principles in the instant case

(i) "Pressing social need"

92. In the instant case the national courts found that in the article in issue the applicants had tarnished Mrs R.M.'s honour, dignity and public image by accusing her of having committed specific offences, such as aiding and abetting fraudulent activities on the part of Vinalex, and by portraying her in a cartoon on the arm of a man carrying a bag full of money; in the courts' view, this was likely to cause her psychological trauma and to lead to misinformation of the public (see paragraphs 40 and 45 above). The Court must determine whether the reasons given by the national authorities to justify the applicants' conviction were relevant and sufficient.

93. One factor of particular importance for the Court's determination of the present case is the vital role of "public watchdog" which the press performs in a democratic society (see *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports* 1996-II, p. 500, § 39, and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III). Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on political issues and on other matters of general interest (see, among many other authorities, *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, pp. 233-34, § 37; *Thoma v. Luxembourg*, no. 38432/97, § 45, ECHR 2001-III; and *Colombani and Others v. France*, no. 51279/99, § 55, ECHR 2002-V).

94. It should be noted in this connection that the article in question mainly contained information about the management of public funds by

certain local elected representatives and public officials, and in particular certain irregularities allegedly committed in the signing of a partnership contract between the city authorities and a private company concerning the service of impounding illegally parked vehicles (see paragraph 20 above).

95. This was indisputably a matter of general interest to the local community which the applicants were entitled to bring to the public's attention through the press. The fact that the same question was raised by the Audit Court in a report drawn up following a review of the city council by its auditors (see paragraph 23 above) merely serves to confirm that the article in issue contributed to a debate on a matter of interest to the local population, who were entitled to receive information about it.

96. As to the Government's allegation that the report in question had been adopted approximately one month after the article was published, the Court would point out that the role of investigative journalists is precisely to inform and alert the public about such undesirable phenomena in society as soon as the relevant information comes into their possession. It is clear from the article that at the time it was written the applicants had knowledge, if not of the Audit Court's final report, at least of its initial version (see paragraphs 23-24 above); the means used by the applicants to obtain a copy of the document in question fall within the scope of the freedom of investigation inherent in the practice of their profession.

97. The Court notes, as the national courts did, that the article in issue also contained assertions relating directly to Mrs R.M., whose name was printed in full in the actual headline of the article and mentioned repeatedly in the article itself (see paragraphs 19-20 above).

Those assertions conveyed the message that she had been involved in fraudulent dealings with Vinalex. They were couched in virulent terms, as is demonstrated by the use of forceful expressions such as "scam" and "series of offences" or statements such as "the signatories cannot claim ignorance of the law, but only an intentional breach of it", "the former deputy mayor ... received backhanders ... and bribed his subordinates, including [R.M.]", "Either she was ignorant of national legislation when she signed the partnership contract, in which case it is hard to understand how she can subsequently have been appointed as a judge ..., or she accepted bribes and may continue to do so in future" or "Ironically, the court's president did not take any action against her on the ground that the sum received was not ... large enough" (see paragraphs 19-20 above).

98. The Court reiterates that it has consistently held that, in assessing whether there was a "pressing social need" capable of justifying interference with the exercise of freedom of expression, a careful distinction needs to be made between facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof (see *De Haes and Gijsels*, cited above, p. 235, § 42, and *Harlanova v. Latvia* (dec.), no. 57313/00, 3 April 2003).

99. Admittedly, where allegations are made about the conduct of a third party, it may sometimes be difficult, as in the instant case, to distinguish between assertions of fact and value judgments. Nevertheless, even a value judgment may be excessive if it has no factual basis to support it (see *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II).

100. In the instant case, the applicants' statements about Mrs R.M. were mainly worded in the form of an alternative ("Either she was ignorant of national legislation ... or she accepted bribes"), which might have suggested that they were value judgments. However, it must be concluded from an examination of the imputations in issue in the light of the article as a whole, including the accompanying cartoon, that they in fact contained allegations of specific conduct on Mrs R.M.'s part, namely that she had been complicit in the signing of illegal contracts and had accepted bribes. The applicants' statements suggested to readers that Mrs R.M. had behaved in a dishonest and self-interested manner, and were likely to lead them to believe that the "fraud" of which she and the former deputy mayor were accused and the bribes they had allegedly accepted were established and uncontroversial facts.

101. While the role of the press certainly entails a duty to alert the public where it is informed about presumed misappropriation on the part of local elected representatives and public officials, the fact of directly accusing specific individuals by mentioning their names and positions placed the applicants under an obligation to provide a sufficient factual basis for their assertions (see *Lešník v. Slovakia*, no. 35640/97, § 57 *in fine*, ECHR 2003-IV, and *Vides Aizsardzības Klubs v. Latvia*, no. 57829/00, § 44, 27 May 2004).

102. This was particularly so because the accusations against Mrs R.M. were so serious as to render her criminally liable, as, indeed, the Supreme Court of Justice noted in its judgment of 9 July 1996 (see paragraph 45 above). It should be pointed out in this connection that the exercise of freedom of expression carries with it duties and responsibilities, and the safeguard afforded by Article 10 to journalists is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see *Radio France and Others v. France*, no. 53984/00, § 37, ECHR 2004-II; *Colombani and Others*, cited above, § 65; *Harlanova*, cited above; and *McVicar v. the United Kingdom*, no. 46311/99, §§ 83-86, ECHR 2002-III).

103. That was not the case in this instance. After examining all the evidence before them, the national courts found that the applicants' allegations against Mrs R.M. had presented a distorted view of reality and had not been based on actual facts (see paragraphs 40 and 45 above). The Court cannot accept the applicants' argument that the Romanian courts did not actively seek to establish the "judicial truth" (see paragraph 74 above). On the contrary, it is clear from the facts of the case that the courts

concerned allowed the applicants adequate time and facilities for the preparation of their defence (see paragraphs 26, 30, 32, 33 and 36 above), even going so far as to issue summonses to ensure their appearance (see paragraphs 26 and 33 above).

104. Another factor that must carry some weight in the instant case is the applicants' conduct during the criminal proceedings against them. It must be noted, as it was by the Lehliu-Gară Court of First Instance and the Călăraşi County Court (see paragraphs 38 and 42 above), that the applicants displayed a clear lack of interest in their trial, not attending the hearings either at first instance or in the County Court, despite having been duly summoned. They did not state any grounds for their appeal (see paragraph 42 above) and failed to adduce evidence at any stage of the proceedings to substantiate their allegations or provide a sufficient factual basis for them (see paragraphs 24 and 27 above).

105. The Court notes, in particular, that the applicants did not produce a copy of the Audit Court report in the national courts or even indicate during the criminal proceedings against them that their assertions had been based on such an official report; such steps would have enabled the national courts to request the Audit Court to produce the document as evidence in the criminal proceedings, as the Government rightly pointed out (see paragraph 80 *in fine*).

106. The Court is not persuaded by the applicants' argument that they did not substantiate their allegations on account of the principle of protection of sources. Reiterating its settled case-law to the effect that the protection of journalists' sources is one of the cornerstones of freedom of the press and that, without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest (see *Goodwin*, cited above, p. 500, § 39, and *Roemen and Schmit v. Luxembourg*, no. 51772/99, § 57, ECHR 2003-IV), the Court points out that the applicants' duty to provide a sound factual basis for the allegations in question in no way entailed an obligation to disclose the names of anyone who had supplied the information they used in producing their report. Furthermore, it does not appear from the evidence before the Court that during the criminal proceedings as a whole, or even on the date on which the second applicant appeared before the Court of First Instance (see paragraph 27 above), the Audit Court report on which the applicants' article was clearly based was a confidential document whose disclosure could have led to sanctions for them or for their sources.

107. Nor can the applicants argue that the reasons given by the national courts that convicted them were not relevant or sufficient, seeing that they themselves neglected to submit to the courts in question the arguments and evidence on which they are now relying before the Court (see paragraphs 24, 73 and 75 above), thereby depriving those courts of the

opportunity to make an informed assessment of whether the applicants had overstepped the limits of acceptable criticism.

108. The Court further notes that although the report in question, having been issued by the Audit Court, could be regarded as a sound and credible factual basis for the allegations questioning the legality of the partnership contract between the city authorities and Vinalex (see, *mutatis mutandis*, *Colombani and Others*, cited above, § 65, and Bladet Tromsø *and Stensaas*, cited above, § 68), nothing is mentioned in it, or even suggested, as to the alleged dishonesty of the former deputy mayor and Mrs R.M. or as to their having accepted bribes in order to sign such a contract.

109. As regards the manner in which the authorities dealt with the present case, the Court notes that the Romanian courts fully recognised that it involved a conflict between the applicants' right, as representatives of the media, to impart information and ideas and Mrs R.M.'s right to protection of her reputation and dignity (see paragraph 91 above). On the basis of the evidence before it, the Court considers that the grounds the domestic courts relied on to justify the applicants' conviction were relevant and sufficient.

110. Having regard to the margin of appreciation left to the Contracting States in such matters, the Court finds in the circumstances of the case that the domestic authorities were entitled to consider it necessary to restrict the exercise of the applicants' right to freedom of expression and that the applicants' conviction for insult and defamation accordingly met a "pressing social need". What remains to be determined is whether the interference in issue was proportionate to the legitimate aim pursued, in view of the sanctions imposed.

(ii) Proportionality of the sanction

111. The nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10 (see *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV; *Tammer v. Estonia*, no. 41205/98, § 69, ECHR 2001-I; *Skałka v. Poland*, no. 43425/98, §§ 41-42, 27 May 2003; and *Lešník*, cited above, §§ 63-64). The Court must also exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern (see *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, pp. 25-26, § 35).

112. In the instant case, besides being ordered to pay Mrs R.M. a sum for non-pecuniary damage, the applicants were sentenced to seven months' immediate imprisonment and prohibited from exercising certain civil rights and from working as journalists for one year (see paragraph 37 above). Those sanctions were undoubtedly very severe.

113. Although the Contracting States are permitted, or even obliged, by their positive obligations under Article 8 of the Convention (see paragraph 91 *in fine* above) to regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals' reputations, they must not do so in a manner that unduly deters the media from fulfilling their role of alerting the public to apparent or suspected misuse of public power (see paragraph 93 above). Investigative journalists are liable to be inhibited from reporting on matters of general public interest – such as suspected irregularities in the award of public contracts to commercial entities – if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment or to a prohibition on the exercise of their profession.

114. The chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression is evident (see, *mutatis mutandis*, *Wille v. Liechtenstein* [GC], no. 28396/95, § 50, ECHR 1999-VII; *Nikula v. Finland*, no. 31611/96, § 54, ECHR 2002-II; *Goodwin*, cited above, p. 500, § 39; and *Elci and Others v. Turkey*, nos. 23145/93 and 25091/94, § 714, 13 November 2003). This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed on the present applicants, who, as the Court has held above, were undeniably entitled to bring to the attention of the public the matter of the signing of the partnership agreement between the city authorities and the private company concerned (see paragraphs 94-95 above).

115. Although sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence (see, *mutatis mutandis*, *Feridun Yazar v. Turkey*, no. 42713/98, § 27, 23 September 2004, and *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, § 63, 8 July 1999). In this connection, the Court notes the recent legislative initiatives by the Romanian authorities, leading to the removal of the offence of insult from the Criminal Code and the abolition of prison sentences for defamation (see paragraph 57 above).

116. The circumstances of the instant case – a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest – present no justification whatsoever for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect, and the fact that the applicants did not serve their prison sentence does not alter that conclusion, seeing that the individual pardons they received are measures subject to the discretionary power of the President of

Romania; furthermore, while such an act of clemency dispenses convicted persons from having to serve their sentence, it does not expunge their conviction (see paragraphs 50 and 60 above).

117. Furthermore, the prison sentence imposed on the applicants was accompanied by an order disqualifying them from exercising all the civil rights referred to in Article 64 of the Criminal Code (see paragraph 58 above). Admittedly, the successive stays of execution granted by the Procurator-General (see paragraphs 48 and 49 above) meant that the applicants did not suffer the practical consequences of this secondary penalty, which was waived as a result of the presidential pardon, in accordance with the relevant national legislation (see paragraph 50 *in fine* above). The fact remains, however, that such a disqualification – which in Romanian law is automatically applicable to anyone serving a prison sentence, regardless of the offence for which it is imposed as the main penalty, and is not subject to review by the courts as to its necessity (see, *mutatis mutandis*, *Sabou and Pîrcălab v. Romania*, no. 46572/99, § 48, 28 September 2004) – was particularly inappropriate in the instant case and was not justified by the nature of the offences for which the applicants had been held criminally liable.

118. As regards the order prohibiting the applicants from working as journalists for one year, which, moreover, was not remitted, the Court reiterates that prior restraints on the activities of journalists call for the most careful scrutiny on its part and are justified only in exceptional circumstances (see, *mutatis mutandis*, *Association Ekin*, cited above, § 56 *in fine*). The Court considers that, although it would not appear from the circumstances of the case that the sanction in question had any significant practical consequences for the applicants (see paragraphs 51-52 above), it was particularly severe and could not in any circumstances have been justified by the mere risk of the applicants' reoffending.

119. The Court considers that by prohibiting the applicants from working as journalists as a preventive measure of general scope, albeit subject to a time-limit, the domestic courts contravened the principle that the press must be able to perform the role of a public watchdog in a democratic society.

(iii) Conclusion

120. Although the national authorities' interference with the applicants' right to freedom of expression may have been justified by the concern to restore the balance between the various competing interests at stake, the criminal sanction and the accompanying prohibitions imposed on them by the national courts were manifestly disproportionate in their nature and severity to the legitimate aim pursued by the applicants' conviction for insult and defamation.

121. The Court concludes that the domestic courts in the instant case went beyond what would have amounted to a "necessary" restriction on the applicants' freedom of expression.

122. There has therefore been a violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

123. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

124. The first applicant sought an award of 2,537.65 United States dollars (USD) (2,108 euros (EUR)) for the pecuniary damage resulting from his loss of earnings between 14 April 1997, when his contract of employment had been terminated, and 7 February 2000, when he had been recruited by another press company.

The second applicant claimed USD 2,445.10 (EUR 2,033), corresponding to the sum of 25,000,000 lei, which the applicants had been ordered to pay Mrs R.M. jointly and severally, but which had in fact been paid solely by him.

125. The applicants also claimed USD 100,000 each (EUR 83,151) for the non-pecuniary damage resulting, in their submission, from the mental suffering caused by the substantial prison sentence they had received, by the impact on their reputation and career, and by the stress relating to the uncertainty they had experienced for more than one year after their conviction, as their custodial sentence could have been enforced at any time.

126. The Government submitted that any award to be made to the first applicant should cover no more than his loss of earnings while he had been prohibited from practising his profession, that is from 22 November 1996 to 22 November 1997. They did not raise any objections to the second applicant's claim for pecuniary damage.

127. They considered, however, that no award should be made to the applicants for non-pecuniary damage. Arguing that the second applicant's conviction had had no effect on his reputation and career, regard being had to his election as a member of the Romanian parliament and as mayor of Constanța, they submitted that the Court's judgment could in itself constitute sufficient just satisfaction.

128. As to the first applicant's claim for loss of earnings, the Court observes that no direct causal link has been sufficiently established between the alleged loss and the violation it has found of Article 10 of the Convention. In particular, his dismissal on 14 April 1997 was due to staff cutbacks by his employer (see paragraph 51 above) and he did not provide any evidence that he had tried in vain to find a new job before the prohibition expired. Accordingly, the Court cannot allow his claim.

129. In view of its conclusion that the applicants' conviction could have been regarded as "necessary in a democratic society" to restore the balance between the various competing interests at stake if the criminal sanction and additional prohibitions had not been manifestly disproportionate (see paragraphs 120-21 above), the Court is likewise unable to allow the second applicant's claim for reimbursement of the sum the national courts' decisions required him to pay the injured party for non-pecuniary damage.

130. Having regard to the circumstances of the case, the Court considers that the finding of a violation of Article 10 of the Convention constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants.

B. Costs and expenses

131. The applicants claimed reimbursement of the costs and expenses they had incurred in the proceedings in the national courts and before the Court, without quantifying them or submitting any supporting documents. They left it to the Court's discretion to determine the amount to be awarded under this head.

132. The Government had no objection in principle to that claim, provided that the necessary supporting documents were produced.

133. The Court reiterates that under Article 41 of the Convention it will reimburse only the costs and expenses that are shown to have been actually and necessarily incurred and are reasonable as to quantum. Furthermore, Rule 60 § 2 of the Rules of Court provides that itemised particulars of any claim made under Article 41 of the Convention must be submitted, together with the relevant supporting documents or vouchers, failing which the Court may reject the claim in whole or in part (see, for example, *Vides Aizsardzības Klubs*, cited above, § 56).

134. In the instant case, the Court observes that the applicants have not substantiated their claim in any way, as they have neither quantified their costs nor submitted any supporting documents. It therefore decides not to award them anything under this head.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 10 of the Convention;

2. *Holds* by sixteen votes to one that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;

3. *Dismisses* by sixteen votes to one the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 17 December 2004.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Cabral Barreto joined by Mr Ress and Mr Bîrsan;

(b) partly dissenting opinion of Mr Costa.

L.W.
P.J.M.

CONCURRING OPINION OF JUDGE CABRAL BARRETO JOINED BY JUDGES RESS AND BÎRSAN

(Translation)

I share the majority's view that the Grand Chamber is entitled to examine the present case as a whole in relation to both applicants, but I have difficulty agreeing with the entire reasoning.

In my opinion, the significant factor is that Mr Mazăre endorsed and accepted the referral request made on his behalf by Mr Cumpănă.

However, if the majority are suggesting in paragraph 68 of the judgment that where there are several applicants, referral of the case entitles the Grand Chamber to examine all aspects of the application considered by the Chamber (see paragraph 66), I am unable to agree.

In my opinion, a distinction should be drawn between cases in which there is only one applicant and cases in which there are more than one.

Where there is only one applicant, referral to the Grand Chamber at the request of the parties – the State or the applicant – entails an examination of the application as a whole, even if the request concerns only certain aspects or complaints (see *K. and T. v. Finland* [GC], no. 25702/94, ECHR 2001-VII).

Where there are several applicants and the request for referral to the Grand Chamber is made by one of them, I consider that the Grand Chamber cannot examine the complaints of another applicant against his or her will unless the subject matter of the case is indivisibly linked to all the applicants (who must have been joined as colitigants in the same proceedings).

It would seem difficult to maintain that all applicants are in such a position of indivisibility and that their interests cannot be considered separately.

Even in the event of a single act by the authorities which gives rise to violations of the Convention for several people, it is legally possible, and even desirable, to treat the applicants' complaints differently and individually.

In such circumstances, the Court has always allowed cases to be settled in respect of one of the applicants; for example, there is nothing to prevent one of the applicants reaching a friendly settlement with the State, thereby terminating his or her application, while the proceedings are pursued with a view to considering the other applicants' complaints.

If I have interpreted paragraph 67 of the judgment correctly, the majority consider that under Article 37 § 1 of the Convention the Grand Chamber may examine the complaints of an applicant who has not requested it to intervene.

In my view, such an interpretation is very far-reaching. The possibility of continuing the examination is in fact subject to the condition that the

application has been struck out of the list for one of the reasons set out in the first paragraph of Article 37.

Once the Chamber has delivered its judgment, which is accepted by the State, the Grand Chamber must confine itself to examining the application by the applicant who has requested the referral of the case.

For the other applicants, the Chamber judgment will become final in accordance with Article 44 § 2.

Admittedly, the Chamber and Grand Chamber judgments may differ, with the result that different legal solutions are applied to the same situation.

However, that can also occur in other circumstances, for example where certain applicants reach a friendly settlement while others eventually obtain a finding that there has been no violation.

The solution which I advocate, in spite of the risk of differences between the Chamber and Grand Chamber decisions, is the only one that ensures observance of the principles governing proceedings before the Court, such as those of equality of arms and adversarial procedure.

It is hard to see how the Grand Chamber can determine the “case” of a person who has not applied to be a party to the proceedings before it without infringing the principles that must be observed in each case.

PARTLY DISSENTING OPINION OF JUDGE COSTA

(Translation)

I agree with the Grand Chamber's judgment, which I consider excellent. Except on one point: the refusal to afford the applicants any just satisfaction.

The Court considered that no award for pecuniary damage was necessary, even though the second applicant paid damages to Mrs R.M. Yet, as a rule, the Court takes into account any sums paid by an applicant to his or her opponents on the basis of court decisions, and will normally order the respondent State to refund them because a causal link has been established (see, for example, *Nikula v. Finland*, no. 31611/96, § 63, ECHR 2002-II).

The Court also held with regard to non-pecuniary damage that the finding of a violation of the Convention constituted sufficient just satisfaction. It is true that the Court has often, but not always, reached this conclusion (see, for example, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 56, ECHR 1999-VIII, and, conversely, *Nikula*, cited above, § 65), whereas in length-of-proceedings cases, on the contrary, it systematically makes awards to the applicants in respect of non-pecuniary damage, on account of the "anxiety" or "anguish" caused by the unreasonable length of proceedings. Questions may be asked as to this severity where a substantive right has been infringed and this generosity where there has been a procedural violation (see, in this connection, for example, the dissenting opinions in *Di Mauro v. Italy* [GC], no. 34256/96, ECHR 1999-V). It may also be observed that in the present case the applicants, having received a prison sentence, undoubtedly suffered feelings of anxiety, or indeed anguish, at least until they were granted a presidential pardon, which, moreover, did not even waive their secondary penalties.

The Court lastly decided not to award the applicants anything for costs and expenses, despite the fact that they had been represented by counsel in the domestic courts and before the Grand Chamber of the Court. It is true that they left it to the Court's discretion to determine the amount to be awarded under this head (see paragraph 131 of the judgment). The Court simply observed that they had not substantiated their claim. But it could well have considered, on an equitable basis, that some costs had necessarily been incurred, and allowed the claim, awarding the applicants a lump sum, as frequently happens.

In short, the applicants merely obtained Platonic satisfaction, or a Pyrrhic victory (according to whether we prefer imagery from Athenian philosophy or from the kingdom of Epirus). Irrespective of their conduct, that seems somewhat excessive to me: once again, litigants who lose all their cases in the national courts are almost always awarded significant amounts under

Article 41 of the Convention, even if they have displayed a dilatory attitude or have acted in bad faith. I consider that that in itself serves as justification for not agreeing (even as a minority of one!) with points 2 and 3 of the operative provisions.

In the case of De Haes and Gijsels v. Belgium (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr F. Matscher,
Mr J. De Meyer,
Mr I. Foighel,
Mr J.M. Morenilla,
Sir John Freeland,
Mr A.B. Baka,
Mr K. Jungwiert,
Mr U. Lohmus,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 29 October 1996 and 27 January 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

_____

Notes by the Registrar

1. The case is numbered 7/1996/626/809. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9).

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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 25 January 1996, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 19983/92) against the Kingdom of Belgium lodged with the Commission under Article 25 (art. 25) by two Belgian nationals, Mr Leo De Haes and Mr Hugo Gijsels, on 12 March 1992.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Belgium recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 and 10 of the Convention (art. 6, art. 10).

2. In response to the enquiry made in accordance with Rule 35

para. 3 (d) of Rules of Court B, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 31).

3. The Chamber to be constituted included ex officio Mr J. De Meyer, the elected judge of Belgian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 8 February 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Matscher, Mr I. Foighel, Mr J.M. Morenilla, Sir John Freeland, Mr A.B. Baka, Mr K. Jungwiert and Mr U. Lohmus (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Belgian Government ("the Government"), the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's and the applicants' memorials on 26 June 1996. On 9 October the Commission supplied him with various documents he had requested on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 October 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr J. Lathouwers, Deputy Legal Adviser,
Head of Division, Ministry of Justice, Agent,
Mr E. Brewaeys, of the Brussels Bar, Counsel;

(b) for the Commission

Mr J.-C. Geus, Delegate;

(c) for the applicants

Mr H. Vandenberghe, of the Brussels Bar,
Mr E. Van der Mussele, of the Antwerp Bar, Counsel.

The Court heard addresses by Mr Geus, Mr Vandenberghe and Mr Brewaeys.

AS TO THE FACTS

I. Circumstances of the case

6. Mr Leo De Haes and Mr Hugo Gijsels live in Antwerp and work as an editor and journalist respectively for the weekly magazine Humo.

A. The action for damages against the applicants

7. On 26 June, 17 July, 18 September and 6 and 27 November 1986 the applicants published five articles (see paragraphs 19 et seq. below) in which they criticised judges of the Antwerp Court of Appeal at length and in virulent terms for having, in a divorce suit, awarded custody of the children to the father, Mr X, a Belgian notary

(notaire); in 1984 the notary's wife and parents-in-law had lodged a criminal complaint accusing him of incest and of abusing the children, but in the outcome it had been ruled that there was no case to answer.

8. Mr X had instituted proceedings for criminal libel against those who had lodged the complaint. The Malines Criminal Court and subsequently the Antwerp Court of Appeal acquitted the defendants on 4 October 1985 and 5 June 1986 respectively. The Court of Appeal held, inter alia:

> "At the present time the rulings that there was no case to answer show that the allegations have been judicially held to be without foundation.
>
> It has not been proved, however, that the defendants acted in bad faith, that is to say with malicious intent, and they had no good reason to doubt the truth of the allegations.
>
> Indeed, it was not only the defendants who were convinced that the allegations were true but also eminent academics, including Professor [MA] ... and Dr [MB], a child psychiatrist, both of whom were appointed as experts by the investigating judge, Mr [YE]...
>
> At the Criminal Court hearing on 6 September 1985 ... the expert [MB] confirmed on oath the content of his report.
>
> That expert, who can hardly be said to lack experience in the field of child psychology and who studied all the evidence in the criminal case file, concluded on 28 August 1984 that the children's statements were credible and put forward several arguments in support of that view."

On 20 January 1987 the Court of Cassation dismissed an appeal on points of law brought by Mr X.

1. In the Brussels tribunal de première instance

9. On 17 February 1987 three judges and an advocate-general of the Antwerp Court of Appeal, Mrs [YA], Mr [YB], Mr [YC] and Mr [YD], instituted proceedings against Mr De Haes and Mr Gijsels and against Humo's editor, publisher, statutory representative, printer and distributor in the Brussels tribunal de première instance (court of first instance). On the basis of Articles 1382 and 1383 of the Civil Code (see paragraph 26 below), they sought compensation for the damage caused by the statements made in the articles in question, statements that were described as very defamatory (zeer lasterlijk en eerrovend). They asked the court to order the defendants to pay nominal damages of one franc each in respect of non-pecuniary damage; to order them to publish its judgment in Humo; and to give the plaintiffs leave to have the judgment published in six daily newspapers at the defendants' expense.

10. In order to safeguard the principle of equality of arms and due process, the defendants asked the court, in their additional submissions of 20 May 1988, to request Crown Counsel to produce the documents mentioned in the disputed articles or at least to study the opinion of Professors [MA], [MC] and [MD] on the medical condition of Mr X's children, which had been filed with the judicial authorities. They gave the following grounds for their application:

"The issue arises whether the defendants, given the factual evidence available to them, were entitled, within the limits of press freedom, to publish the impugned criticisms of the functioning of a judicial body.

...

In the disputed press articles the defendants relied, in particular, on various medical reports, statements by the parties and reports by a bailiff.

...

Nor can it be denied that Mr X's libel action against his wife was dismissed.

Now that it must be determined whether the defendants were entitled to publish the impugned press articles on the basis of the information available to them, it is essential for the proper conduct of the case that Crown Counsel, who is acting in the case under Article 764-4 of the Judicial Code, should produce to the Court the documents cited as sources in the series of articles. These documents are to be found in various court files.

Any argument as to the lawfulness of the press criticism presupposes at the least that the Court should be able to study the opinion of Professors [MA], [MC] and [MD] on the treatment of X's children, which has been sent to the judicial authorities.

The opinion of those eminent professors of medicine was the decisive factor which prompted Humo to publish the impugned series of articles in such a forceful manner.

The views maintained by the defendants and the language and descriptions they used cannot be assessed in the abstract but must be assessed in the light of these data, which go to the substance of the case.

Thus the European Court held in the Lingens case (judgment of the ECHR of 8 July 1986, Series A no. 103) that the issue of the limits of the exercise of freedom of expression had to be examined against the whole of the background:

> 'It must look at them in the light of the case as a whole, including the articles held against the applicant and the context in which they were written' (paragraph 40 of the judgment).

...

For these reasons ... may it please the Court ... to hold that it is necessary, for the proper conduct of the proceedings, in particular in the light of the principle of equality of arms and due process, to request Crown Counsel to produce the documents cited in the disputed articles that appeared in the magazine Humo, or at least to study the opinion of Professors [MA], [MC] and [MD] on the medical condition of X's

children, which has been filed with the judicial authorities."

11. On 29 September 1988 the court ordered Mr De Haes and Mr Gijsels to pay each plaintiff one franc in respect of non-pecuniary damage and to publish the whole of its judgment in Humo; it also gave the plaintiffs leave to have the judgment published at the applicants' expense in six daily newspapers. Lastly, it declared the action inadmissible in so far as it was directed against the other defendants.

The court held, inter alia:

"The plaintiffs are obviously not challenging freedom of expression and of the press as guaranteed in Articles 14 and 18 of the Constitution and Article 10 para. 1 (art. 10-1) of the [European Convention on Human Rights]. Equally, the defendants cannot dispute that this freedom is not unlimited and that there are certain bounds which cannot be overstepped. As has already been set out ..., Article 10 para. 2 of the Convention (art. 10-2) is no obstacle to bringing a civil action under Article 1382 of the Civil Code where the press has acted wrongfully.

Article 10 para. 2 of the Convention (art. 10-2) expressly provides that freedom of the press 'may be subject to such ... restrictions ... as are prescribed by law and are necessary ... for the protection of the reputation or rights of others ... or for maintaining the authority and impartiality of the judiciary'. The need to protect the plaintiffs' private life (Article 8 para. 1 of the Convention) (art. 8-1), and more specifically their honour and reputation, means, in the case of a press article, that the press must (1) strive to respect the truth; (2) not be gratuitously offensive; and (3) respect the privacy of the individual. These criteria are taken up in the 'Declaration of the Rights and Obligations of Journalists' drawn up by the International Federation of Journalists.

In the articles in question the defendants make frequent references to the fact that the plaintiffs had allegedly erred in their judgment and had shown bias. The defendants accepted as true, without more, the statement made by Mr X's former wife and her expert adviser (Professor [MA]), although it was clearly shown in the reasons set out in the four judgments given in the case why that statement was not reliable. More seriously still, in the articles in question the defendants expressed the opinion that the plaintiffs had to be regarded as biased, an opinion derived from the fact that they were said to belong to the influential circle of acquaintances of the notary and his father, that one of them was the son of a gendarmerie general who in 1948 had been convicted of collaboration, that they allegedly had an extreme-right-wing background and that they were friendly with each other.

The plaintiffs' conduct was vigorously attacked by the defendants in extremely virulent terms, and the defendants clearly intended to present the plaintiffs in an unfavourable light and expose them to public opprobrium. The defendants sought to give their readers the impression that the plaintiffs were siding with the children's father and that their judgments were inspired by certain ideological views. To this end, the defendants needlessly reminded their readers of the wartime

activities of the father of one of the plaintiffs.

The plaintiffs rightly observed that they cannot simply be put on a par with members of the legislature or of the executive. Politicians were elected and the public had to trust them. Politicians could, moreover, use the media to defend themselves against any attacks. Magistrats [a term which in Belgian law covers both judges and members of Crown Counsel offices], on the other hand, were expected to discharge their duties wholly independently and dispassionately. Their duty of discretion meant that they could not defend themselves in the same way as politicians.

That being so, the defendants committed a fault in attacking the plaintiffs' honour and reputation by means of irresponsible accusations and offensive insinuations. The orders sought by the plaintiffs will provide appropriate redress for the non-pecuniary damage they have sustained ..."

2. In the Brussels Court of Appeal

12. The applicants appealed against that judgment. In their submissions of 10 November 1989 they pointed out, among other things, that the sole purpose of the articles in question had been to criticise the functioning of the judicial system following the proceedings conducted by the respondent judges and Advocate-General concerning possible abuse and incestuous acts suffered by the children. At no time had they attacked the respondents' private life without reference to their part in the impugned decision. Mr De Haes and Mr Gijsels repeated their offer to prove the facts described in the articles and asked the court to request Antwerp Principal Crown Counsel to produce the documents they had mentioned, at least those emanating from Professors [MA], [MC] and [MD] and those from the file on X's divorce, in particular certain reports and a letter to Principal Crown Counsel from Professor [MA].

13. The respondents sought to have the judgment of the court below upheld. In their submission, the applicants' conduct had been all the more reprehensible and offensive as in an article that had appeared in Humo on 14 October 1988 (see paragraph 24 below) the applicants had not only maintained their accusations that the three judges and the Advocate-General were biased but also criticised by name, in humiliating terms, the judges who had given the judgment of 29 September 1988 (see paragraph 11 above).

14. On 5 February 1990 the Brussels Court of Appeal affirmed that judgment, holding inter alia:

"..., as submitted by the prosecution, no action must or can be taken on the appellants' application to the Court to 'request Antwerp Principal Crown Counsel to produce to the Court the documents cited in the disputed articles that appeared in the weekly magazine Humo', and in particular - under Article 877 of the Judicial Code - 'all the documents from the X file'.

As already indicated, it is not the Court's task - nor is it within its jurisdiction - to consider the case already determined by the Antwerp Court of Appeal, on appeal from the Youth Court. It follows that the possible course - which is

purely discretionary (Court of Cassation, 2 June 1977, Pas[icrisie] 1977, I, 1012) - provided in Article 877 of the Judicial Code of ordering that the documents in question should be added to the file of the present case would serve no useful purpose whatever.

The appellants are accordingly bound to admit that they commented on a court case and besmirched the honour of magistrats without being in possession of all the necessary information, and this makes the complete irresponsibility of their malicious attacks even more flagrant.

They further aggravate their position by offering 'to prove the facts referred to in the relevant articles by any legal means, including an examination of witnesses, before the case is decided' - an offer which not only must be rejected as being out of time but also clearly indicates - and this is the main point to be considered here - with what lack of care and information the articles in question were written and their accusations made, before the appellants even had sufficient evidence that they were true.

In the present case the offer in question could not in any way support the appellants' case; on the contrary, it clearly shows that the original plaintiffs' arguments were well-founded and it also lacks the requisite precision.

It is not sufficient for the appellants to offer - as they nevertheless do - to prove that everything they have written in the past concerning 'the case' is the truth; it has to be specified minutely, point by point, what precise and clearly described fact - 'precise and relevant' in the words of Article 915 of the Judicial Code - is being offered as evidence. This is in order to make it possible for the opposing side to adduce rebutting evidence and to enable the Court to assess the relevance and importance of the facts adduced; the appellants did not even take the trouble to comply with this requirement.

Furthermore, the Court already has before it all the information necessary to enable it to decide, in full knowledge of the facts, whether there has really been defamation.

...

As regards the merits of the case, the court below, for ... relevant reasons that have not been refuted and with which this Court agrees, held that the original claim against the appellants was well-founded because the appellants had undeniably committed a gross fault in casting serious slurs on the honour and reputation of the original plaintiffs by means of unjustified accusations and offensive insinuations.

Freedom of expression and of the press as guaranteed in Articles 14 and 18 of the Constitution and Article 10 para. 1 (art. 10-1) of the [European Convention on Human Rights] is not unlimited; certain bounds must not be overstepped and, as has already been pointed out, it is even possible, under Articles 1382 and 1383 of the Civil Code, to bring an action for damages where the press has acted wrongfully.

Moreover, in relation to the tort in question, Articles 443 et seq. of the Criminal Code also refer to acts which may injure a person's honour or expose a person to public contempt. Defamation of public authorities is punishable in the same way as defamation of individuals. Such defamation was precisely what the original plaintiffs in this case complained of and they undeniably constitute unlawful 'acts', as referred to in Article 1382 of the Civil Code, 'that cause damage to another'.

There is no basis for the appellants' contention that 'Article 443 of the Criminal Code is the sole provision in Belgian law which authorises the courts to restrict freedom to hold opinions with a view to protecting the honour and reputation of others; neither Article 764, 4, of the Judicial Code nor Article 1382 of the Civil Code does so'. According to that argument, the press, and it alone, is not subject to the ordinary, general rule in Articles 1382 and 1383 of the Civil Code, which impose a duty on 'everyone' to act lawfully and make everyone responsible for any damage caused through his own 'act', 'failure to act' or 'negligence'.

Under Article 10 para. 2 of the Convention (art. 10-2), freedom of the press may be subject to such restrictions as are prescribed by law and are necessary, as in the instant case, for the protection of the reputation or rights of others or for maintaining the authority and impartiality of the judiciary.

Pursuant to Article 8 para. 1 (art. 8-1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, the guarantee of respect for private life requires that press articles should be truthful, must not be gratuitously offensive and must respect the privacy of the individual, criteria which were taken up in the 'Declaration of Rights and Obligations of Journalists' drawn up by the International Federation of Journalists and approved by the journalists of daily newspapers in different countries of the European Community in Munich on 24 and 25 November 1971, where Belgium was represented by the Professional Union of the Belgian Press.

The appellants cannot in any way rely on Article 19 of the UN Covenant or of the Universal Declaration, since these similarly make no reference to unlimited freedom of expression.

Furthermore, the appellants did not explain, and it cannot be discerned, why the generally applicable concept of fault, expressly provided in Articles 1382 et seq. of the Civil Code, should be incompatible with Articles 8 para. 1 and 10 para. 2 of the Convention (art. 8-1, art. 10-2) (whose precedence is not being called into question here) in relation to restrictions on freedom prescribed by law and the protection of private life, which is at issue here; nor why only journalists should not be subject to those provisions.

In this connection, the Court wholly agrees with the relevant reasons set out in the judgment of the court below, which it adopts in their entirety.

...

Admittedly, the European Court of Human Rights held in the Bruno Kreisky case that the Austrian journalist Lingens, who was concerned in that case, had attacked Mr Kreisky exclusively as a politician and consequently had not violated his right to respect for private life. In the instant case, on the contrary, that right was well and truly - indeed grossly - challenged by the appellants.

The words used and the insinuations and imputations made in the articles and passages in question are extremely virulent and dishonouring, since the original plaintiffs, referred to by name, were accused of having been biased as senior magistrats, and it was gratuitously insinuated that they had links with the VMO [Vlaamse Militanten Orde] and that they came from an extreme-right-wing background and belonged to the circle of friends of the children's father - who was also, in the appellants' opinion, extremely right-wing - so that the judicial decisions made by the original plaintiffs in respect of the children's custody were only to be expected - all this without any serious and objective evidence whatever being adduced or existing to show that the accusations against these magistrats had any factual basis.

...

The appellants manifestly intended to give their readers the impression that the judges and Advocate-General concerned had sided with one of the parties to the case and, furthermore, that their judgments were inspired by certain ideological views.

Additionally, they needlessly and in a quite uncalled-for manner reminded their readers of the wartime activities of the second respondent's late father, which the second respondent had absolutely nothing to do with and which - despite the appellants' opinion to the contrary - belong exclusively to the protected sphere of private life.

Even if the appellants believed that certain ideological views could be ascribed to the respondents (views which they have failed to prove that the respondents held), they cannot in any event be permitted purely and simply to infer from those views - even if they had been proved - that the judges and the Advocate-General were biased and to criticise that bias in public.

In none of these suspicions or pieces of gossip directed against the judges and Advocate-General who brought the original action is there a shred of truth, and the applicants even lied in their article of 6 November 1986 (p. 19) when they stated that the case decided by those judges had been withdrawn from them by the Court of Cassation, whereas they have now had to admit in their additional pleadings (p. 6) that 'Principal Crown Counsel at the Court of Cassation refused to order that the case should be transferred to another court (under Article 651 of the Judicial Code)'.

On 6 November 1986 they announced: 'Last Thursday the Wim and Jan case took a dramatic legal turn. On an application by Principal Crown Counsel ..., the Court of Cassation withdrew

the X case from the Antwerp court and transferred it to the Ghent tribunal [de première instance] in the hope that the Ghent magistrats would adopt a less biased approach ...'

Admittedly, they went back on this point on 27 November, writing: '... Our prediction of a fortnight ago that the agonisingly slow progress being made in the Wim and Jan case was likely to leave the case stranded in the Antwerp courts has come true. In the teeth of all the evidence, the Court of Cassation has held that the Antwerp judiciary cannot be accused of any bias in this incest case and that the whole case can therefore continue to be dealt with in Antwerp ...'

False reports of this kind, however, caused the original plaintiffs irreparable damage, since to be accused of bias is the worst possible insult that can be levelled at a magistrat.

The exceptional virulence of the appellants' irresponsible criticisms can probably be explained - but not excused - by certain political quarrels (which, indeed, do not serve the interests of justice), as was acknowledged by the appellants themselves in the 12 February 1987 issue of Humo: '... If any further proof were needed of behind-the-scenes intrigues in the case of Mr X and of the fact that political allegiances are definitely playing a role, this (premature?) leak to the press is one of the most persuasive pieces of evidence ...'

Because of the unacceptable way in which they were attacked in the impugned articles, the original plaintiffs were shown in a particularly unpleasant light and their honour and reputation were seriously undermined by insulting statements which without any doubt went far beyond what the appellants described as 'their ability to take flak'.

The appellants in fact nevertheless consider their aggressive style and offensive disparagements justifiable in a little paper like Humo, which they describe as 'clearly critical and anti-bourgeois'.

However, although, when ruling on the defamatory nature of contributions published in a magazine of this kind with a clear critical stance towards bourgeois society, one must not apply the same criteria as when ruling on libellous articles in an 'ordinary' newspaper, it nevertheless remains true that even in an avowedly critical magazine certain standards must be respected when criticisms are made, certain bounds must not be overstepped and it is not permissible to publish false information and unproved accusations with the clear aim of humiliating and wounding particular persons, as to do so undeniably amounts to an abuse of press freedom.

While people are certainly entitled to be 'anti-bourgeois' (?), this does not authorise them to pour out pure gossip to the public - however limited their readership - by writing, for example: 'The Advocate-General [YD] has since very properly been removed from this case for having exceeded his authority' (Humo, 17 July 1986, pp. 6 and 7).

Nevertheless, although the appellants have now, in their additional submissions, backed down and, saying that their

earlier statement that the Advocate-General had been 'removed' had been a 'personal interpretation' of the 'fact that at a given point he had ceased to sit', such an 'interpretation' should impel these 'journalists' - however particularly 'personal' their style may be - to practise their profession in future in a less unscrupulous manner.

In the 14 October 1988 issue of Humo (p. 15) - that is to say during the present proceedings and although they had announced in the same short piece that they would be appealing - the appellants made their position considerably worse still by again accusing the original plaintiffs of bias and criticising, in similarly degrading terms, the judges who delivered the judgment at first instance, who were mentioned by name.

This article stated, among other things: '... The Vice-President, [YF], and the other judges, [YG] and [YH], dealt with the case carelessly (sic) ... We wonder whether their Lordships actually read Humo's submissions ... But at no time has Humo ever brought up anything to do with the judges' private lives (sic) ... Clearly, the Brussels judges [YF], [YG] and [YH] did not manage to give judgment with the necessary detachment and independence on their fellow judges of the Antwerp Court of Appeal. They are thus adhering to the line of biased judgments ...'

This could be interpreted as a particularly misplaced and culpable attempt to influence [the members of this Court], especially as the appellants predict, through counsel in their pleading (p. 27), that no newspaper will be prepared to publish the present judgment, a step that has in any case not been sought.

As regards the question of the case having been dealt with 'carelessly', the appellants have still not grasped that usually - and rightly - the courts must attach greater weight - as they did in the instant case - to the findings of expert witnesses that the courts themselves have appointed and who have no connection with the litigants and whose objectivity therefore cannot be called in question by either of the parties rather than - as the appellants do - to the parties' own experts, whose investigations, assessments and findings, however, form the main or even sole evidence on which the appellants believe they are entitled to rely to make their attacks.

As is unfortunately only too often to be found, notably in court cases, even excellent university professors and specialists - in the instant case no fewer than three on each side - disagree among themselves and, particularly in the fields of psychology and psychiatry, hold diametrically opposed views - of which each claims to be 100% certain; this should prompt everyone - particularly journalists - to refrain from making accusations of bias - that is to say the most serious of all - against judges who have to make the final decision on issues as thorny as the custody of children, where strong passions are always aroused, and who must necessarily prefer one of the different versions put forward by the parties to the proceedings.

In the instant case the appellants dared to go one step further by maintaining, without a shred of evidence, that they were entitled to infer the alleged bias from the very personalities of the judges and the Advocate-General and thus interfere with private life, which is without any doubt unlawful.

Furthermore, the purpose of the present proceedings is not to decide what ultimately was the objective truth in the case that the original plaintiffs finally determined at the time but merely whether the comments in issue are to be considered defamatory, which is not in the slightest doubt.

Although the appellants refused to acknowledge the fact, magistrats cannot be unreservedly put on the same footing as politicians, who can always adequately and promptly defend themselves, orally or in writing, against reprehensible personal attacks and are therefore less vulnerable than a magistrat, who is neither able nor entitled to do likewise.

The status of a magistrat is radically different from that of all other holders of public office and of politicians and is in no way based on privileges or traditions but on the fact that it is necessary for the administration of justice, which entails particular tasks and responsibilities (see the speech delivered by F. Dumon, formerly Principal Crown Counsel at the Court of Cassation, at the opening session of the new judicial term on 1 September 1981, 'Le pouvoir judiciaire, inconnu et méconnu', p. 64).

Given the discretion incumbent upon them by virtue of their office, magistrats cannot defend themselves in the same way as, for example, politicians, if certain newspapers, apparently hungry for lucrative sensational stories, attack them and drag them through the mud.

Purely political cases are precisely what most of the case-law and legal opinion cited by the appellants in this connection relates to, however, and it is therefore not relevant to the instant case.

Unlike a politician, a judge cannot discuss in public a case pending before him with a view to justifying his conduct, so that [the original plaintiffs'] failure to exercise their right of reply certainly cannot be held against them by the appellants (see Ganshof van der Meersch, formerly Principal Crown Counsel at the Court of Cassation, 'Considérations sur l'art de dire le droit', esp. p. 20); this duty of discretion has again recently been referred to by the Court of Cassation (Court of Cassation, 14 May 1987, [Journal des Tribunaux] 1988, p. 58)."

3. In the Court of Cassation

15. Mr De Haes and Mr Gijsels applied to the Court of Cassation, which dismissed their appeal on points of law on 13 September 1991 (Pasicrisie 1992, I, p. 41).

16. In their first ground of appeal, they alleged a violation of the right to an independent and impartial tribunal, relying, in particular, on Article 6 para. 1 of the Convention (art. 6-1). In

their submission, certain passages of the Court of Appeal's judgment raised legitimate doubts as to the impartiality of those who had written it. This was true, for instance, of the words "a little paper like Humo", the word "sic" in the extract from the article of 14 October 1988 (see paragraph 24 below) concerning the judgment of 29 September 1988 (see paragraph 11 above), a number of punctuation marks, such as the question mark after the term "anti-bourgeois", and the statement that the article of 14 October 1988 was "a particularly misplaced and culpable attempt to influence [the members of the Court of Appeal]". The applicants also complained that due process had been disregarded in that, as they alleged, the Court of Appeal had referred to the article of 14 October 1988 of its own motion without their having been able to defend themselves on that point.

The Court of Cassation rejected this ground, considering that "it could not be inferred from the mere fact that in their decision the appellate judges had shown that they preferred the arguments of one of the parties and disapproved of those of the other parties that there had been an infringement of the statutory provision and general principles relied on in this limb of the ground of appeal". As to the article that had appeared in Humo on 14 October 1988, the appellate judges had not referred to it of their own motion, since the respondents to the appeal on points of law had mentioned it in their submissions to the Court of Appeal.

17. In their second ground of appeal Mr De Haes and Mr Gijsels complained of a violation of Articles 8 and 10 of the Convention (art. 8, art. 10). In finding against them on the basis of the general concept of fault in Articles 1382 and 1383 of the Civil Code, the Court of Appeal had, they said, made their freedom of expression subject to formalities, conditions, restrictions and penalties not prescribed by "law" within the meaning of Article 10 para. 2 of the Convention (art. 10-2) (first limb). Furthermore, by holding that press articles must strive to respect the truth, must not be gratuitously offensive and must respect the privacy of the individual, the Court of Appeal had created restrictions which went beyond what was strictly necessary in a democratic society; public discussion of the functioning of the judicial system was of greater importance than the interest of magistrats in protecting themselves from criticism (second limb). Lastly, the evidence in the file did not justify the Court of Appeal's finding that the articles in dispute had disregarded the aforementioned restrictions (third limb).

The Court of Cassation dismissed this ground of appeal, holding in particular:

> "As to the first limb:
>
> In reaching the conclusion that the appellants are liable for the consequences of their press articles, the Court of Appeal based its judgment not only on the finding - partly cited in this limb of the ground of appeal - that the appellants had committed an unlawful act and that they 'did not explain, and it cannot be discerned, why the generally applicable concept of fault, expressly provided in Articles 1382 et seq. of the Civil Code, should be incompatible with Articles 8 para. 1 and 10 para. 2 of the Convention (art. 8-1, art. 10-2)' but also on the undisputed finding, rightly raised by the respondents, that the appellants had been guilty of defamation as defined in Articles 443 et seq. of the Criminal Code.

The Court of Appeal's judgment sets out reasons (not challenged in this limb of the ground of appeal) for the finding that the appellants had committed a fault within the meaning of Article 1382 of the Civil Code.

This limb cannot justify quashing the judgment of the court below and is accordingly inadmissible, as argued by the respondents.

As to the second limb:

Under Article 10 (art. 10) cited above, the exercise of the right to freedom of expression may be subject to the restrictions or penalties necessary in a democratic society for the protection of the reputation or rights of others or for maintaining the authority and impartiality of the judiciary.

When asked to punish a given abuse of freedom of expression affecting members of the judiciary, the courts must endeavour to maintain a fair balance between the requirements of freedom of expression and the restrictions applicable under Article 10 para. 2 (art. 10-2) of the aforementioned Convention.

In the instant case the Court of Appeal based its decision that the appellants had abused the freedom of expression secured in Article 10 para. 1 (art. 10-1) of the Convention for the Protection of Human Rights and Fundamental Freedoms not only on the need to protect the respondents' private life but also on the unchallenged grounds that the accusations made had not been proved, the criticism had been directed against named judges, the matters relied on were irrelevant to the decisions that had been taken and the accusations had been inspired by a desire to harm the respondents personally and damage their reputation.

In holding, as appears from the text of its judgment, that, 'pursuant to Article 8 para. 1 (art. 8-1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, the guarantee of respect for private life requires that press articles should be truthful, must not be gratuitously offensive and must respect the privacy of the individual', the Court of Appeal took the view that a balance had to be sought between the interests of a free press and private interests; it did not thereby decide that the general interest of a public discussion of the functioning of the judiciary was less important than private interests, nor did it add any restriction to the exceptions exhaustively set out in Article 10 para. 2 (art. 10-2).

This limb of the ground of appeal cannot be allowed.

As to the third limb:

Regard being had to the foregoing considerations, the third limb lacks any basis in fact."

18. In their third ground of appeal the applicants complained of the Brussels Court of Appeal's refusal to take into consideration all the evidence that had been before the Antwerp Court of Appeal and to

allow them to prove by any means the truth of their assertions. In their submission, Articles 6 and 10 of the Convention (art. 6, art. 10) had thereby been contravened.

The Court of Cassation held:

"The Court of Appeal decided not to grant the appellants' application for leave to prove the truth of their accusations; in particular, it refused to order that the files of the cases which had given rise to the decisions criticised in the press should be admitted in evidence.

It based its decision not only on the grounds cited in the ground of appeal but also on separate, undisputed findings: that the appellants had admitted besmirching the reputation of magistrats without being in possession of all the necessary information, which in itself constituted a fault; that the offer to bring evidence was out of time and ineffective; and that the Court of Appeal had before it all the information necessary to enable it to decide, in full knowledge of the facts, whether there had really been defamation.

This ground of appeal cannot justify quashing the judgment of the court below and is accordingly inadmissible."

B. The articles in issue

19. The judgments against Mr De Haes and Mr Gijsels related to five articles that appeared in Humo (see paragraph 7 above). The first of these, published on 26 June 1986, included the following:

"...

Today, Thursday 26 June, the courts are due to rule in the long-running case of a well-known Antwerp notary who has been sexually abusing his two young sons. The notary himself comes from a distinguished Flemish family with close links to the most select financial circles in the country. All the indications are that the reputation of the father and grandfather count for more than the physical and mental health of the children. Up to now, the court has rejected, without batting an eyelid, all medical and psychiatric reports unfavourable to the notary.

How can this be? Louis De Lentdecker has already written about this case in De Standaard, albeit in veiled terms. However, he was promptly taken to task by the Antwerp Advocate-General on the ground that his report had 'seriously compromised' the children's father. Yet De Lentdecker had mentioned absolutely no names. For our part, we will also refrain from mentioning the father's name or those of the two under-age children (for convenience, we will call the three-year-old boy 'Wim' and the six-year-old 'Jan' and give the family's surname as 'X'). For the rest, we have every intention of mentioning the other names involved as this is not the first time that the Antwerp courts have shown a lack of independence and given extremely odd judgments.

This report is not for those of a sensitive disposition. We put the facts to a psychologist working in a centre for

psychological, medical and social therapy, a magistrat, a paediatrician and two lawyers, none of whom has anything to do with the case. Each of them, independently of the others, advised us to report on the case in the interests of the children.

...

After Jan was born, things started to go wrong within the family. The husband was having affairs and even had another home. Divorce proceedings are filed in October 1983. The mother is awarded interim custody of the children; the father is given fortnightly access. At the end of 1983 the children return home after spending the Christmas holidays with their father; their mother finds them in a state of total exhaustion. Her paediatrician, Dr [ME], diagnoses them as having been overtaxed. While playing, the elder boy tells a story from which it is apparent that his father has raped him. Dr [ME] is notified and advises the mother to consult a forensic medical examiner.

The same thing happens on 8 January 1984.

Following her paediatrician's advice, the mother tries to consult a forensic medical examiner, but he advises her to see a general practitioner first. There is no answer when she rings Dr [ME], so she turns to the duty doctor, [MF]. He finds that the elder boy has an 'irritation of the anus' and refers the mother to a paediatrician in Malines, Dr [MG]. He in turn observes the following injuries to the elder boy: 'slight anal fissure, pronounced redness around the anus, rectal smear showing presence of sperm'. That evening, at his request, Dr [ME], the paediatrician, re-examines the children and, given the seriousness of the situation, refers them to Dr [MH], of the Mental Health Centre.

On the basis of these medical reports, amongst other things, Judge [YI] of the Antwerp tribunal de première instance, acting on an urgent application, decides on 29 January 1984 to suspend the father's right of access.

However, on 31 January the Third Division of the Antwerp Court of Appeal restores the notary's right of access, although the children are not to spend the night at his home and access has to take place in the presence of the grandparents.

The nightmare begins, not only for the children, but also for their mother.

...

On 4 February 1984, for the first time in four weeks, the notary has an access visit. At 10 o'clock in the morning he picks up the children in Malines, returning them to their mother at around 6.30 p.m. In a report the mother, shocked and bewildered, says: 'State of the children: distraught. Wim (aged 3) lies down on the ground and sobs. Jan (aged 6) sits down apathetically on a chair. He has visible clinical injuries: a very painful mouth, which he cannot close, severe swelling of the lower lip and problems with his eyes; four of

his upper teeth come out at once; he also has a swelling of the neck below the left ear, a reddish irritation of the cheeks and scratches on the left cheek.' Her lawyer urges her to report the matter to the police at all costs, but she thinks there is no longer any point. In her statement she writes, despairingly, 'I did not want to, seeing that the gendarmerie were so sympathetic to the family and that I had already discovered from experience that the gendarmes did not take me seriously where the children were concerned.'

...

The mother's despairing protests are to no avail. On 18 February, 26 February and 3 March 1984, the father rapes his children again.

Enough is enough. On 6 March 1984, at the request of Malines Crown Counsel, Detective Sergeant Luc R. interviews little Jan. A tape recording of the interview is filed with the Malines Criminal Court. We have seen the transcript of this interview. In childish words, but coherently and without contradicting himself, Jan describes sexual acts performed by his father on him and on his brother, who is even younger. The content of this interview is far too sensitive for us to reproduce it here.

...

The mother no longer has any alternative. Since her urgent request for a renowned expert to be appointed has twice been rejected, she herself calls in the child psychiatrist [MA], a professor at the Catholic University of Louvain. On 6 and 11 April he examines the children and finds that during the weekend of 8-9 April the father has again ill-treated and raped his children. According to Professor [MA]'s findings, the children's story essentially corresponds to what is stated in the mother's complaint. Moreover, the children reveal certain details to him which even the mother has not mentioned and which her children manifestly cannot have invented. Professor [MA] concludes: 'We are convinced that the children's visits to their father are manifestly likely to have an adverse effect on their future development. It is already clear that the immediate effect of access is that the children are extremely upset and disorientated; after the two days spent with their father, they present as anxious and aggressive. If these visits continue, we fear that both children may develop problems, in the nature of mental illness in the case of the elder and, in the case of the younger, a tendency to regress, with arrested development. We therefore request that the children should undergo a thorough psychiatric examination; that all the parties, including the father, should be interviewed; and that, pending this examination, the father's right of access be temporarily withdrawn.'

On 28 May 1984 Professor [MA] sent a detailed report on the case to Principal Crown Counsel [YJ] and the Advocate-General [YD]. It is an impressive document recording the results of a number of psychiatric examinations of the children in the form of interviews (both with and without the mother present). The children were examined both immediately

after an access visit and at less stressful times during the week. Professor [MA] concluded: 'The two children confirm, independently of each other, the various types of sexual abuse which have been inflicted on them.' Could the mother have coached the children in these stories? Professor [MA] says 'Jan's version of events always coincides with his mother's. I see this in itself as an indication that Jan's story reflects real experiences. A child of six does not in fact yet have the intellectual capacity, in the context of a guided interview, to faithfully reproduce, exactly as it has been told to him, a story which he has been "fed". Furthermore, there were times when Jan replied to very specific questions with equally specific answers, which he had never given his mother (and which his mother had therefore never mentioned). Thus when asked whether "he bites the willy when it comes into his mouth", he answers, very specifically: "I can't, because he (the father) puts his fingers between my teeth." I do not consider that a six-year-old child is capable of inventing so specific a response, nor do I believe that such specific responses could have been "prepared" in advance by the mother.'

On 22 June Professor [MA] sent a supplementary report to Principal Crown Counsel [YJ] and the Advocate-General [YD]. In it the child psychiatrist confirms his earlier findings with the aid of even more convincing arguments and again calls, insistently, for a judicial investigation and a further expert psychiatric report. But to no avail. The unthinkable happens: three days later the Third Division of the Antwerp Court of Appeal grants Mr X custody of his children.

The court holds, inter alia: 'An expert opinion is not required and, indeed, is not desirable in that the expert would inevitably find himself faced with the issue of fault, which must be left to the courts alone to decide.' Those responsible for this extremely odd judgment are [YA] (the presiding judge), [YC] and [YB] (the other judges) and [YD] (the Advocate-General).

...

In July, pursuant to the custody award in his favour, the notary has the children staying with him; they are again raped. In a tape-recorded interview Jan tells Professor [MA] that his Daddy has done 'the same thing' again, that Daddy 'thumped' him and hit him on his tummy and that he wasn't allowed to tell anyone about it. Jan doesn't know how many times his father has raped him - 'several times, I can't count them'.

Professor [MA] sends his umpteenth letter on the matter to Principal Crown Counsel [YJ], stating, without mincing his words: 'In an emergency the State is bound to intervene under section 36 (2) of the Child Protection Act ... It is impossible and unacceptable for two children to remain exposed to an extremely dangerous situation as a result of a court decision.'

All Professor [MA]'s findings are subsequently confirmed in 'an expert report' by Dr [MB], a child psychiatrist and psychoanalyst appointed by the investigating judge [YE] of the Malines tribunal de première instance. The following few

extracts from Dr [MB]'s report may suffice: '(1) After a little embarrassment Jan nevertheless finds it fairly easy to talk about his experiences with Daddy. His clearest memory is of the events of July 1984. He describes how Daddy sometimes used to sit on him, how Daddy used to put his sexual organ into his anus, or sometimes his mouth, and wee-wee. He says that Daddy threatened him, saying that he would saw Grandma and Grandpa in half, and really hurt Jan, if he said anything about it all. He says that Daddy didn't act like that when Daddy and Mummy were still together, Daddy just used to hit him; (2) Jan describes these experiences fairly readily and there are no contradictions in what he says. However, he presents as shocked and embarrassed when recounting certain things. He blushes and sometimes protests vigorously that Daddy was hurting him. He does not give the impression of making things up or merely seeking attention.'

Psychoanalysis of Jan's emotional life reveals, moreover, that the little boy is constantly anxious and traumatised. The findings concerning the younger child are similar. According to Dr [MB], 'His [Wim's] fantasies create a strong impression that there has been sexual abuse by the father and that his unconscious is trying to assimilate these uncomfortable impressions.'

In October little Wim is again interviewed by two detective sergeants and his (female) schoolteacher. The interview takes place in Wim's usual classroom, in the presence of the headmistress. The child repeatedly confirms what has happened to him. The interview was transcribed verbatim and the tape filed as an exhibit at the Malines tribunal de première instance.

...

How can a father reach the point of committing such atrocities against his own children? In his report Professor [MA] says: 'The problems between husband and wife became more serious after Jan was born. It was then that X, for the first time, overtly displayed his sympathies with Hitler. Thus, for example:

· The family had to live according to Hitler's principles: women do not count - at most, they are instruments of procreation. Anyone who fails to become an "Übermensch" (superman) had better die. An "Übermensch" can legitimately lie and be dishonest. [X] is in fact awaiting the coming of a new Hitler. His whole way of life is dominated by that.

· The children were to be brought up in Hitler's doctrine. They were made to give the Nazi salute; they were taught not to play but only to fight and make war. The children were to venerate their father just as the German people venerated Hitler at the time; their mother is merely an intruder in the X family.

· Lastly, it is worth noting that Mr X has also declared on several occasions that he possesses supernatural powers and can crush anyone who opposes him. In particular, he says "We are leeches, we squeeze someone like a lemon, then we drop them."

He certainly feels very powerful. He has also spoken to the children on several occasions about his "supernatural powers", saying that he was going to change Jan into a brown sheep and leave him in a field and that he was going to change little Wim into an owl. He also used to talk to the children a lot about skeletons and skulls. As a result, little Wim once asked his mother out of the blue "not to put him under the ground in a box".'

Professor [MA] ends his remarks on the father thus:

'His manifest sympathies with Hitler and his regime, and his fantasies concerning his own supernatural powers and omnipotence reveal, at the very least, in my opinion, a pathological personality. I accordingly consider that a much more thoroughgoing judicial investigation and psychiatric report are imperative in this case.'

...

The X family's almost daily contacts with the legal world are not enough to explain how he has remained almost immune. The large network of contacts which the family has woven over the years is proving useful in this respect, especially their contacts in extreme-right-wing and/or Flemish nationalist circles. For example, members of the X family are militants in the Stracke Noodfonds, the Marnixring, the Orde van de Prince, the Vlaamse Kulturele Produkties (an offshoot of Were Di), the Nationalistich Jong Studenten Verbond (NJSV) and the Vlaams Blok. It is a well-known fact that the X family gives financial support to the VMO. In 1971 they helped create the 'new' VMPO under Bert Eriksson, and at the time of the VMO trials they launched an appeal through the Stracke Noodfonds for members to make a financial contribution in support of 'dozens of young Flemish people facing ridiculous penalties and fines'. Witnesses confirm that the cellar of the X family's house is decorated with Nazi swastika flags, the ideal décor for nostalgic little 'brown' parties. Equally remarkable are the X family's efforts in support of apartheid. One of the members of the family was even a founder of the pro-South-African club Protea. Why is this network of contacts so important in the notary's incest case?

Most of the judges of the Third Division of the Court of Appeal, who awarded custody to the notary, also belong to extreme-right-wing circles. Judge [YB] is the son of a bigwig in the gendarmerie who was convicted in 1948 of collaboration: he had, in close collaboration with the 'Feldgendarmerie', restructured the Belgian gendarmerie along Nazi lines. [YB] is no less controversial as a magistrat. During the judicial investigation into the VMO training camps in the Ardennes, he managed, in the teeth of all the evidence, to sustain the theory that the photographs of the training camp had nothing to do with the VMO but came from German neo-Nazis.

Another judge in this incest case is [YA]; she is the President of the Antwerp Court of Appeal. During the VMO trial, over which she presided, the organisation was acquitted on the charge of constituting a private militia. This judgment was

subsequently reversed by the Ghent Court of Appeal.

And then there is Principal Crown Counsel [YJ], whom Professor [MA] has bombarded with reports denouncing the sexual abuse of the children. It just so happens that Principal Crown Counsel [YJ] has the same political sympathies as the X family. He was one of the founders of Protea but had to resign after a question was asked in Parliament. He is still a member of the Marnixring and of the Orde van de Prince in Malines, with both of which the X family maintains very special links.

Since the very beginning of the investigation the gendarmerie too have played a dubious role. The abused children and their mother have consistently been treated like dirt, whereas the notary accused of incest and his father have been treated with the greatest consideration. Is it a coincidence that the X family maintains contacts with several of the (present or past) bigwigs of the gendarmerie: former Lieutenant-General [ZC] (Protea and the Orde van de Prince), General [ZD] (the Marnixring) and General [ZE] (the Marnixring and Orde van de Prince)?

...

The children are not in good shape. They are receiving treatment and, according to well-informed sources, are still 'at risk'. There are only two possible solutions. Either the prosecuting authorities have the courage, in the light of recent events and findings, to prosecute the notary or else the Youth Court must begin new proceedings with a view to restoring custody to the mother. This last point is not unimportant since Mrs X has been summoned to appear before the Antwerp Court of Appeal on 26 June on the grounds that she has twice attempted to keep the children with her at the end of an access visit.

In the meantime, the mother and her parents have been duly acquitted on appeal in proceedings instituted against them by the notary for making a defamatory witness statement. They had already been acquitted at first instance. There are only two possibilities: either the mother's complaint is defamatory or it is not, in which case the notary is guilty of incest. There is no other possibility."

20. Mr De Haes and Mr Gijsels published their second article on 17 July 1986. It included the following:

"...

On Tuesday 24 June Humo published in issue no. 2390 an article that caused a sensation: 'Incest authorised in Flanders'. In that article Mr X, a notary from a distinguished Flemish family with close links to the highest financial circles in the land, was accused of having repeatedly raped and beaten his little boys, Wim and Jan. Those allegations were supported by a number of medical and psychiatric reports. Despite the evidence, the notary was awarded custody of the children.

In the report, we paid due attention to the dubious role played

by the gendarmerie and the network of extreme-right-wing contacts maintained by the X family, whose tentacles have reached the Antwerp law courts. This network of contacts is principally centred on staunch brown organisations like the VMO, Protea, the Stracke Noodfonds and the Marnixring. We also showed how Judges [YJ], [YA] and [YB] - who saw to it that the father gained custody - fitted into and around these shady movements.

From the large number of letters we have received, it appears that half Flanders is shocked by such warped justice. The same question comes up again and again: what kind of a country are we living in? In the meantime, we have obtained even more information about what some of the most highly placed circles have been allowed to get away with, hand in hand with their lackeys in the courts and the gendarmerie.

...

Humo had hardly come off the presses when Mr X personally telephoned one of the authors of the article to say, in a threatening tone: 'I am not a pederast. I am not a paedophile. The time will come when you will apologise to me!!!' And then he hung up.

In the course of the legal proceedings, Mr X has devoted himself to making even more brutal intimidation attempts. For instance, he assaulted one of his children's uncles in broad daylight on the Meir in Antwerp. When the children's mother was acquitted of libel, he hurled abuse at her counsel within the precincts of the Antwerp law courts and in front of other people. His own counsel had to intervene to calm him down. One of the doctors who had found evidence of sexual abuse received a registered letter threatening him with criminal libel proceedings unless he withdrew the findings in his examination report. At least one other doctor has been bombarded with letters containing the crudest threats. The journalist covering the Antwerp Court of Appeal hearing on 26 June was pursued by the notary when he went out for some fresh air during a brief adjournment. The reporter had no choice but to escape by running between the fairground stalls of the Whitsun fair.

The management of Humo and of the Dupuis publishing house have also been put under strong pressure. The X family were tipped off that an article was about to be published concerning the incest case. What happened? The printing was held up for hours, but the article was nevertheless published.

...

This kind of brutal pressurising seems to 'work' very well within the system of justice. After the article was published, a mass of new information came in from all sorts of quarters. This unique incest case has been gathering notoriety for quite some time, not only in the professional circles of paediatricians and child psychiatrists but also in Crown Counsel offices, the youth courts and children's refuges. Thanks to the fresh data, we now have an even better picture of how often and how treacherously the courts have manipulated

the case - with, up to now, only one apparent aim: to promote, not the welfare of the children, but that of the notary.

...

· Likewise accepted were the results of an hour's questioning by Detective Sergeants [ZF] and [ZG], during which Jan was once again forced to withdraw his accusations. Louis De Lentdecker, who was on the spot when Jan came out, wrote in De Standaard: 'He started crying, sobbing. He was completely distraught. Shaking with sobs, he said that he had been questioned again by two men, that he had said that none of it was true because he had been afraid and that he didn't want to go home to his father's but wanted to stay with his mother. And he clung to his (maternal) grandmother, crying his heart out.' What credibility can such an interview have? One of the statements obtained under duress certainly does not fit: according to [interview record] no. 2873, Jan stated that he had never seen his father naked. The notary himself told Louis De Lentdecker: 'It is said I used to stand around naked in front of them. There were evenings when the children would come rushing into the bathroom while I was having a bath. When that happened, I would send them out straight away.' Interviewed by [MN], a psychiatrist, the notary, anxious to defend himself, was even more categorical: 'Prior to the divorce, there were a few times when the children came upon X naked in the bathroom. It is understandable that the children's attention was particularly attracted to the genitals.'

Is it also a coincidence that Detective Sergeant [ZG] and his wife were the notary's guests for Easter lunch?

· In the middle of 1984, following a private meeting with Principal Crown Counsel [YJ] and the Advocate-General [YD], Professor [MA], a well-known child psychiatrist, is informally given the job of studying the criminal case file in detail. To this end, Principal Crown Counsel's office sends him the various typescripts and tapes of the questioning sessions. Professor [MA]'s conclusions are contained in a number of reports sent to Principal Crown Counsel and the Antwerp Court of Appeal. His provisional conclusions are contained in a report of 22 June - just in time, as judgment is due to be given on 27 June. Principal Crown Counsel [YJ] knows that this supplementary report is being drafted, and what happens? Out of the blue, the Third Division of the Court of Appeal sits two days early and awards custody to the notary, 'without taking into account the documents filed by Professor [MA] after the close of the hearing'. Was the Court of Appeal informed that Professor [MA]'s report, which was very unfavourable to the notary, might be filed before the close of the hearing, and is that why the Third Division sat two days early? What is more, not all Professor [MA]'s reports were filed after the close of the hearing. In fact, the Third Division had at least three other reports by Professor [MA] at its disposal, all of them to the same effect. So the judges are lying in their judgment. On 6 November 1984 the case again comes before the court, and this time the division relies on a totally different argument in order to dismiss Professor [MA]'s reports: 'Despite what he

(Professor [MA]) appears to believe, he has not been appointed by Principal Crown Counsel at this Court to assist the Court in any way in relation to this case.' There are only two possibilities: either Professor [MA] was given Principal Crown Counsel's office's tapes so that he could study them, or else he stole them and must be prosecuted and convicted. If he has not been appointed by the court, Professor [MA] is not authorised to be in possession of documents from the criminal file. The courts are therefore once again using dirty tricks to give a veneer of honesty to an inexcusable judgment.

· On 26 June 1984, to general astonishment, the President of the Third Division of the Antwerp Court of Appeal, Mrs [YA], together with her fellow judges [YB] and [YC], award custody to the notary who stands accused of incest. However, he can exercise his right of custody only under the supervision of his parents. Here we find ourselves faced with the most tortuous reasoning: either the notary is to be wholly trusted as far as his children are concerned and he can have custody; or he is not to be trusted and the children are at risk with him. Mrs [YA], however, opted for a hypocritical judgment. If the notary has to be supervised by his parents, he is obviously not trustworthy. And yet he is given custody. Can anyone make head or tail of this? The Third Division had already moved in this direction. At the hearing on 6 June the notary's parents had been asked whether they would be willing to take on this onerous responsibility. To which, of course, they said 'yes'. Coincidence or no, it was the only time that the notary's parents attended a hearing. That fact makes it look very much like a put-up job. Had they been told in advance that this question was going to be put to them?

· The grandparents are not the only ones to have been given information in advance. On 25 June, two days before judgment was officially given, the notary was waiting to pick his children up from school. He already knew that the Court of Appeal was going to award him custody. How could that be?

· In the previous article, we mentioned the mother's complaint that the detectives constantly twisted her words or simply did not write down what she said. That is not all. Statements by eyewitnesses have also been falsified ...

· At a certain point the investigating judge in Malines, Mr [YE], a former CVP [Christian People's Party] councillor for Willebroeck, appoints Dr [MB] as a (medical) expert. Dr [MB] comes to the same conclusions as Professor [MA]: Jan and Wim have been sexually abused. Dr [MB] warns the investigating judge unequivocally: 'It is important to avoid aggravating the father's psychological problems and turning him into a confirmed homosexual or pederast.' Despite this, on 6 November Mrs [YA] and her fellow judges [YB] and [YC] confirmed the custody order in favour of the father. It is the most cowardly judgment we have ever read. The children's mother is blamed for not having filed a copy of the report by the expert [MB], 'with the result that it is not possible to examine its contents'. But how could the mother have filed this report? She is not even entitled to consult it, let alone

to study it. In Belgium the law prevents anyone from obtaining any information so long as a judicial investigation is under way, because the investigation is secret. The Court of Appeal expressly acknowledges in its judgment that the judicial investigation is still under way, and yet Mrs [YA] blames the mother for failing to file this report! When it is for Principal Crown Counsel's office to file an expert's report! Despite the fact that the investigating judge [YE] has been in possession of Dr [MB]'s report since the end of August, we read in the Third Division's judgment that 'Principal Crown Counsel's office did not consider it necessary to inform the Court of this fact'. Why did Principal Crown Counsel's office refuse to forward this crucial expert report to the Court of Appeal? Because it was too unfavourable to Mr X? However that may be, Mrs [YA] put her name to a mass of legal nonsense.

· On 5 September 1984 Louis De Lentdecker publishes his first article on the incest case under the title, 'Justice goes mad. A young woman fights for her children'. Very shortly afterwards the Advocate-General [YD] summons De Lentdecker by telephone. As De Lentdecker comments in his second article, on 28 September, 'It is rare for a judge or Crown Counsel to summon a journalist to an interview in connection with pending legal proceedings.'

The following extract from De Lentdecker's article is also telling: 'When I asked why the court had not appointed three experts to look into the case from the psychiatric, medical and forensic points of view, the Advocate-General replied, and I quote his exact words, "These kids (i.e. Wim and Jan) have already had to drop their trousers too much for all sorts of examinations. The best thing is to leave them in peace." When I retorted that the court had, however, appointed an expert (De Lentdecker is referring to Dr [MB]) and that his report had barely been raised if at all, presumably because it contained damning findings as regards the father, the Advocate-General replied: "It is not true that the expert report ordered by the court damns the father. In any event, I do not know what it says. Besides, the man's findings are not valid - he completed his examination in five days."' What crass bias on the part of the Advocate-General [YD] is revealed in those quotations. And what on earth could have made him take a journalist to task in this way? That is not one of his duties. The Advocate-General [YD] has since very properly been removed from this case for having exceeded his authority and he has been replaced by the Senior Advocate-General [YK].

...

There are also a few positive developments. On Thursday 26 June the Ninth Division of the Antwerp Court of Appeal upheld the October 1985 judgment of the Malines Criminal Court, which had acquitted the mother on the charge of removing the children from the notary's custody. The important thing about that case, apart from the mother's acquittal, is that the court duly took into account the evidence of Professor [MA] and the court-appointed expert [MB], who both testified under oath at the hearing that the children

had indeed been sexually abused. The bench in this case was composed of judges other than [YA], [YB] and [YC], and Principal Crown Counsel was not [YJ]."

21. The applicants published their third article on 18 September 1986. It contained the following:

"...

In this article we reproduce photographs, drawings and quotations which we would have preferred not to publish. Most of these documents have been in our possession from the outset, but we did not want to run the risk of being accused of sensationalism. The courts are likewise in possession of this irrefutable evidence, and it is precisely because the Antwerp Court of Appeal and Youth Court refuse to have regard to it that we find ourselves obliged to publish it.

The astonishment, anger and incredulity our readers feel are fully shared by us. Astonishment that such a thing is possible; anger because it is allowed; and incredulity because the ultimate guarantee of our democracy, an independent system of justice, has been undermined at its very roots. This is why, for the sake of the children Wim and Jan, we are publishing evidence which we would rather have left to rot under lock and key in cupboards in our archives.

Guy Mortier
Editor

On Tuesday 2 September a Youth Court judge, Mrs [YL], made an interim order in the scandalous incest case involving an Antwerp notary. As everyone knows, this tragedy is being played out in the most highly placed financial spheres in the country, against the background of extreme-right-wing circles in Flanders. The Antwerp notary is accused by his wife of having sexually abused his two little boys, whom we are calling Wim and Jan, of having physically ill-treated them and of continuing to ill-treat them. The Youth Court judge has now decided that the father should be awarded custody of his children, or rather should retain custody, since he had already been given it, in defiance of any concept of justice, by the Antwerp Court of Appeal. Yet the mother, who has not been accused of anything, and who has already been twice acquitted on a charge of libelling the notary, is not allowed to see her children more than once a month.

...

This inexplicable judgment once again stands reason on its head. The case file is getting thicker and thicker and contains numerous medical certificates, horrifying drawings by the children of being raped by their father, photographs of anal irritations and marks left on the children's bodies after blows from a cudgel - not to mention detailed psychiatric reports on the children: one by the court expert [MB], five by Professor [MA], an eminent Louvain paediatrician, and two, including a very up-to-date one, by Professor [MC], who recently examined the children in the greatest secrecy. Each time, it emerges clearly that the two children have been

sexually and physically abused. Why does the Youth Court judge [YL] refuse to take account of this solid evidence in her judgment, especially as not one of the medical reports questions that there has been physical abuse? Does Mr X's family really have so much influence and money that the Antwerp courts are incapable of giving an independent ruling?

It is not for the press to usurp the role of the judiciary, but in this outrageous case it is impossible and unthinkable that we should remain silent. Up to now, we have dealt with this incest case as sensitively as possible. Now that the courts have definitively taken a wrong turning, we feel obliged, in the interests of the children, to reveal more details, however horrible and distasteful they may be for the reader.

...

On what evidence did the Youth Court judge [YL] base her interim order? According to an article (the first of several) in Het Volk, the source of which appears to be the notary himself, [YL] allegedly based the interim order on a report by three experts she had appointed. According to Het Volk, that report makes it clear that 'there can never have been any question of any sexual abuse'. The least that can be said is that Het Volk has been misinformed (indeed, it has since gone back on its first article). What exactly is the truth?

Three court-appointed experts, Dr [MI], Dr [MJ] and Dr [MK], had Wim and Jan for observation during the holidays at the Algemeen Kinderziekenhuis Antwerpen ("the AKA" [a paediatric hospital]). Their report is not yet ready and therefore has certainly not yet been filed. The Youth Court judge and the parties have nothing in writing from them. The Youth Court judge [YL] has therefore rushed a decision through even before the experts' report is finished. This procedure in itself appears extremely suspect. But what is worse is that it leaves the mother completely defenceless. Since there is nothing official on paper, she cannot appeal against the Youth Court judge's decision.

Secondly, contrary to what is suggested, the three doctors referred to are not independent experts. Dr [MJ] and Dr [MK] work under Dr [MI] at the AKA. It is therefore difficult for them to challenge their superior's findings. At the AKA these two doctors are not known for being the kind to put a spoke in their boss's wheel.

Thirdly, there is the question whether it was advisable to put Dr [MI] in charge of the team of experts. We do not wish to prejudge the report before knowing what it contains, but is it not singularly unfortunate that a person belonging to the same ideological camp as the extreme-right-wing notary should have been appointed in this case, which is already so politicised? Dr [MI] is married to the daughter of [ZH], who was a governor during the war. Readers will also remember that Mr X's family has a very close relationship with 'blackshirt' circles. Dr [MI] also boasts, in front of hospital staff, that he supports the apartheid regime in South Africa, just like Mr X's family. This is the same Dr [MI] who, some time ago, treated a maladjusted child by enrolling him in the extreme-right-wing

Vlaams Nationaal Jeugdverbond (VNJ), just to teach him some discipline. Everyone is entitled to their political opinions, but in this sensitive case it would have been reassuring to see a less politically charged expert appointed.

Just as inexplicable is the fact that the Youth Court judge [YL] keeps Mrs [ZI] on as the Child Protection Department officer attached to the court. Judge [YL] has to rely very considerably on the child protection officer for all her information, and therefore also for her view of the case; yet we have already disclosed that Mr X knows Mrs [ZI] well. Moreover, that fact appears in an interview record dated 6 October 1984. In this interview the notary repeatedly cites Mrs [ZI] as one of the people whom the courts can ask to testify to his basic kindheartedness. Is it really impossible to remove from this case everyone who has ideological or friendship ties with the X family?

...

How does the notary defend himself against his children's accusation that in May he beat Wim with 'a spiked cudgel'? In a very confused way. It emerges from a transcript of the children's story and a bailiff's report that he beat Wim on 14 May. That day, the notary and his little boys were visiting Dr [MJ]. In the presence of his father, Wim told the doctor some very compromising things about him. As soon as they got home, the father started beating Wim. The next day, the notary went to see Dr [MJ] on his own and, strangely, said not a word about his son's injuries. It was not until several days later, when the photographs were sent to the relevant authorities, that he came up with a story about Wim having fallen downstairs. Why did he not say this at the outset? The children confirm to Professor [MC] that Wim was beaten and that he did not fall downstairs at all. So the notary changes tack. On 2 June he calls in a bailiff who is a friend of his and who draws up a report according to which the children deny everything. Strangely, it is not the bailiff but the father himself who questions his little boys. So this report is worthless.

On 5 June the notary comes up with yet another idea. A Dr [ML] issues a certificate stating that he can find no injuries. Which is quite possible, since three weeks have gone by in the meantime. Why does the notary have the fact that there are no injuries certified three weeks later, when he originally stated that the injuries were caused by a fall downstairs?

The latest version is that Jan hit Wim. This figment of the imagination comes from the Youth Court judge herself. There's bias for you.

...

The ill-treatment which occurred in May was not an isolated incident (as we have already indicated on several occasions). As early as 10 January 1984 Dr [MG] sent the following results of his examination of four smear tests to a forensic medical examiner, Dr [MM]: 'Apart from amorphous matter, epithelial and mucous cells, I observed, in three out of the

four samples, a structure with a triangular head on a long, more or less straight tail, which matches the description of spermatozoa. I observed the presence of one such structure in two of the three samples, and two in the third.' Other doctors also made the same findings. Subsequently, Professor [MA] and the court expert [MB] reach the conclusion, independently of each other, that Wim and Jan have been sexually and physically abused. The latest report is by Professor [MC]. In order to supplement an earlier report, this expert examined the children on twelve occasions between 1 August 1985 and 31 May 1986 - the elder without his mother present, Wim normally in his mother's presence because at the beginning it was practically impossible to examine him without her. As Director of 'Kind en Gezin in Nood' ['Children and Families in Need'], one of the departments of Leuvense Universitaire Ziekenhuizen [Louvain University Hospitals], Professor [MC] is one of the principal authorities in the field. In order to remain entirely uninfluenced in his work, he expressly decided to refuse any form of payment. His report contains the most horrific findings. According to it, the children have been beaten not once but several times with a spiked cudgel. This abuse is, moreover, inflicted as a form of ritual. Candles are lit; sometimes, the father wears a brown uniform and the cudgel has a 'sign of the devil' on it. Through the children, Professor [MC] was also able to discover where the father took his inspiration from. He found the sign of the devil in Volume I of the Rode Ridder ('The Red Knight')(!), entitled De barst in de Ronde Tafel ('The cleft in the Round Table'). The sign is accompanied by the following text: 'This is the symbol of the Prince of Darkness, an unknown magician and Grand Master of Black Magic! Even before the Round Table was created, he went away and no one knows where he is today! He devotes his exceptional knowledge and power to everything that is evil and negative! His sole objective is to sow confusion and destruction. He is a symbol of the violence which reigns in these times over humanity and justice!'

Professor [MC] does not mince his words in his report: 'By way of conclusion, it can be said that Wim is the victim of repeated sexual and physical abuse and that his brother Jan is subjected to the same abuse to a lesser degree but, under very strong psychological pressure, is becoming increasingly psychologically disturbed, hence the drop in his school marks and the occasional inconsistencies in what he says in different interviews. In the interests of both children a court order should be made immediately to remove them completely and permanently from their father's orbit. Any further delay would be medically unjustifiable.'

Appended to the professor's two reports are very precise descriptions of the children's injuries, the statements made by the children, sinister drawings by Wim and Jan of sex scenes with their father (often represented with horns), and photographs. Both reports are in the hands of the experts [MI], [MJ] and [MK]. Judge [YL] also has them. Just as she has Professor [MA]'s five reports and the report by the court expert [MB]. How can Mrs [YL] maintain that there is no evidence? Do the children have to be beaten or raped before her eyes before she believes it?

...

Similar accusations by the children against their father were also subsequently recorded by Professor [MA], the court expert [MB], the two detective sergeants [ZF] and [ZG] in the presence of Wim's schoolteacher, and, lastly, Professor [MC]. On the other hand, there is one retraction of the statements in an interview (of which there is only a single, confused minute on tape) carried out by Detective Sergeant [ZJ], since suspended, who intimidated Jan with a weapon; one in an interview with Detective Sergeants [ZF] and [ZG], at the end of which Jan broke down completely (as Louis De Lentdecker happened to witness); and one retraction made by Jan to Professor [MC], in his father's presence.

The crucial question remains: is any mother capable of inventing all this? Even more to the point, would two young children - they will be 6 and 9 respectively this month - be capable of keeping up their accusations for over two and a half years if those accusations had been invented and forced on them by their mother? And when could the mother have coached her children in accusations such as these?

It should not be forgotten that since 25 June 1984 the notary has had custody of the children by order of the Third Division of the Antwerp Court of Appeal. For more than two years the father has had a great deal more influence over these children than their mother, who has the right to see her children only from time to time - a right of access with which the notary has frequently not complied.

What is more, if the notary has such a clear conscience, why does he declare war on anyone who puts legal or other obstacles in his path? Why has he already threatened so many people in connection with this case? In this article we shall mention only the most recent threats and acts of intimidation.

...

The case file also contains the report of an interview Professor [MA] had on 23 May 1984 with Principal Crown Counsel [YJ] and the Advocate-General [YD]. We realise how delicate it is to quote from letters that were not intended for publication, but needs must when the devil drives. Professor [MA] describes how the interview went: 'After I had discussed my problem and my request, namely that three experts should be appointed, I quickly realised that Principal Crown Counsel wished to proceed with the case impartially and without prejudging the issues, but that Mr [YD] already had a very clear idea of what should be done - "The children's story was made up, perhaps fed to them by the mother, and the children should be entrusted to the care of their grandparents, with the father also being involved in the process." Mr [YD] brushed aside my request for an expert report rather brusquely. In his view, judges had far more expertise than doctors in this field, and subjecting the children to further expert investigations and interviews could only do them more harm. Principal Crown Counsel was much more balanced in his response and considered that an expert report

was indeed called for. Moreover, Principal Crown Counsel expressed serious reservations about Mr [YD]'s suggestion. He said that the children's paternal grandfather, to whose care Mr [YD] proposed entrusting the children, was, and I quote, "mad". At every reception at which he encountered Mr X, he would see Mr X senior explaining, very clearly and without attempting to disguise his meaning, that Hitler should come back to this country. He added that this impression that the grandfather was "mad" was shared generally by all the guests at such receptions. And he expressly told Mr [YD] that he would consider it totally unjustified to entrust the children to the care of their paternal grandfather.'

Despite being in possession of this preliminary information, the Antwerp courts entrusted the children, at first instance, to the care of the notary under the supervision of his 'mad' father. In the course of the meeting with Professor [MA], Principal Crown Counsel [YJ] also cast doubt on the notary's probity. Professor [MA] gave the following evidence in his own defence before the Ordre des Médecins [Medical Association]:
'He (Principal Crown Counsel) described how Mr X had been made a notary, against the advice of the judicial bodies, on the last day in office of the late Mr [ZK] (then Minister of Justice) and that, furthermore, in a very short space of time (a few years) he had succeeded in transforming an almost defunct practice into one with an official profit of 32 million francs a year. He obviously doubted whether a notary could make such an annual profit by legal and honest means in view of the property crisis at the time, and thought he remembered that Mr X had already been the subject of legal proceedings at the time in connection with his activities as a notary.'

He was right. In 1984 the notary was even suspended by the Disciplinary Board. Principal Crown Counsel's office (once again!) took no account of that penalty. In the meantime a fresh criminal complaint has been lodged against the notary alleging forgery.

The worst thing is the notary's publicly expressed Nazi sympathies. A statement taken by Malines CID shows that he calls the genocide of six million Jews an 'American lie'. At his wedding the notary and his father gave the Nazi salute and struck up the 'Horst-Wessel Song' at the top of their voices.

But the notary goes much further. He wants to bring his children up according to Hitler's principles. That is why they must learn to bear pain and to endure humiliation and fear. Hitler himself described a Hitlerite education:

> 'My educational philosophy is tough. The weak must be beaten and driven out. My élite schools will produce young people whom the world will fear. I want young people to be violent, imperious, impassive, cruel. That is what young people should be like. They must be capable of bearing pain. They must not show any weakness or tenderness. Their eyes must shine with the brilliant, free look of a beast of prey. I want my young people to be strong and beautiful ... Then I can build something

new.'

There is little to add. Except to say that it is high time that, in the interests of the children, the medical certificates, the reports and evidence produced by the court expert, the bailiff and the child psychiatrists should at last be taken seriously and that a decision in this case be given on the basis of facts and not on the basis of the influential status of one of the parties. Public confidence in the judiciary is at stake."

The article was illustrated with what the applicants described as photos of injuries sustained by "Wim" in May, two drawings said to be by "Jan" and another said to be by "Wim"; it also contained a transcript of part of Detective Sergeant [ZB]'s alleged questioning of "Jan" on 6 March 1984.

22. On 6 November 1986 the fourth article by Mr De Haes and Mr Gijsels appeared. It read as follows:

"...

Last Thursday the Wim and Jan case took a dramatic legal turn. On an application by Principal Crown Counsel [YM], the Court of Cassation withdrew the X case from the Antwerp court and transferred it to the Ghent tribunal [de première instance] in the hope that the Ghent magistrats would adopt a less biased approach. It is certainly none too soon. The battle between the legal and medical professions in the Wim and Jan case had reached a climax. In a final attempt to make the Antwerp magistrats see reason, four eminent experts sent a joint letter to Principal Crown Counsel [YJ], declaring on their honour that they were 100% convinced that Mr X's children were the victims of sexual and physical abuse. The professional competence of these four experts cannot be questioned - even by the Antwerp magistrats. They are Professor [MD] (Professor of Paediatrics at UIA [Antwerp University Institution], Medical Director of the Algemeen Kinderziekenhuis Antwerpen and Director of the Antwerp Vertrouwensartscentrum [medical reception centre for abused children]); Professor [MC] (Professor of Paediatrics at Louvain C[atholic] U[niversity], Head of the Gasthuisberg [University Hospital] Paediatric Clinic in Louvain and President of the National Council on Child Abuse); Professor [MA] (Professor of Child and Youth Psychiatry at Gasthuisberg [Hospital], Louvain C[atholic] U[niversity], who was appointed by Principal Crown Counsel [YJ] to study the case); and Dr [MB] (a child psychiatrist and psychoanalyst, appointed as an expert by the court).

With their letter they enclosed a note listing ten pieces of evidence, any one of which on its own would, in any other case, have led to criminal proceedings or even an arrest. The aim of these scientists was clear. They were seeking from the courts a temporary 'protective measure' whereby the children would have been admitted to one of the three [medical reception centres in Flanders for abused children] pending a final court ruling. There was no response. The relevant magistrats did not react. The Ordre des Médecins, however, did - it forbade Professors [MA] and [MC] to voice their opinions.

Yet again the messenger is being shot without anyone listening to the message.

Politicians also reacted. The Justice Minister, Jean Gol, asked to see the file and is following the case closely but is powerless to intervene because of the constitutional separation of powers. And the MEPs Jef Ulburghs, Anne-Marie Lizin ... and Pol Staes ... have laid a draft resolution before the European Parliament requesting a proper investigation and urgent measures to put an end to the children's dangerous predicament.

The public are finding the case harder and harder to 'swallow'. The Justice Minister's office is inundated with dozens of indignant letters. The weekly silent demonstrations on the steps of the Antwerp law courts continue and last week, during Monday night, posters were stuck up all over the centre of town revealing Mr X's surname and forename. The poster campaign, which aroused mixed feelings among journalists and lawyers, has given a new dimension to the controversy surrounding the X case.

..."

23. On 27 November 1986 the applicants' fifth article appeared. It read as follows:

"...

Our prediction of a fortnight ago that the agonisingly slow progress being made in the Wim and Jan case was likely to leave the case stranded in the Antwerp courts has come true. In the teeth of all the evidence, the Court of Cassation has held that the Antwerp judiciary cannot be accused of any bias in this incest case and that the whole case can therefore continue to be dealt with in Antwerp.

In parallel with the Court of Cassation's decision there have been some remarkable events. The notary Mr X, so called in order to protect the identities of Wim and Jan, now shows himself in public and is giving interviews, sometimes even accompanied by his children. The fact that his name (and therefore the names of his little boys) now appears in the press does not appear to bother him.

Another consequence is that the media are now breaking several months' silence, and some editors have really gone off the rails.

It is very worrying, for example, that certain daily and weekly newspapers are trying to play down the X case, depicting it as a run-of-the-mill divorce case in which both parties are hurling the most disgusting accusations at each other. In these really not very cheering proceedings the 'divorce' aspect is only an insignificant detail, and moreover is quite another matter. Indeed, we have not published a single word on that subject, nor do we wish to do so, since it is a purely private matter.

The real issues in the case with which we are concerned are

very serious accusations of incest and child abuse, supported by medical certificates and examinations, and the extremely questionable manner in which those accusations are being dealt with by the courts. This state of affairs is no longer part of two people's private life but concerns us all. Moreover, the case of Mr X is simply the tip of the iceberg and is representative of other incest cases. It is for that reason, and that reason only, that we have written about it.

In the meantime, certain daily and weekly newspapers are indulging in the most unsavoury sensationalism and, without really knowing the case, allowing the notary whole pages in which to proclaim his version of the facts. Of course, freedom of expression is sacred. But have we ever pushed Wim and Jan's mother into the foreground? Have we ever published her opinion of the case? No. Humo's reports on Wim and Jan have always been based on our own investigations alone and on innumerable authentic documents.

We have not written a single word that was not based on the reports of doctors, paediatricians, court experts and a bailiff. Since our first 'Incest authorised in Flanders' article came out as far back as 26 June, the notary's family has tried to get Humo's management round the dinner table to 'discuss' the case. The editorial staff have always taken a consistent line: no discussion - send us documents proving us wrong and we will publish them. We also made this offer on

[the television programme] Argus, but up to now Mr X has not got round to sending us his 'equally numerous pieces of expert evidence in rebuttal'. For all his assertions in Knack and De Nieuwe Gazet that these exist, it is strange that those papers' journalists have yet to receive this rebutting evidence. All the notary has tried to do so far is to muddy the waters and present the case as if it were a matter of his word against his wife's, an argument along the lines of 'Oh no, I didn't' and 'Oh yes, you did'.

...

In the 5 November issue of Knack the notary reveals yet another new discovery: the photographs were not taken by the bailiff but by his ex-wife, and were faked with 'red ointment'. We repeat: if the bruises were caused by falling downstairs, why would they need to be faked with red ointment? It is true that his wife took photographs, but in the presence of the bailiff. And they were expressly annexed to the bailiff's report.

But irrespective of that, the relevant point is that the bailiff did take photographs himself.

...

Nothing but red ointment? The whole thing rigged so as to be more visible?

...

Besides, those are not the only photos of injuries to have been taken. Dr [MC] also took numerous photographs of the injuries

and of an 'abnormal irritation of the penis and the peri-anal region', and they were annexed to his reports. There is no evidence, the notary asserts. Will it really be necessary to publish a photo of his little boys' sore anuses?

The court, for which the bailiff's report was drawn up and the photographs taken, does not appear to have entertained any doubts as to their authenticity and added them to the case file four months ago without comment. With good reason. [ZM], the bailiff, took the photos with a polaroid camera in the presence of witnesses. That type of camera takes just seconds to produce a photograph. It is not possible to tamper with them. Mr X knows very well why he has not instituted proceedings against the bailiff and why he has published his insinuations only in certain newspapers and magazines.

This is not the first time that the notary has tried bluff tactics. The following extract from Knack is telling: 'He freely admits that he has put pressure on several doctors, beaten up his brother-in-law and, after receiving a tip-off from inside the Humo editorial team, issued threats against Albert Frère's magazine in order to try to get his name deleted from the articles, but he does not see any of this as intimidation and considers that in his unhappy situation, others would have behaved much worse.'

The allegation that Mr X tried to have his name deleted from Humo is one of his many lies. At that time he was asking for no more and no less than complete censorship: the article was not to be published! For our part, it has never for a moment even crossed our minds to mention the name of the notary and his family. That name has therefore never appeared in a single draft, not even a preliminary one. For Humo it has never been a matter of attacking an individual (and in this connection we dissociate ourselves completely from the billposters who are plastering the notary's name all over Antwerp) but of the dubious way in which the case has been handled.

...

Mr X delights in telling everyone that he knows that the courts and the officially appointed experts are on his side. 'He told us that the report by the three experts from the AKA (appointed by the Youth Court judge [YL] - Ed.) would be published on Wednesday, but that he could already reveal that the report proves his total innocence' (Algemeen Dagblad, 1.11.86).

'This week he hopes to distribute the reports by Dr [MI], Dr [MK] and Dr [MJ], appointed as experts by the Youth Court a year ago(!). "They are unanimous and totally favourable to me" [he says] ...' (Knack, 5.11.86)

Mr X was so positive that we fell into the trap (see our previous article) of believing that the reports cleared him of all suspicion. Since at that point the reports had not been filed, we asked: 'Does the notary have a hitherto unsuspected gift of clairvoyance or has he had an opportunity to consult the reports even before they are filed with the Youth Court?'

We don't know. But what we do know is that in his interviews

the notary is cocking a snook at the truth. The three reports are not entirely favourable to him. The conclusions of the report by the psychiatrist [MK], wholly confused though they indeed are, explicitly indicate that the evidence on the case file raises a strong presumption of sexual and physical abuse but that there is no absolute, irrefutable proof. Using the conditional mood, [MK] adds that Wim and Jan's stories could have been the product of 'coaching', not to say spoon-feeding, by the mother. In other words, [MK] is saying that in fact he doesn't know. At all events, one can hardly say that this report is entirely favourable to Mr X. The notary has also lied to the press about other things. According to him, the children are afraid of Malines, the mother's environment - whereas according to [MK]'s report, one of the children is very positive towards his mother and very negative towards his father. The other child sometimes would prefer to stay in Antwerp and at other times to live in Malines. Moreover, [MK]'s opinion is that the children should be placed with a foster family, with access for both parents.

Last week Dr [MJ]'s expert report also came in. A key witness in relation to the ill-treatment of 16 May, [MJ] concludes that it never took place. Yet another sample of the expert's wisdom: on the one hand, he states in his report that the children want to stay with their mother but, on the other, he recommends placing them with the father after the divorce, with limited access for the mother. As an immediate step, he recommends, just like [MK], that the children should be placed in a neutral setting, with generous access for both parents. No doubt you have to be an expert in order to understand so many contradictions.

...

In contrast to the contradictory and inconsistent reports of these doctors, there are the irrefutable, unequivocal reports of Professor [MA]:

'Given that the children have again been subjected to sexual abuse by their father, I consider that any further contact between the father and the children would for the time being be extremely prejudicial to the children's subsequent development, and the situation is particularly dangerous for them in that their mental development and that of their personalities are seriously jeopardised. This being so, I consider it necessary to intervene as a matter of urgency under section 36 (2) (children at risk) of the Child Protection Act.' (August 1984)

The court expert [MB], appointed by the investigating judge [YE], stated:

'All the examinations of Wim and Jan lead to the same conclusion: the two children describe sexual contact with Daddy. Wim is in the midst of assimilating the psychological trauma into his subconscious. For Jan this process of assimilation is more difficult. The children's statements appear credible and I have set out a series of arguments on this point.' (August 1984)

Dr [MC], who has examined the children twenty-two times (and not twelve as the notary, lying again, states in De Nieuwe Gazet) and has found non-accidental injuries on seventeen occasions, states:

'In the interests of the two children there should be an immediate court order withdrawing them totally and permanently from their father's orbit. Any further delay would be medically unjustifiable.' (May 1986)

It remains a disgrace that the Antwerp courts refuse to take this evidence into account."

The article was illustrated with two other drawings said to be by the children; it also contained what the applicants said was an extract from a report by the bailiff [ZM] describing bruises on both legs of the younger boy.

24. Following the judgment of 29 September 1988 (see paragraph 11 above) Mr De Haes and Mr Gijsels published an article on 14 October 1988 that contained the following:

"...

On 29 September the Brussels tribunal de première instance gave judgment in the case brought against Humo by the judges of the Antwerp Court of Appeal as a result of our articles about the notary Mr X. Humo lost all along the line. This judgment is not only desperately short on reasoning but also completely unsatisfactory. The Vice-President, [YF], and the other judges, [YG] and [YH], dealt with the case carelessly. They were not willing to listen to Humo's very strong arguments, while the debate about the relationship between the media and the judiciary, which was important for the press as a whole, was purely and simply brushed aside. We wonder whether their Lordships actually read Humo's submissions.

The Brussels tribunal de première instance chose the easy way out, holding it against us that the 'insinuations and offensive accusations' against the judges 'have no foundation except gossip and malicious distortions'. What the whole of Flanders knows, except apparently Messrs [YF], [YG] and [YH], is that our doubts as to the integrity of the Antwerp Court of Appeal magistrats were (and still are) based on a number of medical reports, which we have always cited verbatim, so there can be no question of malicious distortion. Are journalists acting unlawfully where they confine themselves to verbatim extracts from medical reports and to known and proved facts?

We are also accused of sullying the Antwerp judges' private lives. But at no time has Humo ever brought up anything to do with the judges' private lives. We have kept, strictly and deliberately, to those matters that were directly linked to the case and were capable of verification in history books and press articles. How can matters which are so manifestly and indisputably in the public domain suddenly be considered aspects of private life?

Further on in the reasons for their judgment, Judges [YF], [YG]

and [YH] say bluntly that we '[accept] as true, without more, the statement made by Mr X's former wife and her expert adviser (Professor [MA])'. We care not a jot about Mr X's former wife's statement. We have always concentrated solely on the medical findings and reports of innumerable doctors.

Yet the tribunal de première instance simply skirts round these facts.

Furthermore, one of the essential aspects of Mr X's case has cleverly been evaded: the conflict between the medical profession and the judiciary. Journalists have a duty to strive 'to respect the truth', says the court - a dictum to which we gladly subscribe, but judges are under the same duty.

The judgment of the tribunal de première instance becomes positively Kafkaesque when it attacks the medical reports by simply referring to the judgments of the Court of Appeal judges, who deliberately failed to take those reports seriously - precisely the attitude that Humo has condemned. For which we had our reasons. But what do the judges of the Brussels tribunal de première instance do? They use their fellow judges' judgments as evidence against Humo. In other words, the truth is to be found only in the judgments of the Antwerp judges. If that is the case, anyone who challenges a judgment, including in the press, runs the risk of being put in the wrong since a judge is always right. It is not the truth but 'the official truth and nothing but the official truth' which will be published in our newspapers in future. Is that what people want?

Clearly, the Brussels judges [YF], [YG] and [YH], did not manage to give judgment with the necessary detachment and independence on their fellow judges of the Antwerp Court of Appeal. They are thus adhering to the line of biased judgments which we have condemned in the case of Mr X. Humo will accordingly be appealing against this judgment."

II. Relevant domestic law

25. The first paragraph of the former Article 18 (currently Article 25) of the Constitution provides:

"The press shall be free; there shall never be any censorship; no security can be demanded of writers, publishers or printers."

26. The relevant provisions of the Civil Code are worded as follows:

Article 1382

"Any act committed by a person that causes damage to another shall render the person through whose fault the damage was caused liable to make reparation for it."

Article 1383

"Everyone shall be liable for damage he has caused not only

through his own act but also through his failure to act or his negligence."

According to legal writers and the case-law, an offence against the criminal law constitutes per se a fault within the meaning of Article 1382 of the Civil Code (see L. Cornelis, Beginselen van het Belgische buitencontractuele aansprakelijkheidsrecht, p. 62, no. 41; judgments of the Court of Cassation of 31 January 1980 (Pasicrisie 1980, I, p. 622) and 13 February 1988 (Rechtskundig Weekblad 1988-89, col. 159)). Articles 1382 and 1383 of the Civil Code accordingly provide a basis for civil proceedings for abuse of freedom of the press (judgment of the Court of Cassation of 4 December 1952, Pasicrisie 1953, I, p. 215). A publication is regarded as being an abuse where it breaches a criminal provision (without it being necessary, however, for all the ingredients of the offence to have been made out); disseminates ill-considered accusations without sufficient evidence; employs gratuitously offensive terms or exaggerated expressions; or fails to respect private life or the individual's privacy.

27. Articles 443 to 449 and 561, 7, of the Criminal Code make defamation and insults punishable. By Article 450, these offences, where committed against individuals, can be prosecuted only on a complaint by the injured party or, if that person has died, his spouse, descendants or statutory heirs up to and including the third degree. Articles 275 and 276 of the same Code make it a punishable offence to insult members of the ordinary courts.

PROCEEDINGS BEFORE THE COMMISSION

28. Mr De Haes and Mr Gijsels applied to the Commission on 12 March 1992. They alleged that the judgments against them had infringed their right to freedom of expression as guaranteed in Article 10 of the Convention (art. 10) and that it had been based on an erroneous interpretation of Article 8 (art. 8). They also maintained that they had not had a fair trial by an independent and impartial tribunal within the meaning of Article 6 (art. 6).

29. The Commission declared the application (no. 19983/92) admissible on 24 February 1995. In its report of 29 November 1995 (Article 31) (art. 31), it expressed the opinion that there had been a violation of Article 10 (art. 10) (six votes to three) and Article 6 (art. 6) (unanimously) of the Convention but not of Article 8 (art. 8). The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment (1).

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Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-I), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS TO THE COURT

30. In their memorial the Government asked the Court to "hold that there ha[d] been no violation of Articles 6 and 10 of the Convention (art. 6, art. 10)".

31. In their memorial the applicants asked the Court to "hold that there ha[d] been a violation of Article 10 and Article 6 of the Convention (art. 10, art. 6)".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION (art. 10)

32. The applicants alleged that the judgment of the Brussels tribunal de première instance and Court of Appeal against them had entailed a breach of Article 10 of the Convention (art. 10), which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

33. The judgment against the applicants indisputably amounted to an "interference" with their exercise of their freedom of expression. It was common ground that the interference had been "prescribed by law" and had pursued at least one of the legitimate aims referred to in Article 10 para. 2 (art. 10-2) - the protection of the reputation or rights of others, in this instance the rights of the judges and Advocate-General who brought proceedings.

The Court agrees. It must therefore ascertain whether the interference was "necessary in a democratic society" for achieving that aim.

34. Mr De Haes and Mr Gijsels pointed out that their articles had been written against the background of a public debate, reported by other newspapers, on incest in Flanders and on the way in which the judiciary was dealing with the problem. Before writing them, they had undertaken sufficient research and sought the opinion of several experts, and that had enabled them to base the articles on objective evidence. The only reason why they had not produced that evidence in court was that they had not wished to disclose their sources of information. The refusal of the Brussels courts of first instance and appeal to admit in evidence the documents they had mentioned had accordingly in itself entailed a breach of Article 10 (art. 10).

Their criticisms of the judges and Advocate-General concerned could not, they continued, justify a penalty merely on the ground that the criticisms were at odds with decisions of the Antwerp Court of Appeal. The determination of the "judicial truth" in a court decision did not mean that any other opinion had to be

considered wrong when the exercise of the freedom of the press was being reviewed. That, however, was exactly what had happened in the instant case, although the impugned articles had been based on sufficient objective information. In short, the interference complained of had not been necessary in a democratic society.

35. The Commission accepted this argument in substance.

36. The Government maintained that, far from stimulating discussion of the functioning of the system of justice in Belgium, the impugned press articles had contained only personal insults directed at the Antwerp judges and Advocate-General and had therefore not deserved the enhanced protection to which political views were entitled. No immunity could be claimed for opinions expressed by journalists merely on the ground that the accuracy of those opinions could not be verified. In the instant case the authors of the articles had incurred a penalty for having exceeded the limits of acceptable criticism. It would have been quite possible to challenge the way the courts had dealt with Mr X's cases without at the same time making a personal attack on the judges and Advocate-General concerned and accusing them of bias and of showing "a lack of independence". In that connection, it also had to be borne in mind that the duty of discretion laid upon magistrats prevented them from reacting and defending themselves as, for example, politicians did.

37. The Court reiterates that the press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart - in a manner consistent with its obligations and responsibilities - information and ideas on all matters of public interest, including those relating to the functioning of the judiciary.

The courts - the guarantors of justice, whose role is fundamental in a State based on the rule of law - must enjoy public confidence. They must accordingly be protected from destructive attacks that are unfounded, especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying to criticism.

In this matter as in others, it is primarily for the national authorities to determine the need for an interference with the exercise of freedom of expression. What they may do in this connection is, however, subject to European supervision embracing both the legislation and the decisions applying it, even where they have been given by an independent court (see, mutatis mutandis, the Prager and Oberschlick v. Austria judgment of 26 April 1995, Series A no. 313, pp. 17-18, paras. 34-35).

38. The Court notes at the outset that the judgment against the applicants was based on all the articles published by them between 26 June and 27 November 1986 on the subject of the X case.

This must be taken into account for the purpose of assessing the scale and necessity of the interference complained of.

39. The articles contain a mass of detailed information about the circumstances in which the decisions on the custody of Mr X's children were taken. That information was based on thorough research into the allegations against Mr X and on the opinions of several experts who

were said to have advised the applicants to disclose them in the interests of the children.

Even the Antwerp Court of Appeal considered that Mr X's wife and parents-in-law, who had been prosecuted for criminal libel, "had no good reason to doubt the truth of the allegations" in question (see paragraph 8 above).

That being so, the applicants cannot be accused of having failed in their professional obligations by publishing what they had learned about the case. It is incumbent on the press to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them (see, among other authorities, the Jersild v. Denmark judgment of 23 September 1994, Series A no. 298, p. 23, para. 31, and the Goodwin v. the United Kingdom judgment of 27 March 1996, Reports of Judgments and Decisions 1996-II, p. 500, para. 39). This was particularly true in the instant case in view of the seriousness of the allegations, which concerned both the fate of young children and the functioning of the system of justice in Antwerp. The applicants, moreover, made themselves quite clear in this regard when they wrote in their article of 18 September 1986: "It is not for the press to usurp the role of the judiciary, but in this outrageous case it is impossible and unthinkable that we should remain silent" (see paragraph 21 above).

40. It should be noticed, moreover, that the judges and Advocate-General who brought proceedings did not, either in their writ or in their submissions to the Brussels courts of first instance and appeal, cast doubt on the information published about the fate of the X children, other than on the statement that the case in question had been withdrawn from the Antwerp courts (see paragraphs 22 and 23 above). However, the weight of the latter item in comparison with the impugned articles as a whole and the fact that the applicants corrected it themselves, mean that, on its own, that incident cannot put in doubt the reliability of the journalists' work.

41. In actual fact the judges and Advocate-General complained mainly of the personal attacks to which they considered they had been subjected in the journalists' comments on the events in the custody proceedings in respect of the X children. The applicants, in accusing them of marked bias and cowardice, had, they maintained, made remarks about them that were defamatory and constituted an attack on their honour. The applicants had furthermore accused two of them of pronounced extreme-right-wing sympathies and had thus grossly infringed their right to respect for their private life.

The Brussels courts accepted that contention in substance (see paragraphs 11 and 14 above). The Court of Appeal essentially found the applicants guilty of having made unproved statements about the private life of the judges and Advocate-General who had brought proceedings and of having drawn defamatory conclusions by alleging that they had not been impartial in their handling of the case of the X children. Its judgment says:

> "In the instant case the appellants dared to go one step further by maintaining, without a shred of evidence, that they were entitled to infer the alleged bias from the very personalities of the judges and the Advocate-General and thus interfere with private life, which is without any doubt

unlawful.

Furthermore, the purpose of the present proceedings is not to decide what ultimately was the objective truth in the case that the original plaintiffs finally determined at the time but merely whether the comments in issue are to be considered defamatory, which is not in the slightest doubt."
(see paragraph 14 above)

42. The Court reiterates that a careful distinction needs to be made between facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof (see the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, p. 28, para. 46).

43. As regards, firstly, the statements concerning the political sympathies of the judges and Advocate-General who brought proceedings, it must be noted that the Brussels Court of Appeal held:

"Even if the appellants believed that certain ideological views could be ascribed to the respondents (views which they have failed to prove that the respondents held), they cannot in any event be permitted purely and simply to infer from those views - even if they had been proved - that the judges and the Advocate-General were biased and to criticise that bias in public." (see paragraph 14 above)

It is apparent from this that even if the allegations in question had been accurate, the applicants would not have escaped being found liable since that finding related not so much to the allegations reported as to the comments which these inspired the journalists to make.

44. Added to the information which the applicants had been able to gather about Mr X's behaviour towards his children, information which was in itself capable of justifying the criticism of the decisions taken by or with the aid of the judges and Advocate-General concerned, the facts which they believed they were in a position to allege concerning those persons' political sympathies could be regarded as potentially lending credibility to the idea that those sympathies were not irrelevant to the decisions in question.

45. One of the allusions to the alleged political sympathies was inadmissible - the one concerning the past history of the father of one of the judges criticised (see paragraph 19 above). It is unacceptable that someone should be exposed to opprobrium because of matters concerning a member of his family. A penalty was justifiable on account of that allusion by itself.

It was, however, only one of the elements in this case. The applicants were convicted for the totality of the accusations of bias they made against the three judges and the Advocate-General in question.

46. In this connection, the Court reiterates that freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any section of the community. In addition, journalistic freedom also covers possible recourse to a degree of exaggeration, or even

provocation (see, mutatis mutandis, the Prager and Oberschlick judgment cited above, p. 19, para. 38).

47. Looked at against the background of the case, the accusations in question amount to an opinion, whose truth, by definition, is not susceptible of proof. Such an opinion may, however, be excessive, in particular in the absence of any factual basis, but it was not so in this instance; in that respect the present case differs from the Prager and Oberschlick case (see the judgment cited above, p. 18, para. 37).

48. Although Mr De Haes and Mr Gijsels' comments were without doubt severely critical, they nevertheless appear proportionate to the stir and indignation caused by the matters alleged in their articles. As to the journalists' polemical and even aggressive tone, which the Court should not be taken to approve, it must be remembered that Article 10 (art. 10) protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (see, as the most recent authority, the Jersild judgment cited above, p. 23, para. 31).

49. In conclusion, the Court considers that, regard being had to the seriousness of the circumstances of the case and of the issues at stake, the necessity of the interference with the exercise of the applicants' freedom of expression has not been shown, except as regards the allusion to the past history of the father of one of the judges in question (see paragraph 45 above).

There has therefore been a breach of Article 10 (art. 10).

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 OF THE CONVENTION (art. 6-1)

50. The applicants also complained of a breach of Article 6 para. 1 of the Convention (art. 6-1), which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an ... impartial tribunal ..."

They firstly criticised the Brussels tribunal de première instance and Court of Appeal for having refused to admit in evidence the documents referred to in the impugned articles or hear at least some of their witnesses (see paragraphs 10 and 12 above). This, they said, had resulted in a basic inequality of arms between, on the one hand, the judges and the Advocate-General, who were familiar with the file, and, on the other, the journalists, who with only limited sources had had to reconstruct the truth.

Further, in arguing against Mr De Haes and Mr Gijsels on the basis of their article of 14 October 1988 (see paragraph 24 above), the Brussels Court of Appeal had ruled on matters not before it as the judges criticised in that article were not parties to the case before the Court of Appeal and their decision had not been mentioned in the original writ. The Court of Appeal had thus taken as a basis a fact that had not been the subject of adversarial argument and had thereby departed from due process.

Lastly, the derogatory terms used in the Brussels Court of Appeal's judgment showed that there had been a lack

of subjective impartiality.

51. The Commission shared, in substance, the applicants' opinion as to the effects of the alleged breaches on equality of arms and due process. It did not consider it necessary to express a view on the Brussels Court of Appeal's impartiality.

52. The Government submitted that the evidence which the journalists proposed to submit had been calculated to call in question the decisions taken in the lawsuit between Mr X and his wife, which was res judicata. The Brussels courts had therefore been entitled to reject it, seeing that the "judicial truth" was sufficiently clear from the judgments delivered in Mr X's cases. In short, production of the evidence in question had been shown not to be decisive in the instant case, and the Court of Cassation had confirmed that.

As to the Court of Appeal's reference to the press article of 14 October 1988, it was a superfluous reason, as the judgment against the applicants rested primarily on other grounds. The reference to that article in the submissions of the judges and Advocate-General who had brought proceedings was not intended to amend their claim but simply to highlight Mr De Haes and Mr Gijsels' relentless hostility.

53. The Court reiterates that the principle of equality of arms - a component of the broader concept of a fair trial - requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see, among other authorities, the Ankerl v. Switzerland judgment of 23 October 1996, Reports 1996-V, pp. 1565-66, para. 38).

54. It notes that in their submissions to the Brussels courts of first instance and appeal the judges and Advocate-General concerned maintained, in substance and inter alia, that the criticisms made of them in Humo were not supported by the facts of the case and certainly not by the four judgments that had been delivered by them or with their aid in that case, which were otherwise uncontradicted. They thus referred, in order to deny that there was any basis for the journalists' argument, to the content of the case they had themselves dealt with and of the relevant judgments.

Coming as it did from the judges and Advocate-General who had handled the case, that statement had such credibility that it could hardly be seriously challenged in the courts if the defendants could not adduce at least some relevant documentary or witness evidence to that end.

55. In this respect, the Court does not share the Brussels Court of Appeal's opinion that the request for production of documents demonstrated the lack of care with which Mr De Haes and Mr Gijsels had written their articles. It considers that the journalists' concern not to risk compromising their sources of information by lodging the documents in question themselves was legitimate (see, mutatis mutandis, the Goodwin judgment cited above, p. 502, para. 45). Furthermore, their articles contained such a wealth of detail about the fate of the X children and the findings of the medical examinations they had undergone that it could not reasonably be supposed, without further inquiry, that the authors had not had at least some relevant information available to them.

56. It should also be noted that the journalists' argument could hardly be regarded as wholly unfounded, since even before the judges and the Advocate-General brought proceedings against the applicants, the Antwerp tribunal de première instance and Court of Appeal had held that the defendants in the libel action Mr X had brought against his wife and parents-in-law had not had any good reason to doubt the truth of their allegations (see paragraph 8 above).

57. At all events, the proceedings brought against the applicants by the judges and the Advocate-General did not relate to the merits of the judgment in the X case but solely to the question whether in the circumstances the applicants had been entitled to express themselves as they had. It was not necessary in order to answer that question to produce the whole file of the proceedings concerning Mr X but only documents which were likely to prove or disprove the truth of the applicants' allegations.

58. It was in those terms that Mr De Haes and Mr Gijsels made their application. They asked the Brussels tribunal de première instance and Court of Appeal at least to study the opinion of the three professors whose examinations had prompted the applicants to write their articles (see paragraph 10 above). The outright rejection of their application put the journalists at a substantial disadvantage vis-à-vis the plaintiffs. There was therefore a breach of the principle of equality of arms.

59. That finding alone constitutes a breach of Article 6 para. 1 (art. 6-1). The Court consequently considers it unnecessary to examine the other complaints raised by the applicants under that provision (art. 6-1).

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

60. Article 50 of the Convention (art. 50) provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

61. The applicants sought 113,101 Belgian francs (BEF) in respect of pecuniary damage. That sum corresponded to the cost of publishing the Brussels Court of Appeal's judgment of 5 February 1990 in Humo, plus "one franc on account" for the publication of the same judgment in six daily newspapers, which has not yet taken place.

62. No observations were made by either the Delegate of the Commission or the Government.

63. As the publishing of the judgment was a direct consequence of the wrongful finding against Mr De Haes and Mr Gijsels, the Court considers the claim justified.

B. Non-pecuniary damage

64. The journalists also sought compensation in the amount of BEF 500,000 each for non-pecuniary damage caused by the adverse publicity and the psychological ordeals which followed their conviction.

65. The Government considered that the Court's judgment would be sufficient redress for that damage.

The Delegate of the Commission did not express a view.

66. In the Court's opinion, the Belgian courts' decisions against the applicants must have caused them certain unpleasantnesses. The finding of a breach of the Convention, however, affords sufficient just satisfaction in this regard.

C. Costs and expenses

67. Mr De Haes and Mr Gijsels sought BEF 851,697 in respect of the costs and expenses relating to their legal representation, namely: BEF 332,031 for the proceedings in the domestic courts and BEF 519,666 for those before the Convention institutions, including BEF 179,666 for translation expenses.

68. No observations were made by either the Delegate of the Commission or the Government.

69. That being so, the Court allows the claim.

D. Default interest

70. According to the information available to the Court, the statutory rate of interest applicable in Belgium at the date of adoption of the present judgment is 7% per annum.

FOR THESE REASONS, THE COURT

1. Holds by seven votes to two that there has been a breach of Article 10 of the Convention (art. 10);

2. Holds unanimously that there has been a breach of Article 6 para. 1 of the Convention (art. 6-1);

3. Holds unanimously that the respondent State is to pay the applicants, within three months, 113,101 (one hundred and thirteen thousand, one hundred and one) Belgian francs in respect of pecuniary damage and 851,697 (eight hundred and fifty-one thousand, six hundred and ninety-seven) francs for costs and expenses, on which sums simple interest at an annual rate of 7% shall be payable from the expiry of the above-mentioned three months until settlement;

4. Holds unanimously that the present judgment in itself constitutes sufficient just satisfaction in respect of non-pecuniary damage.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 February 1997.

Signed: Rolv RYSSDAL

President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 55 para. 2 of Rules of Court B, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Mr Matscher;

(b) partly dissenting opinion of Mr Morenilla.

Initialled: R. R.

Initialled: H. P.

PARTLY DISSENTING OPINION OF JUDGE MATSCHER

(Translation)

I am unable to agree with the majority of the Chamber in so far as it finds a breach of Article 10 (art. 10).

Although I fully endorse what the Chamber says on the subject of freedom of expression, and in particular about the importance of freedom of the press in a democratic society, I believe that the Chamber has failed to recognise the limits that this freedom entails, which are also of importance in a civilised democratic society. Indeed, the reference in the second paragraph of Article 10 (art. 10-2) to the "duties and responsibilities" inherent in freedom of the press seems to carry little weight in the Court's case-law.

Applying these principles to the present case, I would make the following observations.

The applicants were entitled to criticise the decision of the Antwerp Court of Appeal awarding Mr X custody of his children since the objective information available to them justified the severest censure of that decision; having regard to the circumstances of the case, it was indeed legitimate to ask how the judges in question could have taken such a decision.

What I find fault with in the press articles that gave rise to the decision imposing a penalty on the applicants - albeit a nominal one - is the insinuation that the judges who gave that decision had deliberately acted in bad faith because of their political or ideological sympathies and thus breached their duty of independence and impartiality, all with the aim of protecting someone whose political ideas appeared to be similar to those of the judges concerned. Nothing justified such an insinuation, even if it had been possible to discover the impugned judges' political opinions.

In those circumstances, the interference constituted by the judgment against the applicants was "necessary" within the meaning of the second paragraph of Article 10 (art. 10-2) and was not disproportionate.

PARTLY DISSENTING OPINION OF JUDGE MORENILLA

(Translation)

1. To my regret, I cannot agree with the majority's conclusion as to the breach of Article 10 of the Convention (art. 10) in this case. In my opinion, the Belgian civil courts' judgment against the applicants for defamation was necessary in a democratic society and proportionate within the meaning of paragraph 2 of Article 10 (art. 10-2).

In the impugned judgments - of the Brussels tribunal de première instance, the Brussels Court of Appeal and the Court of Cassation - the defendants, Mr De Haes and Mr Gijsels, who are journalists, were found to have acted unlawfully. They were ordered to pay each of the four plaintiffs - three judges and an Advocate-General at the Antwerp Court of Appeal - one franc in respect of non-pecuniary damage suffered and to publish the relevant decision in full in the weekly magazine Humo, in which they had published five articles between July and November 1986 criticising judgments given by the Third Division of that court in terms which the members of that division described as defamatory. The plaintiffs were also given leave to have the judgment published in six daily newspapers at the applicants' expense.

The decisions criticised by the applicants had been given in divorce proceedings in which the Court of Appeal had awarded the father custody of his children despite allegations by the mother that he had committed incest with them and subjected them to abuse.

2. Like the majority, I take the view that the impugned judgments undoubtedly amounted to an interference with the applicants' exercise of their right to freedom of expression, including freedom to hold opinions and the right to impart information, which is enshrined in Article 10 of the Convention (art. 10). That interference was provided for in Articles 1382 et seq. of the Belgian Civil Code and pursued the aim of protecting the reputation of others - in this instance the reputation of the judges of the division of the Court of Appeal that had delivered the judgment - and maintaining the authority and impartiality of the judiciary, legitimate aims under Article 10 para. 2 of the Convention (art. 10-2).

3. The necessity of the judgment against the applicants in a democratic society is therefore the final condition that the interference has to satisfy in order to be regarded as justified under paragraph 2 of Article 10 of the Convention (art. 10-2). It is also the only ground for my dissent from the majority, who considered that the measure was neither necessary nor proportionate in view of the fundamental role of the press in a State governed by the rule of law and the relevance, in principle, of criticism of the functioning of the system of justice.

4. In my view, however, the articles in question contained, in addition to criticism of the judicial decision on the custody of the children in the divorce proceedings, assessments of the Belgian judicial system in general and the political opinions of members of the Antwerp Court of Appeal, whose names were given, and details of the past of the father of one of the judges. They attributed to the judges and the Advocate-General political ideas similar to those of the father who had been awarded custody. I consider these comments to have been very offensive to the Belgian judiciary and defamatory of the judges and Advocate-General at

the Court of Appeal. The latter were intentionally accused by the applicants of having taken unjust decisions because of their friendship or their political affinities with one of the parties to the proceedings, and that amounts to an accusation of misfeasance in public office.

5. The articles contained expressions such as "Two children crushed between the jaws of blind justice. Incest authorised in Flanders" or "Most of the judges of the Third Division of the Court of Appeal, who awarded custody to the notary, also belong to extreme-right-wing circles. Judge [YB] is the son of a bigwig in the gendarmerie who was convicted in 1948 of collaboration ... It just so happens that Principal Crown Counsel [YJ] has the same political sympathies as the X family" (first article, of 26 June 1986). "[H]alf Flanders is shocked by such warped justice." "This kind of brutal pressurising seems to 'work' very well within the system of justice." "Thanks to the fresh data, we now have an even better picture of how often and how treacherously the courts have manipulated the case" (second article, of 17 July 1986). "[T]he ultimate guarantee of our democracy, an independent system of justice, has been undermined at its very roots" (third article, of 18 September 1986). "It remains a disgrace that the Antwerp courts refuse to take this evidence into account" (fifth article, of 27 November 1986).

6. In another case concerning the conviction of a journalist and a publisher for defamation of a judge, similar to the present case, albeit in criminal proceedings, the case of Prager and Oberschlick v. Austria (judgment of 26 April 1995, Series A no. 313), the Court stressed the need to strike the correct balance between the role of the press in imparting information on matters of public interest, such as the functioning of the system of justice, and the protection of the rights of others and "the special role of the judiciary in society", where "as the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties" (paragraph 34).

7. These features of freedom of the press not only are compatible with freedom of expression but also confer on it the objectivity required to ensure truthful and serious reporting of the functioning of the system of justice. As the Court said in the Prager and Oberschlick case, "[i]t may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying" (ibid.).

8. In the same judgment the Court also said: "The assessment of these factors falls in the first place to the national authorities, which enjoy a certain margin of appreciation in determining the existence and extent of the necessity of an interference with the freedom of expression." However, this margin of appreciation is subject to European supervision (paragraph 35). In reviewing its compatibility with the Convention, the Court must have regard to the fact that "the press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them" (paragraph 34).

9. In my opinion, the decision on how to classify the extracts mentioned in the impugned judgments concerning the lack of impartiality

of the judges and the Advocate-General at the Antwerp Court of Appeal and the statements regarding the Belgian system of justice lies within the margin of appreciation of the national courts. The statements made by the applicants amounted to value judgments on the political ideas of the judges and Advocate-General in question or on the influence that those ideas and family background had on the decision commented upon. Such value judgments were not susceptible of proof and could not justify the accusation of bias on the part of the judges or the sweeping nature of the accusations or the virulence and contemptuousness of the terms employed.

10. The judicial decisions complained of were based not on the criticism of the "objective truth" of the facts established in the divorce proceedings or on the lawfulness of the decisions taken by the judges, but on the dishonouring statements contained in the articles. The journalists nevertheless raised important questions relating to the criticism of the functioning of the system of justice and the courts ought to have considered them in full and ruled on them in their judgments. This defect does not, in my view, invalidate the judgment against the applicants for defamation, since that judgment was in fact based on the offensive statements used in their articles. The defect goes to the breach of Article 6 (art. 6), which the Court found unanimously.

11. In the strict context of the impugned decisions, I consider that the Belgian civil courts' finding that the terms employed and statements made in the articles had undermined the reputation for impartiality of the judges who had given the judgment on appeal and the authority and independence of the judiciary was in conformity with Article 10 para. 2 of the Convention (art. 10-2), as was the relief afforded to the plaintiffs on this account.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FORMER THIRD SECTION

CASE OF DICHAND AND OTHERS v. AUSTRIA

(Application no. 29271/95)

JUDGMENT

STRASBOURG

26 February 2002

FINAL

26/05/2002

In the case of Dichand and Others v. Austria,

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

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 9 January 2001 and 30 January 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 29271/95) against the Republic of Austria lodged on 28 September 1995 with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Hans Dichand, Krone-Verlag GmbH & Co KG, a limited partnership registered under Austrian law, and Krone-Verlag GmbH, a limited company registered under Austrian law.

2. The applicants were represented before the Court by Mr T. Höhne, a lawyer practising in Vienna (Austria). The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicants alleged that an injunction prohibiting them from repeating certain statements they had published in a periodical ("Neue Kronen-Zeitung"), and ordering them to retract these statements, violated their right to freedom of expression, contrary to Article 10 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 9 January 2001 the Chamber declared the application admissible.

7. On 1 November 2001 the Court effected a change in the composition of its Sections, but the present case remained with the former Chamber of Section III which had declared the application admissible.

8. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*), the applicant, but not the Government, submitted additional observations on the merits. In addition, third-party comments were received from the Mr Michael Graff, who had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3). The applicants replied to those comments (Rule 61 § 5).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The first applicant, an Austrian citizen born in 1921 and residing in Vienna, is the chief editor and publisher of the newspaper "Neue Kronen-Zeitung". The second applicant, a limited partnership (*Kommanditgesellschaft*) is the owner of this newspaper. The third applicant is a limited company, the general partner (*Komplementär*) of the second applicant. The second and third applicants have their places of business in Vienna.

10. The applicants belong to a large media group which at the relevant time was in strong competition with another media group represented by Mr Michael Graff, a lawyer practising in Vienna. Besides his profession as a lawyer, Mr Graff was from 1982 to 1987 secretary general of the Austrian People's Party (*Österreichische Volkspartei*) and, from 1983 to 1995, a Member of Parliament for that party. Between 1987 and 1995 he was the Chairman of the Parliament's Legislative Committee (*Justizausschuß*). From 1989 to July 1995 he represented the applicants' competitor in several proceedings concerning unfair competition against companies belonging to the applicants' media group.

11. In 1989 several Austrian laws were amended by the Extended Pecuniary Limits Amendment Act (*Erweiterte Wertgrenzen-Novelle*). The Government Bill (*Regierungsvorlage*) had also provided for an amendment to Section 359 § 1 of the Enforcement Act (*Exekutionsordnung*), a section

which is of particular relevance for the enforcement of injunctions. The Government Bill had envisaged raising the fines that could be imposed for non-compliance with injunctions from ATS 50,000 per enforcement order to ATS 80,000 per enforcement order.

12. Under the chairmanship of Mr Graff, the Legislative Committee dealing with the Government Bill proposed a different version, namely that a maximum fine of AS 80,000 could be imposed for each request for enforcement (*Exekutionsantrag*) instead of for each enforcement order issued by the Enforcement Court. In its report of June 1989, the Legislative Committee pointed out that the fine had to be multiplied by the number of requests for enforcement, if only one decision combining several requests was taken. This proposal was adopted by Parliament on 29 June 1989 and published as Article XI of the Extended Pecuniary Limits Amendment Act, Federal Law Gazette 1989/343 (*Erweiterte Wertgrenzen-Novelle 1989, BGBl. 1989/343*).

13. Four years later, in June 1993, the following article written by the first applicant under the pseudonym "Cato" was published in the "Neue Kronen-Zeitung":

> "Moral 93
>
> Before Roland Dumas became the French Minister for Foreign Affairs, he was one of Europe's most famous and most successful lawyers. He administered the gigantic estate of Picasso; he represented Kreisky and an Austrian Minister for Foreign Affairs when the latter found himself in a bad situation. Dumas took it for granted that he had to give up his law firm when he became a member of the government. In every democracy of the world this course of action is followed. Only Mr Graff, who is obviously thick-skinned, does not intend to comply with these moral concepts.
>
> It so happened that at the time when Mr Graff was presiding Parliament's Legislative Committee, a law was amended which brought about big advantages for the newspaper publishers whom Mr Graff represented as a lawyer. In order to ensure that in such cases no suspicion, not even one that has no objective justification, can arise, there exists the wise rule of incompatibility; a lawyer is not allowed to take part in the adoption of laws which lead to advantages for his clients.
>
> Also the Austrian People's Party thought that way and they decided to appeal to Mr Graff's conscience. In vain! It is very telling for the present situation of the Austrian People's Party that it cannot convince Mr Graff. The other parties will be only too pleased, when it becomes so flagrantly evident how powerless the Austrian People's Party is vis-a-vis one of their officials who has his own moral concepts. Mr Graff was even allowed to present his disreputable attitude on our monopoly-television. Mr Graff thought that it would be a sign of fear to the 'Kronen Zeitung' if he had to resign from the Legislative Committee.
>
> The People's Party does not have to fear the 'Krone' but its voters, who will continue turning away from it if the party shows itself incapable of establishing order within its own ranks; how could one then possibly trust that it would succeed in doing this in the State ... Cato."

<German>

"Moral 93

Roland Dumas war, bevor er Frankreich's Außenminister wurde, einer der bekanntesten und erfolgreichsten Rechtsanwälte Europas. Er verwaltete zum Beispiel das gigantische Erbe Picassos, vertrat Kreisky und einen österreichischen Außenminister, als dieser in eine arge Affäre geraten war. Für Dumas war es ganz selbstverständlich, daß er sein Rechtsanwaltsbüro aufgeben mußte, als er in die Regierung eintrat. Überall in der Welt wird dies in Demokratien so gehalten. Nur der offenbar mit einer Büffelhaut ausgestattete Rechtsanwalt Dr. Graff denkt nicht daran, sich nach solchen Moralbegriffen zu richten.

So kam es, während er im Justizausschuß des Parlaments den Vorsitz hatte, zur Veränderung eines Gesetzes, wodurch der Zeitungsverlag, den Graff rechtsanwaltlich vertritt, große Vorteile hatte. Damit in solchen Fällen nicht ein bestimmter Verdacht entstehen kann, der keineswegs begründet sein muß, gibt es eben die weise Regel der Unvereinbarkeit; ein Anwalt darf nicht an der Entstehung von Gesetzen beteiligt sein, die seinen Mandanten Vorteile bringen.

Das dachte man auch in der ÖVP, und man entschloß sich, Graff ins Gewissen zu reden. Vergeblich! Es sagt einiges über den Zustand der ÖVP aus, daß sie sich gegen Graff nicht durchsetzen konnte. Den anderen Parteien kann es nur recht sein, wenn sich in so brutaler Offenheit zeigt, wie ohnmächtig die Volkspartei gegenüber einem Funktionär ist, der seine eigene Moral hat. Sogar in unserem Monopol-Fernsehen durfte er seine anrüchige Haltung vertreten. Graff meinte, es würde nur Angst vor der 'Kronen Zeitung' signalisieren, berufe man ihn im Justizausschuß ab.

Nicht vor der 'Krone' braucht die ÖVP Angst zu haben, sondern vor ihren Wählern, die sich weiter von ihr abwenden werden, wenn sie sich als unfähig erweist, in der eigenen Partei Ordnung zu machen; wie sollte man da das Vertrauen haben, es könne ihr im Staat gelingen ... Cato."

14. On 7 June 1993 Mr Graff brought injunction proceedings under Section 1330 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) against the three applicants before the Vienna Commercial Court (*Handelsgericht*). He requested that the applicants be prohibited from stating or repeating that he "does not intend to comply with moral concepts existing in democracies all over the world, namely that one has to give up one's law firm if one becomes a member of the government, (M.G. had never been a member of the government), and/or that he has taken part in the adoption of laws which have brought about advantages for his clients, and/or that he has been allowed to present his disreputable opinion on television". He also requested that the statement be retracted and that this retraction be published in the "Neue Kronen-Zeitung".

15. On 9 July 1993 the Vienna Commercial Court issued a preliminary injunction (*einstweilige Verfügung*) against the applicants prohibiting them from reiterating the impugned statements. The applicants' appeal against this decision was to no avail.

16. On 9 September 1994 the Vienna Commercial Court granted a permanent injunction. It ordered the applicants not to repeat the impugned statements and to retract the statements in one edition of the "Neue Kronen-Zeitung". It found that the applicants' statements amounted to an insult and therefore fell to be considered not only under Section 1330 § 2 of the Austrian Civil Code, but also under the first paragraph of Section 1330. In that case the onus of proof shifted to the applicants who had to prove the truth of the impugned statements. The court pointed out that all the statements contained in the article were statements of fact which the applicants had failed to prove.

17. The court found that the statement contained in the first paragraph of the newspaper article was an insult, within the meaning of Section 1330 § 1 of the Civil Code, because Mr Graff was accused of ignoring or neglecting moral, democratic standards and had therefore acted immorally. This statement contained the implicit allegation that Mr Graff had become a member of the government. However, the allegation was untrue because Mr Graff had never been a member of the government.

18. The court further considered that the statement in the second paragraph of the newspaper article expressed the suspicion that Mr Graff had abused his position as a Member of Parliament. The proposed evidence that should prove the truth of this allegation, namely the amendment of Section 359 § 1 of the Enforcement Act, was insufficient because the applicants had not even contended before the court that the amendment served the exclusive interest of Mr Graff's client. In fact this amendment had an objective basis, concerned both competing media groups and had no distorting effect on competition.

19. In respect of the third statement according to which Mr Graff's attitude was disreputable, the court found that this statement again contained the allegation that Mr Graff had acted immorally because he had exercised two incompatible activities. The court therefore concluded that the applicants could not successfully rely on Article 10 of the Convention, because the interference with the applicants' rights under this provision was justified in order to protect Mr Graff's good reputation, which could be prejudiced by such untruthful statements.

20. On 20 October 1994 the applicants appealed. They submitted that the Commercial Court had not sufficiently taken into account a written statement by E.S., an employee of the second applicant, which the applicants had submitted. According to this written statement, Mr Graff had requested the amendment to the Enforcement Act in order to impose a fine for each request for execution, thus exploiting one of the applicants' weak points. The applicants were the owners of several monthly magazines. Unlike daily newspapers, these magazines were therefore usually on the market longer. If one of the applicants' magazines, for instance, had violated the Unfair Competition Act (*Bundesgesetz gegen den unlauteren*

Wettbewerb), Mr Graff, as the legal representative of the competitors, had immediately obtained a preliminary injunction and had filed almost daily requests for enforcement. He had counted on the fact that the applicants could, in the long run, not afford to pay the fines, or that they could not afford the cost of withdrawing the relevant issue of the monthly magazine from distribution. Under the previous legal situation, several requests for enforcement would be combined in one decision, and the applicants had only had to pay one fine of AS 50,000 for them. Under Section 359 § 1 of the Enforcement Act in its amended form, however, the fines were multiplied by the number of requests and, consequently, increased dramatically.

21. Furthermore, the applicants complained that the Commercial Court had failed to take sufficient account of a written statement by their lawyer, S.R., and had refused to hear this person as a witness. He would have given evidence of a telephone conversation on 12 June 1989 between himself and Mr Graff in which the latter had complained that his requests for enforcement had not been successful and had not reaped the expected fines. He continued that this would require changes in the pecuniary limits and the system of fines. The applicants also submitted that the impugned article constituted a criticism of Mr Graff's behaviour as a politician and was therefore protected by the freedom of expression guaranteed by Article 10 of the Convention.

22. On 15 December 1994 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the applicants' appeal. It found that the Commercial Court had correctly taken the necessary evidence and assessed the relevant facts. The applicants had not even argued before the Commercial Court that Mr Graff had been a member of the government or that the amendment of the Enforcement Act had served the exclusive interests of Mr Graff's client. Instead they had merely argued that Mr Graff, in his function as Chairman of the Legislative Committee, had been involved in the making of laws which created advantages for his client. The applicants therefore should have proved that Mr Graff had been a member of the government and that he had manipulated the enactment of laws to the exclusive advantage of his client. The evidence proposed by the applicants, however, had been insufficient to prove such allegations. Moreover, the contested statements were not value judgments, but (political) criticism based on alleged facts. Such criticism was only acceptable if the underlying facts were true. Since the applicants had failed to prove the truth of these facts, they could not rely on Article 10 of the Convention.

23. On 9 March 1995 the Supreme Court rejected as inadmissible the applicants' extraordinary appeal on points of law (*außerordentliche Revision*). Referring to its previous case-law, the court pointed out that disparagement by means of untrue statements, even if made in the course of

political debate, went beyond acceptable (political) criticism and could not be justified by a weighing of interests or by invoking the right to freedom of expression. This decision was served on the applicants on 10 April 1995.

II. RELEVANT DOMESTIC LAW

24. Section 1330 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) provides as follows:

> "(1) Everyone who has suffered material damage or loss of profit because of an insult may claim compensation.
>
> (2) The same applies if anyone disseminates statements of fact which jeopardise another person's credit, gain or livelihood and if the untruth of the statement was known or must have been known to him. In such a case the retraction of the statement and the publication thereof may also be requested ...."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

25. The applicants complain under Article 10 of the Convention that the injunction prohibiting them from making certain statements with regard to Mr Graff violated their right to freedom of expression. The relevant part of Article 10 of the Convention reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority....
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others...."

A. Whether there was an interference

26. The Court notes that it was common ground between the parties that the injunction issued by the Austrian courts constituted an interference with the applicants' freedom of expression, as guaranteed by Article 10 § 1 of the Convention.

B. Whether the interference was justified

27. An interference contravenes Article 10 of the Convention unless it is "prescribed by law", pursues one or more of the legitimate aims referred to in paragraph 2 of Article 10 and is "necessary in a democratic society" for achieving such an aim or aims.

1. "Prescribed by law"

28. The applicants submit that the injunction at issue was not prescribed by law. The interference was not foreseeable because the detailed, casuistic and confusing case-law of the Austrian courts on Section 1330 of the Civil Code leads to unpredictable results. In the present case, the Austrian courts qualified the statements in the impugned article as statements of fact although, in accordance with the case-law of the European Court of Human Rights, they should have qualified them as value judgments.

29. The Government for their part asserted that Section 1330 of the Austrian Civil Code formed the legal basis for the injunctions. This provision and the case-law developed by the Austrian courts was sufficiently accessible and rendered the application of that provision foreseeable.

30. Having regard to its case-law as to the requirements of clarity and foreseeability (Markt Intern Verlag GmbH and Klaus Beermann v. Germany judgment of 20 November 1989, Series A no. 165, p. 18, § 30; Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133 p. 20, § 29), and to the fact that considerable domestic case-law exists on that issue, the Court considers that the injunction was prescribed by law within the meaning of Article 10 § 2 of the Convention. The mere fact that the case-law of the Austrian courts or part of it on these issues was, in the applicants' view, not in conformity with the Court's case-law may be criticised but does not affect the issue of "forseeability". Accordingly, the Court is satisfied that the interference was "prescribed by law".

2. Legitimate aim

31. The applicants submit that the interference at issue did not pursue a legitimate aim as required by paragraph 2 of Article 10. Given that Mr Graff was a politician in respect of whom the limits of acceptable criticism are wider when acting in his public capacity, together with the fact that the article at issue did not concern Mr Graff's private life, the injunction did not pursue the interests of the protection of the reputation or rights of others, within the meaning of paragraph 2 of Article 10.

32. In the Government's view, there existed a legitimate aim, namely the protection of the reputation and rights of others.

33. The Court agrees with the Government and finds that the measure at issue pursued a legitimate aim, namely the protection of the reputation and rights of others, i.e. of Mr Graff. In the Court's view the applicants' arguments concern more the question whether the interference at issue was "necessary in a democratic society", a matter which the Court will examine below. The interference complained of, thus, had an aim that was legitimate under paragraph 2 of Article 10.

3. "Necessary in a democratic society"

(a) Arguments before the Court

(i) The applicant

34. The applicants submit that the injunction was not necessary in a democratic society. The impugned article was not intended to inform the public in detail of the specific offices held by Mr Graff, but to explain that, in the author's view, certain political functions were incompatible with professional activities outside politics. Although Mr Graff as chairman of Parliament's Legislative Committee did not *de jure* exercise any public powers, he had a decisive political influence on the making of laws. Since the party of which Mr Graff was a member was represented in the Government, his position was comparable to that of the former French Minister of Foreign Affairs. The criticism of Mr Graff's attitude, although harsh and polemical, did not constitute a gratuitous personal attack. Rather it constituted an objectively understandable evaluation of Mr Graff's attitude and the use of expressions like "immoral" or "disreputable" in that context were therefore appropriate.

(ii) The Government

35. The Government argued that the interference was proportionate to the legitimate aim and that the reasons invoked by the domestic courts were sufficient and relevant. In their view, the allegations in the impugned article, namely that Mr Graff held a government post, that the amendment of a law was enacted exclusively in the interests of one of Mr Graff's clients and that he had an immoral attitude, constituted statements of fact which were untrue, defamatory and unnecessarily harsh. These statements went far beyond the limits of acceptable criticism even if the plaintiff, as a politician, had to show a higher degree of tolerance to criticism. In the injunction proceedings the applicants had been given the opportunity to prove the truth of their statements, but failed to convince the national courts that the circumstances on which they had been based were essentially correct, although there was no reason to doubt the applicants' good faith in this respect. Moreover, the injunction was a proportionate measure, account

being taken of the fact that it was based on a decision by a civil court, and not a criminal conviction, and that it was not formulated in broad terms but confined to particular articles which were clearly defined in the judgment.

(iii) Mr Michael Graff

36. In his comments submitted under Article 36 § 2 of the Convention and Rule 61 § 3 of the Rules of Court, Mr Graff observed that although Article 10 § 2 mentioned the protection of the rights of others as one of the legitimate aims, this element has not been given sufficient attention in the Court's case-law.

There is no doubt that it must be admissible to a very large extent to express publicly a value judgment and that a politician must tolerate criticism to a greater extent than ordinary members of society. However, at the same time he must not be left without protection if, by means of untrue statements of fact, he is wrongly accused. The same applies if a value judgment is based on incorrect facts. Thus, the Austrian Supreme Court held that "a right to freedom of expression on the basis of wrong or unproven statements of fact did not exist".

The reproaches against him were based on an untrue statement of facts. It was untrue that the amendment to the Extended Pecuniary Limits Amendment Act created major advantages for his then client. It was obvious that any change in the legal provisions on enforcement of injunctions affected all competitors on the market including his client, in that it considerably increased fines for breaches of injunctions under the Unfair Competition Act. Although it was correct to require that a practising lawyer should give up his cabinet if he becomes a member of the Government, he had never been a member of the Government. Therefore, it had been clearly misleading when reference was made to Mr Dumas in the article who had given up his legal practice when becoming a Government minister.

Mr Graff concluded that the interference with the applicants' freedom of expression had been justified.

(b) The Court's assessment

(i) The relevant principles

37. According to the Court's case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. This freedom is subject to the exceptions set out in Article 10 § 2, which must however be

construed strictly (see Lehideux and Isorni v. France judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, p. 2886, § 52, and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

38. The test of "necessity in a democratic society" requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient. In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not however unlimited, but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10. The Court's task in exercising its supervisory function is not to take the place of the national authorities, but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their margin of appreciation. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see *Jerusalem v. Austria*, no. 26958/95, § 33, 27.2.2001, with further references).

39. The Court further recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or debates on questions of public interest (see *Sürek v. Turkey (No. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV). Moreover, the limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance. A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of the open discussion of political issues (see Lingens v. Austria judgment of 8 June 1986, Series A no. 103, p. 26, § 42; Oberschlick v. Austria judgment of 23 May 1991, Series A no. 204, p. 26, § 59).

40. The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (De Haes and Gijsels v. Belgium judgment of 24 February 1997, *Reports* 1997-I, pp. 233-234, § 37). Not only does it have the task of imparting such information and ideas, the public also has a right to receive them. Were it otherwise, the press would be unable to play

its vital role of "public watchdog" (Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239, p. 28, § 63; *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III).

41. Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (Oberschlick v. Austria judgment of 23 May 1991, Series A no. 204, p. 25, § 57). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (Prager and Oberschlick v. Austria judgment of 26 April 1995, Series A no. 313, p. 19, § 38).

42. In its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (Lingens v. Austria judgment, op. cit., p. 28, § 46; Oberschlick v. Austria judgment of 23 May 1991, Series A, no. 204, p. 27, § 63).

43. However, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (Jerusalem v. Austria, op. cit., § 43, with further references).

(ii) Application of the aforementioned principles to the instant case

44. In the present case the Court is called upon to examine the applicants' complaint that the injunction issued by the Austrian courts which obliged them to retract certain statements regarding Mr Graff and not to repeat them in the future interfered with their freedom of expression, in violation of Article 10 of the Convention.

45. The injunction against the applicants relate to the following three elements in the impugned article: (i) that Mr Graff "does not intend to comply with moral concepts existing in democracies all over the world, namely that one has to give up one's law firm if one becomes a member of the government (M.G. had never been a member of the government), and/or (ii) that he has taken part in the adoption of laws which have brought about advantages for his clients, and/or (iii) that he has been allowed to present his disreputable opinion on television". The Court will consider these elements in turn.

46. As regards the first element, the Court finds that the applicants' statement as quoted verbatim below did not explicitly state that Mr Graff was a member of the Austrian government. Moreover, this cannot justifiably be read into the context either. The impugned statement has been extracted from one paragraph which is closely followed by a second

paragraph, in the first sentence of which Mr Graff's exact function is spelled out explicitly.

47. The first paragraph is illustrating a general moral principle with a concrete example, *in casu* that of a French lawyer and later Minister, Roland Dumas, who was said to have behaved in an exemplary manner when "he took it for granted that he had to give up his law firm when he became a member of the [French] government." In the next sentences it is stated that:

> "In every democracy of the world this course of action is followed. Only Mr M.G., who is obviously thick-skinned, does not intend to comply with these moral concept."

48. The next paragraph describes in detail and accurately with reference to Mr Graff's public function the factual background for the concluding remark about him in the last sentence of the first paragraph. It reads:

> "It so happened that at the time when M.G. was presiding Parliament's Legislative Committee, a law was amended which brought about big advantages for the newspaper publishers whom M.G. represented as a lawyer. In order to ensure that in such cases no suspicion, not even one that has no objective justification can arise, there exists the wise rule of incompatibility; a lawyer is not allowed to take part in the adoption of laws which lead to advantages for his clients."

49. In these circumstances, the Court cannot endorse the Austrian courts' conclusion that the interference with the applicants' rights was justified because the applicants had published an incorrect statement of fact.

50. As regards the second element, namely the statement that Mr Graff had, as chairman of the Legislative Committee, participated in the passing of an amendment which had brought about big advantages for one of his clients, the Court notes that the test applied by the Commercial Court in the domestic proceedings that the applicants had to prove that the amendment to the Enforcement Act exclusively served the interests of Mr Graff's clients imposed an excessive burden on the applicant. The impugned statements did not imply that the amendment served the interests of Mr Graff's clients exclusively, only that it brought about considerable advantages for them. In these circumstances, the Court finds that there was sufficient factual basis for the value judgment (the second element) in the article. The latter represents, in the Court's opinion, a fair comment on an issue of general public interest. The same applies to the third element.

51. In any event, the Court does not find that the restriction imposed in the present case on freedom of expression was necessary in a democratic society: Mr Graff was a politician of importance, and the fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic law arises.

52. It is true that the applicants, on a slim factual basis, published harsh criticism in strong, polemical language. However, it must be remembered that Article 10 also protects information or ideas that offend, shock or disturb (the Handyside v. the United Kingdom judgment of

7 December 1976, Series A no. 24, p. 23, § 49). On balance, the Court finds

that the Austrian courts overstepped the margin of appreciation afforded to Member States and, in this respect, the measure at issue was disproportionate to the aim pursued.

53. The Court concludes, therefore, that there has been a breach of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

55. The applicants claimed 103,750.11 Austrian schillings [ATS] (7,539.81 euros [EUR]) corresponding to the costs awarded to Mr Graff by the Austrian courts.

56. The Government did not comment on this claim.

57. Having regard to the direct link between this item and the violation of Article 10 found by the Court, the applicants are entitled to recover the full amount of 7,539.81 EUR, and the Court therefore awards this sum.

B. Costs and expenses

58. The applicants claimed 205,094.84 ATS (14,904.82 EUR) for their costs and expenses in Austria. These items are to be taken into account as they were incurred to prevent or redress the breach found by the Court. The amount, on which the Government did not comment, appears reasonable to the Court and is therefore awarded in full.

59. For their costs and expenses before the Convention institutions, the applicants claimed 109,808.40 ATS (7,980.09 EUR).

60. The Government does not comment on the claim.

Having regard to the fact that no hearing has been held before it in the present case the Court considers this claim excessive. On the basis of the evidence in its possession, the observations of the participants in the proceedings and its own case-law, the Court considers it equitable to award 5,800 EUR under this head.

C. Interest payable pending the proceedings before the national courts and the Convention institutions

61. The applicants claimed that interest at a rate of 4% per annum should be added to their claim for costs awarded to the opposing party in the domestic proceedings from the date on which the Vienna Court of Appeal gave its judgment, i.e. 15 December 1994.

62. The Court finds that some pecuniary loss must have been occasioned by reason of the period that elapsed from the time when the above costs were incurred until the Court's award (see, for example, Darby v. Sweden judgment of 23 October 1990, Series A no. 187, p. 14, § 38; Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, p. 38, § 80 (d); *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 83, ECHR 1999-III). Deciding on an equitable basis and having regard to the statutory rate of interest in Austria, it awards the applicants 1,850 EUR with respect to their claim under this head.

D. Default interest

63. According to the information available to the Court, the statutory rate of interest applicable in Austria at the date of adoption of the present judgment is 4% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;

2. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following global amounts:
      (i) 7,539.81 EUR (seven thousand five hundred thirty nine euros and eighty one cents) in respect of pecuniary damage;
      (ii) 20,704.82 EUR (twenty thousand seven hundred and four euros and eighty two cents) in respect of costs and expenses;
      (iii) 1,850 EUR (one thousand eight hundred and fifty euros) for additional interest;
   (b) that simple interest at an annual rate of 4% shall be payable from the expiry of the above-mentioned three months until settlement;

3. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 26 February 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

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

FOURTH SECTION

CASE OF ERDOĞDU v. TURKEY

(Application no. 25723/94)

JUDGMENT

STRASBOURG

15 June 2000

In the case of Erdoğdu v. Turkey,

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

Mr A. PASTOR RIDRUEJO, *President*,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr J. HEDIGAN,
Mr M. PELLONPÄÄ,
Mrs S. BOTOUCHAROVA, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 25 May 2000,

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

PROCEDURE

1. The case was referred to the Court, in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the European Commission of Human Rights ("the Commission") on 3 June 1999.

2. The case originated in an application (no. 25723/94) against the Republic of Turkey lodged with the Commission under former Article 25 by Mr Ümit Erdoğdu ("the applicant"), who is a Turkish national, on 4 November 1994.

Relying on Articles 7, 9 and 10 of the Convention, the applicant complained of his conviction by a National Security Court on account of an article published in the bi-monthly periodical of which he was the editor.

3. The Commission declared the application admissible on 23 January 1998. In its report of 1 March 1999 (former Article 31 of the Convention)[1], in which it considered that the complaint, based on an infringement of the right to freedom of thought, should be examined under Article 10 of the Convention, it concluded, by twenty-five votes to one, that there had been an infringement of that Article and expressed the unanimous opinion that there had not been an infringement of Article 7.

4. Before the Court, the applicant was represented by Ms O.E. Ataman, a member of the Istanbul Bar.

5. On 7 July 1999 a panel of the Grand Chamber determined that the case should be decided by one of the Sections of the Court (Rule 100 § 1 of the Rules of Court). The President of the Court assigned the case to the Fourth Section. Subsequently Mr R. Türmen, the judge elected in respect of

1. *Note by the Registry*: The Commission's report is obtainable from the Registry.

Turkey, withdrew (Rule 28). The Turkish Government ("the Government") accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. On 4 October 1999 the Registrar received the memorial of the applicant, whom the President of the Chamber had given leave to use the Turkish language in the proceedings before the Court (Rule 34 § 3). On 14 December 1999, within the time-limit as extended by the President, the Government filed their memorial, to which the applicant replied on 13 January 2000.

7. After consulting the parties, the Chamber decided that it was not necessary to hold a hearing (Rule 59 § 2).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. At the material time Mr Ümit Erdoğdu, a journalist and writer, born in 1970, was the editor of the bi-monthly periodical *İşçilerin Sesi* ("The Workers' Voice"), which appears in Istanbul. In issue no. 40 of 2 October 1992, the periodical published an article written by a reader and entitled "*Kürt Sorunu Türk Sorunudur*" ("the Kurdish problem is a Turkish problem").

9. On 29 December 1992 the public prosecutor ("the prosecutor") at the Istanbul National Security Court ("the National Security Court") instituted criminal proceedings against A.E.A. and the applicant in their respective capacities as publisher and editor of the periodical.

The prosecutor noted that, in the article in question, "acts of separatist terrorism perpetrated in the south-east of the country were described as Kurdish National Resistance; part of the country, [thus] of the State of the Republic of Turkey, was called Kurdistan [and] an appeal was made for support for acts described as being of National Resistance". He charged the defendants with disseminating propaganda, through the medium of a periodical, against the territorial integrity of the State and the indivisible unity of the Turkish nation, contrary to section 8, paragraphs 1 and 2, of the Prevention of Terrorism Act (Law no. 3713) (see paragraph 21 below).

10. Having regard to the context from which the public prosecutor appears to have drawn his grounds for pressing charges (see paragraph 9 above and paragraph 12 below), the relevant passages of the article in question can be summarised as follows:

> "... The confrontations between Turks and Kurds in the various provinces are seen as foreseeable incidents; moreover, they are sometimes provoked by the security

forces, sometimes by fascist civilians and from time to time by the 'fundamentalists'. Consequently, the policy of favouring 'a military solution', which until now was implemented by means of a dirty war against [the guerrillas] has taken on a new dimension and has begun to be coupled with a destructive social policy leading to ethnic conflict in all regions of Turkey. It is very clear from this that the Kurdish problem is a general problem for Turkish society and not a problem experienced in Kurdistan and confined to within Kurdistan's borders ... Today, the Kurdish problem is a Middle Eastern problem ... The Republic of Turkey [“RT”], which is confronted with a Kurdish national movement within its own borders, clings firmly onto [the branch] of the 'Kurdish problem' and, in doing so, is rapidly sucked into the complex developments in the Middle East ... Will the daily repositioning of the pawns in the Middle East, the changes of alliance and the long-term imperialist plans ensure the success of those policies of the RT? Besides that, ... will the proportions reached by the Kurdish national movement allow it to be destroyed as a result of suffocation by a series of massacres? Clearly, nobody today can foresee answers to these questions ... Given the proposals for a 'political solution', expressed recently by the various spokespersons of the sovereign powers, the latter do not appear to have renounced the 'military solution'. Since the 'political solution' referred to is merely a sham political solution which denies the people of Kurdistan their free will ... In addition to that, the 'referendum' discussions, which have also been on the agenda for some time, are engaged in by the sovereign classes not in such a way as to achieve a solution to the problem, but to push it into a dead end. The envisaged 'referendum' does not in any way take as its basis the self-determination of the people of Kurdistan, but, on the contrary, outlines a 'solution' which is likely to unleash a rise in hostilities between the peoples ... Many of those on the left in Turkey have confined their perspective to preventing State terror and violations of human rights in Kurdistan, whereas another section are attempting to find their *raison d'être* in the shadow of the Kurdish national movement with a point of view which is far from likely to offer a democratic solution for all. It is clear that neither of those approaches can provide society with a credible means of solving the Kurdish problem. The revolutionary democratic powers must offer society as a whole a programme setting out the path necessary to achieve a democratic and liberal solution to the Kurdish problem. In order to make such a solution acceptable to the many different sectors of society, it is also necessary to implement an appropriate practice. Otherwise, the RT's warring policies will reach a point at which they can only engender circumstances condemning the whole country to chauvinism, State terror and darkness. Since the Kurdish problem is also a Turkish problem ... Moreover, in the ranks of the National Resistance Movement in Kurdistan, the current war is generally perceived as an 'international war'. Irrespective of what has been said in official declarations, the policy of favouring a military solution resembles, in practice, open warfare against the Kurdish people ... The sovereign powers, in their deliberate distortion [of things], make every effort to present this war as that of the Turks against the Kurds. And, alas!, the fact that the Turkish people have adopted a passive attitude towards the Kurdish problem renders that distortion credible. To perceive the war in Kurdistan as an 'international war' reinforces, among Turkish workers, chauvinistic and exclusive tendencies against the Kurds, while among the Kurdish youth in the West the same social atmosphere very spontaneously sparks off feelings of hostility towards Turkish society ... In actual fact, if one were to react in accordance with the requirements of an 'international war', what would affect Kurdish and Turkish workers would not be an 'international war', but a generalised social collapse. Faced with this increasingly marked tendency, even the leader of the Kurdish National Resistance Movement is failing to show himself to be sufficiently sensitive and prefers to keep silent. Clearly, such a dispute will benefit neither the Turkish people nor the Kurdish people. A dispute of this kind will merely be a

> confrontation between fundamentalists, lacking in any revolutionary dynamic, and will make the Turkish and Kurdish people vulnerable to attacks by the sovereign classes and imperialists. In order to curb this negative tendency, there is surely nothing more foolish than to suggest that the Kurdish people give up national resistance. On the contrary, defeating Kurdish national resistance will not in any way serve to eliminate the ethnic tensions beginning to appear in the West and will only set off a trend towards the establishment of lasting hostilities between the peoples. If there really is something to be achieved, it must be achieved in the West within the Turkish population. The only key to resolving the problem is for the Turkish people to perceive Kurdish national resistance as part of their [own] struggle for freedom and democracy ... activities designed to establish fraternity between peoples in the West constitute, in themselves, one of the most important means of the struggle against the current bonds of sovereignty ... The revolutionary movement in the West should henceforth 'intervene' in the Kurdish problem."

11. At a hearing on 19 April 1993 in the National Security Court, the applicant denied the charges against him. He submitted, among other things, that the article in question had been written by a reader residing in Germany, Y.A., and that he had published it because he had considered that it did not contain anything justifying censorship or anything revealing any criminal intention. The applicant argued that the article, considered as a whole, intended only to put forward the different approaches to the Kurdish problem, with the aim of suggesting democratic solutions to it.

12. On 20 December 1993 the National Security Court found the applicant and A.E.A. guilty of the offence as charged. It also ordered the copies of the issue of the review in which the impugned article had been published to be seized.

In its judgment, considering that it was not necessary to reproduce the passages judged to be in breach of the law, the National Security Court agreed with the prosecutor that the article in question referred to a part of Turkish territory which it called Kurdistan and condoned acts of violence by the PKK (Workers' Party of Kurdistan), which it portrayed as a national resistance movement against the State. Considering that the expressions and phrases used by Y.A., the author of the impugned article, undoubtedly showed an intention to transgress section 8 of Law no. 3713, the court concluded that, in publishing the article, the applicant and his co-defendant should be deemed to have knowingly conveyed propaganda designed to obtain support for the aim of destroying the territorial integrity of Turkey and the unity of the Turkish nation.

The National Security Court accordingly sentenced Mr Erdoğdu, in his capacity as editor, to six months' imprisonment and a fine of 50,000,000 Turkish liras (TRL).

13. The applicant appealed to the Court of Cassation. In a judgment of 4 May 1994, delivered after holding a hearing, the court dismissed his appeal, upholding the National Security Court's assessment of the evidence and its reasons for dismissing Mr Erdoğdu's defence.

14. On 10 January 1995 the applicant began paying the fine, which had been divided into monthly instalments of TRL 1,750,000.

15. On 30 October 1995, before the custodial sentence imposed on the applicant was enforced, Law no. 4126 came into force amending, *inter alia*, section 8 of Law no. 3713 (see paragraph 22 below). It modified the *mens rea* laid down by the former text of section 8 as to the commission of the act of propaganda in question. It also imposed a lighter custodial sentence for that offence, but increased the fines. In a transitional provision, Law no. 4126 also provided for an *ex officio* re-examination of earlier convictions imposed under section 8 (see paragraph 23 below).

16. Mr Erdoğdu applied to the National Security Court for a re-examination of his case on the merits. In his pleadings, his lawyer submitted:

> "As you know, section 8 of the Prevention of Terrorism Act has been amended by Law no. 4126 ... However, since the words 'irrespective of the methods used and the intention' ... have been repealed, the *mens rea* of the offence has been completely done away with, so as to fully alter the nature of the offence. The court is therefore legally obliged ... to set aside on grounds of nullity the sentence imposed on our client ... under former section 8 ... there will have to be a re-trial on the basis of the new definition of the offence."

He continued as follows:

> "Freedom of opinion must allow individuals unrestricted access to ideas and knowledge, to not be criticised for the opinions and convictions they hold, to express them freely, either alone or with others, through various media, such as speech, the press, drawings, cinema, theatre, etc., [and] to defend them, disseminate them to others and broadcast them. ... To put acts of terrorism and concepts of expression and statement of opinions in the same category is to restrict 'the free circulation of ideas' and the right and freedom 'of people to inform themselves'. ... What has been punished in our case is merely the 'risk of legitimising the ideas and acts of the PKK'. No one is obliged to think in accordance with official points of view and to produce ideas which conform to them. An idea which conflicts with the concept of nation cannot be considered as 'propaganda destroying the unity of the country or that of the nation'. Furthermore, criticisms of leaders for their acts contrary to democracy and freedoms resulting from erroneous policies or proposing solutions are not acts destructive of national unity ... Proposing economic, cultural and social solutions ... and a discussion of those solutions is a natural *sequitur* of the most basic right of persons to think and express their opinions ... Article 10 of the European Convention on Human Rights expresses that fact by stipulating that the public has a right to receive and impart information. Free political debate constitutes the essence of the concept of a democratic society fully implementing the Convention. A balance has to be struck between the aims of ensuring the national security and integrity of the country and the benefit brought by the free debate of political issues. The important role of the freedom of expression in a democratic society and above all the publication by the press of information and ideas of public interest can only be secured by means of a pluralistic society underwritten by the State. The least satisfactory method of achieving this is by a State monopoly imposing a maximum restriction on the freedom of speech."

17. In its judgment of 18 April 1996, the wording of which turned out to be based on the judgment of 20 December 1993 (see paragraph 12 above), the National Security Court finally sentenced Mr Erdoğdu to a fine of TRL 50,900,000, which it decided to defer in accordance with section 6 of Law no. 647 (see paragraph 25 below). The court stipulated that a new judgment had thus been delivered, and ordered that execution of the previous sentence be stopped.

18. On 24 April 1996 the applicant appealed to the Court of Cassation. In his notice of appeal, in which he reserved the right to enlarge on his submissions after service of the finalised judgement, the applicant complained that the National Security Court's judgment "was contrary to the principles both of domestic law and of international law and had been delivered without any examination of the defence" submitted in the instant case.

19. While those proceedings were still pending, Law no. 4304 was promulgated on 4 August 1997. That Law provided for the deferment of judgment and of execution of sentence in respect of offences committed by editors before 12 July 1997 (see paragraph 24 below).

Having regard to that new Law, on 17 November 1997 the Court of Cassation set the judgment aside and remitted the case to the lower court.

20. Lastly, in a judgment of 10 December 1997, the National Security Court decided, pursuant to section 1(3) of Law no. 4304, to defer judgment against Mr Erdoğdu, but to proceed to delivery if, within three years from the date of deferment, Mr Erdoğdu was convicted of an intentional offence in his capacity as editor, and, lastly, that the criminal proceedings against him would be discontinued if no similar conviction was made before the expiry of that three-year period.

II. RELEVANT DOMESTIC LAW

A. The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991)[1]

21. Before Law no. 4126 of 27 October 1995 came into force, section 8 of Law no. 3713 provided:

Section 8[2]

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity

1. This Law, promulgated with a view to preventing acts of terrorism, refers to a number of offences defined in the Criminal Code which it describes as acts "of terrorism" or acts "perpetrated for the purposes of terrorism" and to which it applies.
2. As modified by a judgment of the Constitutional Court on 31 March 1992.

of the nation are prohibited, irrespective of the methods used and the intention. Any person who engages in such an activity shall be sentenced to not less than two and not more than five years' imprisonment and a fine of from fifty million to one hundred million Turkish liras.

Where the act of propaganda, deemed to be an offence for the purposes of the above paragraph, is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly. However, the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment."

22. Since being amended by Law no. 4126, that section reads as follows:

Section 8

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited. Any person who engages in such an activity shall be sentenced to not less than one and not more than three years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras. The penalty imposed on a re-offender may not be commuted to a fine.

Where the act of propaganda, deemed to be an offence for the purposes of the first paragraph, is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly. However, the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment.

Where the act of propaganda, deemed to be an offence for the purposes of the first paragraph, is committed through the medium of printed matter or by means of mass communication other than periodicals within the meaning of the second paragraph, those responsible and the owners of the means of mass communication shall be sentenced to not less than six months' and not more than two years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras ...

..."

B. Law no. 4126 of 27 October 1995

23. The following amendment was made to Law no. 3713 following the enactment of Law no. 4126:

Transitional provision relating to section 2

"In the month following the entry into force of the present Law, the court which has given judgment shall re-examine the case of a person convicted pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) and, in accordance with the amendment ... to section 8 of Law no. 3713, shall reconsider the term of imprisonment imposed on that person and decide whether he should be allowed the benefit of sections ... and 6[1] of Law no. 647 of 13 July 1965."

C. Law no. 4304 of 14 August 1997 on the deferment of judgment and of execution of sentences in respect of offences committed by editors before 12 July 1997

24. The following provisions are applicable to sentences in respect of offences under the Press Act:

Section 1

"The execution of sentences passed on those who were convicted under section 16 of the Press Act (Law no. 5680) or other laws as editors for offences committed before 12 July 1997 shall be deferred.

The provision in the first paragraph shall also apply to editors who are already serving their sentences.

The institution of criminal proceedings or delivery of final judgments shall be deferred where no proceedings against the editor have yet been brought, or where a preliminary investigation has been commenced but criminal proceedings have not been instituted, or where the final judicial investigation has been commenced but judgment has not yet been delivered, or where the judgment has still not become final."

Section 2

"If an editor who has benefited under the provisions of the first paragraph of section 1 is convicted as an editor for committing an intentional offence within three years of the date of deferment, he must serve the entirety of the suspended sentence.

...

Where there has been a deferment, criminal proceedings shall be instituted or judgment delivered if an editor is convicted as such for committing an intentional offence within three years of the date of deferment.

Any conviction as an editor for an offence committed before 12 July 1997 shall be deemed a nullity if the aforesaid period of three years expires without any further conviction for an intentional offence. Similarly, if no criminal proceedings have been

1. This provision concerns reprieves (see paragraph 25 below).

instituted, it shall no longer be possible to bring any, and, if any have been instituted, they shall be discontinued."

D. The Execution of Sentences Act (Law no. 647 of 13 July 1965)

25. The relevant parts of section 6 of the Execution of Sentences Act 1965 provide:

Section 6(1)

"Where a person is ... sentenced to a fine ... and/or up to one year's imprisonment ... for an offence which he has committed, execution of the sentence shall be deferred if the court considers that, having regard to his criminal record and [his] tendency to break the law, such deferment will suffice to deter him from reoffending."

E. Article 322 of the Code of Criminal Procedure

26. Paragraphs 5 and 6 of Article 322 of the Code of Criminal Procedure govern applications for rectification of judgment:

"5. Applications for rectification of a judgment of the Criminal Divisions or of the Court of Cassation sitting as a full criminal court shall be admissible only where a ground relied on in the notice ... of appeal ... and/or errors or omissions affecting the judgment on the merits have not been taken into account by the Court of Cassation ...

6. The Principal Public Prosecutor alone shall have power to request rectification of a judgment. ..."

The Principal Public Prosecutor can use the remedy in question either of his own motion or at the request of the public prosecutor at the court of first instance and/or the party adversely affected by the Court of Cassation's judgment.

THE LAW

I. SCOPE OF THE ISSUES BEFORE THE COURT

27. In his application to the Commission, Mr Erdoğdu submitted, *inter alia*, that his conviction amounted to a violation of Articles 7 and 9 of the Convention (see paragraph 2 above). Before the Court, however, he made no reference to Article 9 and referred only once to Article 7, and then in support of his principal complaint based on Article 10. In the circumstances, he cannot be considered to have maintained either of those complaints before the Court, which can see no reason to examine them of its own

motion (see, *mutatis mutandis*, *Öztürk v. Turkey* [GC], no. 22479/93, § 40, ECHR 1999-VI).

The Court's examination will accordingly be confined to the complaint under Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

28. The applicant requested the Court to hold that his conviction under section 8 of Law no. 3713 had violated Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

29. The Government, for their part, requested the Court to declare the application inadmissible on the ground that domestic remedies had not been exhausted and, in the alternative, to find that Mr Erdoğdu's conviction did not reveal any violation of Article 10 of the Convention.

A. The Government's preliminary objection

30. The Government argued, on two grounds, that domestic remedies had not been exhausted.

1. Failure to apply to the Principal Public Prosecutor at the Court of Cassation

31. The Government submitted that the applicant had failed to apply to the Principal Public Prosecutor at the Court of Cassation under Article 322 § 5 of the Code of Criminal Procedure (see paragraph 13 above) to request rectification of the Court of Cassation's judgment of 4 May 1994 (see paragraph 26 above).

32. The Court notes at the outset that, in their written observations of 28 August 1995 on the admissibility of the application, the Government had indeed referred to that remedy without, however, submitting that it had not been used.

Be that as it may, even supposing that they were not to be estopped from relying on that ground of their objection, the Court considers it baseless for the following reasons.

33. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant's complaint and offered reasonable prospects of success (see *V. v. the United Kingdom* [GC], no. 24888/94, § 57, ECHR 1999-IX).

34. In that connection, it points out that an application for rectification of a judgment as provided for in Turkish law is a special remedy against decisions of the Court of Cassation by which that court can be requested to review its own judgments where it is alleged that it has failed to rule on a ground which had been submitted to it and/or an error of law by the trial court which is likely to be decisive for the outcome of the trial.

Under Article 322 of the Code of Criminal Procedure, only the Principal Public Prosecutor can use that remedy, either of his own motion or at the request of the convicted person. It is not therefore a domestic remedy directly accessible to persons triable in the courts (see the Çıraklar v. Turkey judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VII, pp. 3070-71, §§ 29-32, and also *Kucherenko v. Ukraine* (dec.), no. 41974/98, 4 May 1999, unreported).

It follows that in the present case the applicant was not required, under Article 35 of the Convention, to lodge an application with the Principal Public Prosecutor in order to exhaust domestic remedies.

Consequently, that ground of the objection cannot be upheld.

2. Failure to rely on the provisions of the Convention

35. As they had before the Commission, the Government also maintained that Mr Erdoğdu had not at any stage in the proceedings in the national courts relied – even in substance – on the provisions of the Convention and/or the rights and freedoms on which he had relied before the Commission and on which he now relied before the Court. The Court could not therefore deal with the instant case if it were to be consistent with its conclusions in the Ahmet Sadık v. Greece judgment of 15 November 1996 (*Reports* 1996-V).

36. The applicant replied that, in his notice of appeal lodged in order to have his case re-examined on the merits (see paragraph 16 above), his lawyer had expressly referred to a contradiction between the charge laid against him and the exercise of the freedoms of expression and information.

37. The Commission had dismissed that objection at the admissibility stage on the ground, *inter alia*, that the Government had not provided it with any example of a case in which a conviction under section 8 of Law no. 3713 had been set aside following the submission of a ground of appeal based on Article 10 of the Convention and/or equivalent provisions of domestic law.

38. The Court reiterates that the rule of exhaustion set forth in Article 35 § 1 of the Convention must be applied "with some degree of flexibility and without excessive formalism"; it is sufficient that the complaints intended to be made subsequently in Strasbourg should have been raised, "at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law", before the national authorities (see, among other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I, and *Civet v. France* [GC], no. 29340/95, § 41, ECHR 1999-VI).

39. In the present case the Court is prepared to admit that during the initial phase of his trial (see paragraphs 11-13 above), Mr Erdoğdu merely defended himself against the charge of disseminating propaganda harmful to the State, contrary to section 8 of Law no. 3713, putting forward arguments which did not relate to the freedom of expression.

The Court observes, however, that in his application for a re-examination of the merits of his client's case, Mr Erdoğdu's lawyer criticised the conviction in question, not only from the point of view of domestic law, but also of Article 10 of the Convention. In doing so, he referred, moreover, to several principles established by relevant judgments of the Court, from which he even quoted long passages (see paragraph 16 above).

40. Thus, contrary to its findings in the case of Ahmet Sadık (judgment cited above, p. 1654, §§ 31-33), the Court cannot hold that in the instant case the Turkish courts – when requested to re-examine Mr Erdoğdu's case under Law no. 4126 (see paragraphs 15-18 and 23 above) – did not benefit from the opportunity which the exhaustion of domestic remedies rule precisely affords to the Contracting States, namely to prevent or redress the violations alleged against them before those allegations are submitted to the Court (see, among other authorities, the judgments referred to in paragraph 38 above).

It follows that this ground of the objection cannot be upheld either.

41. In conclusion, the Court dismisses the Government's preliminary objection.

B. The merits of the complaint

1. Existence of an interference

42. The Court notes that it is clear, and this has not been disputed, that there has been an "interference" with the applicant's exercise of his freedom of expression on account of his conviction.

2. Justification of the interference

43. The above-mentioned interference infringed Article 10 unless it satisfied the requirements of paragraph 2 of that provision. It thus remains to be determined whether the interference was "prescribed by law", pursued one or more legitimate aims as defined in that paragraph and was "necessary in a democratic society" to achieve them.

(a) "Prescribed by law"

44. The applicant submitted, in substance, that section 8 of the Prevention of Terrorism Act (Law no. 3713) did not satisfy this requirement. In his submission, by failing to define with sufficient clarity the constituent elements of the offence defined as such, that section conferred a wide margin of appreciation on the National Security Courts, which, in practice, used it to muzzle the press and suppress the dissemination of opinions and thoughts which they considered to deviate from "official ideology". The applicant adduced his own conviction as proof of his submissions, arguing that the reason given for his conviction was a so-called "risk of legitimising the acts and beliefs of the PKK", without any evidence being adduced as to how the impugned article could generate violence and/or was likely to effectively harm the "unity of the country".

45. The Government did not comment on this point.

46. The Commission, for its part, considered that section 8 of Law no. 3713 provided a sufficient basis for the applicant's conviction.

47. The Court reiterates that it has already examined, from the standpoint of Articles 7 and 10 § 2 of the Convention, the issue of "legality" and "foreseeability" of a conviction imposed under section 8 of Law no. 3713 and held that it satisfied the requirements set forth in the two provisions of the Convention referred to above (*Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, §§ 40, 43 and 49, ECHR 1999-IV; for the general principles on the subject see, *inter alia*, *Öztürk* cited above, §§ 54-55, and *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 31, ECHR 1999-VIII).

In the instant case the Court does not see any particular reason to depart from that finding and considers, like the Commission, that since the applicant's conviction was based on section 8 of Law no. 3713, the resulting

interference with his right to freedom of expression can be considered to be "prescribed by law".

(b) Legitimate aim

48. The applicant has not specifically disputed this aim.

49. In the Commission's view, with which the Government agreed, Mr Erdoğdu's conviction was part of the authorities' efforts to combat terrorist activities and to maintain national security and public safety, which are legitimate aims under Article 10 § 2 of the Convention.

50. Having regard to the sensitivity of the fight against terrorism and to the need for the authorities to be alert to acts capable of fuelling additional violence and to the grounds set out in the judgments of the National Security Court of 20 December 1993 and 18 April 1996 (see paragraphs 12 and 17 above), the Court considers that the interference in question pursued an aim which was compatible with Article 10 § 2: the prevention of disorder or crime.

(c) "Necessary in a democratic society"

51. The remaining issue before the Court is whether Mr Erdoğdu's conviction was "necessary in a democratic society" to achieve that aim.

In that connection the Court reiterates first of all the fundamental principles underlying its case-law on the subject (see, among other authorities, *Fressoz and Roire* cited above, § 45; *Öztürk* cited above, § 64; *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII; and the most recent authority, *News Verlags GmbH & CoKG v. Austria*, no. 31457/96, § 52, ECHR 2000-I).

(i) General principles

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

In a case concerning the press, such as this one, any restriction on the exercise of the freedom of expression calls for an examination taking into account the essential role of the press in ensuring the proper functioning of political democracy. While the press must not overstep the boundaries set, *inter alia*, for the protection of vital interests of the State such as the prevention of disorder or crime, it is nevertheless incumbent on the press, in accordance with its duties and responsibilities, to impart information and ideas on all matters of public interest, in particular political questions,

including divisive ones (see also *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 59, ECHR 1999-IV, and *Sürek v. Turkey (no. 3)* [GC], no. 24735/94, § 38, 8 July 1999, unreported). Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. In that connection, press freedom also covers possible recourse to a degree of exaggeration, or even provocation.

53. The adjective "necessary", within the meaning of Article 10 § 2, implies a "pressing social need". In general, the "need" for an interference with the exercise of the freedom of expression must be convincingly established. Admittedly, it is first of all for the national authorities to assess whether there is such a need capable of justifying that interference and, to that end, they enjoy a certain margin of appreciation. However, the margin of appreciation is coupled with supervision by the Court both of the law and the decisions applying the law and, particularly where the press is concerned, it is circumscribed by the interests of a democratic society in ensuring and maintaining journalistic freedom.

When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to check, in the final instance, whether their decisions, thus "the restriction" or "the penalty" constituting the interference, can be reconciled with the freedom of expression guaranteed by Article 10.

(ii) Application of the above principles to the present case

(α) Submissions to the Court

54. The Commission observed, *inter alia*, that the impugned article tended to analyse the Kurdish question from a Marxist standpoint. Criticising the Turkish State for having engaged in a war against the Kurds, the article accused particularly the dominant classes of society of artificially maintaining a conflict between the Kurds and other Turkish citizens. That, according to the Commission, was why the article appealed to the Turkish people, including Turks living abroad, to join the Kurdish people's struggle for liberation and democracy. Reiterating that people who express an opinion in public on sensitive political issues should guard against condoning "unlawful political violence", the Commission considered, however, that in the case in question the author had expressed himself in relatively moderate terms, without associating himself with the use of violence in the context of Kurdish separatism. It concluded, accordingly, that the applicant's conviction amounted to a form of censorship which was not permissible under Article 10 § 2 of the Convention.

55. The Government first criticised the Commission for failing to perceive the hidden aim of the impugned article and to take account of the

background against which it had been written at the material time. Referring to the Court's conclusions in *Sürek (no. 3)* cited above, they drew attention to the fact that the article had been published on 2 October 1992, during a period in which acts of violence by the PKK had been raging in south-east Turkey. From 1984 to May 1996 that conflict had claimed the lives of 4,036 civilians and 3,884 members of the security forces, and more than 10,000 people had been left injured. In 1999 the number of victims of clashes in the region had amounted to some 30,000.

56. In that connection, the Government questioned how the Commission could have been satisfied that the article in question did not incite to violence without even having studied on the spot the reaction of citizens to comments such as those made by Y.A.; in their opinion, that merely illustrated the lengths to which it had gone to attribute a peaceful dimension to a text which could hardly be described as such. When Y.A. asserted that "the Republic of Turkey, which is confronted with a Kurdish national movement within its own borders, clings firmly onto [the branch] of the 'Kurdish problem' and, in doing so, is rapidly sucked into the complex developments in the Middle East", he explicitly compared the armed actions of the PKK to a Kurdish liberation movement. Similarly, where he contended that "there is surely nothing more foolish than to suggest that the Kurdish people give up national resistance", he elevated such violence to the level of national resistance of an ethnic sector of the Turkish population; even the comment "the confrontations between Turks and Kurds in the various provinces are seen as foreseeable incidents" is too allusive, and therefore provocative, given that in Turkey the only confrontations are between the PKK terrorists and the security forces, and not between society's various groups. The Government also questioned whether the assertion that "the same social atmosphere very spontaneously sparks off feelings of hostility towards Turkish society" was not likely to aggravate the situation in other parts of the country and increase the violence there.

The Government also pointed out that in the text in question the word "war" occurred eighteen times, the expression "armed conflict" four times, the word "massacre" six times, the words "violence" and "fascist" twice and the word "carnage" once. They referred to *Sürek (no. 1)* cited above to assert that such language amounted to "... an appeal for bloody revenge by [stirring up] base emotions and [hardening] already embedded prejudices which have manifested themselves in deadly violence", was "capable of inciting to further violence in the region by instilling a deep-seated and irrational hatred" and was of a kind to incite people, particularly young people, to join the PKK ranks despite their better judgment.

57. In short, the Government considered that the impugned article did not propose a peaceful solution, but was limited to advocating the methods of the PKK in terms of an illusory and imaginary national movement. The

Commission was therefore wrong to construe the applicant's conviction as "censorship".

In that connection, they referred to a document entitled "*Doğu Raporu*" (Report on the East) and prepared by eminent academics at the request of the Union of Chambers and Stock Exchanges of Turkey. That report was entirely devoted to an analysis of the problems in the east of the country on the basis of which it made suggestions, such as the establishment of a Kurdish Federation or the proclamation of Kurdish as a second official language. Notwithstanding the conflict between such suggestions and State policy in the field, no proceedings had been instituted against the authors of that report. That went to show that in Turkey anyone making an objective contribution to the political debate which did not incite to violence was not liable to be punished.

58. The Government submitted, further, that the interference in question had been proportionate for the purposes of Article 10 § 2 because judgment against the applicant had ultimately been deferred. The interference could be deemed to have met a pressing social need and, consequently, to have been necessary in a democratic society.

59. The applicant, for his part, who agreed in the main with the Commission's conclusions, submitted, in particular, that he had published the impugned article on account of his own democratic convictions, satisfied as he was, moreover, that the article merely expressed objective opinions on the possible solutions to the Kurdish problem, without in any way intending to condone PKK separatism. In associating those opinions with terrorist crime, the National Security Court had not only hindered the free discussion of such issues and criticism of the official ideology, but had also flouted the principal function of the press, namely to communicate to the public information which, since it was a subject of current affairs, they were entitled to receive.

In the applicant's submission, the aim of section of 8 of Law no. 3713 was not to penalise "the commendation of acts of terrorist organisations", but "thinking" itself. On that point he considered that neither the amendment introduced by Law no. 4126, nor the adoption of Law no. 4304 of 12 July 1997, had eradicated the concept of criminal thinking from the Turkish landscape, and, as far as he personally was concerned, he emphasised the fact that the deferment of judgment in accordance with Law no. 4304 carried the threat of a conviction if he reoffended within three years from the date on which judgment was deferred.

(β) The Court's assessment

60. The Court must consider the impugned "interference" in the light of the case as a whole, including the contents of the article in question and the background against which it was published, in order to determine whether it was "proportionate to the legitimate aims pursued" and whether the reasons

adduced by the national authorities to justify it are “relevant and sufficient” (see, among other authorities, *Fressoz and Roire* cited above, ibid.).

61. In the instant case the applicant was penalised for disseminating separatist propaganda through the medium of the bi-monthly periodical, *İşçilerin Sesi*, in which he had published an article sent in by a reader, Y.A. The Court observes that, in his article, Y.A. attempts to give an explanation for the developments in south-east Turkey and expresses his point of view on the repercussions both inside and outside the country. In Y.A.'s view, the circumstances “inciting to ethnic conflict” had sown the idea in people's minds that the conflict in the south-east was an “international war” pitting Turks against Kurds. On the basis of that finding, he draws the reader's attention to the awakening “of chauvinistic and exclusive tendencies” among “Turkish workers” and “hostile sentiments towards Turkish society” among “the Kurdish youth in the West”. Deploring the fact that the so-called official initiatives for finding a “political solution” acknowledge neither the right to “self-determination of the people of Kurdistan,” nor the “free will” of those people, Y.A. condemns the “military solution” adopted by the State, which consists in perpetrating “a dirty war against guerrillas,” or even “an open war against the Kurdish people”.

Although Y.A. identifies a “Kurdish National Movement”, a “national resistance in Kurdistan”, his main argument appears to be, however, that “the Kurdish problem is a general problem of Turkish society” to which the solution would be for “the Turkish people to perceive Kurdish national resistance as part of their [own] struggle for freedom and democracy”. Thus, given the inappropriateness of the solutions proposed by left-wing circles in Turkey, he arrives at the conclusion that “the revolutionary movement in the West should henceforth 'intervene' in the Kurdish problem”.

In the Court's view, it is clear that the article in question is written in the form of a political speech, both in its content and the terms used.

62. Having regard to those considerations, the Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest. Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities, but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the relevant State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks.

Admittedly, where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression (see, among many other authorities, *Öztürk* cited above, § 66). The Court also acknowledges that in situations of conflict and tension particular caution is called for on the part of the national authorities when consideration is being given to the publication of opinions which advocate recourse to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence (see, *mutatis mutandis*, *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, § 63, 8 July 1999, unreported).

63. In that connection, the Court notes at the outset that the article in question was published against the background of the situation prevailing in south-east Anatolia and the Kurdish problem, which have been arousing major controversies for years. The Court also acknowledges that the article in question does not amount to a "neutral" analysis of that situation and/or that problem: through his article, Y.A. intended, albeit indirectly, to stigmatise both the dominant political ideology of the State and the conduct of the Turkish authorities in the area.

64. The Istanbul National Security Court held, twice, that the impugned article contained comments which were harmful to the territorial integrity of the State because it referred to a part of the country as though it "belonged to Kurdistan," advocated the dismantling of the nation and glorified the acts of the PKK as a national resistance movement (see paragraphs 12 and 17 above). As the Court has already found: "... although these are no doubt relevant considerations, they cannot of their own be deemed sufficient to regard the interference as necessary within the meaning of Article 10 § 2" (see, *mutatis mutandis*, *Sürek (no. 3)* cited above, § 40).

65. Since the above-mentioned judgments do not provide any other element requiring consideration (see paragraph 12 above), it remains for the Court to study attentively the passages of the impugned article which the Government have highlighted and the terms of which they disapprove. In the Government's submission, those passages should lead the Court to concede – as it did in the *Sürek (no. 1)* case – that the author of the article "associated himself with the use of separatist violence" by the PKK and that in publishing it Mr Erdoğdu disseminated propaganda for that violence to the detriment of the State.

66. In that connection, the Court observes first of all that the four sentences to which the Government referred in their memorial (see paragraph 56 above) amount to personal and subjective findings which can, at the very most, be considered to reflect Y.A.'s strong opposition to the official policy implemented in the South East. When these passages are examined in context and in relation to the arguments drawn from them by the author, it does not in any way appear that he associated himself with the

PKK or that he called for the use of violence with a view to serving that organisation. With regard to that organisation, the Court notes two passages in which Y.A. appears to be referring to the PKK: "... in the ranks of the national resistance movement in Kurdistan, the current war is generally perceived as an 'international war' ... Faced with this increasingly marked tendency, even the leader of the Kurdish National Resistance Movement is failing to show himself to be sufficiently sensitive and prefers to keep silent"; however, the Court notes that, before making those assertions, Y.A. predicts that "if one were to react in accordance with the requirements of an 'international war', what would affect Kurdish and Turkish workers would be ... a general social collapse" and that he subsequently clearly indicates his disagreement with the mentality thus described: "Clearly, such a dispute will benefit neither the Turkish people nor the Kurdish people." The Court interprets all the foregoing comments only as criticism levelled at the PKK.

67. That being so, the Court notes, as the Government pointed out, the use in the article of words such as "war", "conflict", "armed conflict", "massacre", "violence" and "fascist". It observes that the first three terms – apart from the two places in which they refer to the Gulf War – refer to the confrontations relating to the fight against terrorism and the consequent social unrest; the word "fascist" refers to civilians or fundamentalist powers; the term "massacre" is used to stigmatise the domestic policies of the Turkish authorities, and lastly, the word "violence" appears in its usual meaning.

While the Court is prepared to admit that the use of such terms confers a certain virulence on the political criticism expressed by the author, it considers, however, that the impugned article can be clearly distinguished, in respect of the tone used, from the articles examined in the case of *Sürek (no. 1)*, since, in the instant case, the Court does not find anything which can be construed "as an appeal for bloody revenge" and/or to communicate to the reader "the message that recourse to violence is a necessary and justified measure of self-defence" in the face of the Turkish State (see the judgment cited above, §§ 11 and 62).

68. Neither does the Court agree with the Commission's interpretation to the effect that the article appeals to the Turkish people, including Turks living abroad, to join the Kurdish people's struggle for liberation and democracy. It notes that, in this context, the only relevant passages appear to be the following: "The only key to resolving the problem is for the Turkish people to perceive Kurdish national resistance as part of their [own] struggle for freedom and democracy ... activities designed to establish fraternity between peoples in the West constitute, in themselves, one of the most important means of the struggle against the current bonds of sovereignty ... The revolutionary movement in the West should henceforth 'intervene' in the Kurdish problem." Those arguments, far from supporting an interpretation of the kind made by the Commission, constitute, in the

Court's view, the very essence of the solution recommended by the author to the issues which he considers (see paragraph 61 above).

69. Admittedly, as the Government have maintained, the Court cannot exclude the possibility that such an article might conceal objectives and intentions which are at variance with the ones it proclaims; the Court is also aware, naturally, of the authorities' preoccupations with regard to the fight against terrorism and acknowledges that it was for the domestic courts to determine whether the applicant had published the impugned article with a reprehensible aim (see, *mutatis mutandis*, *Öztürk* cited above, §§ 68-69). However, as there is no evidence of any concrete action which belies it, the Court sees no reason to doubt the sincerity of the aim pursued by Mr Erdoğdu in publishing the article by Y.A. (see paragraphs 11 and 59 above).

Nor is the Court convinced by the argument that the publication could in the long term result in consequences which would be very harmful in terms of the prevention of disorder and crime in Turkey or that young people would be incited by the publication "to join the ranks of the PKK against their better judgment", as the Government maintain. Contrary to its findings in the case of *Sürek (no. 3)*, to which the Government referred, the Court does not perceive anything in the article which would allow it to conclude that Mr Erdoğdu had in any way been responsible for the increase of security problems in south-east Anatolia or elsewhere in the country (see, *mutatis mutandis*, the judgment cited above, § 40).

70. In short, the Court concludes that the opinions expressed in the article, however categorical or acerbic they may be, could not be said to incite to violence; nor could they be construed as liable to do so.

71. Where a publication cannot be categorised as inciting to violence, Contracting States cannot with reference to the prevention of disorder or crime restrict the right of the public to be informed by bringing the weight of the criminal law to bear on the media (see *Sürek and Özdemir* cited above, ibid.; see paragraphs 51 and 61 above).

It thus appears that, in concluding that the applicant had provided the author of the article in question with a medium for stirring up violence and hatred, the national authorities failed to have sufficient regard to the freedom of the press and to the public's right to be informed of a different perspective on the Kurdish problem, irrespective of how unpalatable that perspective may be for them (see, among other authorities, *Başkaya and Okçuoğlu* cited above, § 65). The Government have failed to prove to the Court that there was an overriding requirement which made the interference with the exercise of Mr Erdoğdu's journalistic freedom compatible with Article 10 of the Convention.

72. For the rest, the Court is not convinced by the Government's submission that judgment against the applicant was ultimately deferred by the National Security Court (see paragraph 58 above). The Court

acknowledges that the moderateness of measures amounting to an interference is a factor to be taken into consideration in assessing the proportionateness of such measures to the aim they pursue. However, a decision or measure favourable to an applicant is not sufficient in principle to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, among other authorities, *Öztürk* cited above, § 73).

In the instant case, the Court notes that the applicant only stood to benefit from deferment of the judgment if for three years from the date of the measure being granted he did not commit any other intentional offence in his capacity as editor (see paragraphs 20 and 24 above); otherwise, Mr Erdoğdu was liable, at the very least, to be tried and, in all probability, to be sentenced to a fine (see paragraph 17 above) in addition to the one he had had to pay previously (see paragraphs 12 and 14 above). In the Court's opinion, that condition amounts to a prohibition which had the effect of censoring the applicant's very profession and was unreasonable in scope since the measure compelled Mr Erdoğdu to refrain from publishing anything likely to be considered to be contrary to the interests of the State. Since there is no certainty in this area, the restriction indirectly imposed on the applicant substantially reduced his ability to put forward in public views on, among other things, the Kurdish problem, which have their place in a public debate. As the Court has already stressed (see paragraph 52 above), it would be excessive to limit in that way freedom of journalistic expression to generally accepted ideas that are favourably received or regarded as inoffensive or as a matter of indifference (see also, *mutatis mutandis*, the Hertel v. Switzerland judgment of 25 August 1998, *Reports* 1998-VI, pp. 2331-32, § 50).

73. Having regard to the foregoing, the measure in question cannot be construed as "necessary in a democratic society". The Court therefore concludes that there has been a violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. The applicant claimed compensation for both the pecuniary and non-pecuniary damage which he alleged that he had sustained, and reimbursement of the costs and expenses incurred in the proceedings before the Strasbourg institutions. He relied on Article 41 of the Convention, which provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

75. The applicant explained that his trial had resulted in the interruption of his university studies and delayed by one year and four months his entry into professional life. For fear of being imprisoned at any time on account of the conviction pronounced on 4 May 1994, he had, he alleged, been unable to resume his electronic engineering degree until October 1995, following the entry into force of Law no. 4126, but had nonetheless continued to pay his university fees during that time. In support of those claims, he produced, among other things, copies of two salary slips showing his gross salary as an engineer for March 1997 (62,737,010 Turkish liras (TRL)) and September 1998 (TRL 205,548,490). He also produced copies of receipts for his university fees in a total sum of TRL 9,241,000. He further considered himself entitled to claim reimbursement of TRL 50,000,000 which he had paid by way of a fine and default interest.

Overall, he claimed an aggregate sum of 20,000 French francs (FRF) in respect of pecuniary damage.

76. The Government replied that the claim was inflated and requested the Court not to allow the applicant's claims. They drew attention first to the fact that since the applicant had enrolled at the Engineering Faculty in 1987, he should have finished his degree in 1991, or at the latest in 1992. At that time, however, he had appeared to prefer earning his living as an editor to concentrating on his studies. Additionally, the applicant had made a mistake in the calculation of his alleged loss of earnings. Lastly, as far as the fine was concerned, the Government submitted that a capital sum of TRL 50,000,000, even if invested on the stock market, did not in any circumstances justify the amount claimed by the applicant.

77. The Court cannot allow the applicant's claims relating to loss of earnings and expenses incurred as a result of the interruption of his university degree, for want of a sufficient causal link between the infringement of his right to freedom of expression and the loss alleged.

However, the Court notes that the fine imposed on the applicant by the judgment of 20 December 1993 (see paragraph 12 above) was a direct consequence of the infringement of Article 10 of the Convention. It is therefore fitting to order that the applicant be fully reimbursed in the sum he has paid. Although the applicant has produced receipts for only ten monthly instalments, that is TRL 17,500,000, the Court considers that it can base its calculation on the sum of TRL 50,000,000 since the Government have not referred to any failure to make payment. In conclusion, ruling on an equitable basis and on all the information before it, particularly the

exchange rates in force at the time of payment of each of the TRL 1,750,000 monthly instalments, the Court awards the applicant FRF 6,000 for pecuniary damage.

B. Non-pecuniary damage

78. The applicant also claimed FRF 20,000 for non-pecuniary damage. He stressed that during his trial he had been branded a "terrorist" and that his relations with his family and his circle of friends had considerably deteriorated as a result. Besides that, his conviction had forced him to quit his post as editor and, consequently, to take on temporary jobs in order to support his family, with his wife's help. The circumstances had also aroused feelings of insecurity and anxiety in him on account of the risk of permanently losing his student status pursuant to the rules of procedure governing institutions of tertiary education, which provide that students shall be stripped of their student status if convicted of an offence against the State. In addition to that, his conviction had resulted, albeit temporarily, in the loss of certain public-law rights, such as obtaining a passport; again on account of his criminal record, when he had tried to have his identity card renewed, he had been kept in police custody for no reason for more than six hours.

79. The Government disputed, first of all, the allegation that Mr Erdoğdu had been taken into police custody unjustifiably and asserted that in the case in question it had merely been a security measure taken by the local police with a view to satisfying themselves that no arrest warrant had been issued against him. Reiterating that the applicant had ultimately benefited from a deferment of judgment, the Government considered the claim to be inflated and contended that the Court should avoid awarding compensation which would amount to unjust enrichment.

80. The Court considers that the applicant can be deemed to have suffered a certain feeling of helplessness in the circumstances of the case. Ruling on an equitable basis, as required by Article 41 of the Convention, it finds the claim relating to non-pecuniary damage reasonable and considers it appropriate to award the applicant the entire sum.

C. Costs and expenses

81. The applicant also requested reimbursement of his costs and expenses, plus value-added tax, which he broke down as follows:

(i) TRL 250,000,000 for the cost of translating correspondence with the Commission;

(ii) 5,000 United States dollars for the fees of Ms Ersoy Ataman, the lawyer instructed to represent him before the Court (a copy of the instructions produced).

82. The Government, for their part, submitted that costs under this head should be calculated according to the minimum fees charged by the Istanbul Bar, and argued that, having regard to the fee scales in force for the period from 1 July to 31 December 1999, the Court should not award more than TRL 625,000,000.

83. Ruling on an equitable basis under this head as well and in accordance with the criteria laid down in its case-law (see, among other authorities, *Nilsen and Johnsen* cited above, § 62), the Court awards the applicant FRF 20,000, together with any sum due in value-added tax.

D. Default interest

84. The Court considers it appropriate to provide that default interest should be payable at the rate of 2.74% per annum since the sums are awarded in French francs.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following sums to be converted into Turkish liras at the rate applicable at the date of settlement:
      (i) FRF 6,000 (six thousand French francs) for pecuniary damage;
      (ii) FRF 20,000 (twenty thousand French francs) for non-pecuniary damage;
      (iii) FRF 20,000 (twenty thousand French francs) for costs and expenses together with any sum due in value-added tax;
   (b) that simple interest at an annual rate of 2.74% shall be payable on those sums from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the claim for just satisfaction.

Done in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 June 2000.

Vincent BERGER
Registrar

Antonio PASTOR RIDRUEJO
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Gölcüklü is annexed to this judgment.

A.P.R.
V.B.

CONCURRING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

In the present case I voted with the majority. However, I cannot but entertain doubts on a number of points as to the application of this provision to cases such as the one that concerns us here. Let me explain. According to the Court "... the opinions expressed in the article, however categorical or acerbic they may be, could not be said to incite to violence; nor could they be construed as liable to do so" (see paragraph 70 of the judgment). The Court therefore found that there had been a violation of Article 10 of the Convention.

Both that analysis and the resulting conclusion are, admittedly, accurate from the "case-law" point of view. That said, are they also "politically" accurate, having regard to the policy of protecting human rights considered as a whole? I doubt it.

In my view, a "written text" should be analysed not in isolation from the material circumstances surrounding it, that is to say, in the abstract, but in the context of the factual realities of the background against which it is written.

Violence, deadly hatred, danger threatening public order and national security, and separatism never appear overnight. First the groundwork is laid and then, when this has been achieved, action is taken. It is from that very moment that all sorts of misfortunes, which should have been prevented, begin to take root, like a deadly cancer: when it manifests itself, it is – alas! – too late to hope for any sort of a cure. Once violence exists, we never know how and at what price we can rid ourselves of it.

The recent history of Europe during the period between the two wars is full of stark examples of what I have just described. Did it not all start with an allegedly anodyne "political" or "religious" speech given in the name of freedom of opinion or of conscience, and end up with bloody acts of violence? Did today's terrorist acts, whether inspired by allegedly religious or political fanaticism, not all begin in that way?

I wonder whether, despite the clear message contained in Article 17 of the Convention, it is permissible to open up the way to violence or to let freedom perish in the name of freedom. Is the flagrant misuse of a right now going to be protected by law?

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

COURT (CHAMBER)

CASE OF FAYED v. THE UNITED KINGDOM

(Application no. 17101/90)

JUDGMENT

STRASBOURG

21 September 1990

In the case of Fayed v. the United Kingdom[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr R. BERNHARDT,
Mr C. RUSSO,
Mr S.K. MARTENS,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Sir John FREELAND,
Mr L. WILDHABER,
Mr J. MAKARCZYK,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 25 March and 25 August 1994,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 12 July 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 17101/90) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) on 30 August 1990 by Mr Mohamed Al Fayed, Mr Ali Fayed and Mr Salah Fayed, who are Egyptian citizens, and by a company they owned, namely House of Fraser Holdings PLC.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 para. 1 and 13 (art. 6-1, art. 13) of the Convention.

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[*] Note by the Registrar. The case is numbered 28/1993/423/502. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 25 August 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Bernhardt, Mr L.-E. Pettiti, Mrs E. Palm, Mr A.N. Loizou, Mr F. Bigi, Mr L. Wildhaber and Mr J. Makarczyk (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr S.K. Martens, Mr R. Pekkanen and Mr C. Russo, substitute judges, replaced respectively Mr Pettiti, who had withdrawn, and Mr Bigi and Mrs Palm, who were prevented from taking further part in the consideration of the case (Rules 22 para. 1 and 24 paras. 1 to 3).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Registrar received the Government's memorial on 10 January 1994 and the applicants' memorial on 24 January 1994, the applicants' supplementary memorial on 1 March 1994, the Government's supplementary observations on 16 March 1994, and the applicants' and the Government's comments on the claims for just satisfaction on 10 and 18 March respectively. In a letter received on 3 March 1994 the Secretary to the Commission had informed the Registrar that the Delegate did not wish to submit argument in writing.

5. On 5 October 1993 the British company, Lonrho PLC (see paragraphs 10 and following below) sought leave to submit written comments under Rule 37 para. 2. However, by letter received at the registry on 17 November 1993 the company withdrew its request.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 March 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mrs A.F. GLOVER, Legal Counsellor,
Foreign and Commonwealth Office, *Agent*,
Mr M. BAKER, QC,
Mr J. EADIE, Barrister-at-law, *Counsel*,
Mrs T. DUNSTAN, Department of Trade and Industry,
Mr R. BURNS, Department of Trade and Industry,
Mr J. GARDNER, Department of Trade and Industry, *Advisers*;

- for the Commission

Sir Basil HALL, *Delegate*;
- for the applicants
Lord Lester of HERNE HILL, QC,
Mr P. GOULDING, Barrister-at-law, *Counsel*,
Mr R. FLECK,
Ms L. HUTCHINSON, Solicitors,
Mr D. MARVIN, Attorney-at-law (Washington, DC, USA),
Mr R. WEBB, Legal Director,
House of Fraser Holdings PLC, *Advisers*.

The Court heard addresses by Sir Basil Hall, Mr Baker and Lord Lester, and also replies to questions put by the President.

On the day of the hearing and subsequently on 12 April 1994 the applicants produced to the Court a number of documents referred to in argument by Lord Lester.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. The applicants

7. The three applicants, Mr Mohamed Al Fayed, Mr Ali Fayed and Mr Salah Fayed, are brothers. They are businessmen.

B. Takeover of the House of Fraser PLC

8. In March 1985 the applicants acquired ownership of the House of Fraser PLC ("HOF"), a public company, for about £600 million in cash. HOF was then, and is now, one of the largest groups of department stores in Europe and includes one particularly well-known London store, Harrods. The acquisition of HOF was effected through a public company called House of Fraser Holdings PLC ("HOFH"), which at all material times was owned by the applicants. HOFH had previously been known as the Al Fayed Investment Trust (UK) Limited and assumed its present name in December 1985.

9. Prior to the HOF takeover, in or about early November 1984, the applicants appointed public relations consultants. With the latter's assistance, the brothers and their direct advisers led the press to receive and present a positive picture of their origins, wealth, business interests and resources. Upon the basis of this picture, which they had a part in painting,

they enjoyed, for a time, an esteem or reputation which was highly valuable to them. Between 2 and 10 November 1984 the first applicant gave separate interviews to The Observer, The Sunday Telegraph and The Daily Mail. A further interview involving the brothers took place on 10 March 1985. In these interviews the brothers described a wealthy, distinguished and established family background. They gave a similar picture to their merchant banker, who accepted it and, acting on their behalf, conveyed that picture by a press release in November 1984 and in a television interview in early March 1985. There were other press interviews about the family background for which the applicants were responsible.

They thus took active steps to promote their own reputations in the public domain. The acceptance of the brothers by the City of London and by the Government was later considered to be crucial to an understanding of the events surrounding their takeover of HOF.

10. The takeover was vigorously but unsuccessfully opposed by Lonrho PLC ("Lonrho") and, in particular, its Chief Executive, Mr Rowland, a former business associate, turned rival, of the applicants.

From about 1981, if not earlier, it had been Lonrho's wish to acquire HOF. In December 1981, following a report from the Monopolies and Mergers Commission the Secretary of State for Trade and Industry ("the Secretary of State") had sought and obtained from Lonrho undertakings not to acquire or control any further shareholdings beyond its then level of 29.9% of HOF. Thereafter Lonrho had sought to be released from these undertakings.

In 1984 Lonrho had sold its share-holding in HOF to the applicants, but when those directors representing Lonrho's interests were obliged to resign from HOF's Board and the applicants bid to take over HOF completely, relations between Lonrho and the applicants deteriorated. Lonrho proceeded to launch an acrimonious campaign against the applicants. In opposing the applicants' bid for HOF, Lonrho had made submissions to Ministers concerning unfair competition and the undesirability of HOF falling into foreign hands. It was alleged that the applicants were fraudulently claiming that the funds for the acquisition were theirs personally. Lonrho asserted that the brothers were lying about their money and themselves and that they should not be permitted to acquire HOF without a thorough inquiry. However, the applicants' bid was cleared by the Department of Trade and Industry ("DTI") and accepted by the HOF Board. In March 1985 the Secretary of State decided, on the recommendation of the Director General of Fair Trading, not to refer the applicants' proposed acquisition to the Monopolies and Mergers Commission, as had been done in the case of the earlier bid by Lonrho. The decision of Government clearance was expressly described at the time by the DTI as having been influenced by the statements made and assurances given by and on behalf of the Fayed brothers about their bid. Lonrho nevertheless campaigned on through the

media and other publications, and in particular through The Observer, a newspaper it owned.

11. The applicants instructed their solicitors to threaten and, if necessary, institute libel proceedings if anything were published putting in doubt their claim to be the beneficial owners of the funds used to acquire HOF. This policy affected several publications, including The Observer. In almost every instance the threat of action led to the publication of a retraction. The applicants instituted three libel actions against The Observer in 1985 and 1986 for articles written about them. One central issue in these actions was the truth or not of The Observer's allegation that the funds used by the applicants in their takeover of HOF were not their own.

12. In March 1987 Lonrho commenced legal proceedings against the applicants and their bankers alleging wrongful interference with Lonrho's business, and conspiracy and negligence in connection with HOFH's acquisition of HOF. In particular, it was alleged that the applicants, by false statements about their financial capacity to acquire the share capital and develop HOF's business, had persuaded HOF's Board of Directors to accept their bid and had convinced the Secretary of State not to refer their bid to the Monopolies and Mergers Commission. It was claimed that the applicants had thereby tortiously interfered with Lonrho's right to bid for the shares or, alternatively, they had conspired against Lonrho.

Lonrho unsuccessfully sought leave to apply for judicial review of the Secretary of State's refusal to refer the applicants' acquisition of HOF to the Monopolies and Mergers Commission.

C. Appointment of the Inspectors and their investigation

13. On 9 April 1987, after two years of unrelenting pressure by Lonrho upon the Government, the Secretary of State appointed two Inspectors to investigate the affairs of HOFH and, in particular, the circumstances surrounding the acquisition of shares in HOF in 1984 and 1985. The appointment of the Inspectors was made by the Secretary of State under section 432 (2) of the Companies Act 1985 (see paragraph 36 below). They were told at the time of their appointment, and they so informed the applicants, that an area of particular concern to the Secretary of State was the validity of the assurances given by the applicants and their advisers in March 1985 (Inspectors' report, paragraphs 1.10, 23.1.9 and 26.19).

14. In their subsequent report the Inspectors described the applicants' takeover bid as being unusual, not least because it was a bid involving huge sums of money by three individuals and, since the offerers were individuals, the corporate balance sheets and other financial statements which are customary on such occasions were totally absent (Inspectors' report, paragraph 21.1.1). In order to establish what had occurred during the

takeover, they had been obliged to make findings on vigorously contested issues of fact (Inspectors' report, paragraph 1.7).

The principal questions they addressed when investigating the affairs of HOFH were listed in their report as follows:

> "(i) Were the Fayeds who they said they were, and if not who were they?
>
> (ii) Did they acquire HOF with their own unencumbered funds?
>
> (iii) Did they deliberately mislead, whether directly or indirectly, those who represented them to the authorities and the public?
>
> (iv) If so, did they seek to frustrate those who tried to establish the true facts, and if so how?
>
> (v) What steps did the Board of HOF and its advisers take before they gave the comfort that they appeared to give to those who relied on their words or actions?
>
> (vi) Were the authorities - the officials of the [Office of Fair Trading] and the DTI and, eventually, Ministers - or the public misled about the Fayeds? If so, how and why?"

(The Inspectors' report, paragraph 1.11)

The Inspectors also stated that, throughout their investigation, they were not concerned solely with simple questions relating to the direct control of the purchase money which was used to buy HOF. They were also concerned about the veracity of the statements which the applicants made, or which they allowed others to make on their behalf, which had the effect of influencing people to act favourably towards them (Inspectors' report, paragraph 1.12; and also chapter 9).

15. During the course of the investigation, the Inspectors identified matters upon which they wished to receive evidence. If any uncertainty or issue arose in relation to the provision of such evidence, these were discussed in the course of meetings or through correspondence between the Inspectors' staff and the applicants' solicitors. Thereafter, information was provided to the Inspectors by way of memoranda, together with copy documentation. In addition, the Inspectors received oral evidence by interviewing witnesses on oath. Mr Mohamed Al Fayed and Mr Ali Fayed were interviewed, in the presence of their lawyers, on 14 October 1987 and again on 8 and 9 March 1988. All proceedings were conducted in private. There was no opportunity for the applicants to confront or cross-examine witnesses, it being well-established as a matter of English law that the Inspectors were not obliged to afford such an opportunity to anyone.

16. It was agreed between the Inspectors and the applicants that, having assimilated the factual information supplied, the Inspectors would notify the applicants of the provisional conclusions they had reached and the material upon which they had relied in reaching such conclusions. The Inspectors

would then consider such submissions as the applicants might make in respect of these conclusions.

17. Respect for personal privacy was known to be a matter of especial concern to the applicants. The Inspectors' approach to matters of privacy and confidentiality is summed up in their report (at paragraphs 26.44 - 45) as follows:

> "[I]f private people incorporate a company, in which they become directors, and which makes public representations about their affairs, Inspectors who are appointed to investigate the truth of those representations must balance their concern to preserve the directors' privacy as far as practicable ... against their duty to do the job which they were appointed to perform.
>
> If the Fayeds had chosen to say nothing this might have created evidential difficulties for us. But because they wished us to make findings in their favour they brought witnesses to see us ... and gave us evidence about their private affairs which it was then our duty to test."

18. At the start of the investigation the applicants expressly accepted that the Inspectors were entitled to inquire into the accuracy of statements which had been made by them or on their behalf in late 1984 and early 1985. These were the statements at the heart of the investigation. Only at the very end of the investigation, when they were confronted by the Inspectors with "overwhelming evidence" that they had been telling lies, did they resile from that stance and challenge the Inspectors' entitlement to look into certain aspects of their private life (Inspectors' report, paragraph 26.28).

The Inspectors rejected the challenge and gave their reasons for so doing (see generally chapter 16 of the Inspectors' report). The Inspectors were entitled to seek confidential information from third parties, but before doing so they gave the applicants an opportunity to satisfy them as to the accuracy of the statements "in whatever manner was least obtrusive to their privacy" (Inspectors' report, paragraphs 16.2.5 and 16.6.2). The law did not permit them to compel the applicants to produce personal bank statements (which would have gone far to confirm or refute the accuracy of the statements) nor, save to a very limited extent, did the applicants consent to such production. The Inspectors considered that the applicants were in breach of their duty to give all the assistance which they were reasonably required to give. By virtue of section 436 of the 1985 Act the Inspectors could have certified this to a court, which could then have taken steps to sanction the applicants if, after hearing evidence, it was satisfied that they were in breach of their duty (see paragraph 38 below). The Inspectors were, however, of the opinion that they could complete their task without the need to resort to such a serious measure and chose to pursue the matter without making such a certificate. They made clear that if the applicants chose not to give evidence, they, the Inspectors, would be entitled to draw inferences from such failure.

19. In October 1987 and thereafter Lonrho publicly criticised the conduct of the investigation by the Inspectors and sought an additional two-month period in which to assemble and submit evidence to them. Through its lawyers, Lonrho argued that the rules of natural justice required the Inspectors to allow Lonrho access to the information the Inspectors had received from the applicants because Lonrho's commercial reputation would suffer if the Inspectors dismissed the complaints which it had made so publicly. The Inspectors dismissed Lonrho's application for access to the applicants' evidence, but permitted Lonrho to have a longer period in which to adduce evidence to them, relating primarily to the personal background of the applicants and their family. The applicants' solicitors in turn protested to the Inspectors vigorously about this latter decision. The written material provided to the Inspectors by Lonrho ran to thousands of pages. The Inspectors accepted that Lonrho and its directors had pursued their ends in a remarkably single-minded manner, and they described the applicants and Lonrho as "bitterly antagonistic parties" (Inspectors' report, paragraph 26.71).

D. The Inspectors' report and its follow-up, including consideration of criminal and civil proceedings

20. The Inspectors' provisional conclusions, which exceeded 500 pages of text and were, in large part, unfavourable to the applicants, were made available to the applicants on 12 April 1988. The Inspectors had previously made known to the applicants the gist of the adverse evidence received and the conclusions that they, the Inspectors, might be disposed to draw from that evidence.

Between 12 April and 17 June there was no significant response from the applicants. On the latter date the applicants' solicitors informed the Inspectors that they were not even in a position to discuss the procedural situation of the inquiry. The Inspectors told the applicants' solicitors on 20 June that by 15 July the Inspectors would consider that they had had ample time to respond to the provisional conclusions. On that date the applicants lodged detailed submissions running to 571 pages and containing a mixture of factual analysis and legal argument and, quite often, new evidence. The argument sought to limit the scope of the inquiry very drastically. The applicants' solicitors requested the Inspectors, as "the basic minimum which fairness required", to deal with certain questions raised and, if rejecting any of their principal submissions, to state reasons before issuing any report (Inspectors' report , paragraph 1.23 and chapter 17).

21. On 23 July 1988 the Inspectors delivered their report to the Secretary of State, in broadly the same terms as their provisional conclusions. They explained that they had not acceded to the applicants'

ultimate procedural request because they were of the view that otherwise the completion of their report might be indefinitely delayed:

> "It appeared to us that the appropriate course for us to take would be to consider the written submissions we had received and to express our views on them when we submitted our report to the Secretary of State. Our findings would not be dispositive of anything, we had given HOFH, HOF, the Fayeds and their advisers ample time to make their submissions, which they had chosen to make in this way at this extremely late stage and we considered that it was in the public interest that we should now complete our work and submit our report."

22. The Inspectors concluded that the applicants had dishonestly misrepresented their origins, their wealth, their business interests and their resources to the Secretary of State, the Office of Fair Trading, the press, the HOF Board and HOF shareholders and their own advisers; that during the course of their investigations, the Inspectors had received evidence from the applicants, under solemn affirmation and in written memoranda, which was false and which the applicants knew to be false; in addition, that the applicants had produced a set of documents they knew to be false; that this evidence related mainly, but not exclusively, to their background, their past business activities and the way in which they came to be in control of enormous funds in the autumn of 1984 and the spring of 1985 (see especially Inspectors' report, chapter 2). The Inspectors were satisfied that the main thrust of Lonrho's attack on the applicants was well founded on a sound basis of substantiated fact (Inspectors' report, paragraph 1.20).

However, the Inspectors did not reject the entirety of the applicants' evidence and praised part of their work. Thus the report included, for example, findings that "the departure of the Lonrho directors and their replacement by the Fayeds brought harmony to a board where previously discord had existed" (Inspectors' report, paragraph 6.6.9); and that "the Fayeds' considerable ability to identify assets with a potential for capital appreciation has undoubtedly been an important element in their business success" (Inspectors' report, paragraph 12.6.10). In the final chapter of the report the Inspectors made complimentary findings of fact and expressed favourable opinions about HOFH. They regarded the management of HOF since its acquisition as, subject to certain reservations, "law-abiding, proper and regular".

23. The Secretary of State passed the report to the Director of Public Prosecutions and the Director of the Serious Fraud Office. On 29 September 1988 the DTI announced that publication of the report would be delayed until the Serious Fraud Office had completed its investigations. In the summer of 1988 the Secretary of State also sent copies of the report to the Bank of England, the City Panel on Takeovers and Mergers (which is an integral part of the system of regulation of business in the United Kingdom), the Inland Revenue, the Office of Fair Trading and the Monopolies and Mergers Commission.

24. On 9 November 1988 the Secretary of State announced that, consistent with the advice of the Director General of Fair Trading, he had decided against the referral of HOFH's acquisition of HOF to the Monopolies and Mergers Commission, even though the Inspectors' report did disclose new material facts.

Also in November 1988 Lonrho made an application for judicial review of the Secretary of State's decisions (i) not to publish the report immediately and (ii) not to refer the acquisition to the Monopolies and Mergers Commission in the light of the report. In the context of these proceedings the Director of the Serious Fraud Office and the Director of Public Prosecutions submitted affidavits in December 1988 stating their opinion that publication of the report would prejudice the criminal investigation and run the risk of preventing a fair trial in the event of criminal proceedings subsequently being brought against the applicants. Lonrho's application was ultimately rejected by the House of Lords in May 1989.

25. On 30 March 1989 The Observer newspaper published a sixteen-page special midweek edition devoted solely to extracts from and comments on a leaked copy of the Inspectors' report. On the same day, Lonrho posted between 2,000 and 3,000 copies of the special edition to persons named on a mailing list to whom Lonrho had been regularly sending literature hostile to the applicants. The High Court immediately granted injunctions, on the applications of the Secretary of State and HOFH, restraining any further disclosure of the report or its contents.

26. During the course of a radio interview broadcast on 4 April 1989, the Secretary of State stated, prior to its publication, that the Inspectors' report "clearly disclosed wrongdoing". This gave rise to substantial press coverage.

27. On 1 March 1990 the Director of the Serious Fraud Office and the Director of Public Prosecutions announced that their inquiries into the matter were complete (see paragraph 23 above) and that they would not be taking further action. In a joint statement issued on that date they said:

> "The directors are now satisfied that all lines of inquiry have been pursued and that the evidence available is insufficient to afford a realistic prospect of conviction for any criminal offence relating to any matter of substance raised in the report."

The Attorney General expressed himself satisfied that the conclusion reached by the two directors was the correct one on the basis of the admissible and available evidence. On 12 March 1990 he stated to the House of Commons, in reply to a question (Hansard, House of Commons, 12 March 1990, column 14):

> "Whereas it was open to the Inspectors to take account of hearsay evidence if they thought that it was reliable - and of course it was open to them to reach the conclusion that they did - it would not have been open to a jury in a criminal case to convict upon evidence of the same character. The Inspectors are entitled to take account of evidence

covering a wider scope than that available in criminal proceedings in an English court ... Inquiries were pursued in every part of the world indicated by the Inspectors' report, but the [Director of the Serious Fraud Office and the Director of Public Prosecutions] had to conclude, as they said in their joint statement issued on 1 March, that there was insufficient evidence available for use in an English court in English criminal proceedings on any matter of substance raised in the Inspectors' report to warrant the bringing of criminal proceedings."

E. Publication of the Inspectors' report

28. On 1 March 1990 the Secretary of State had announced his intention to publish the report on 7 March 1990. It is general policy to publish reports on public companies, of which HOFH was one (see paragraph 41 below). In addition the Government considered that in the particular case there were specific grounds of general public interest justifying publication. In their pleadings before the Commission they described these grounds as follows:

"There had been a complex and lengthy investigation, and the public were entitled to learn the result of that investigation unless there were compelling reasons why they should not. There were important lessons to be learnt by those involved in takeovers from studying the report. ... The report contained a recommendation that certain features of part XIV of the 1985 Act (which deals with the investigation of companies and their affairs) deserved to be reconsidered in the light of difficulties encountered by the Inspectors ... It was appropriate to acknowledge that the Secretary of State, the [Office of Fair Trading], the DTI, certain journalists and sections of the press, the Board of HOF, the regulatory authorities, and the applicants' professional advisers had been misled by the applicants. Lonrho considered that its interests and reputation had been seriously and adversely affected by the preparedness of the Secretary of State to allow the HOFH bid to go forward in March 1985 without a reference to the [Monopolies and Mergers Commission]. Lonrho would have had a legitimate grievance if the explanation for this was suppressed without compelling reasons. There was a need to dispel continuing speculation as to the events which had given rise to the investigation. Rumours and speculation were rife. Publication of the report would provide employees and creditors with information concerning the way in which HOF and Harrods had been run and might be expected to be run in future. (The Inspectors were largely prepared to accept the sincerity of the brothers' assurances for the future.) The brothers had been prepared before the Inspectors to attempt to discredit Lonrho, Mr Rowland, The Observer, its editor and others. It was deemed to be in the public interest to publicise both the fact that these attempts had been made and the conclusion of the Inspectors that they were ill-founded."

29. On 2 March 1990, the applicants were provided with pre-publication copies of the report in confidence, in order to enable them to consider their position.

Throughout the period between submission of the report to the Secretary of State in July 1988 and its publication on 7 March 1990 the applicants' solicitors had adopted, in extensive correspondence with the DTI and the Treasury Solicitor, the position that judicial review or other court proceedings were likely to be taken, on the basis, inter alia, that the Inspectors' report did not constitute a valid report under the Companies Act

1985 because of the scope of the investigation and alleged procedural unfairness (including departures from what the applicants alleged was an agreed procedure). By letter dated 1 March 1990 the DTI undertook that if the applicants were to apply for judicial review to challenge the validity of the report, publication would be held up pending the final determination by the courts of their application. In the event no such proceedings were commenced. According to the applicants, the possibility of applying for judicial review to prevent publication was kept under consideration by them and their advisers, but the unanimous view at all stages was that such proceedings were almost inevitably bound to fail.

30. On 7 March 1990, the day the report was published, the Secretary of State stated to the House of Commons (Hansard, House of Commons, 7 March 1990, column 873):

> "I should explain to the House that in this matter I have three main responsibilities as Secretary of State: first, to decide whether to publish the report. This I have now done as soon as possible after I was informed by the prosecution authorities that they had withdrawn their objection to publication. Second, I had to consider whether to apply to the court to disqualify any director under section 8 of the Company Directors Disqualification Act 1986. I have concluded that it would not be in the public interest to do so. Anyone who reads the report can decide for themselves what they think of the conduct of those involved. Third, I also have responsibility for decisions on whether to refer mergers to the Monopolies and Mergers Commission. That responsibility was fully discharged by my predecessor. He had six months from July 1988 in which to consider the findings of the Inspectors' report and to decide whether to refer the matter. He concluded in November 1988 that a reference to the Monopolies and Mergers Commission would not be appropriate ...
>
> No other matters require action from me. I have passed the report to all those authorities concerned with enforcement and regulation so that they may consider whether to take action under their various powers."

The Secretary of State considered that the publication of the report and the ensuing publicity would enable people who might have dealings with the applicants in their capacity as directors to judge whether their interests were likely to be at risk from the type of conduct described in the report (ibid., column 878).

31. The Secretary of State also publicly expressed his own view as to the correctness of the Inspectors' findings. On 28 March 1990 he told a Parliamentary Select Committee (House of Commons Trade and Industry Committee report on company investigations, 2 May 1990, HC 36, Annex 6, p. 183, paras. 938, 940A):

> "... the allegations in the report have not been substantiated in a court of law. We can all take our view about them and I think that the balance of probability is extremely strong that they are accurate, but there is no proof of this.
>
> ...

I am not required to say that every fact and opinion in the report is true. These were outside Inspectors who were appointed to look into these matters, and they published their report. I have no means of checking it word for word. I myself and I think most people are inclined to believe that the events revealed are correct, but we have no proof - that is all I am saying.

...

[Question:] It appears that [the applicants] even told a succession of lies to the Inspectors themselves, who were then investigating the lies they had already told. Is that right?

[Secretary of State:] It so appears."

The Select Committee accepted the Inspectors' findings as authoritative, referring in its subsequent report to the "misinformation concerning the financial status of the Fayed brothers" recounted in the Inspectors' report (Trade and Industry Committee report, loc. cit., p. xxvi, para. 126).

32. On the day of the publication of the report the applicants issued a press communiqué through HOFH commenting on, inter alia, the contents of the report and the conduct of the Inspectors. Part of this press release read as follows:

"It is appalling to discover that two people in such a position could have gone so badly off the rails in the conduct of this investigation.

...

The Inspectors misled us.

They misled our lawyers. Indeed they were not even honest with them.

They demonstrated prejudice towards us and they did not treat us even-handedly.

They reneged on their agreements with us.

They have employed language which has no place in such a document.

They have reached conclusions which they do not support with facts.

They have dishonoured themselves and the whole procedure of Department of Trade inquiries.

These Inspectors went far beyond their legal powers, enquiring into matters that were no legitimate concern to them.

They completely disregarded the principles of natural justice. In simple terms they did not give us a fair hearing. They reversed the burden of proof in a denial of the basic tenet of British justice. They have held us to be guilty, unless proven innocent."

33. On 28 March 1990, in the course of a debate in the House of Lords, the Minister of State for Trade and Industry stated (Hansard, House of Lords, 28 March 1990, columns 946-47):

> "Although the Inspectors concluded that the Fayeds lied to the competition authorities at the time of the merger - I have no reason to believe that they were wrong, but it is for individuals to make up their own minds once they have read the report - the Inspectors did not criticise the Fayeds for the way they were running the House of Fraser which they already owned and which cannot be taken away from them. In these circumstances, [the Secretary of State] considered that publication of the report, which would allow people to judge for themselves whether they wished to do business with the Fayeds, would be a severe blow to their reputation, as indeed I think it has proved."

F. Aftermath of publication

34. The report and its findings were widely reported on television, radio and in the national press. The applicants claimed that it very seriously damaged their personal and commercial reputations as the Minister had predicted.

In August 1990 they abandoned their libel actions against The Observer newspaper and paid the latter's £500,000 legal costs. At the time the Court of Appeal was about to hear an appeal brought by the applicants on a preliminary procedural question. Failure in this appeal would have had the consequence of obliging the applicants to disclose a number of crucial documents bearing on the issue of the possible financing of the acquisition of HOF by third-party funds. According to the applicants, they discontinued the libel actions as a result of legal advice that publication of the Inspectors' report had deprived them of any effective remedy (see paragraph 11 above).

One month after the publication of the report the Bank of England served notice of restrictions on Harrods Bank Ltd in relation to the applicants' positions within that company. The Parliamentary Select Committee considered that the Secretary of State had not taken sufficient action against the applicants (Trade and Industry Committee report on company investigations, loc. cit., pp. xxv-xxvii, paras. 118-40). The City Takeover Panel subsequently disciplined the applicants, in reliance on the report. As the Takeover Panel made clear, it did not seek to conduct its own investigation into the facts, but relied on the Inspectors' report. The penalty imposed was public censure.

35. Lonrho persisted with its attacks. In May 1990 it applied for judicial review of the Secretary of State's refusal to apply to the High Court for an order disqualifying the three applicants as directors. This application was dismissed on 21 October 1991.

In October 1993 it was announced that a settlement had been negotiated between the applicant brothers and Lonrho, the terms of which included the discontinuance of all proceedings between the two parties.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Basis and scope of a section 432 (2) investigation

36. The investigation of HOFH was conducted under section 432 (2) of the Companies Act 1985 in relation to the circumstances surrounding the acquisition of shares in HOF in 1984 and 1985. Section 432 (2) empowers the Secretary of State to appoint Inspectors to investigate the affairs of a company and to report on them in such manner as he directs if it appears to him that there are circumstances suggesting wrongdoing, within the categories of wrongdoing defined as follows:

> "(a) that the company's affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person, or otherwise for a fraudulent or unlawful purpose, or in a manner which is unfairly prejudicial to some part of its members, or
>
> (b) that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial, or that the company was formed for any fraudulent or unlawful purpose, or
>
> (c) that persons concerned with the company's formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members, or
>
> (d) that the company's members have not been given all the information with respect to its affairs which they might reasonably expect."

37. The Secretary of State is under no statutory obligation to disclose to the company concerned the reasons for the appointment of Inspectors to investigate its affairs (Norwest Holst Limited v. Secretary of State [1978] 3 Weekly Law Reports 73 (Court of Appeal)); nor does he generally do so. In the present case, when requested by the House of Lords to do so in the course of Lonrho's judicial review applications, counsel for the Government stated that the Secretary of State had acted under section 432 (2) (a) in appointing the Inspectors.

B. Inspectors' powers to obtain information

38. Section 434 confers wide powers upon the Inspectors to obtain information, if necessary by compulsion, from officers and agents of the company whose affairs are being investigated. An answer given by a person

to a question put to him in exercise of powers conferred by section 434 may be used in evidence against him (section 434 (5)). Under section 436 obstruction of the Inspectors may be certified by them to a court, which may, after enquiry, treat it as a contempt of court punishable by imprisonment or fine.

C. Inspectors' duty to act fairly

39. The Inspectors are bound by the rules of natural justice; they have a duty to act fairly and to give anyone whom they propose to criticise in their report a fair opportunity to answer what is alleged against them (In re Pergamon Press Ltd [1971] 1 Chancery 388 (Court of Appeal)). The Inspectors in the present case accepted as applicable to them the principle of natural justice whereby a person exercising an investigatory jurisdiction must base his or her findings on material having probative value (Inspectors' report, paragraphs 26.23 and 26.25 - citing Mahon v. Air New Zealand [1985] Appeal Cases 808 (Privy Council), at pp. 820-21).

However, proceedings before the Inspectors are administrative in form, not judicial; the Inspectors are not a court of law and they are masters of their own procedure (In re Pergamon Press Ltd, loc. cit., pp. 399-400, per Lord Denning MR; pp. 406-07, per Buckley LJ). Except for the duty to act fairly, Inspectors are not subject to any set rules or procedures and are free to act at their own discretion. There is no right for a person who is at risk of being criticised by the Inspectors to cross-examine witnesses (ibid., p. 400B, per Lord Denning MR). It is not necessary for the Inspectors to put their tentative conclusions to the witnesses in order to give them a chance to refute them. It is sufficient in law for the Inspectors to put to the witnesses what has been said against them by other persons or in documents to enable them to deal with those criticisms in the course of the investigation (Maxwell v. Department of Trade and Industry [1974] 1 Queen's Bench 523 (Court of Appeal)).

D. Publication of the report of an investigation

40. The Secretary of State is empowered by section 437 (3) (c) to decide whether or not to print and publish the Inspectors' report. Although he has a very wide discretion in deciding whether or not to publish the whole report, he is precluded by section 437 (3) (c) from deciding to publish only parts or a synopsis of it.

Publication may be deferred if there is a possibility that criminal proceedings may be taken, in order to avoid the possibility of prejudice to such proceedings.

41. The question whether an Inspector's report should be published is considered in each case on its merits. The DTI's general policy is to publish

reports on public companies wherever possible, as being matters of public interest.

Members of a limited company are in a privileged legal position because their liability is limited. In view of this privilege, where the Secretary of State has decided that the affairs of a large public company should be investigated under the provisions of section 432 of the 1985 Act, because he is satisfied that the circumstances are of sufficient concern to warrant the substantial cost of an inspection, it is important that the Inspectors' report explaining the underlying facts and the conclusions that they draw from them should be made public unless there are overriding reasons to the contrary.

E. Inspectors' liability in defamation

42. The defence of privilege or immunity in defamation cases rests upon the idea that conduct which would otherwise be actionable escapes liability because the defendant is acting in furtherance of some interest of social importance which is entitled to protection, even at the expense of uncompensated harm to the plaintiff's reputation. If the interest is one of paramount importance, considerations of policy may require that the defendant's immunity for false statements be absolute, without regard to his purpose or motive or the reasonableness of his conduct. Such is the nature of the absolute protection afforded to judicial and parliamentary proceedings. Also on grounds of public policy, a defence of qualified privilege may lie when the publication is made by a person in good faith and in the discharge of some public or private duty. The condition attached to qualified privilege is that it must be exercised in a reasonable manner and for a proper purpose. A publisher with malicious intent would lose the defence of qualified privilege.

43. In re Pergamon Press Ltd (loc. cit., at p. 400G) Lord Denning MR stated:

> "Inspectors should make their report with courage and frankness, keeping nothing back. The public interest demands it. They need have no fear because their report, so far as I can judge, is protected by an absolute privilege ..."

Even if, contrary to Lord Denning's observation, the Inspectors' report is subject to a qualified rather than an absolute privilege, neither the Inspectors nor the Secretary of State could be successfully sued for defamation in publishing the report, except upon proof of express malice (that is, the desire to injure as the dominant motive for the defamatory publication: see Horrocks v. Lowe [1975] Appeal Cases 135 (House of Lords), at p. 149, per Lord Diplock).

F. Judicial review

44. The grounds on which administrative action (such as the Secretary of State's decision to publish the report) is subject to judicial control are the three traditional grounds of judicial review described by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service ([1985] Appeal Cases 375 (House of Lords), at pp. 410-11). These grounds are illegality, irrationality and procedural impropriety.

"Illegality" means that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

"Irrationality", or what is often also referred to as "Wednesbury unreasonableness" (see Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1947] 1 King's Bench 223 (Court of Appeal)), applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. "'Irrationality' or 'Wednesbury unreasonableness' is a narrowly restricted ground of judicial review of an administrative decision. Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely" (per Lord Brightman, in R. v. Hillingdon LBC, ex parte Puhlhofer [1986] Appeal Cases 484 (House of Lords), p. 528).

"Procedural impropriety" covers failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision, as well as failure to observe procedural rules that are expressly laid down even where such failure does not involve any denial of natural justice.

45. Judicial review would, for example, provide a remedy if Inspectors under the Companies Act were prejudiced or biased against the subjects of their report (Franklin v. Minister of Town and County Planning [1948] Appeal Cases 87 (House of Lords)); or if the Inspectors reached conclusions which there were no facts to support, or took into account irrelevant considerations, or failed to take account of relevant considerations, or reached conclusions which no reasonable person in their position could have reached (the Wednesbury case, loc. cit.); or if their findings have not been properly based on material which has probative value (Mahon v. Air New Zealand, loc. cit.); or if the Inspectors were dishonest or acted in bad faith (the Wednesbury case, loc. cit.); or if the Inspectors acted ultra vires or beyond their legal powers (the Wednesbury case, loc. cit.); or if the Inspectors acted against the legitimate expectations of those concerned

(Council of Civil Service Unions v. Minister for the Civil Service, loc. cit.); or if the Inspectors acted contrary to the rules of natural justice (Wiseman v. Borneman [1971] Appeal Cases 297 (House of Lords)); or if the Inspectors acted unfairly (In re Pergamon Press, loc. cit.; Maxwell v. Department of Trade, loc. cit.; R. v. Panel on Takeovers and Mergers, ex parte Guinness PLC [1990] 1 Queen's Bench 146 (Court of Appeal)).

However, a mistake of fact could not form the basis of a challenge to an administrative decision by the Inspectors or the Secretary of State unless the fact was a condition precedent to an exercise of jurisdiction, or the fact was the only evidential basis for a decision, or the fact was as to a matter which expressly or impliedly had to be taken into account (R. v. London Residuary Body, ex parte Inner London Education Authority, Times Law Reports, 24 July 1987 (Divisional Court)).

PROCEEDINGS BEFORE THE COMMISSION

46. The three applicant brothers and the company HOFH lodged an application (no. 17101/90) with the Commission on 30 August 1990.

The applicants contended that, in violation of Article 6 para. 1 (art. 6-1) of the Convention, the Inspectors' report had determined their civil right to honour and reputation and denied them effective access to a court in determination of this civil right. They further alleged a denial of effective domestic remedies to challenge the findings of the Inspectors, contrary to both Article 6 para. 1 and Article 13 (art. 6-1, art. 13) of the Convention.

In addition, they claimed that the making and publication of the Inspectors' report had determined criminal charges against them and violated the presumption of innocence, in breach of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2); and had unjustifiably interfered with their honour and reputation, protected as part of their right to respect for private life under Article 8 (art. 8) of the Convention, and with the peaceful enjoyment of their possessions as guaranteed under Article 1 of Protocol No. 1 (P1-1).

47. On 15 May 1992 the Commission declared admissible the complaint of the three applicant brothers under the "civil" branch of Article 6 para. 1 (art. 6-1) of the Convention, both on its own and in relation to Article 13 (art. 13) of the Convention. The remainder of the application, including the grievance of the fourth applicant company, was declared inadmissible.

48. In its report of 7 April 1993 (Article 31) (art. 31) the Commission expressed the opinion that there had been no violation of Article 6 para. 1 (art. 6-1), either as regards the making and publication of the Inspectors' report (twelve votes to one) or as regards the applicant brothers' access to court whether for proceeding against the Inspectors and the Secretary of State (ten votes to three) or for proceeding against others (twelve votes to

one). The Commission further concluded (unanimously) that no separate issue arose under Article 13 (art. 13).

The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

49. At the public hearing on 23 March 1994 the Government maintained in substance the concluding submission set out in their memorial, whereby they invited the Court to hold

> "(1) that the application is inadmissible because of failure by the applicants to exhaust domestic remedies;
>
> (2) alternatively, (a) that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention and (b) that there has been no violation of Article 13 (art. 13) of the Convention or that no separate issue arises for examination under Article 13 (art. 13)".

50. On the same occasion the applicants likewise maintained in substance the conclusions formulated at the close of their memorial, whereby they requested the Court

> "to decide and declare that they are the victims of breaches of Article 6 (art. 6), and to afford just satisfaction to them under Article 50 (art. 50) of the Convention".

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

51. The Government submitted that the applicants had failed to exhaust their domestic remedies in a number of respects. The Delegate of the Commission explained at the hearing that this plea, although not adverted to in the admissibility decision of 15 May 1992 because the Commission assumed that it had not been maintained, had been raised before the Commission at the appropriate time. The Court therefore has jurisdiction to entertain it (see the Artico v. Italy judgment of 13 May 1980, Series A no. 37, pp. 12-13, paras. 24 and 27).

52. According to the Government, the applicants failed to exhaust their domestic remedies (a) by not having applied for judicial review either of the

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* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 294-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

Inspectors' conduct of the inquiry or of their decision to submit their report to the Secretary of State; (b) by not having applied for judicial review of the Secretary of State's decision to publish the Inspectors' report; and (c) by not having pursued the libel proceedings commenced against The Observer newspaper.

53. The grounds on which judicial review may be sought (see paragraphs 44 and 45 above) are such that it would not have ensured access to a court for determination of the truth of statements made about the applicants in the Inspectors' report, the absence of such access being the essence of their complaints under the Convention. Nor would the libel actions against The Observer, although to some extent concerned with the same subject-matter (see paragraph 11 above), have provided a remedy against the Inspectors or the Secretary of State as regards the publication of the damaging statements contained in the Inspectors' report.

The Court therefore agrees with the Delegate of the Commission and the applicants that the plea of non-exhaustion of domestic remedies has not been made out by the Government.

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

54. The applicants contended that the Inspectors' investigation and, above all, the publication of the Inspectors' report gave rise to a violation of Article 6 para. 1 (art. 6-1), which, in so far as relevant, provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law ..."

In their submission, the making and the subsequent publication of the Inspectors' report in its entirety seriously damaged their reputations, thereby determining their civil right to honour and reputation, and the state of English law was such that they were denied effective access to the courts to challenge the resultant interference with that civil right.

This contention was accepted neither by the Government nor by the majority of the Commission.

A. Investigation by the Inspectors

55. The first stage of the applicants' argument, which was disputed by the Government and not accepted by the Commission, was that Article 6 para. 1 (art. 6-1) was applicable to the investigation by the Inspectors.

56. In order for an individual to be entitled to a hearing before a tribunal, there must exist a "dispute" ("contestation") over one of his or her civil rights or obligations. It follows, so the Court's case-law has explained, that the result of the proceedings in question must be directly decisive for

such a right or obligation, mere tenuous connections or remote consequences not being sufficient to bring Article 6 para. 1 (art. 6-1) into play (see, inter alia, the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June 1981, Series A no. 43, pp. 20-22, paras. 44-50).

57. The applicants claimed to identify three different disputes (contestations) arising in and during the investigation by the Inspectors: firstly, the dispute between the applicants and Lonrho, which the applicants described as giving rise to and forming the subject-matter of the proceedings conducted by the Inspectors; secondly, a dispute between the applicants and the Inspectors, in that the applicants had contested the Inspectors' actions in investigating their honesty and then arriving at conclusions in this regard; and, thirdly, a dispute between the applicants and the Secretary of State, in that, notwithstanding their opposition, the Secretary of State had initially considered there to be circumstances suggesting dishonest conduct by them, and had thereafter adopted the contents of the Inspectors' report, so they asserted, and decided to publish it.

In the applicants' submission, one of the objects of the inquiry by the Inspectors was to make findings as to whether the applicants were guilty of misconduct and the central conclusion of the report was that the applicants had dishonestly misled the authorities. Even though the Inspectors' role may in theory have been investigative, the manner in which they performed their functions in the present case was in fact determinative. The Inspectors' report, published to the world at large, had the force of a judgment convicting the applicants of dishonesty. The result of the inquiry was thus directly decisive for the applicants' civil right to a good reputation. In short, so they argued, the Inspectors' report effectively "determined" their civil right to reputation without any of the procedural guarantees of Article 6 para. 1 (art. 6-1) being respected.

58. Having regard to the cases of Golder v. the United Kingdom (judgment of 21 February 1975, Series A no. 18, p. 13, para. 27) and Helmers v. Sweden (judgment of 29 October 1991, Series A no. 212-A, p. 14, para. 27), the respondent Government did not dispute the existence and "civil" character of the right under English law to a good reputation.

However, they submitted that neither the investigation by the Inspectors nor the publication of the report "determined" the applicants' civil right to a good reputation or, indeed, any right at all. The principal purpose of the investigation and report of the Inspectors, they maintained, was to acquire, marshal and set down factual information which would enable the various competent authorities - such as the Director General of Fair Trading, the prosecuting authorities, the Bank of England, the Takeover Panel and the Secretary of State (see paragraphs 23, 27, 30 and 34 above) - to decide what action, if any, to take. Four further purposes also existed, none of which, however, included ascertaining whether the applicants merited their good reputation. These additional purposes were dispelling public speculation

about the events surrounding the takeover, enabling those concerned in takeovers to learn lessons, laying the foundations for reform of company law and practice, and providing information to HOF's employees, shareholders and creditors.

59. The Commission, after analysing the purposes served by the preparation and publication of the Inspectors' report, came to the conclusion that the Inspectors had an "investigative rather than determinative" role (paragraph 64 of the Commission's report). The Commission was therefore of the opinion that Article 6 para. 1 (art. 6-1) was not applicable to the proceedings conducted by Inspectors because those proceedings did not determine any civil right or obligation of the applicants.

60. The Court notes that under the terms of section 432 (2) of the Companies Act 1985 Inspectors can only be appointed if it appears to the Secretary of State that there are circumstances suggesting one or more types of specified wrongdoing or unlawful action in the conduct of a company's affairs (see paragraph 36 above). The Act confers on the Inspectors wide powers to obtain information and obstruction of the Inspectors may, upon reference by them to a court, be treated by it as a contempt of court and punished accordingly (sections 434 and 436 of the Act - see paragraph 38 above). The principal question addressed by the Inspectors in the instant case can be reduced to whether the Fayed brothers had dishonestly misled the authorities and the public in order to obtain Government clearance and acceptance by the HOF Board of their bid (see paragraphs 13 and 14 above). The Inspectors' published findings - that the applicants had indeed made dishonest representations concerning their origins, their wealth, their business interests and their resources and had thereafter knowingly submitted false evidence to the Inspectors (see paragraph 22 above) - undoubtedly damaged the applicants' reputations. The competent Ministers and a Parliamentary Select Committee - quite apart, it can be supposed, from a substantial section of public opinion - showed a disposition to accept as correct these findings, publication of which was seen as a kind of sanction (see paragraphs 26, 30, 31, 33 and 34 above).

Such elements or consequences are, it is true, not infrequently found in the context of adjudicatory proceedings.

61. However, the Court is satisfied that the functions performed by the Inspectors were, in practice as well as in theory, essentially investigative (see the similar analysis by the Supreme Court of the United States of America of the function of the Federal Civil Rights Commission in the case of Hannah v. Larche (363 US 420 (1960)). The Inspectors did not adjudicate, either in form or in substance. They themselves said in their report that their findings would not be dispositive of anything (see paragraph 21 above). They did not make a legal determination as to criminal or civil liability concerning the Fayed brothers, and in particular concerning the latter's civil right to honour and reputation. The purpose of their inquiry

was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities - prosecuting, regulatory, disciplinary or even legislative.

Lonrho admittedly exhibited a clear interest in the inquiry and its outcome, by being instrumental in bringing about the appointment of the Inspectors, by submitting evidence and by seeking to prompt action by the Secretary of State (see paragraphs 12 in fine, 13, 19, 24, 25 and 35 above). The Inspectors described Lonrho and the Fayed brothers as "bitterly antagonistic parties" (see paragraph 19 in fine above). Nonetheless, whilst there was a close connection between Lonrho's grievance against the Fayed brothers and the matters investigated by the Inspectors (see, inter alia, paragraphs 10-13 and 22 above), the object of the proceedings before the Inspectors was not to resolve any dispute (contestation) between Lonrho and the applicants. Those disputes, and in particular the applicants' libel claims that Lonrho, through The Observer, had wrongfully damaged their reputations, were being adjudicated by the ordinary courts (see paragraphs 11 and 12 above). Likewise, no dispute (contestation) between the Secretary of State or the Inspectors and the applicants as to the lawfulness of any alleged interference with the applicants' right to reputation arose merely because the applicants contested the grounds on which the Minister decided to appoint the Inspectors and on which the Inspectors conducted their lines of inquiry.

In short, it cannot be said that the Inspectors' inquiry "determined" the applicants' civil right to a good reputation, for the purposes of Article 6 para. 1 (art. 6-1), or that its result was directly decisive for that right.

62. Acceptance of the applicants' argument would entail that a body carrying out preparatory investigations at the instance of regulatory or other authorities should always be subject to the guarantees of a judicial procedure set forth in Article 6 para. 1 (art. 6-1) by reason of the fact that publication of its findings is liable to damage the reputation of the individuals whose conduct is being investigated. Such an interpretation of Article 6 para. 1 (art. 6-1) would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities. In the Court's view, investigative proceedings of the kind in issue in the present case fall outside the ambit and intendment of Article 6 para. 1 (art. 6-1).

63. The Court accordingly concludes that the investigation by the Inspectors was not such as to attract the application of Article 6 para. 1 (art. 6-1).

B. Proceedings to contest the Inspectors' findings

64. The Inspectors' report, published to the world at large, contained statements damaging to the applicants' reputations.

The applicants argued that English law denied them their entitlement under Article 6 para. 1 (art. 6-1) to access to a court to have determined whether there was any justification for this attack on their reputations. In particular, they stated, there was no opportunity under English law, whether by way of defamation proceedings or by way of judicial review, to challenge the Inspectors' condemnatory findings of fact or conclusions before a tribunal satisfying the requirements of Article 6 para. 1 (art. 6-1).

1. Relevant principles

65. In the words of the Court's Golder judgment, "... Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article (art. 6-1) embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only" (loc. cit., p. 18, para. 36). This right to a court "extends only to 'contestations' (disputes) over (civil) 'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law; [Article 6 para. 1] (art. 6-1) does not in itself guarantee any particular content for (civil) 'rights and obligations' in the substantive law of the Contracting States" (see, inter alia, the James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, pp. 46-47, para. 81; and the Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, p.16, para. 36).

Whether a person has an actionable domestic claim may depend not only on the substantive content, properly speaking, of the relevant civil right as defined under national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court. In the latter kind of case Article 6 para. 1 (art. 6-1) may have a degree of applicability. Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6 para. 1 (art. 6-1) a substantive civil right which has no legal basis in the State concerned. However, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 para. 1 (art. 6-1) - namely that civil claims must be capable of being submitted to a judge for adjudication - if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons (see the Commission's admissibility decision of 9 October 1984 on application no. 10475/83, Dyer v. the United Kingdom, Decisions and Reports 39, pp. 246-66 at pp. 251-52).

The relevant principles have been stated by the Court as follows:

> "(a) The right of access to the courts secured by Article 6 para. 1 (art. 6-1) is not absolute but may be subject to limitations; these are permitted by implication since the right of access 'by its very nature calls for regulation by the State, regulation which

> may vary in time and in place according to the needs and resources of the community and of individuals'.
>
> (b) In laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.
>
> (c) Furthermore, a limitation will not be compatible with Article 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

(Lithgow and Others v. the United Kingdom judgment of 8 July 1986, Series A no. 102, p. 71, para. 194, citing the Ashingdane v. the United Kingdom judgment of 28 May 1985, Series A no. 93, pp. 24-25, para. 57)

These principles reflect the process, inherent in the Court's task under the Convention, of striking a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, inter alia, the Sporrong and Lönnroth v. Sweden judgment of 23 September 1982, Series A no. 52, p. 26, para. 69).

2. Applicability of Article 6 para. 1 (art. 6-1)

66. In the Government's submission, the defence of privilege delimited the very content of the applicants' right to a good reputation as protected under English law. They maintained that, unlike procedural barriers to access to court, such an exercise by the State of the power to fix the content of a particular civil right did not bring into play Article 6 para. 1 (art. 6-1), although it might on occasions raise an issue in relation to one or other of the substantive rights protected by the Convention (such as the right to respect for private life under Article 8) (art. 8). In the circumstances, they concluded, the applicants had no actionable claim to a civil right under English law so as to attract the application of Article 6 para. 1 (art. 6-1).

The Commission and the applicants, on the other hand, considered that the defence amounted to a limitation on the right to bring defamation proceedings and, as such, a restriction on effective access to court.

67. It is not always an easy matter to trace the dividing line between procedural and substantive limitations of a given entitlement under domestic law. It may sometimes be no more than a question of legislative technique whether the limitation is expressed in terms of the right or its remedy.

In the present case the Court does not consider it necessary to settle the question of the precise nature of the defence of privilege for the purposes of Article 6 para. 1 (art. 6-1), since it is devoid of significance in the particular circumstances. If the Court were to treat the facts underlying the complaints declared admissible by the Commission as raising a substantive, rather than

a procedural, complaint going to the right to respect for private life under Article 8 (art. 8) of the Convention - as it has jurisdiction to do (see the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, pp. 19-20, para. 41) -, the same central issues of legitimate aim and proportionality as under Article 6 para. 1 (art. 6-1) would be posed.

The Court therefore proposes to proceed on the basis that Article 6 para. 1 (art. 6-1) is applicable to the facts of the case, the argument before the Court having been directed solely to this Article.

68. On this approach, it has to be ascertained whether the contested limitation on the applicants' ability to take legal proceedings to challenge the findings and conclusions in the Inspectors' report which were damaging to their reputations satisfied the conditions stated in the Court's case-law.

3. Legitimacy of the aims pursued by the contested limitation

69. The legitimacy of the limitation complained of cannot be divorced from its context, namely the system of investigation and reporting under the Companies Act 1985.

The underlying aim of this system is clearly the furtherance of the public interest in the proper conduct of the affairs of public companies whose owners benefit from limited liability. Considerations of public interest dictate both the appointment of Inspectors and the publication or not of their report (see paragraphs 36, 40 and 41 above). The system contributes to safeguarding the interests of the various parties concerned in the affairs of public companies such as investors, shareholders, especially small shareholders, creditors, customers, trading partners and employees, as well as ensuring the overall soundness and credibility of the country's company law structures. In the words of the Commission's report (at paragraph 64), "it is ... necessary in a democratic society that governments exercise supervisory controls over large commercial activities in order to ensure good management practices and the transparency of honest dealings".

As regards the particular facts complained of by the applicant brothers, the Court accepts as accurate the Government's analysis of the purposes served by the making and publication of the Inspectors' report (see paragraphs 28 and 58 above - see also paragraphs 13, 14 and 30 above as regards the particular facts).

The investigation into the affairs of HOFH and the publication of the resultant report in themselves therefore pursued legitimate aims.

70. As to the contested limitation on the ability to take legal proceedings, it was common ground that any defamation action brought by the applicants against the Inspectors or the Secretary of State would have been successfully met with a defence of privilege, be it absolute or qualified (see paragraphs 42 and 43 above). The rationale of this defence is that statements which harm an individual's reputation and which would otherwise give rise to liability should benefit from total or partial immunity

because their author or publisher is acting in furtherance of some overriding interest of social importance (see paragraph 42 above). As regards more specifically investigations under the Companies Act, the British courts have explained that "the public interest demands" that "Inspectors should make their report with courage and frankness" (per Lord Denning in re Pergamon Press Ltd - see paragraph 43 above).

Like the Commission, the Court has no difficulty in accepting that the underlying objective in according Inspectors freedom to report in this manner is likewise legitimate.

4. Proportionality of the means employed

71. It remains to be determined whether in the circumstances of the particular case there was a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the contested limitation.

72. Before the Court the applicants appeared to shift the emphasis of their argument as compared with their submissions to the Commission. Whilst continuing to maintain that the means employed were disproportionate to the aim pursued, they stressed that their complaint was not directed against the defence of privilege as such. They were not asserting a right to hold the Inspectors or the Secretary of State personally liable for damages in a suit for defamation; nor were they arguing that such independent reports into the affairs of public companies should never be prepared or published. Rather their claim was that where a report by organs of the State has branded an individual as being guilty of wrongdoing such as dishonesty after a procedure not attended by the procedural guarantees of a fair trial, Article 6 para. 1 (art. 6-1) grants the individual whose reputation is at stake the right to challenge the findings against him or her in a court of law before publication of the report. Accepting that a cause of action based on libel was barred and that judicial review did not provide the desired remedy, some other form of effective access to the courts should have been available to them for this purpose by virtue of Article 6 para. 1 (art. 6-1).

The English legal system, in their view, lacked adequate safeguards to protect their civil right to honour and reputation against misuse of their powers by the Inspectors and the Secretary of State. They submitted that means which involved denying them any effective remedy at all for the attack on their reputations caused disproportionate harm to them. They suggested that the requisite fair balance between the competing interests would be secured by the Government adopting a system which satisfied the aim pursued in a manner less harmful to their human rights, such as publication of the report only following full judicial scrutiny of the Inspectors' findings of fact.

73. In its report, the Commission expressed the opinion that the principle of proportionality had not been transgressed in the applicants'

case. In its view, judicial review, whilst not affording complete protection against possibly erroneous conclusions by the Inspectors, did "provide sufficient guarantees for persons affected by the report, which [were] proportionate to the general public interest in inquiries of the present kind" (paragraph 75 of the report).

74. In so far as the defence of privilege was taken to be a procedural bar on access, the Government agreed with the Commission's analysis. As they perceived it, the applicants' claim was really based on the impracticable proposition that a person aggrieved at any conclusion of fact reached by Inspectors acting under section 432 (2) of the Companies Act 1985 because of some detrimental effect on his or her reputation ought, by virtue of Article 6 para. 1 (art. 6-1), to have a right of appeal to a court to challenge that conclusion.

75. The Court recognises that limitations on access to court may be more extensive when regulation of activities in the public sphere is at stake than in relation to litigation over the conduct of persons acting in their private capacity. As to enforcement of the right to a good reputation under domestic law, the limits of acceptable criticism are wider with regard to businessmen actively involved in the affairs of large public companies than with regard to private individuals, to paraphrase a principle enunciated by the Court in the context of the State's power to restrict freedom of expression in accordance with Article 10 para. 2 (art. 10-2) of the Convention (see the Oberschlick v. Austria judgment of 23 May 1991, Series A no. 204, p. 26, para. 59). Persons, such as the applicants, who fall into the former category of businessmen inevitably and knowingly lay themselves open to close scrutiny of their acts, not only by the press but also and above all by bodies representing the public interest (ibid.).

76. An additional point to note as concerns the particular circumstances of the present case is that the findings in the Inspectors' report to which the applicants took exception related to matters which the applicants themselves had made great efforts to bring into the public domain, namely their family background, their personal wealth and their business activities (see paragraphs 9 and 22 above). The beneficial public reputation which the applicants enjoyed in late 1984 and early 1985 was largely the result of an active public relations campaign which they undertook with the assistance of their advisers, and it played a crucial role in facilitating clearance of their bid for HOF. Thereafter the applicants were at pains to stifle any publicity adverse to this favourable reputation which they had themselves largely created, as is shown by their threatened or actual libel actions against various newspapers, notably The Observer (see paragraph 11 above). The contested limitation was thus concerned with an investigation of circumstances offered to public scrutiny by persons who had themselves sought a public profile through their bid to take over a large public company.

77. Like the Commission, the Court does not find it decisive whether the Inspectors' report benefited from absolute or merely qualified privilege (see paragraphs 42 and 43 above). In any event, in their argument to the Court the applicants did not suggest that either the Inspectors or the successive Secretaries of State had acted with malicious intent, which would have destroyed a defence of qualified privilege.

78. In arriving at their findings of fact or conclusions, the Inspectors were under a duty to act fairly and to give anyone whom they proposed to criticise in their report a fair opportunity to answer the allegations against them. Although the investigation was administrative and not judicial in nature, the Inspectors were bound by what are known under English law as "the rules of natural justice" (see paragraph 39 above). The remedy of judicial review was available to the applicants against the Inspectors or the Secretary of State to challenge the appointment of the Inspectors, the making of the report, its content or its publication if it could be claimed that there had been unfairness or breach of the rules of natural justice or that the findings or conclusions were unreliable on a number of other grounds (see paragraphs 44 and 45 above). In the latter connection, judicial review would have provided relief if it could have been established that the Inspectors had made findings of fact not properly based on material with probative value, or reached conclusions which there were no facts to support, or taken into account irrelevant considerations or failed to take account of relevant considerations, or reached conclusions which no reasonable person in their position could have reached (ibid.).

Judicial review would not, it is true, have provided the applicants with "the effective remedy" to which they were claiming to be entitled under Article 6 para. 1 (art. 6-1), namely a remedy enabling them to argue before a court that the Inspectors' findings of fact were simply erroneous. Nonetheless, the manner in which findings detrimental to a person's reputation are arrived at in an administrative investigation, as well as the objectives pursued by the investigation, is relevant for assessing the permissibility under Article 6 para. 1 (art. 6-1) of a limitation on the person's opportunities to go to court to enforce his or her civil right to reputation.

Whilst Inspectors are accorded broad freedom in reporting on the affairs of public companies, the performance of their investigative functions is attended by not inconsiderable safeguards intended to ensure a fair procedure and the reliability of findings of fact.

79. Extremely serious accusations were levelled against the Inspectors by the applicants in the press release issued by them on the day of the publication of the Inspectors' report, including accusations of dishonesty, prejudice, non-respect of agreed procedures, unfairness and total disregard of the principles of natural justice (see paragraph 32 above). In correspondence with the authorities the applicants had previously been

consistently threatening to take legal action to contest the report and its publication; yet in the event they did not do so, despite a formal undertaking on behalf of the Secretary of State to hold up publication if proceedings were brought (see paragraph 29 above). As the Government pointed out, a reading of the Inspectors' report shows that the applicants were made aware of the information required of them and were given every reasonable opportunity to respond to the allegations made against them and to furnish evidence, notwithstanding their last-minute procedural request to the Inspectors (see paragraphs 20 and 21 above). Safeguards afforded to the applicants throughout the investigation included constant consultation by the Inspectors as regards the structure, procedure and lines of inquiry of the investigation, the professional representation of the applicants, at interviews as well as in the submission of evidence and argument, and the Inspectors' concern to respect the applicants' personal privacy as much as possible (see paragraphs 15 to 18 and 20 above).

80. The applicants pointed out that the Inspectors' report containing findings of dishonesty was published, with the benefit of protection from liability in defamation, even though the authorities decided that there was no cause for instituting either criminal or civil proceedings (see paragraphs 23, 27, 28 and 30 above). The Court has also taken note of the evidence submitted by the applicants showing that there is a body of informed opinion in the United Kingdom which believes that these consequences of the system enacted by Parliament in the Companies Act 1985 are not desirable.

81. It is not, however, for the Court to substitute its own view for that of the national legislature as to what would be the most appropriate policy in this regard. The risk of some uncompensated damage to reputation is inevitable if independent investigators in circumstances such as those of the present case are to have the necessary freedom to report without fear, not only to the authorities but also in the final resort to the public. It is in the first place for the national authorities to determine the extent to which the individual's interest in full protection of his or her reputation should yield to the requirements of the community's interest in independent investigation of the affairs of large public companies. The applicants' argument would amount to reading into Article 6 para. 1 (art. 6-1) an entitlement to have a report such as the one in the present case not published until after a full judicial hearing repeating, doubtless over a longer time-scale, the same fact-finding exercise as that already carried out by the Inspectors. Such an entitlement could effectively destroy the utility of informing the public of the results of the administrative investigations provided for under section 432 (2) of the Companies Act 1985. Having found the aim of not only making but also publishing Inspectors' reports to be legitimate, the Court cannot apply the test of proportionality in such a way as to render publication impracticable.

82. In the light of the foregoing considerations, the Court cannot find that, in the exercise of their responsibility of regulating the conduct of the affairs of public companies, the national authorities exceeded their margin of appreciation to limit the applicant brothers' access to the courts under Article 6 para. 1 (art. 6-1), either as regards the state of the applicable law or as regards the effects of the application of that law to the brothers. Having regard in particular to the safeguards that did exist in relation to the impugned investigation, the Court concludes that a reasonable relationship of proportionality can be said to have existed between the freedom of reporting accorded to the Inspectors and the legitimate aim pursued in the public interest.

5. Conclusion

83. In the Court's view, the limitation on the applicants' opportunity, before and after publication of the Inspectors' report, to take legal proceedings to challenge the Inspectors' findings damaging to their reputations did not involve an unjustified denial of their "right to a court" under Article 6 para. 1 (art. 6-1).

C. Proceedings against others

84. A further issue addressed in the Commission's report was whether the publication of the Inspectors' report rendered impossible a fair and unbiased trial of the libel actions brought by the applicants against The Observer newspaper (see paragraphs 13 and 34 above), such that they were thereby denied effective access to court for the determination of a dispute over their civil right to honour and reputation.

This complaint was not pursued by the applicants in their pleadings before the Court, and the Court sees no cause, in law or on the facts, to examine it of its own motion.

D. Recapitulation

85. The Court finds no violation of Article 6 para. 1 (art. 6-1) in the present case under any of the heads of complaint.

III. ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

86. Before the Commission the applicants alleged that, contrary to Article 13 (art. 13) of the Convention, no effective remedy was available under English law in respect of their complaint of a violation of Article 6 para. 1 (art. 6-1) of the Convention. Article 13 (art. 13) provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

87. The Commission concluded in its report that no separate issue arose under Article 13 (art. 13). In their memorial to the Court, the applicants announced that they would not be seeking to contest the Commission's conclusion.

88. In view of the applicants' effective withdrawal of this complaint, the Court does not find it necessary also to examine the case under Article 13 (art. 13).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Dismisses the Government's preliminary objection;

2. Holds that there has been no breach of Article 6 para. 1 (art. 6-1) of the Convention;

3. Holds that it is not necessary also to examine the case under Article 13 (art. 13) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 September 1994.

Rolv RYSSDAL
President

Herbert PETZOLD
Acting Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the concurring opinion of Mr Martens is annexed to this judgment.

R. R.
H. P.

CONCURRING OPINION OF JUDGE MARTENS

1. The applicants submitted that Article 6 para. 1 (art. 6-1) was violated because the defence of privilege amounted to a restriction on their right of access to court with respect to the statements in the Inspectors' report which were damaging to their reputation (paragraph 64 of the Court's judgment).

2. The Government denied the applicability of Article 6 para. 1 (art. 6-1) since in their opinion the applicants had no actionable claim to a civil right under English law (paragraph 66).

3. The outcome of the Court's reasoning in paragraphs 65-67 of its judgment is that the Court "proposes to proceed on the basis that Article 6 para. 1 (art. 6-1) is applicable to the facts of the case". I support that modus procedendi, although I find it difficult to subscribe to the reasoning which led to it.

4. The starting-point for the Court's reasoning is its doctrine that Article 6 (art. 6) "extends only to 'contestations' (disputes) over (civil) 'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law" (paragraph 65).

5. In my concurring opinion in the case of Salerno v. Italy (judgment of 12 October 1992, Series A no. 245-D, pp. 57 et seq.), I examined the genesis of this doctrine. In paragraph 3.4 of that opinion I recalled that the doctrine had been fundamentally criticised on repeated occasions by several judges[1], but I left open whether I too subscribed to that criticism. I came to the conclusion that in any event there was no room for the "arguable claim" test where the applicant has in fact had access to a court which has decided on the merits of his claim: a decision on a non-arguable claim should also meet the requirements of Article 6 para. 1 (art. 6-1).

6. The present case demonstrates that also within the context of an access-to-court issue the "arguable claim" test is an unfortunate feature of the Court's case-law[2]. It has obliged the Court to adopt a reasoning whose subtleness, to my mind, seems hardly convincing. Nor clear, for what does it mean to say that "Article 6 para. 1 (art. 6-1) may have a degree of applicability" and in what cases will this extraordinary phenomenon occur? When does the answer to the question whether a person has an actionable domestic claim depend not only on the substantive content of the relevant right as defined under national law but also on the existence of procedural bars?

7. In my opinion the Court's reasoning would have been simpler and more persuasive without all this meandering necessitated by its maintaining

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[1] See, inter alios, the separate opinion of Judge De Meyer in the case of H. v. Belgium (judgment of 30 November 1987, Series A no. 127-B, pp. 48 et seq.).

[2] I note incidentally that I also share Judge De Meyer's opinion as to the role of the requirement that there must be a "dispute" ("contestation"); from which it follows that I am not happy with paragraphs 56 et seq. either.

the "arguable claim" test: there could be no doubt as to the applicants' right to reputation having been damaged. Whether or not a right to reputation is enshrined in Article 8 (art. 8) of the Convention is immaterial, since such a right does exist, at least in principle, under all our national laws and it has not been contended that in this respect English law makes an exception by clearly and fully excluding such a right. Neither can there be doubt as to the right to reputation being a "civil" right within the autonomous meaning of that notion under Article 6 para. 1 (art. 6-1). It follows that under this provision, whenever a person's reputation has been interfered with, he or she is in principle entitled to access to a court meeting its requirements. Consequently, the question whether under English law the defence of privilege constitutes a substantive limitation on the content of the right to reputation or a procedural barrier to access to court is immaterial. On this approach the Court could have gone into the essential question whether the contested limitation was justified under the conditions stated in its case-law (paragraph 68) almost immediately.

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

COURT (PLENARY)

CASE OF GASKIN v. THE UNITED KINGDOM

(Application no. 10454/83)

JUDGMENT

STRASBOURG

07 July 1989

In the Gaskin case*,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr J.A. CARRILLO SALCEDO,
Mr N. VALTICOS,
Mr S. K. MARTENS,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 30 March and 23 June 1989,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court on 8 March 1988 by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") and on 14 March 1988 by the European Commission of Human Rights ("the Commission"), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 10454/83) against

* Note by the Registrar: The case is numbered 2/1988/146/200. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

the United Kingdom lodged with the Commission under Article 25 (art. 25) by Mr Graham Gaskin, a British citizen, on 17 February 1983.

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request and of the Government's application was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 (art. 8) and, as far as the request was concerned, Article 10 (art. 10) of the Convention.

3. In response to the inquiry made in accordance with Rule 33 para. 3(d) of the Rules of Court, the applicant stated that he wished to participate in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

4. The Chamber to be constituted included, as ex officio members, Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3(b)). On 25 March 1988, the President of the Court drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr J. Pinheiro Farinha, Mr. B. Walsh, Mr C. Russo, Mr R. Bernhardt and Mr N. Valticos (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

5. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5). He ascertained, through the Registrar, the views of the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant regarding the need for a written procedure (Rule 37 para. 1). Thereafter, in accordance with the Orders and directions of the President of the Chamber, the memorial of the Government was lodged at the registry on 30 August 1988 and the memorial of the applicant on 1 September 1988. Further memorials relating to the application of Article 50 (art. 50) were lodged at the registry, on 27 April and 24 May 1989 by the applicant and on 16 June by the Government.

6. After consulting, through the Registrar, those who would be appearing before the Court, the President directed on 6 December 1988 that the oral proceedings should open on 28 March 1989 (Rule 38).

7. On 23 February 1989, the Chamber decided to relinquish jurisdiction in favour of the plenary Court (Rule 50).

8. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. Immediately prior to its opening, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mr I.D. HENDRY, Legal Adviser,
Foreign and Commonwealth Office, *Agent*,
Mr N. BRATZA, Q.C., *Counsel*,

Mr E.R. MOUTRIE, Solicitor,
Department of Health and Social Security,
Mrs A. WHITTLE, Department of Health and Social Security,
Mr R. LANGHAM, Department of Health and Social Security,
Miss T. FULLER, City Solicitor's Department,
Liverpool City Council,
Mr A. JAMES, Liverpool City Council, *Advisers*;
- for the Commission
Mrs G.H. THUNE, *Delegate*;
- for the applicant
Mr R. MAKIN, Solicitor
of the Supreme Court, *Counsel*.

9. The Court heard addresses by Mr Bratza for the Government, by Mrs Thune for the Commission and by Mr Makin for the applicant, as well as their replies to its questions.

AS TO THE FACTS

10. The applicant is a British citizen and was born on 2 December 1959. Following the death of his mother, he was received into care by the Liverpool City Council under section 1 of the Children Act 1948 ("the 1948 Act") on 1 September 1960. Save for five periods varying between one week and five months when he was discharged to the care of his father, the applicant remained in voluntary care until 18 June 1974. On that date the applicant appeared before the Liverpool Juvenile Court and pleaded guilty to a number of offences including burglary and theft. The court made a care order in respect of him under section 7 of the Children and Young Persons Act 1969. The applicant ceased to be in the care of the Liverpool City Council on attaining the age of majority (18) on 2 December 1977.

During the major part of the period while he was in care the applicant was boarded out with various foster parents, subject to the provisions of the Boarding-Out of Children Regulations 1955 ("the 1955 Regulations"). Under the terms of those regulations the local authority was under a duty to keep certain confidential records concerning the applicant and his care (see paragraph 13 below).

11. The applicant contends that he was ill-treated in care, and since his majority has wished to obtain details of where he was kept and by whom and in what conditions in order to be able to help him to overcome his problems and learn about his past.

12. On 9 October 1978, the applicant was permitted by a social worker in the employment of the Liverpool City Council to see the case records relating to him kept by the Social Services Department of the Council in

accordance with its statutory duty. He removed those records without the Council's consent, retaining them in his possession until he returned them to the Social Services Department on 12 October 1978.

I. THE APPLICANT'S CASE RECORDS AND THE APPLICATION FOR DISCOVERY THEREOF

13. It is the practice of the local authorities to keep a case record in respect of every child in care. In respect of children boarded out they were and are under a statutory duty to keep case records by virtue of the 1955 Regulations, which were made under section 14 of the 1948 Act. Regulation 10 of the 1955 Regulations, so far as relevant, provides that:

> "10.-(1) A local authority shall compile a case record in respect of -
>
> (a) every child boarded out by them;
>
> (b) ...
>
> (c) ... and the said records shall be kept up-to-date.
>
> (2) ...
>
> (3) Every case record compiled under this Regulation or a microfilm recording thereof shall be preserved for at least three years after the child to whom it relates has attained the age of eighteen years or has died before attaining that age, and such microfilm recording or, where there is none, such case record shall be open to inspection at all reasonable times by any person duly authorised in that behalf by the Secretary of State."

14. In 1979 the applicant, wishing to bring proceedings against the local authority for damages for negligence, made an application under section 31 of the Administration of Justice Act 1970 ("the 1970 Act") for discovery of the local authority's case records made during his period in care. Section 31 of the 1970 Act provides, inter alia, that the High Court shall have power to order such disclosure to a person who is likely to be a party to legal proceedings for personal injuries.

15. The application was heard by the High Court on 22 February 1980. The local authority objected to the grant of discovery of the records on the ground that disclosure and production would be contrary to the public interest. The principal contributors to those case records were medical practitioners, school teachers, police and probation officers, social workers, health visitors, foster parents and residential school staff. Their contributions to the case records were treated in the strictest confidence and it was in the interest of the effective conduct of the care system that such records should be as full and frank as possible. If discovery were ordered, the public interest in the proper operation of the child-care service would be

jeopardised since the contributors to the records would be reluctant to be frank in their reports in the future.

16. The applicant contended that the case records held by the local authority should be made available to him on the general principles of discovery, for the purpose of his proposed proceedings for personal injuries against the local authority. He further argued that it was also in the public interest that some measure of review of the standard of care provided by a local authority to a child in care be available.

17. The judge did not read the records in question, but balanced the public interest in maintaining an efficient child-care system with the applicant's private interest in receiving access to his case records for the purpose of the proposed litigation. After referring to the case of Re D (infants) [1970] 1 Weekly Law Reports ("WLR") 599, in which Lord Denning, Master of the Rolls, held that case records compiled pursuant to Regulation 10 of the 1955 Regulations were regarded as private and confidential, he concluded:

> "I am left in no doubt that it is necessary for the proper functioning of the child care service that the confidentiality of the relevant documents should be preserved. This is a very important service to which the interests - also very important - of the individual must, in my judgment, bow. I have no doubt that the public interest will be better served by refusing discovery and this I do."

18. The applicant appealed from this decision to the Court of Appeal. On 27 June 1980 the Court of Appeal unanimously dismissed the appeal. In the Court of Appeal's view, the High Court, in its judgment, had correctly balanced the competing interests. It added that the inspection of a document is a course which it is proper for a court to take in certain cases, for example where grave doubt arises and the court cannot properly decide upon which side the balance of public and private interests falls without itself inspecting the documents. However, this was not a case in which such doubt arose as would make it proper for the court itself to inspect the documents. The High Court's decision was accordingly affirmed and leave to appeal to the House of Lords was refused (Gaskin v. Liverpool City Council [1980] 1 WLR 1549).

II. RESOLUTIONS OF LIVERPOOL CITY COUNCIL RELATING TO ACCESS TO PERSONAL FILES

19. On 21 October 1980, Liverpool City Council set up the Child Care Records Sub-Committee ("the Sub-Committee") to make recommendations on access to personal social services files and to investigate the allegations relating to the applicant.

20. On 17 June 1982, the Sub-Committee recommended making available case records to ex-clients of the social services, subject to certain safeguards and restrictions relating in particular to medical and police

information. As to the applicant, the Sub-Committee viewed with concern the number of placements which he had while in care, and which they recognised could be detrimental to a young person's development, but found no evidence to suggest that "the officers carried out their duties in other than a caring manner". The applicant was to be allowed access to, and to make photocopies of, his case records, subject however to the exclusion of medical and police information.

21. On 30 June 1982, the Sub-Committee's recommendations, subject to an amendment which would require the consent of members of the medical profession and police services to be sought to the disclosure of information which they had contributed, were embodied in a resolution of the Social Services Committee. However, Mr Lea, a dissenting member of the Sub-Committee, brought an action challenging the resolution and obtained an interlocutory court order preventing the City Council from implementing it until the trial of the action or until further order.

22. On 26 January 1983, Liverpool City Council passed a further resolution. As regards future records this reiterated the general terms of the resolution of 30 June 1982 and added certain further restrictions to protect information given in confidence and to provide for the non-disclosure of the whole or part of the personal record in particular cases, but as regards information obtained and compiled before 1 March 1983 it was resolved that this should be disclosed only with the consent of the suppliers thereof. Pursuant to this policy the resolution went on to instruct the Council's officers to contact the various suppliers of information to the Gaskin file immediately with a view to disclosure. The local authority's officers were, however, ordered not to implement this resolution pending the outcome of the legal action brought by Mr Lea. This action was discontinued on 13 May 1983 and on 29 June the local authority confirmed a further resolution to the effect that the resolution of 26 January would be implemented as from 1 September 1983.

23. On 24 August 1983 the Department of Health and Social Security issued Circular LAC (Local Authority Circular) (83) 14 to local authorities and health authorities pursuant to section 7 of the Local Authority Social Services Act 1970 setting out the principles governing the disclosure of information in social services case records to persons who were the subject of the records. The general policy laid down in paragraph 3 of the circular was that persons receiving personal social services should, subject to adequate safeguards, be able to discover what is said about them in social services records and with certain exceptions should be allowed to have access thereto. Paragraph 5 set out under five headings the reasons for withholding information. These included the protection of third parties who contributed information in confidence, protecting sources of information, and protecting social service department staff's confidential judgments. Paragraphs 6 to 9 set out in more specific terms the policy governing client

access to case records. Paragraph 7 in particular defined the considerations to be weighed on the other side of the balance whenever an application was made for access, the most relevant for the purposes of the present case being that "information shall not be disclosed to the client if derived in confidence from a third party without the consent of the third party". However, it was then provided in paragraph 9 that since existing records had been compiled on the basis that their contents would never be disclosed, material entered in the records prior to the introduction of the new policy should in no event be disclosed without the permission of the contributor of the information.

24. On 31 August 1983, the High Court granted the Attorney General leave to apply for judicial review of the resolution of 26 January 1983 as amended by that of 29 June 1983 on the ground that it went beyond what were considered to be the proper limits and, in particular, omitted certain important safeguards which were contained in Circular LAC (83) 14. Pending the trial of the action an injunction was granted restraining the local authority from implementing the resolution of 26 January 1983.

25. On 9 November 1983, Liverpool City Council confirmed a further resolution of its Social Services Committee of 18 October 1983 setting out certain additional grounds on which information should be withheld. The resolution provided that the information in the applicant's file should be made available to him if the contributors to the file (or as regards some information the Director of Social Services) consented and that the various contributors of the information contained in the file should be contacted for their permission before the release of that information. Following the passing of this resolution, which was in line with Government Circular LAC (83) 14 (see paragraph 23 above), the Attorney General withdrew his application for judicial review.

26. The applicant's case record consisted of some 352 documents contributed by 46 persons. On 23 May 1986 copies of 65 documents supplied by 19 persons were sent to the applicant's solicitors. These were documents whose authors had consented to disclosure to the applicant. The size of each contribution disclosed varied from one letter to numerous letters and reports.

27. Those contributors who refused to waive confidentiality, although not asked to give reasons, stated, inter alia, that third-party interests could be harmed; that the contribution would be of no value if taken out of context; that professional confidence was involved; that it was not the practice to disclose reports to clients; and that too great a period of time had elapsed for a letter or report still to be in the contributor's recollection.

Furthermore, in June 1986, one contributor refused his consent to disclosure on the ground that it would be detrimental to the applicant's interests.

28. In a letter of 15 July 1986, the Director of Social Services of Liverpool City Council wrote to the applicant's solicitors in the following terms:

> "I refer to your letter dated 11 June 1986.
>
> I would wish to be as helpful as possible to you, but at the end of the day suspect that we may have genuine differences of opinion. At least I take that to be the implication of the questions you asked.
>
> I do not think therefore, that we can take this correspondence further in a profitable way because, as I have said, it is, in the last analysis, for the provider of information, retrospectively collected, to release or refuse to release, in their absolute discretion, the information supplied from the 'confidential' embargo originally accorded to it. The reasons for releasing or not releasing are irrelevant whether they are good, bad or indifferent.
>
> I regret I do not feel able to help you further."

III. SUBSEQUENT LEGISLATIVE DEVELOPMENTS

29. On 1 April 1989 the Access to Personal Files (Social Services) Regulations 1989 came into force. These regulations, made under the Access to Personal Files Act 1987 and further explained in Local Authority Circular LAC (89) 2, impose upon social services departments a duty to give to any individual access to personal information held concerning him, except for personal health information which originated from a health professional and subject to the exceptions in Regulation 9. This latter provision exempts from the obligation of disclosure, inter alia, any information from which the identity of another individual (other than a social service employee), who has not consented to the disclosure of the information, would be likely to be disclosed or deduced by the individual who is the subject of the information or any other person who is likely to obtain access to it.

According to the Government, the effect of Regulation 9 (3) is that, in future, case records will be compiled on the basis that the information contained therein is liable to be disclosed, except in so far as disclosure would be likely to reveal the identity of the informant or another third party. However, by virtue of section 2 (4) of the Access to Personal Files Act 1987, the 1989 Regulations apply only to information recorded after the Regulations came into force, that is, after 1 April 1989. As in the case of Circular LAC (83) 14, which governed the adoption of the resolution mentioned in paragraph 25 above and the subsequent partial release of documents to Mr Gaskin, the Access to Personal Files (Social Services) Regulations 1989 do not have retrospective effect.

PROCEEDINGS BEFORE THE COMMISSION

30. The applicant applied to the Commission (application no. 10454/83) on 17 February 1983. He claimed that the refusal of access to all his case records held by the Liverpool City Council was in breach of his right to respect for his private and family life under Article 8 (art. 8) of the Convention and his right to receive information under Article 10 (art. 10) of the Convention. He also invoked Articles 3 and 13 (art. 3, art. 13) of the Convention and Article 2 of Protocol No. 1 (P1-2).

31. On 23 January 1986, the Commission declared admissible the applicant's complaint concerning the continuing refusal of Liverpool City Council to give him access to his case records but declared the remainder of the application inadmissible.

In its report of 13 November 1987 (Article 31) (art. 31), the Commission concluded, by six votes to six, with a casting vote by the acting President, that there had been a violation of Article 8 (art. 8) of the Convention by the procedures and decisions which resulted in the refusal to allow the applicant access to the file. It further concluded, by eleven votes to none with one abstention, that there had been no violation of Article 10 (art. 10) of the Convention.

The full text of the Commission's opinion and of the partly dissenting opinions contained in the report is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

32. At the public hearing on 28 March 1989, the Government maintained the concluding submissions set out in their memorial, whereby they requested the Court to decide and declare:

> "(i) that the facts disclose no breach of the applicant's rights guaranteed by Article 8 (art. 8) of the Convention;
>
> (ii) that the facts disclose no breach of the applicant's rights guaranteed by Article 10 (art. 10) of the Convention."

AS TO THE LAW

I. SCOPE OF THE CASE BEFORE THE COURT

33. The sole complaint declared admissible by the Commission was that of the applicant's continuing lack of access to the whole of his case-file held by Liverpool City Council (see paragraph 31 above). Although the question of access to the file was first posed in the context of Mr Gaskin's application for discovery of documents with a view to bringing legal proceedings against the local authority (see paragraphs 14-18 above), the only issues before the Court are those arising under Articles 8 and 10 (art. 8, art. 10) in relation to the procedures and decisions pursuant to which the applicant was refused access to the file subsequently to the termination of the proceedings for discovery (see paragraphs 93 and 104 of the Commission's report).

II. ALLEGED BREACH OF ARTICLE 8 (art. 8)

A. Applicability

34. The applicant alleges a breach of Article 8 (art. 8) of the Convention, which is worded as follows:

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

35. Before the Commission, the Government claimed that the file as such, being information compiled for and by the local authority, did not form a part of the applicant's private life. Accordingly, in their submission, neither its compilation nor the question of access thereto fall within the scope of Article 8 (art. 8).

In the proceedings before the Court the Government did not revert specifically to this contention but rather concentrated on the questions whether there was any relevant interference with the applicant's right to respect for private life or alternatively whether there was any failure to comply with such positive obligations as are inherent in Article 8 (art. 8) to secure through its legal and administrative system respect for private life.

36. In the opinion of the Commission "the file provided a substitute record for the memories and experience of the parents of the child who is not in care". It no doubt contained information concerning highly personal aspects of the applicant's childhood, development and history and thus could constitute his principal source of information about his past and formative years. Consequently lack of access thereto did raise issues under Article 8 (art. 8).

37. The Court agrees with the Commission. The records contained in the file undoubtedly do relate to Mr Gaskin's "private and family life" in such a way that the question of his access thereto falls within the ambit of Article 8 (art. 8).

This finding is reached without expressing any opinion on whether general rights of access to personal data and information may be derived from Article 8 para. 1 (art. 8-1) of the Convention. The Court is not called upon to decide in abstracto on questions of general principle in this field but rather has to deal with the concrete case of Mr Gaskin's application.

B. Approach to Article 8 (art. 8) in the present case

38. As the Court held in the Johnston and Others judgment of 18 December 1986, "although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective 'respect' for family life" (Series A no. 112, p. 25, para. 55).

39. The Commission considered that "respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that in principle they should not be obstructed by the authorities from obtaining such very basic information without specific justification".

In its report, reference was made to the Court's Leander judgment of 26 March 1987, in which it was held that:

> "Both the storing and the release of ... information, which were coupled with a refusal to allow Mr Leander an opportunity to refute it, amounted to an interference with his right to respect for private life as guaranteed by Article 8 para. 1 (art. 8-1)" (Series A no. 116, p. 22, para. 48).

The Commission noted that Mr Gaskin sought access to a file of a different nature from that in the Leander case. Nevertheless, since the information compiled and maintained by the local authority related to the applicant's basic identity, and indeed provided the only coherent record of his early childhood and formative years, it found the refusal to allow him access to the file to be an interference with his right to respect for his private life falling to be justified under paragraph 2 of Article 8 (art. 8-2).

40. The Government contended that, contrary to the Leander case, which was concerned with the negative obligations flowing from Article 8 (art. 8),

namely the guarantee against arbitrary interference by public authorities, the present case involved essentially the positive obligations of the State under that Article.

In their view, the applicant was complaining not about direct interference by a public authority with the rights guaranteed by Article 8 (art. 8), but of a failure by the State to secure through its legal or administrative system the right to respect for private and family life. In this connection, the Government conceded that neither the legal nor the administrative system in the United Kingdom provided an absolute and unfettered right of access to case records to a person in the applicant's situation. However, the existence of such positive obligations entailed a wide margin of appreciation for the State. The question in each case was whether, regard being had to that margin of appreciation, a fair balance was struck between the competing interests, namely the public interest in this case in the efficient functioning of the child-care system, on the one hand, and the applicant's interest in having access to a coherent record of his personal history, on the other.

41. The Court agrees with the Government that the circumstances of this case differ from those of the Leander case in which the respondent State was found to have interfered with Article 8 (art. 8) rights by compiling, storing, using and disclosing private information about the applicant in that case. Nevertheless, as in the Leander case, a file exists in this case concerning details of Mr Gaskin's personal history which he had no opportunity of examining in its entirety.

However, it is common ground that Mr Gaskin neither challenges the fact that information was compiled and stored about him nor alleges that any use was made of it to his detriment. In fact, the information compiled about Mr Gaskin served wholly different purposes from those which were relevant in the Leander case. He challenges rather the failure to grant him unimpeded access to that information. Indeed, by refusing him complete access to his case records, the United Kingdom cannot be said to have "interfered" with Mr Gaskin's private or family life. As regards such refusal, "the substance of [the applicant's] complaint is not that the State has acted but that it has failed to act" (see the Airey judgment of 9 October 1979, Series A no. 32, p. 17, para. 32).

The Court will therefore examine whether the United Kingdom, in handling the applicant's requests for access to his case records, was in breach of a positive obligation flowing from Article 8 (art. 8) of the Convention.

C. Compliance with Article 8 (art. 8)

42. In accordance with its established case-law, the Court, in determining whether or not such a positive obligation exists, will have regard to the "fair balance that has to be struck between the general interest

of the community and the interests of the individual ... In striking this balance the aims mentioned in the second paragraph of Article 8 (art. 8) may be of a certain relevance, although this provision refers in terms only to 'interferences' with the right protected by the first paragraph - in other words is concerned with the negative obligations flowing therefrom ..." (see the Rees judgment of 17 October 1986, Series A no. 106, p. 15, para. 37).

43. Like the Commission, the Court considers that the confidentiality of the contents of the file contributed to the effective operation of the child-care system and, to that extent, served a legitimate aim, by protecting not only the rights of contributors but also of the children in need of care.

44. As to the general policy in relation to the disclosure of information contained in case records, the Government relied on Local Authority Circular (83) 14 dated 24 August 1983 (see paragraph 23 above). The Government drew attention to paragraph 3 thereof, according to which, subject to certain exceptions, clients who wish to have access to child care records should be allowed to do so. The terms of the Circular were substantially followed in the resolution of the Liverpool City Council's Social Services Committee of 18 October 1983 (see paragraph 25 above).

The Government argued that both circular and resolution acknowledged the importance of access to the child-care records for those who are the subject of those records, and at the same time the importance of respecting the confidentiality of those who contributed to the records. That was not merely to protect the private interests of individual contributors but involved a much wider public interest. The proper operation of the child-care service depended on the ability of those responsible for the service to obtain information not only from professional persons and bodies, such as doctors, psychiatrists, teachers and the like, but also from private individuals - foster-parents, friends, neighbours and so on. The Government argued that, if the confidentiality of these contributors were not respected, their co-operation would be lost and the flow of information seriously reduced. This would have a serious effect on the operation of the child-care service.

In this connection, the Government attached particular importance to paragraph 5 of the Circular, which contained an express recognition of the rights of persons who had provided information on the clear understanding that it would not be revealed, and to paragraph 7, pursuant to which "information should not be disclosed to the client if derived in confidence from a third party without the consent of the third party". They also drew attention to paragraph 9 which stated that records existing prior to the introduction of the new policy had in general been prepared on the basis that their content would never be disclosed to clients and therefore should not be disclosed without the contributor's permission.

In this respect, the balance struck by both the circular and the resolution between the interests of the individual seeking access to the records on the

one hand and, on the other hand, the interests of those who have supplied information in confidence and the wider public interest in the maintenance of full and candid records, was said by the Government to be proper, rational, reasonable and consistent with their obligations under Article 8 (art. 8). There was thus no failure on the part of the United Kingdom to secure the applicant's right to respect for private life guaranteed by that provision.

45. The applicant, however, contested this. He emphasised the fundamental change which, according to him, has occurred in the Government's position since the issue in August 1983 of Circular LAC (83) 14. He pointed to that Circular as evidence of an "increasingly held view" that persons receiving personal social services should be able to discover what is said about them in case records. The Access to Personal Files Act 1987, and the Access to Personal Files (Social Services) Regulations 1989 made thereunder, illustrated the extent to which information of the kind sought by Mr Gaskin would in the future be made available by public authorities in the United Kingdom (see paragraph 29 above).

By way of example, Mr Gaskin explained in some detail that he wished to establish his medical condition, which was not possible without sight of all the records and expert advice.

46. As to the alleged confidentiality of the records, the applicant submitted that it was not clear precisely how or why the contributors to his case records contended that their contributions were made in confidence; whether a condition of confidence had been made a prerequisite of the contribution; and whether confidentiality was clearly expressed at the time of the contribution or had been implied ex post facto.

The Government explained to the Court, in reply to its question on this point, that all information contributed to a case record kept under the 1955 Regulations (see paragraph 13 above) was treated as supplied on the understanding that it was to be kept confidential, unless the contrary was clear either from the nature of the information supplied or from the fact that the contributor had waived confidentiality. The basis for this principle of confidentiality was to be found in Regulation 10 which provides that the case record shall be open to inspection by any person duly authorised in that behalf by the Secretary of State. As the Court of Appeal held in Re D (infants) [1970] 1 All England Law Reports 1089, in which that provision was applied in the context of wardship proceedings, "that shows that the case record is regarded as private and confidential" (see paragraph 17 above).

47. It should be noted that, in seeking in this context to reconcile the competing interests with which it was faced, Liverpool City Council contacted the various suppliers of information with a view to obtaining waivers of confidentiality. Out of forty-six contributors nineteen gave their

consent and 65 out of 352 documents were released. Mr Gaskin wishes however to have access to his entire file (see paragraph 26 above).

The Commission observed that the applicant had not had the benefit of any "independent procedure to enable his request to be tested in respect of each of the various entries in the file where consent is not forthcoming". It concluded that the "absence of any procedure to balance the applicant's interest in access to the file against the claim to confidentiality by certain contributors, and the consequential automatic preference given to the contributors' interests over those of the applicant," was disproportionate to the aim pursued and could not be said to be necessary in a democratic society.

48. In this connection, the Government maintained that the United Kingdom was not alone amongst European States in having no general independent procedure for weighing the competing interests. As in other member States, such procedure as does exist was confined to cases where legal proceedings are subsisting or in contemplation. Moreover, a balance between the competing interests was already provided for in Circular LAC (83) 14. There was no blanket refusal of access to case records. Access was given to information which was not provided in confidence and access was given even to confidential information in so far as the consent of the contributor could be obtained by the Local Authority concerned. As regards the alleged giving of "automatic preference to the contributors' interest over those of the applicant", it would, in the Government's view, be unreasonable and arbitrary to assume the right to dispense with a contributor's consent or to determine that a confidence should be overridden. The Government further relied on the statement contained in the partly dissenting opinion of one member of the Commission, that to do so would amount to a violation of a moral obligation on their part and would place at risk the effective operation of the child-care system.

For his part, the applicant pointed out that, under the procedure of obtaining the consent of contributors adopted by the Circular, there were always likely to be certain contributors whom it is impracticable to ask for consent, as it may not be possible to identify or trace them. In that case, there would always be an element of the documents which may never be released to someone in his situation. The example was also given of jointly prepared reports where one of the authors consents to disclosure but the other does not.

49. In the Court's opinion, persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development. On the other hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the

British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8 (art. 8), taking into account the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent. No such procedure was available to the applicant in the present case.

Accordingly, the procedures followed failed to secure respect for Mr Gaskin's private and family life as required by Article 8 (art. 8) of the Convention. There has therefore been a breach of that provision.

III. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

50. The applicant further maintained that the same facts as constituted a violation of Article 8 (art. 8) also gave rise to a breach of Article 10 (art. 10), which reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

51. The Commission found that Article 10 (art. 10) did not, in the circumstances of the case, give the applicant a right to obtain, against the will of the local authority, access to the file held by that authority. The Government agreed.

52. The Court holds, as it did in its aforementioned Leander judgment, that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him." (Series A no. 116, p. 29, para. 74). Also in the circumstances of the present case, Article 10 (art. 10) does not embody an obligation on the State concerned to impart the information in question to the individual.

53. There has thus been no interference with Mr Gaskin's right to receive information as protected by Article 10 (art. 10).

IV. APPLICATION OF ARTICLE 50 (art. 50)

54. Mr Gaskin claimed just satisfaction under Article 50 (art. 50), which reads:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

55. First of all, Mr Gaskin claimed amounts in respect of past and future loss of earnings totalling in excess of £380,000. He alleged that his employment prospects had been damaged, owing to the loss of opportunities sustained by him.

The Government contended that no causal link had been shown to exist between the losses said to have been suffered and the alleged violations of the Convention.

56. The Court notes that, even if a procedure as described in paragraph 49 above had existed in Mr Gaskin's case, there is no evidence to show that the documents withheld would have been released and, if so, that this would have had a favourable effect on his future earnings. The claim for damages under this head should therefore be rejected.

B. Non-pecuniary damage

57. The applicant also sought compensation for non-pecuniary damage in respect of distress, humiliation and anxiety suffered by him. By reason of the failings in his upbringing, Mr Gaskin's status and dignity had been irreversibly damaged.

The Government contended that it could not be assumed that the applicant had sustained a real loss of opportunities such as to justify an award of just satisfaction in respect of non-pecuniary damage. Even if some loss of opportunities had been suffered, the applicant had not established any causal link between the damage claimed and any violation of the Convention found.

58. The Court acknowledges that Mr Gaskin may have suffered some emotional distress and anxiety by reason of the absence of any independent procedure such as that mentioned in paragraph 49 above.

Making a determination on an equitable basis, the Court awards to Mr Gaskin under this head the amount of £5,000.

C. Costs and expenses

59. The applicant claimed legal costs and expenses. His claim was calculated on the basis of 650 hours' work by his solicitor at the rate of £60 per hour, increased by a multiplier of 200% in order to reflect the importance and complexity of the case, whereby a total amount claimed of £117,000 was arrived at.

The Court will deal with this claim in accordance with the criteria it has established (see, among other authorities, the Belilos judgment of 29 April 1988, Series A no. 132, p. 33, para. 79).

1. Costs incurred at domestic level

60. According to the Government, the costs arising at domestic level were not incurred in order to remedy a breach of the Convention: it was solely in connection with a prospective claim for damages that the applicant had brought proceedings before the domestic courts for the discovery of his case records.

The Court agrees that only costs incurred subsequently to the termination of the domestic proceedings may be considered (see paragraph 33 above). It is therefore appropriate to include this aspect of the claim in the examination conducted in paragraphs 61 to 62 below.

2. Costs incurred in the European proceedings

61. The Government contested the amount claimed. It considered the number of hours stated to be excessive. In addition, according to them, appropriate hourly rates ranged between £36 and £60. In this connection, they also relied on paragraph 15 (d) of the Court's judgment of 9 June 1988 in B v. the United Kingdom (Series A no. 136-D, p. 34), which however indicated that an upper figure of £70 might be reasonable, depending on the nature of the case.

The Government did not dispute that the applicant had incurred liability to pay sums additional to those covered by the legal aid which he had received from the Council of Europe. If the Court were to make an award, it should not be greater than that awarded in comparable cases.

62. The Court is of the opinion that the total amount claimed is not reasonable as to quantum. Taking into account all the circumstances and making an equitable assessment, the Court considers that Mr Gaskin is entitled to be reimbursed, for legal fees and expenses, the sum of £11,000 less 8,295 French francs already paid in legal aid.

FOR THESE REASONS, THE COURT

1. Holds by eleven votes to six that there has been a violation of Article 8 (art. 8);

2. Holds unanimously that there has been no violation of Article 10 (art. 10);

3. Holds by nine votes to eight that the United Kingdom is to pay to the applicant, for non-pecuniary damage, £5,000 (five thousand pounds) and, for legal fees and expenses, £11,000 (eleven thousand pounds) less 8,295 FF (eight thousand two hundred and ninety-five French francs) to be converted into pounds sterling at the rate applicable on the date of this judgment, plus value added tax on the balance;

4. Rejects the remainder of the claims for just satisfaction.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 July 1989.

Rolv RYSSSDAL
President

For the Registrar
Herbert PETZOLD
Deputy Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Joint dissenting opinion of Mr Ryssdal, Mr Cremona, Mr Gölcüklü, Mr Matscher and Sir Vincent Evans;

(b) Dissenting opinion of Mr Walsh.

R.R.
H.P.

JOINT DISSENTING OPINION OF JUDGES RYSSDAL, CREMONA, GÖLCÜKLÜ, MATSCHER AND SIR VINCENT EVANS

1. We accept the finding of the majority of the Court that the records contained in the local authority's file relate to Mr Gaskin's private and family life in such a way that the question of his access thereto raises an issue under Article 8 (art. 8) of the Convention. We do not, however, agree that a violation of Article 8 (art. 8) has been established in this case.

2. The confidential nature of the case records compiled under Regulation 10 of the Boarding-Out of Children Regulations 1955 at the time when Mr Gaskin was in care has been clearly affirmed by the English courts, particularly in the case of Re D. (Infants) [1970] 1 WLR 599, which was followed by the decisions of the High Court and the Court of Appeal in refusing Mr Gaskin's application for discovery of documents in 1980 (see paragraphs 14 to 18 of the Court's judgment). Boreham J in the High Court, whose finding on this point was accepted by the Court of Appeal, said that he was "left in no doubt that it is necessary for the proper functioning of the child care service that the confidentiality of the relevant documents should be preserved".

3. As both the Commission and the Court have recognised, the confidentiality of the contents of the file had a legitimate aim - or aims. It not only protected the rights of those who had provided information on a confidential basis, but by contributing to the efficient operation of the child-care system it also served to protect the rights of children in need of care.

4. Admittedly a more open policy as regards access to personal files has been followed in other Contracting States and this is now the approach adopted in Great Britain in the Access to Personal Files Act 1987 and Regulations made under it as to information recorded in the future. In our opinion, however, it would be wrong to alter retrospectively the basis on which existing case-records have been compiled. The question of access to them, including access to Mr Gaskin's file, must be considered with proper regard to the conditions of confidentiality under which information was contributed to them.

5. Mr Gaskin claims that his right to respect for his private and family life under Article 8 (art. 8) entitles him to access to the whole of his case-file. In determining whether the respondent Government are under a positive obligation to grant him access, the Court, in accordance with its established case-law, has had regard to the "fair balance that has to be struck between the general interest of the community and the interests of the individual" (see paragraph 42 of the judgment). The Court has also pointed out in its judgment in the case of Abdulaziz, Cabales and Balkandali (Series A no. 94, p. 33, para. 67) that the notion of "respect" is not clear-cut

especially as far as positive obligations inherent in Article 8 (art. 8) are concerned and accordingly that this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.

6. It is implicit in the Court's judgment in the present case that it does not accept that the applicant should have access to his entire file irrespective of the confidentiality attaching to its contents, but that access can only be given on a selective basis.

7. The Government maintain that by writing a letter to each of the contributors to the file seeking his permission to disclose the information that he had contributed and then making available to the applicant documents supplied by persons who gave their consent, the authorities in the United Kingdom have gone as far as they properly could to meet the applicant's request for access. It is the Government's view that it would be entirely improper and a breach of good faith to disclose information supplied in confidence without the consent of the supplier.

8. The Court has taken the view that the final decision whether access should be granted in cases where a contributor fails to answer or withholds consent should be taken by an independent authority (see paragraph 49 of the judgment). Inasmuch as such a system envisages the disclosure of information received in confidence without the contributor's consent, we consider that it is open to serious objection as not fairly and adequately respecting and protecting his position.

9. In our opinion the procedure that has been followed by the United Kingdom authorities for determining what parts of Mr Gaskin's file could be made available to him should be accepted as representing a fair balance of interests in the circumstances.

10. Finally, we do not agree that the payment of non-pecuniary damage is justified in this case. The stress and anxiety which the applicant has no doubt suffered have been occasioned by the refusal to grant him access to his case-file and not to the lack of any review procedure, which may or may not result in the release of further documents to him. This therefore is, in our opinion, a case in which the finding of a breach of Article 8 (art. 8) constitutes adequate just satisfaction for the purpose of Article 50 (art. 50).

DISSENTING OPINION OF JUDGE WALSH

1. In my opinion Article 8 (art. 8) of the Convention is not applicable in the present case. The information sought by the applicant was for the purpose of furthering his legal action for damages against the Liverpool City Council. It was not sought in defence of or to further his right to respect for his private and family life. Furthermore the present application is, in effect, an appeal against the orders of the English courts which decided on the merits of the case not to permit the revelation of information imparted and received in confidence.

2. In my opinion Article 10 (art. 10) of the Convention is applicable. Prima facie the applicant's right to receive the information sought from the public authority falls within the guarantee contained in Article 10 para. 1 (art. 10-1) of the Convention. The information sought was relevant to his legal proceedings. The willingness of the Liverpool City Council to furnish the information was restrained by the English courts on the grounds that to do so would be to breach the undisputed confidentiality which covered the documents in question. In my view that fell within the qualification permitted by Article 10 para. 2 (art. 10-2) of the Convention. In fact nineteen of the forty-six informants agreed to waive the confidentiality and the relevant documents were furnished to the applicant. The applicant's freedom to pursue his legal proceedings is not impaired and he is free to exercise his rights guaranteed by Article 6 para. 1 (art. 6-1) of the Convention. He can furnish first-hand testimony of the alleged personal injuries suffered by him and examine and cross-examine witnesses in accordance with the rules of English procedural law. The fact that the English courts in their discretion might have given the applicant access to the documents sought does not affect the construction of Article 10 para. 2 (art. 10-2) of the Convention. The matter was decided in accordance with English law on grounds which, in my view, can in the circumstances of the case be justified as being necessary in a democratic society for preventing the disclosure of information received in confidence relating to a very sensitive area of social welfare.

3. In my opinion it has not been shown that there has been any breach of the Convention.

In the case of Goodwin v. the United Kingdom (1),

The European Court of Human Rights, sitting, in pursuance of Rule 51 of Rules of Court A (2), as a Grand Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr R. Bernhardt,
Mr Thór Vilhjálmsson,
Mr F. Matscher,
Mr B. Walsh,
Mr C. Russo,
Mr A. Spielmann,
Mr J. De Meyer,
Mr N. Valticos,
Mrs E. Palm,
Mr F. Bigi,
Sir John Freeland,
Mr A.B. Baka,
Mr D. Gotchev,
Mr B. Repik,
Mr P. Jambrek,
Mr P. Kuris,
Mr U. Lohmus,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 30 September 1995 and 22 February 1996,

Delivers the following judgment, which was adopted on the last-mentioned date:

_____

Notes by the Registrar

1. The case is numbered 16/1994/463/544. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 20 May 1994, within the three-month period laid down by Article 32 para. 1 (art. 32-1) and Article 47 (art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in application (no. 17488/90) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25

(art. 25) by Mr William Goodwin, a British citizen, on 27 September 1990.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 28 May 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr B. Walsh, Mr C. Russo, Mr J. De Meyer, Mrs E. Palm, Mr A.B. Baka and Mr B. Repik (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Registrar received the Government's memorial on 3 February 1995 and the applicant's memorial on 1 March. On 19 April 1995 the Secretary to the Commission indicated that the Delegate did not wish to reply in writing.

On various dates between 12 April and 7 September 1995 the Registrar received from the Government and the applicant observations on his Article 50 (art. 50) claim.

5. On 24 February 1995 the President, having consulted the Chamber, granted leave to Article 19 and Interights, two London based non-governmental human rights organisations, to submit observations on national law in the area in question in the present case, as applicable in certain countries (Rule 37 para. 2). Their comments were filed on 10 March 1995.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 April 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr I. Christie, Foreign and Commonwealth Office, Agent,
Mr M. Baker, QC, Counsel,
Mr M. Collon, Lord Chancellor's Department, Adviser;

(b) for the Commission

Mrs G.H. Thune, Delegate;

(c) for the applicant

Mr G. Robertson QC, Counsel,
Mr G. Bindman, Solicitor,
Mr R.D. Sack, Attorney,
Ms A.K. Hilker, Attorney,
Ms L. Moore, Attorney,
Mr J. Mortimer QC, Advisers.

The Court heard addresses by Mrs Thune, Mr Robertson and Mr Baker and also replies to a question put by one of its members individually.

7. Following deliberations on 27 April 1995 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51 para. 1).

8. The Grand Chamber to be constituted included ex officio Mr Ryssdal, President of the Court, Mr R. Bernhardt, Vice-President of the Court, and the other members of the Chamber which had relinquished jurisdiction (Rule 51 para. 2 (a) and (b)). On 5 May 1995, in the presence of the Registrar, the President drew by lot the names of the nine additional judges called on to complete the Grand Chamber, namely Mr F. Matscher, Mr A. Spielmann, Mr N. Valticos, Mr R. Pekkanen, Mr F. Bigi, Mr D. Gotchev, Mr P. Jambrek, Mr P. Kuris and Mr U. Lohmus (Rule 51 para. 2 (c)). Mr Pekkanen subsequently withdrew, being unable to take part in the further consideration of the case (Rule 24 para. 1 in conjunction with Rule 51 para. 6).

9. Having taken note of the opinions of the Agent of the Government, the Delegate of the Commission and the applicant, the Grand Chamber decided on 4 September 1995 that it was not necessary to hold a further hearing following the relinquishment of jurisdiction by the Chamber (Rules 26 and 38, taken together with Rule 51 para. 6).

AS TO THE FACTS

I. Particular circumstances of the case

10. Mr William Goodwin, a British national, is a journalist and lives in London.

11. On 3 August 1989 the applicant joined the staff of The Engineer, published by Morgan-Grampian (Publishers) Ltd ("the publishers"), as a trainee journalist. He was employed by Morgan Grampian PLC ("the employer").

On 2 November 1989 the applicant was telephoned by a person who, according to the applicant, had previously supplied him with information on the activities of various companies. The source gave him information about Tetra Ltd ("Tetra"), to the effect that the company was in the process of raising a £5 million loan and had financial problems as a result of an expected loss of £2.1 million for 1989 on a turnover of £20.3 million. The information was unsolicited and was not given in exchange for any payment. It was provided on an unattributable basis. The applicant maintained that he had no reason to believe that the information derived from a stolen or confidential document. On 6 and 7 November 1989, intending to write an article about Tetra, he telephoned the company to check the facts

and seek its comments on the information.

The information derived from a draft of Tetra's confidential corporate plan. On 1 November 1989 there had been eight numbered copies of the most recent draft. Five had been in the possession of senior employees of Tetra, one with its accountants, one with a bank and one with an outside consultant. Each had been in a ring binder and was marked "Strictly Confidential". The accountants' file had last been seen at about 3 p.m. on 1 November in a room they had been using at Tetra's premises. The room had been left unattended between 3 p.m. and 4 p.m. and during that period the file had disappeared.

A. Injunction and orders for disclosure of sources and documents

12. On 7 November 1989 Mr Justice Hoffmann of the High Court of Justice (Chancery Division) granted an application by Tetra of the same date for an ex parte interim injunction restraining the publishers of The Engineer from publishing any information derived from the corporate plan. The company informed all the national newspapers and relevant journals of the injunction on 16 November.

13. In an affidavit to the High Court dated 8 November 1989, Tetra stated that if the plan were to be made public it could result in a complete loss of confidence in the company on the part of its actual and potential creditors, its customers and in particular its suppliers, with a risk of loss of orders and of a refusal to supply the company with goods and services. This would inevitably lead to problems with Tetra's refinancing negotiations. If the company went into liquidation, there would be approximately four hundred redundancies.

14. On 14 November 1989 Mr Justice Hoffmann, on an application by Tetra, ordered the publishers, under section 10 of the Contempt of Court Act 1981 ("the 1981 Act"; see paragraph 20 below), to disclose by 3 p.m. on 15 November the applicant's notes from the above telephone conversation identifying his source. On the latter date, the publishers having failed to comply with the order, Mr Justice Hoffmann granted Tetra leave to join the applicant's employer and the applicant himself to the proceedings and gave the defendants until 3 p.m. on the following day to produce the notes.

On 17 November 1989 the High Court made a further order to the effect that the applicant represented all persons who had received the plan or information derived from it without authority and that such persons should deliver up any copies of the plan in their possession. The motion was then adjourned for the applicant to bring this order to the attention of his source. However, the applicant declined to do so.

15. On 22 November 1989 Mr Justice Hoffmann ordered the applicant to disclose by 3 p.m. on 23 November his notes on the grounds that it was necessary "in the interests of justice", within the meaning of section 10 of the 1981 Act (see paragraph 20 below), for the source's identity to be disclosed in order to enable Tetra to bring proceedings against the source to recover the document, obtain an injunction preventing further publication or seek damages for the expenses to which it had been put. The judge concluded:

> "There is strong prima facie evidence that it has suffered a serious wrong by the theft of its confidential file. There is similar evidence that it would suffer serious commercial damage from the publication of the information in the file

> during the near future. It is true that the source may not be the person who stole the file. He may have had the information second hand, although this is less likely. In either case, however, he was trying to secure damaging publication of information which he must have known to be sensitive and confidential. According to the respondent, having given him the information he telephoned again a few days later to ask how the article was getting on. The plaintiff wishes to bring proceedings against the source for recovery of the document, an injunction against further publication and damages for the expense to which it has been put. But it cannot obtain any of those remedies because it does not know whom to sue. In the circumstance of this case, in which a remedy against the source is urgently needed, I think that disclosure is necessary in the interests of justice.
>
> ... There is no doubt on the evidence that the respondent was an innocent recipient of the information but the Norwich Pharmacal case shows that this does not matter. The question is whether he had become mixed up in the wrongdoing ...
>
> The respondent has sworn an affidavit expressing the view that the public interest requires publication of the plaintiff's confidential commercial information. Counsel for the respondent says that the plaintiff's previous published results showed it as a prosperous expanding company and therefore the public was entitled to know that it was now experiencing difficulties. I reject this submission. There is nothing to suggest that the information in the draft business plan falsifies anything which has been previously made public or that the plaintiff was under any obligation, whether in law or commercial morality, to make that information available to its customers, suppliers and competitors. On the contrary, it seems to me that business could not function properly if such information could not be kept confidential."

16. On the same date the Court of Appeal rejected an application by the applicant for a stay of execution of the High Court's order, but substituted an order requiring the applicant either to disclose his notes to Tetra or to deliver them to the Court of Appeal in a sealed envelope with accompanying affidavit. The applicant did not comply with this order.

B. Appeals to the Court of Appeal and to the House of Lords

17. On 23 November 1989 the applicant lodged an appeal with the Court of Appeal from Mr Justice Hoffmann's order of 22 November 1989. He argued that disclosure of his notes was not "necessary in the interests of justice" within the meaning of section 10 of the 1981 Act; the public interest in publication outweighed the interest in preserving confidentiality; and, since he had not facilitated any breach of confidence, the disclosure order against him was invalid.

The Court of Appeal dismissed the appeal on 12 December 1989. Lord Donaldson held:

> "The existence of someone with access to highly confidential information belonging to the plaintiffs who was prepared to

break his obligations of confidentiality in this way was a permanent threat to the plaintiffs which could only be eliminated by discovering his identity. The injunctions would no doubt be effective to prevent publication in the press, but they certainly would not effectively prevent publication to the plaintiffs' customers or competitors.

...

... I am loath in a judgment given in open court to give a detailed explanation of why this is a case in which, if the full facts were known and the courts had to say that they could give the plaintiffs no assistance, there would, I think, be a significant lessening in public confidence in the administration of justice generally. Suffice it to say that the plaintiffs are a, and perhaps the, leader in their very important field, which I deliberately do not identify, with national and international customers and competitors. They are faced with a situation which is in part the result of their own success. They have reached a point at which they have to refinance and expand or go under with the loss not only of money, but of a significant number of jobs. This is not the situation in which the court should be or be seen to be impotent in the absence of compelling reasons. The plaintiffs are continuing with their refinancing discussions menaced by the source (or the source's source) ticking away beneath them like a time bomb. Prima facie they are entitled to assistance in identifying, locating and defusing it.

That I should have concluded that the disclosure of Mr Goodwin's source is necessary in the interests of justice is not determinative of this appeal. It does, however, mean that I have to undertake a balancing exercise. On the one hand there is the general public interest in maintaining the confidentiality of journalistic sources, which is the reason why section 10 was enacted. On the other is, in my judgment, a particular case in which disclosure is necessary in the general interests of the administration of justice. If these two factors stood alone, the case for ordering disclosure would be made out, because the parliamentary intention must be that, other things being equal, the necessity for disclosure on any of the four grounds should prevail. Were it otherwise, there would be no point in having these doorways.

But other things would not be equal if, on the particular facts of the case, there was some additional reason for maintaining the confidentiality of a journalistic source. It might, for example, have been the case that the information disclosed what, on the authorities, is quaintly called `iniquity'. Or the plaintiffs might have been a public company whose shareholders were unjustifiably being kept in ignorance of information vital to their making a sensible decision on whether or not to sell their shares. Such a feature would erode the public interest in maintaining the confidentiality of the leaked information and correspondingly enhance the public interest in maintaining the confidentiality of journalistic sources. Equally, on particular facts such as that the identification of the source was necessary in order to support or refute a defence

> of alibi in a major criminal trial, the necessity for disclosure `in the interests of justice' might be enhanced and overreach the threshold of the statutory doorway requiring some vastly increased need for the protection of the source if it was to be counterbalanced. Once the [plaintiffs] can get through a doorway, the balancing exercise comes into play.
>
> On the facts of this case, nothing is to be added to either side of the equation. The test of the needs of justice is met, but not in superabundance. The general public interest in maintaining the confidentiality of journalistic sources exists, but the facts of this particular case add absolutely nothing to it. No `iniquity' has been shown. No shareholders have been kept in the dark. Indeed the public has no legitimate interest in the business of the plaintiffs who, although corporate in form, are in truth to be categorised as private individuals. This is in reality a piece of wholly unjustified intrusion into privacy.
>
> Accordingly, I am left in no doubt that, notwithstanding the general need to protect journalistic sources, this is a case in which the balance comes down in favour of disclosure. I would dismiss the companies' appeals. I can see no reason in justice for doing otherwise with regard to Mr Goodwin's appeals."

Lord Justice McCowan stated that the applicant must have been "amazingly naïve" if it had not occurred to him that the source had been at the very least guilty of breach of confidence.

The Court of Appeal granted the applicant leave to appeal to the House of Lords.

18. The House of Lords upheld the Court of Appeal's decision on 4 April 1990, applying the principle expounded by Lord Reid in Norwich Pharmacal Co. v. Customs and Excise Commissioners [1974] Appeal Cases 133, a previous leading case:

> "if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers."

Lord Bridge, in the first of the five separate speeches given in the applicant's case, underlined that in applying section 10 it was necessary to carry out a balancing exercise between the need to protect sources and, inter alia, the "interests of justice". He referred to a number of other cases in relation to how the balancing exercise should be conducted (in particular Secretary of State for Defence v. Guardian Newspapers Ltd [1985] Appeal Cases 339) and continued:

> "... the question whether disclosure is necessary in the interests of justice gives rise to a more difficult problem of weighing one public interest against another. A question arising under this part of section 10 has not previously come before your Lordships' House for decision. In discussing the section generally Lord Diplock said in Secretary of State for Defence v. Guardian Newspapers Ltd [1985] Appeal Cases 339,

350:

`The exceptions include no reference to "the public interest" generally and I would add that in my view the expression "justice", the interests of which are entitled to protection, is not used in a general sense as the antonym of "injustice" but in the technical sense of the administration of justice in the course of legal proceedings in a court of law, or, by reason of the extended definition of "court" in section 19 of the Act of 1981 before a tribunal or body exercising the judicial power of the state.'

I agree entirely with the first half of this dictum. To construe `justice' as the antonym of `injustice' in section 10 would be far too wide. But to confine it to the `technical sense of the administration of justice in the course of legal proceedings in a court of law' seems to me, with all respect due to any dictum of the late Lord Diplock, to be too narrow. It is, in my opinion, `in the interests of justice', in the sense in which this phrase is used in section 10, that persons should be enabled to exercise important legal rights and to protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court of law will be necessary to attain these objectives. Thus, to take a very obvious example, if an employer of a large staff is suffering grave damage from the activities of an unidentified disloyal servant, it is undoubtedly in the interests of justice that he should be able to identify him in order to terminate his contract of employment, notwithstanding that no legal proceedings may be necessary to achieve that end.

Construing the phrase `in the interests of justice' in this sense immediately emphasises the importance of the balancing exercise. It will not be sufficient, per se, for a party seeking disclosure of a source protected by section 10 to show merely that he will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he bases his claim in order to establish the necessity of disclosure. The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached.

Whether the necessity of disclosure in this sense is established is certainly a question of fact rather than an issue calling for the exercise of the judge's discretion, but, like many other questions of fact, such as the question of whether somebody has acted reasonably in given circumstances, it will call for the exercise of a discriminating and sometimes difficult value judgment. In estimating the weight to be attached to the importance of disclosure in pursuance of the policy which underlies section 10 on the other hand, many factors will be relevant on both sides of the scale.

It would be foolish to attempt to give a comprehensive guidance as to how the balancing exercise should be carried out. But it may not be out of place to indicate the kind of factors which will require consideration. In estimating the importance to be given to the case in favour of disclosure there will be a wide spectrum within which the particular case must be located. If the party seeking disclosure shows, for example, that his very livelihood depends upon it, this will put the case near one end of the spectrum. If he shows no more than that what he seeks to protect is a minor interest in property, this will put the case at or near the other end. On the other side the importance of protecting a source from disclosure in pursuance of the policy underlying the statute will also vary within a spectrum. One important factor will be the nature of the information obtained from the source. The greater the legitimate interest in the information which the source has given to the publisher or intended publisher, the greater will be the importance of protecting the source. But another and perhaps more significant factor which will very much affect the importance of protecting the source will be the manner in which the information was itself obtained by the source. If it appears to the court that the information was obtained legitimately this will enhance the importance of protecting the source. Conversely, if it appears that the information was obtained illegally, this will diminish the importance of protecting the source unless, of course, this factor is counterbalanced by a clear public interest in publication of the information, as in the classic case where the source has acted for the purpose of exposing iniquity. I draw attention to these considerations by way of illustration only and I emphasise once again that they are in no way intended to be read as a code ...

In the circumstances of the instant case, I have no doubt that [the High Court] and the Court of Appeal were right in finding that the necessity for disclosure of Mr Goodwin's notes in the interests of justice was established. The importance to the plaintiffs of obtaining disclosure lies in the threat of severe damage to their business, and consequentially to the livelihood of their employees, which would arise from disclosure of the information contained in their corporate plan while their refinancing negotiations are still continuing. This threat ... can only be defused if they can identify the source either as himself the thief of the stolen copy of the plan or as a means to lead to the identification of the thief and thus put themselves in a position to institute proceedings for the recovery of the missing document. The importance of protecting the source on the other hand is much diminished by the source's complicity, at the very least, in a gross breach of confidentiality which is not counterbalanced by any legitimate interest which publication of the information was calculated to serve. Disclosure in the interests of justice is, on this view of the balance, clearly of preponderating importance so as to override the policy underlying the statutory protection of sources and the test of necessity for disclosure is satisfied ..."

Lord Templeman added that the applicant should have "recognised that [the information] was both confidential and damaging".

C. Fine for contempt of court

19. In the meantime, on 23 November 1989, the applicant had been served with a motion seeking his committal for contempt of court, an offence which was punishable by an unlimited fine or up to two years' imprisonment (section 14 of the 1981 Act). On 24 November, at a hearing in the High Court, counsel for the applicant had conceded that he had been in contempt but the motion was adjourned pending the appeal.

Following the House of Lord's dismissal of the appeal, the High Court, on 10 April 1990, fined the applicant £5,000 for contempt of court.

II. Relevant domestic law

20. Section 10 of the Contempt of Court Act 1981 provides:

> "No court may require a person to disclose, nor is a person guilty of contempt of court for refusing to disclose the source of information contained in the publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

21. Section 14 (1) reads:

> "In any case where a court has power to commit a person to prison for contempt of court and (apart from this provision) no limitation applies to the period of committal, the committal shall (without prejudice to the power of the court to order his earlier discharge) be for a fixed term, and that term shall not on any occasion exceed two years in the case of committal by a superior court, or one month in the case of committal by an inferior court."

22. In Secretary of State for Defence v. Guardian Newspapers Lord Diplock considered the expression "interests of justice" in section 10 of the 1981 Act:

> "The exceptions include no reference to the 'public interest' generally and I would add that in my view the expression 'justice', the interests of which are entitled to protection, is not used in a general sense as the antonym of 'injustice' but in a technical sense of the administration of justice in the course of legal proceedings in a court of law ...
>
> [The expression `interests of justice'] ... refers to the administration of justice in particular legal proceedings already in existence or, in the type of `bill of discovery' case ... exemplified by the Norwich Pharmacal Co. v. Customs and Excise Commissioners ... a particular civil action which it is proposed to bring against a wrongdoer whose identity has not yet been ascertained. I find it difficult to envisage a civil action in which section 10 of the [1981] Act would be relevant other than one of defamation or for

> detention of goods where the goods, as in the instant case and in British Steel Corporation v. Granada Television ... consist of or include documents that have been supplied to the media in breach of confidence."

PROCEEDINGS BEFORE THE COMMISSION

23. In his application (no. 17488/90) of 27 September 1990 to the Commission, the applicant complained that the imposition of a disclosure order requiring him to reveal the identity of a source violated his right to freedom of expression under Article 10 (art. 10) of the Convention.

24. The Commission declared the application admissible on 7 September 1993. In its report of 1 March 1994 (Article 31) (art. 31), the Commission expressed the opinion that there had been a violation of Article 10 (art. 10) (by eleven votes to six). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment.

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Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (Reports 1996-II), but a copy of the Commission's report is obtainable from the Registry.

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FINAL SUBMISSIONS MADE TO THE COURT

25. At the hearing on 24 April 1995 the Government, as they had done in their memorial, invited the Court to hold that there had been no violation of Article 10 (art. 10) of the Convention.

26. On the same occasion the applicant reiterated his request to the Court, stated in his memorial, to find that there had been a breach of Article 10 (art. 10) and to award him just satisfaction under Article 50 (art. 50) of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10) OF THE CONVENTION

27. The applicant alleged that the disclosure order requiring him to reveal the identity of his source and the fine imposed upon him for having refused to do so constituted a violation of Article 10 (art. 10) of the Convention, which reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime,

for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

28. It was undisputed that the measures constituted an interference with the applicant's right to freedom of expression as guaranteed by paragraph 1 of Article 10 (art. 10-1) and the Court sees no reason to hold otherwise. It must therefore examine whether the interference was justified under paragraph 2 of Article 10 (art. 10-2).

A. Was the interference "prescribed by law"?

29. The Court observes that, and this was not disputed, the impugned disclosure order and the fine had a basis in national law, namely sections 10 and 14 of the 1981 Act (see paragraphs 20 and 21 above). On the other hand, the applicant maintained that as far as the disclosure order was concerned the relevant national law failed to satisfy the foreseeability requirement which flows from the expression "prescribed by law".

30. The Government contested this allegation whereas the Commission did not find it necessary to reach a conclusion on this point.

31. The Court reiterates that, according to its case-law, the relevant national law must be formulated with sufficient precision to enable the persons concerned - if need be with appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. A law that confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see, for instance, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, pp. 71-72, para. 37).

32. The applicant argued that the interests-of-justice exception to the protection of sources under section 10 of the 1981 Act was not sufficiently precise to enable journalists to foresee the circumstances in which such an order could be made against them in order to protect a private company. By applying this provision to the present case, Lord Bridge had completely revised the interpretation given by Lord Diplock in Secretary of State for Defence v. Guardian Newspapers. The balancing exercise introduced by Lord Bridge amounted to subjective judicial assessment of factors based on retrospective evidence presented by the party seeking to discover the identity of the source (see paragraph 18 above). At the time the source provided the information, the journalist could not possibly know whether the party's livelihood depended upon such discovery and could not assess with any degree of certainty the public interest in the information. A journalist would usually be in a position to judge whether the information was acquired by legitimate means or not, but would not be able to predict how the courts would view the matter. The law, as it stood, was no more than a mandate to the judiciary to order journalists to disclose sources if they were "moved" by the complaint of an aggrieved party.

33. The Court recognises that in the area under consideration it

may be difficult to frame laws with absolute precision and that a certain degree of flexibility may even be desirable to enable the national courts to develop the law in the light of their assessment of what measures are necessary in the interests of justice.

Contrary to what is suggested by the applicant, the relevant law did not confer an unlimited discretion on the English courts in determining whether an order for disclosure should be made in the interests of justice. Important limitations followed in the first place from the terms of section 10 of the 1981 Act, according to which an order for disclosure could be made if it was "established to the satisfaction of the court that disclosure [was] necessary in the interests of justice" (see paragraph 20 above).

In addition, at the material time, that is when the applicant received the information from his source, there existed not only an interpretation by Lord Diplock of the interests-of-justice provision in section 10 in the case of Secretary of State for Defence v. Guardian Newspapers but also a ruling by Lord Reid in Norwich Pharmacal Co. v. Customs and Excise Commissioners (1973), to the effect that a person who through no fault of his own gets mixed up in wrongdoing may come under a duty to disclose the identity of the wrongdoer (see paragraphs 15, 18 and 22 above).

In the Court's view the interpretation of the relevant law made by the House of Lords in the applicant's case did not go beyond what could be reasonably foreseen in the circumstances (see, mutatis mutandis, the recent S.W. v. the United Kingdom judgment of 22 November 1995, Series A no. 335-B, p. 42, para. 36). Nor does it find any other indication that the law in question did not afford the applicant adequate protection against arbitrary interference.

34. Accordingly, the Court concludes that the impugned measures were "prescribed by law".

B. Did the interference pursue a legitimate aim?

35. It was not disputed before the Convention institutions that the aim of the impugned measures was to protect Tetra's rights and that the interference thus pursued a legitimate aim. The Government maintained that the measures were also taken for the prevention of crime.

36. The Court, being satisfied that the interference pursued the first of these aims, does not find it necessary to determine whether it also pursued the second.

C. Was the interference "necessary in a democratic society"?

37. The applicant and the Commission were of the opinion that Article 10 (art. 10) of the Convention required that any compulsion imposed on a journalist to reveal his source had to be limited to exceptional circumstances where vital public or individual interests were at stake. This test was not satisfied in the present case. The applicant and the Commission invoked the fact that Tetra had already obtained an injunction restraining publication (see paragraph 12 above), and that no breach of that injunction had occurred. Since the information in question was of a type commonly found in the business press, they did not consider that the risk of damage that further publication could cause was substantiated by Tetra, which had suffered

none of the harm adverted to.

The applicant added that the information was newsworthy even though it did not reveal matters of vital public interest, such as crime or malfeasance. The information about Tetra's mismanagement, losses and loan-seeking activities was factual, topical and of direct interest to customers and investors in the market for computer software. In any event, the degree of public interest in the information could not be a test of whether there was a pressing social need to order the source's disclosure. A source may provide information of little value one day and of great value the next; what mattered was that the relationship between the journalist and the source was generating the kind of information which had legitimate news potential. This was not to deny Tetra's entitlement to keep its operations secret, if it could, but to contest that there was a pressing social need for punishing the applicant for refusing to disclose the source of the information which Tetra had been unable to keep secret.

38. The Government contended that the disclosure order was necessary in a democratic society for the protection of "the rights" of Tetra. The function of the domestic courts was both to ascertain facts and, in the light of the facts established, to determine the legal consequences which should flow from them. In the Government's view, the supervisory jurisdiction of the Convention institutions extended only to the latter. These limitations on the Convention review were of importance in the present case, where the national courts had proceeded on the basis that the applicant had received the information from his source in ignorance as to its confidential nature, although, in fact, this was something he ought to have recognised. Moreover, the source was probably the thief of the confidential business plan and had improper motives for divulging the information. In addition, the plaintiffs would suffer serious commercial damage from further publication of the information. These findings by the domestic courts were based upon the evidence which was placed before them.

It was further submitted that there was no significant public interest in the publication of the confidential information received by the applicant. Although there is a general public interest in the free flow of information to journalists, both sources and journalists must recognise that a journalist's express promise of confidentiality or his implicit undertaking of non-attributability may have to yield to a greater public interest. The journalist's privilege should not extend to the protection of a source who has conducted himself mala fide or, at least, irresponsibly, in order to enable him to pass on, with impunity, information which has no public importance. The source in the present case had not exercised the responsibility which was called for by Article 10 (art. 10) of the Convention. The information in issue did not possess a public-interest content which justified interference with the rights of a private company such as Tetra.

Although it was true that effective injunctions had been obtained, so long as the thief and the source remained untraced, the plaintiffs were at risk of further dissemination of the information and, consequently, of damage to their business and to the livelihood of their employees. There were no other means by which Tetra's business confidence could have been protected.

In these circumstances, according to the Government, the order requiring the applicant to divulge his source and the further order

fining him for his refusal to do so did not amount to a breach of the applicant's rights under Article 10 (art. 10) of the Convention.

39. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance (see, as a recent authority, the Jersild v. Denmark judgment of 23 September 1994, Series A no. 298, p. 23, para. 31).

Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms (see, amongst others, the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and Resolution on the Confidentiality of Journalists' Sources by the European Parliament, 18 January 1994, Official Journal of the European Communities No. C 44/34). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest.

These considerations are to be taken into account in applying to the facts of the present case the test of necessity in a democratic society under paragraph 2 of Article 10 (art. 10-2).

40. As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established (see the Sunday Times v. the United Kingdom (no. 2) judgment of 26 November 1991, Series A no. 217, pp. 28-29, para. 50, for a statement of the major principles governing the "necessity" test). Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In the present context, however, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10 (art. 10-2), whether the restriction was proportionate to the legitimate aim pursued. In sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court.

The Court's task, in exercising its supervisory function, is not to take the place of the national authorities but rather to review under Article 10 (art. 10) the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

41. In the instant case, as appears from Lord Bridge's speech in

the House of Lords, Tetra was granted an order for source disclosure primarily on the grounds of the threat of severe damage to their business, and consequently to the livelihood of their employees, which would arise from disclosure of the information in their corporate plan while their refinancing negotiations were still continuing (see paragraph 18 above). This threat, "ticking away beneath them like a time bomb", as Lord Donaldson put it in the Court of Appeal (see paragraph 17 above), could only be defused, Lord Bridge considered, if they could identify the source either as himself the thief of the stolen copy of the plan or as a means to lead to identification of the thief and thus put the company in a position to institute proceedings for the recovery of the missing document. The importance of protecting the source, Lord Bridge concluded, was much diminished by the source's complicity, at the very least, in a gross breach of confidentiality which was not counterbalanced by any legitimate interest in publication of the information (see paragraph 18 above).

42. In the Court's view, the justifications for the impugned disclosure order in the present case have to be seen in the broader context of the ex parte interim injunction which had earlier been granted to the company, restraining not only the applicant himself but also the publishers of The Engineer from publishing any information derived from the plan. That injunction had been notified to all the national newspapers and relevant journals (see paragraph 12 above). The purpose of the disclosure order was to a very large extent the same as that already being achieved by the injunction, namely to prevent dissemination of the confidential information contained in the plan. There was no doubt, according to Lord Donaldson in the Court of Appeal, that the injunction was effective in stopping dissemination of the confidential information by the press (see paragraph 17 above). Tetra's creditors, customers, suppliers and competitors would not therefore come to learn of the information through the press. A vital component of the threat of damage to the company had thus already largely been neutralised by the injunction. This being so, in the Court's opinion, in so far as the disclosure order merely served to reinforce the injunction, the additional restriction on freedom of expression which it entailed was not supported by sufficient reasons for the purposes of paragraph 2 of Article 10 (art. 10-2) of the Convention.

43. What remains to be ascertained by the Court is whether the further purposes served by the disclosure order provided sufficient justification.

44. In this respect it is true, as Lord Donaldson put it, that the injunction "would not effectively prevent publication to [Tetra's] customers or competitors" directly by the applicant journalist's source (or that source's source) (see paragraph 17 above). Unless aware of the identity of the source, Tetra would not be in a position to stop such further dissemination of the contents of the plan, notably by bringing proceedings against him or her for recovery of the missing document, for an injunction against further disclosure by him or her and for compensation for damage.

It also had a legitimate reason as a commercial enterprise in unmasking a disloyal employee or collaborator, who might have continuing access to its premises, in order to terminate his or her association with the company.

45. These are undoubtedly relevant reasons. However, as also

recognised by the national courts, it will not be sufficient, per se, for a party seeking disclosure of a source to show merely that he or she will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he or she bases his or her claim in order to establish the necessity of disclosure (see paragraph 18 above). In that connection, the Court would recall that the considerations to be taken into account by the Convention institutions for their review under paragraph 2 of Article 10 (art. 10-2) tip the balance of competing interests in favour of the interest of democratic society in securing a free press (see paragraphs 39 and 40 above). On the facts of the present case, the Court cannot find that Tetra's interests in eliminating, by proceedings against the source, the residual threat of damage through dissemination of the confidential information otherwise than by the press, in obtaining compensation and in unmasking a disloyal employee or collaborator were, even if considered cumulatively, sufficient to outweigh the vital public interest in the protection of the applicant journalist's source. The Court does not therefore consider that the further purposes served by the disclosure order, when measured against the standards imposed by the Convention, amount to an overriding requirement in the public interest.

46. In sum, there was not, in the Court's view, a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim. The restriction which the disclosure order entailed on the applicant journalist's exercise of his freedom of expression cannot therefore be regarded as having been necessary in a democratic society, within the meaning of paragraph 2 of Article 10 (art. 10-2), for the protection of Tetra's rights under English law, notwithstanding the margin of appreciation available to the national authorities.

Accordingly, the Court concludes that both the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so gave rise to a violation of his right to freedom of expression under Article 10 (art. 10).

II. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

47. Mr William Goodwin sought just satisfaction under Article 50 (art. 50) of the Convention, which reads:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

48. The applicant claimed 15,000 pounds sterling for non-pecuniary damage, on account of mental anguish, shock, dismay and anxiety which he felt as a result of the proceedings against him. For five months he was in constant peril of being sent to prison, for up to two years, as a punishment for obeying his conscience and for living up to his ethical obligations as a journalist. He still has to live with a criminal record since his crime of contempt of court would not be

expunged by a finding of breach by the Court. He had been the subject of harassment by court process servers and his employers so as to comply with a court order against themselves, all of which was added to the pressure exerted on him by the threat of dismissal if he did not disclose the identity of his source.

49. The Government objected to the applicant's claim on the ground that the alleged adverse consequences stemmed from the fact that he was defying and disobeying the law. Even if he considered it a bad law, he should have obeyed the order to provide the information to the court in a sealed envelope, or, at the very least, he should have recognised his duty to obey the disclosure order when he lost his case in the House of Lords. Had he done so, the Government would have found it difficult to resist a claim for compensation for any adverse consequences.

50. The Court is not persuaded by the Government's arguments. What matters under Article 50 (art. 50) is whether the facts found to constitute a violation have resulted in non-pecuniary damage. In the present case, the Court finds it established that there was a causal link between the anxiety and distress suffered by the applicant and the breach found of the Convention. However, in the circumstances of the case, the Court considers that this finding constitutes adequate just satisfaction in respect of the damage claimed under this head.

B. Costs and expenses

51. The applicant further sought reimbursement of costs and expenses totalling £49,500, in respect of the following items specified in his memorial to the Court of 1 March 1995:

(a) £19,500 for counsel's fees for drafting the application to the Commission and written observations to the latter and the Court and for preparing and presenting the case before both the Commission and the Court;

(b) £30,000 for work by the applicant's solicitors in connection with the proceedings before the Commission and the Court.

To the above amounts should be added any applicable value added tax (VAT).

52. The Government, by letter of 11 April 1995, invited the applicant to provide a detailed breakdown of the costs.

53. In a letter of 25 July 1995 the applicant stated that the solicitors' work before the Commission and Court amounted to a total of 136 hours at, on average, £250 per hour for a senior partner and £150 per hour for an assistant solicitor.

54. On 30 August 1995, the Government submitted their comments on the breakdown provided by the applicant. Without prejudice to the Court's decision regarding the belatedness of the applicant's claim, they stated that they considered that the £19,500 sought in respect of counsel was unreasonably high and that £16,000 would be reasonable.

As to solicitors' fees, the Government regarded the rates and the number of hours claimed as excessive. In their view 110 hours at an average rate of £160 per hour for a senior partner and £100 per hour for an assistant solicitor would be reasonable.

According to the Government's calculations, it would be reasonable to indemnify the applicant £37,595.50 (VAT included) for costs.

55. By letter of 1 September 1995, the applicant stressed that the number of hours and the hourly rates claimed were reasonable. He conceded that if the Court found in his favour, it could properly in its discretion award the amounts indicated by the Government. He stated that he would be prepared to settle for a total figure midway between the total figures contended for by the two parties.

56. The Court considers the sum conceded by the Government to be adequate in the circumstances of the present case. The Court therefore awards the applicant £37,595,50 (VAT included) for legal costs and expenses, less the 9,300 French francs already paid in legal aid by the Council of Europe in respect of legal fees.

C. Default interest

57. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT

1. Holds by eleven votes to seven that there has been a violation of Article 10 (art. 10) of the Convention;

2. Holds unanimously that the finding of a violation constitutes adequate just satisfaction for the non-pecuniary damage suffered by the applicant;

3. Holds unanimously:

(a) that the respondent State is to pay to the applicant, within three months, in respect of costs and expenses £37,595.50 (thirty seven thousand, five hundred and ninety five pounds sterling and fifty pence) less 9,300 (nine thousand, three hundred) French francs to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment;

(b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;

4. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 March 1996.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the

Convention and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr De Meyer;

(b) joint dissenting opinion of Mr Ryssdal, Mr Bernhardt, Mr Thór Vilhjálmsson, Mr Matscher, Mr Walsh, Sir John Freeland and Mr Baka;

(c) separate dissenting opinion of Mr Walsh.

Initialled: R. R.

Initialled: H. P.

CONCURRING OPINION OF JUDGE DE MEYER

I fully agree with the Court's conclusion that the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so violated his right to freedom of expression.

I would however observe that so did also, in my view, the earlier injunction against publication of the information (1), since it was an utterly unacceptable form of prior restraint (2).

_____

1. Paragraphs 12 and 42 of the judgement.

2. See my partly dissenting opinion on that matter in the case of Observer and Guardian v. the United Kingdom, judgment of 26 November 1991, Series A no. 216, p.46.

_____

Even if there had not been such an injunction the disclosure order and the ensuing fine would not have been legitimate. The protection of a journalist's source is of such a vital importance for the exercise of his right to freedom of expression that it must, as a matter of course, never be allowed to be infringed upon, save perhaps in very exceptional circumstances, which certainly did not exist in the present case.

JOINT DISSENTING OPINION OF JUDGES RYSSDAL, BERNHARDT, THÓR VILHJÁLMSSON, MATSCHER, WALSH, SIR JOHN FREELAND AND BAKA

1. We are unable to agree that, as the majority conclude in paragraph 46 of the judgment, "both the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so gave rise to a violation of his right to freedom of expression under Article 10 (art. 10)".

2. We of course fully accept that, as is recalled in paragraph 39 of the judgment, freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. We likewise agree that, as the paragraph goes on to say, "Protection of journalistic sources is one of the basic conditions for press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the

ability of the press to provide accurate and reliable information may be adversely affected". It follows that an order for source disclosure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified under paragraph 2 of that Article (art. 10-2).

3. Where we part company with the majority is in the assessment of whether, in the circumstances of the present case, such a justification existed - whether, in particular, the test of necessity in a democratic society should be regarded as having been satisfied.

4. As regards the test in domestic law, section 10 of the Contempt of Court Act 1981 clearly gives statutory force to a presumption against disclosure of sources. It provides (see paragraph 20 of the judgment) that no court may require disclosure "unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime".

5. As explained by Lord Bridge in the House of Lords in the applicant's case, this statutory restriction operates unless the party seeking disclosure can satisfy the court that "disclosure is necessary" in the interests of one of the four matters of public concern that are listed in the section. In asking himself the question whether disclosure of the source of some particular information is necessary to serve one of the interests in question, the judge has to engage in a balancing exercise: he must start "with the assumptions, first, that the protection of sources is itself a matter of high public importance, secondly, that nothing less than necessity will suffice to override it, thirdly, that the necessity can only arise out of concern for another matter of high public importance, being one of the four interests listed in the section". Dealing with the way in which the judge should determine necessity where, as here, the relevant interests are those of justice, Lord Bridge said that it would never be enough for a party seeking disclosure of a source protected by the section to show merely that he will be unable without disclosure to exercise a legal right or avert a threatened legal wrong. "The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached."

6. Given that, as the judgment accepts, the protection of Tetra's rights by way of the "interests-of-justice" exception amounts to the pursuit of a legitimate aim under paragraph 2 of Article 10 (art. 10-2), the domestic-law test of necessity strikingly resembles that required by the Convention. The domestic courts at three levels, on the basis of all the evidence which was before them, concluded that disclosure was necessary in the interests of justice. Factors which Lord Bridge stressed, in support of his conclusion that the judge at first instance and the Court of Appeal were right in finding that the necessity for disclosure in the interests of justice was established, were the following. First, the importance to Tetra of obtaining disclosure lay in the threat of severe damage to their business, and consequentially to the livelihood of their employees, which would arise from disclosure of the information contained in their corporate plan while their refinancing operations were still continuing. This threat could only be defused if they could identify the source as himself the

thief of the stolen copy of the plan or as a means to lead to identification of the thief and thus put themselves in a position to institute proceedings for the recovery of the missing document. Secondly, the importance of protecting the source was much diminished by the source's complicity, at the very least, in a gross breach of confidentiality which was not counterbalanced by any legitimate interest which publication of the information was calculated to serve. In this view of the balance, disclosure in the interests of justice was clearly of preponderating importance so as to override the policy underlying the statutory protection of sources and the test of necessity for disclosure was satisfied.

7. The judgment, on the other hand, concludes that there was not a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim (paragraph 46). In reaching this conclusion, the judgment first says (rightly), in paragraph 42, that the justifications for the disclosure order have to be seen in the broader context of the injunction which Tetra had already obtained. That injunction was effective in stopping dissemination of the confidential information by the press, so that a "vital component of the threat of damage to the company had ... already largely been neutralised ...". "This being so", the paragraph continues "... in so far as the disclosure order merely served to reinforce the injunction, the additional restriction on freedom of expression which it entailed was not supported by sufficient reasons for the purposes of paragraph 2 of Article 10 (art. 10-2) ..".

8. To suggest, however, that the disclosure order may have "merely served to reinforce the injunction" is to misstate the case. As the decisions of the domestic courts explain, the purpose of the disclosure order was to extend the protection of Tetra's rights by closing gaps left by the injunction. The injunction bit upon the press, but it would not effectively prevent publication to Tetra's customers or competitors directly by the applicant's source (or that source's source). Without knowing the identity of the source, Tetra would not be in a position to stop further dissemination of the contents of the plan by bringing proceedings against him for recovery of the missing document, for an injunction prohibiting further disclosure by him and for damages. Nor would they be able to remove any threat of further harm to their interests from a possible disloyal employee or collaborator who might enjoy continued access to their premises.

9. These further purposes served by the disclosure order are considered in paragraphs 44 and 45 of the judgment. The latter paragraph, after recalling that the considerations to be taken into account by the Convention institutions for their review under paragraph 2 of Article 10 (art. 10-2) "tip the balance of competing interests in favour of the interest of democratic society in securing a free press", asserts that Tetra's interests in securing the additional measures of protection sought through the disclosure order were insufficient to outweigh the vital public interest in the protection of the applicant's source.

10. No detailed assessment of these interests of Tetra's is, however, undertaken, and in the absence of it there is no satisfactory basis for the balancing exercise which the Court is required to undertake. The domestic courts were, in any event, better placed to evaluate, on the basis of the evidence before them, the strength of

those interests, and in our view the conclusion which they reached as to where, in the light of their evaluation, the corresponding balance should be struck was within the margin of appreciation allowed to the national authorities.

11. We therefore conclude that neither the disclosure order nor the fine imposed upon the applicant for his failure to comply with it gave rise to a violation of his right to freedom of expression under Article 10 (art. 10).

SEPARATE DISSENTING OPINION OF JUDGE WALSH

1. In his opening address to the Court counsel for the applicant stated that his client was "claiming no special privilege by virtue of his profession because journalists are not above the law". Yet it appears to me that the Court in its decision has decided in effect that under the Convention a journalist is by virtue of his profession to be afforded a privilege not available to other persons. Should not the ordinary citizen writing a letter to the papers for publication be afforded an equal privilege even though he is not by profession a journalist? To distinguish between the journalist and the ordinary citizen must bring into question the provisions of Article 14 (art. 14) of the Convention.

2. In the present case the applicant did not suffer any denial of expressing himself. Rather has he refused to speak. In consequence a litigant seeking the protection of the law for his interests which were wrongfully injured is left without the remedy the courts had decided he was entitled to. Such a result is certainly a matter of public interest and the applicant has succeeded in frustrating his national courts in their efforts to act in the interests of justice.
It is for the national courts to decide whether or not the document in question was stolen. Yet the applicant claims that because he does not believe it was stolen he can justify his refusal to comply with the court order made in his case. His attitude and his words give the impression that he would comply if he believed the document in question had been stolen. He is thus setting up his personal belief as to truth of a fact which is exclusively within the domain of the national courts to decide as a justification for not obeying the order of the courts simply because he does not agree with the judicial findings of fact.

3. It does not appear to me that anything in the Convention permits a litigant to set up his own belief as to the facts against the finding of fact made by the competent courts and thereby seek to justify a refusal to be bound by such judicial finding of fact. To permit him to do so simply because he is a journalist by profession is to submit the judicial process to the subjective assessment of one of the litigants and to surrender to that litigant the sole decision as to the moral justification for refusing to obey the court order in consequence of which the other litigant is to be denied justice and to suffer damage. Thus there is a breach of a primary rule of natural justice - no man is to be the judge of his own cause.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

CASE OF GRIGORIADES v. GREECE

(121/1996/740/939)

JUDGMENT

STRASBOURG

25 November 1997

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SUMMARY[1]

Judgment delivered by a Grand Chamber

Greece – conviction of an officer of the crime of insult to the army (Article 74 of the Military Criminal Code)

I. ARTICLE 10 OF THE CONVENTION

A. Whether there was an "interference" with the applicant's rights under Article 10

It was not disputed that the applicant's conviction and sentence consituted an "interference" with his right to freedom of expression.

B. Whether the interference was "prescribed by law"

Article 74 of the Military Criminal Code was sufficiently precise – it ought to have been clear to the applicant that he risked incurring a criminal sanction – interference was "prescribed by law".

C. Whether the interference pursued a legitimate aim

An effective military defence requires the maintenance of an appropriate measure of discipline in the armed forces – interference pursued at any rate the legitimate aims of protecting national security and public safety.

D. Whether the interference was "necessary in a democratic society"

Principles emerging from the Court's case-law reiterated.

Article 10 applies to military personnel as to all other persons within the jurisdiction of the Contracting States – nevertheless it must be open to the State to impose restrictions where there is a real threat to military discipline – it is not, however, open to the national authorities to rely on such rules for the purpose of frustrating the expression of opinions, even if these are directed against the army as an institution.

In the present case the applicant had had a letter delivered to his commanding officer which the latter had considered insulting to the armed forces – it is true that the letter contained certain strong and intemperate remarks – however, these remarks were made in the context of a general and lengthy discourse critical of army life and the army as an institution – the letter was not published by the applicant or disseminated to a wider audience – it did not contain any insults directed against either the recipient of the letter or any other person – objective impact on military discipline insignificant – applicant's prosecution and conviction not necessary in a democratic society.

Conclusion: violation (twelve votes to eight).

1. This summary by the registry does not bind the Court.

II. ARTICLE 7 OF THE CONVENTION

Applicant's arguments in this respect coincide with those put forward in support of allegation that his conviction and sentence were not "prescribed by law" – Court refers to its contrary finding.

Conclusion: no violation (unanimously).

III. ARTICLE 50 OF THE CONVENTION

Damage: no causal link established between violation of Article 10 found and damage alleged.

Costs and expenses: award made on an equitable basis.

Conclusion: respondent State to pay specified sum to applicant for costs and expenses (seventeen votes to three).

COURT'S CASE-LAW REFERRED TO

6.11.1980, *Sunday Times* v. the United Kingdom; 19.12.1994, Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria; 26.9.1995, Vogt v. Germany

In the case of Grigoriades v. Greece[1],

The European Court of Human Rights, sitting, in accordance with Rule 51 of Rules of Court A[2], as a Grand Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr R. BERNHARDT,
Mr F. GÖLCÜKLÜ,
Mr L.-E. PETTITI,
Mr B. WALSH,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr A. SPIELMANN,
Mr N. VALTICOS,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,
Sir John FREELAND,
Mr L. WILDHABER,
Mr P. JAMBREK,
Mr K. JUNGWIERT,
Mr U. LÕHMUS,
Mr J. CASADEVALL,
Mr V. BUTKEVYCH,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 26 June, 29 August and 24 October 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

1. The case is numbered 121/1996/740/939. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 16 September 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 24348/94) against the Hellenic Republic lodged with the Commission under Article 25 by a Greek national, Mr Panayiotis Grigoriades, on 17 March 1994.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Greece recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 7 and 10 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). The lawyer was given leave by the President to use the Greek language (Rule 27 § 3).

3. The Chamber to be constituted included *ex officio* Mr N. Valticos, the elected judge of Greek nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 17 September 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr B. Walsh, Mr R. Pekkanen, Mr A.N. Loizou, Mr L. Wildhaber, Mr K. Jungwiert and Mr J. Casadevall (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Greek Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 20 March 1997. No memorial was received from the applicant within the time-limit set by the President of the Chamber. A document setting out the applicant's claims for just satisfaction under Article 50 was received at the registry on 26 May 1997. The Delegate of the Commission did not reply in writing.

5. On 21 March and 2 April 1997 the Commission produced certain documents contained in the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 June 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr P. GEORGAKOPOULOS, Senior Adviser,
Legal Council of State, *Delegate of the Agent*,
Mr V. KYRIAZOPOULOS, Legal Assistant,
Legal Council of State, *Adviser*;

(b) *for the Commission*
Mr L. LOUCAIDES, *Delegate*;

(c) *for the applicant*
Mr IPP. MYLONAS, of the Athens Bar, *Counsel*.

The Court heard addresses by Mr Loucaides, Mr Mylonas, Mr Kyriazopoulos and Mr Georgakopoulos.

7. Following deliberations held on 26 June 1997 the Chamber relinquished jurisdiction in favour of a Grand Chamber (Rule 51).

The Grand Chamber to be constituted included *ex officio* Mr Ryssdal, the President of the Court, and Mr R. Bernhardt, the Vice-President, together with the members and the four substitutes of the original Chamber, the latter being, Mr I. Foighel, Mr R. Macdonald, Mr F. Gölcüklü and Mr A. Spielmann (Rule 51 § 2 (a) and (b)). On 3 July 1997, the President, in the presence of the Registrar, drew by lot the names of the seven additional judges needed to complete the Grand Chamber, namely Mr C. Russo, Mr J.M. Morenilla, Sir John Freeland, Mr P. Jambrek, Mr U. Lõhmus, Mr V. Butkevych and Mr V. Toumanov (Rule 51 § 2 (c)).

Mr Toumanov was prevented from taking part in the consideration of the case.

8. On 3 July 1997 the Government submitted a further document, having been given leave to do so by the President at the hearing.

9. Having taken note of the agreement of the Agent of the Government, the Delegate of the Commission and the applicant, the Court decided on 29 August 1997 that consideration of the case should continue without resumption of the oral proceedings (Rule 26).

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Background to the case

10. The applicant was a conscripted probationary reserve officer holding the rank of second lieutenant.

11. In the course of his military service, the applicant claimed to have discovered a number of abuses committed against conscripts and came into conflict with his superiors as a result. Criminal and disciplinary proceedings were instituted against him. The former ended with his acquittal. However, a disciplinary penalty was imposed on him, as a result of which he had to serve additional time in the army.

12. On 30 April 1989 the applicant was granted twenty-four hours' leave. He failed to return to his unit after its expiry. He was declared a deserter on 6 May 1989 and criminal charges were brought against him.

13. On 10 May 1989 the applicant sent a letter to his unit's commanding officer through a taxi driver.

14. The letter read as follows:

> "PERSONAL STATEMENT
>
> After two whole years of military service as reserve officer cadet, I am obliged to inform you that I object to the prolongation of my military service following a penalty imposed on me for defending soldiers' rights. Judging from my experience to this date, I think that it was imposed as part of a general approach intended to suppress both freedom of personality and the vindication of constitutional rights and personal freedom. Apart from the personal cost, I generally consider that imposing a penalty on young soldiers is inadmissible and unconstitutional, all the more so when such penalty is related to the struggle of young people for respect for the ideological – social human rights of people and [their struggle] to defend their personality against the humiliations of the military apparatus. Having maintained for twenty-four months a fighting stance and a conscious position on that subject, I reserve the right, which is also a duty, to establish social justice and peace, now more than ever and, being fully aware of my actions which are imperatively dictated to me in the interests of society, hereby to DENOUNCE:
>
> That the army is an apparatus opposed to man and society and, by its nature, contrary to peace.

I am now absolutely certain that the process of military service is responsible for crimes and aggressiveness in society since it has created a psychology of violence, overcoming in this manner all moral and psychological resistance to violence. The army remains a criminal and terrorist apparatus which, by creating an atmosphere of intimidation and reducing to tatters the spiritual welfare of the radical youth, clearly aims at transforming people to mere parts of an apparatus of domination which ruins human nature and transforms human relations from relations of friendship and love to relations of dependence, through a hierarchy of fear guided by an illiberal and oppressing set of Standing Orders (No. 20-1), records of political beliefs, etc. The truth is that the living conditions in the army are unacceptable to the point of being destructive and any healthy form of resistance and any effort towards dialogue are persecuted and brought defenceless before the military justice, a dangerous institution that should be abolished. All this happens despite the electoral announcements of the Ministry of National Defence concerning respect for the personality of the soldiers; in reality, the Ministry participates in and encourages such oppressive processes. By this means of protest, I and all young people who feel a deep sense of injustice because their life has been reduced to tatters, FIGHT:

To stop all forms of persecution of those who have participated in processes that promote social justice, peace and the right to have an opinion on issues that concern our lives; for the Ministry to have the political will to control in a meaningful manner the military power and to prosecute those who are really responsible for this authoritarianism, instead of systematically covering for them; for the State to establish once and for all respect for the initiatives and social choices of young people, by eliminating all penalties for the promotion of such ideals. It should not content itself with "socialist vocabulary" and then follow the practice of extermination; to declare that the elimination of these authoritarian institutions is a matter of a multi-faceted and long struggle at a personal, political and social level; to put an end to discrimination, favouritism and dependency, all of these being methods used by corrupt organs.

Thus, having gone through this experience, I have developed a free conscience which prevents me from taking part in and being an accomplice to this criminal process, both in its operation and in its structure, and refuse from now on to wear my uniform in these conditions. If I were to wear it, I feel that I would find myself in a crisis of conscience, contrary to my nature and beliefs as a man brought up with liberal ideas. We, the young generation, will resist any attempt to be burdened with weaknesses and become vehicles of the military establishment. This is why my stance cannot be lawfully considered to be desertion or insubordination, since it stems from fundamental human rights and is in conformity with the provisions of the Greek Constitution. I consider that I remain a citizen and a free man who sought to remain true to his conscience and the free will flowing from it. I also consider that my stance and the voicing of my protest against this humiliation are the most genuine expression of solidarity with and support for conscientious objectors because I firmly believe that this is how the struggle for social liberation and peace is carried on."

15. A fellow reserve officer testified before the Ioannina Permanent Army Tribunal (see paragraph 18 below) that the applicant gave him a copy of the letter on 10 May 1989. It has not been alleged that any further copies were circulated.

B. The criminal proceedings against the applicant

16. Taking the view that the content of the letter constituted an insult to the armed forces, the commanding officer instituted further criminal proceedings against the applicant under Article 74 of the Military Criminal Code (see paragraph 26 below).

17. On 12 May 1989 the applicant appeared before the investigating officer, a member of the army judicial corps, who remanded him in custody on a charge of desertion.

1. Proceedings in the Permanent Army Tribunal

18. The applicant was tried on 27 June 1989 by the Permanent Army Tribunal of Ioannina on charges of desertion and insulting the army.

At the outset of the trial the defence challenged the constitutionality of the second charge on the ground that the relevant criminal provision was not *lex certa* and that the expression of criticism could not amount to an insult. That preliminary objection was dismissed.

19. At the close of the hearing the president of the court formulated a series of questions which the members of the court had to address before deciding on the applicant's guilt. The questions relating to the insult charge were the following:

> "(a) Did the accused commit the offence of insulting the Greek army when**,** on 10 May 1989, while a reserve officer on probation, he sent a two-page typed personal statement to the commanding officer of the X unit, which came to the latter's knowledge on the same day and which contained, *inter alia*, the following expressions contemptuous of, and disparaging, the authority of the army: '... [T]he army is an apparatus opposed to man and society ... [t]he army remains a criminal and terrorist apparatus which, by creating an atmosphere of intimidation and reducing to tatters the spiritual welfare of the radical youth, clearly aims at transforming people to mere parts of an apparatus of domination which ruins human nature and transforms human relations from relations of friendship and love to relations of dependence, through a hierarchy of fear guided by an illiberal and oppressive set of Standing Orders (No. 20-1), records of political beliefs, etc. ...'. In so doing, did he wilfully insult the Greek army as a constitutionally entrenched institution of the Nation?
>
> (b) ... [did the applicant act] in the mistaken but bona fide belief that he was engaging in permissible criticism, in accordance with Article 14 of the Constitution currently in force?"

20. In a judgment delivered the same day the court, by a unanimous vote, answered the first question in the affirmative and the second in the negative. The applicant was found guilty of desertion and insulting the army. Taking into account the fact that the applicant was a first-offender, the court sentenced him to imprisonment for one year and eight months for the first offence and three months for the second offence, and ordered him to serve a global sentence of one year and ten months.

2. Proceedings in the Military Appeal Court

21. The applicant lodged an appeal with the Military Appeal Court which was heard on 5 September 1989. In a judgment delivered the same day the court quashed the applicant's conviction for desertion. However, it upheld, by three votes to two, his conviction for insulting the army after dismissing his objection that the relevant provision was contrary to the Constitution and, taking into account that the applicant had no previous convictions, sentenced him to three months' imprisonment. The applicant was immediately released, the time he had spent in detention on remand being credited against his sentence.

3. Proceedings in the Court of Cassation

22. On 20 September 1989 the applicant lodged an appeal on points of law to the Court of Cassation (*Arios Pagos*), on the ground that Article 74 of the Military Criminal Code had not been correctly construed and applied. He argued, *inter alia*, that general criticism of the armed forces could not be considered an insult. He claimed in addition that the provision in question violated the Constitution because of its vagueness and could not be considered *lex certa*, and also that it imposed unwarranted limitations on the right to freedom of expression.

23. The applicant's appeal on points of law was heard by a Chamber of the Court of Cassation on 12 March 1991. On 26 June 1991 the Chamber of the Court of Cassation decided to submit the case to the plenary court, having considered, by three votes to two, that Article 74 of the Military Criminal Code did not violate the Constitution and that it had been correctly applied in the applicant's case.

24. In a judgment delivered on 22 September 1993 the plenary Court of Cassation considered that Article 74 of the Code sufficiently circumscribed the elements of the offence, namely the insult and the intention of the culprit. Elaborating on this point, the court held that

> "[t]he concept of 'insult' includes every show of contempt damaging the esteem, and respect for, and the reputation of, the protected value. To qualify as an insult, such expression must convey contempt, taunt and denigration; it is not sufficient merely to call into question the protected value. This value is the armed forces and, more particularly, not the army or air force and the navy individually, but the armed forces in their entirety as an idea and an institution entrusted with defending the freedom and

independence of the country and the necessary training of Greeks who are able to bear arms. Article 74 of the Military Criminal Code does not specify the nature of the insult nor the manner and means by which the insult is made, as it was not the intention of the legislature to make insulting behaviour of a particular kind, or committed in a particular manner, or by a particular means, a criminal offence. Any insult of the army by a member of the armed forces constitutes a criminal offence. This does not create any uncertainty as to the elements of the offence. Any further specification would have limited the scope of the criminal prohibition, which the legislature did not intend. Article 14 of the Constitution, which protects freedom of opinion, does not in any way preclude the legislature from making every instance of insulting the army by a member of the armed forces a criminal offence. The protection of Article 14 is subject to limitations provided for by law ..."

For these reasons, the plenary Court of Cassation upheld the applicant's conviction.

II. RELEVANT DOMESTIC LAW

25. Article 14 § 1 of the Greek Constitution provides:

"Every person may express and propagate his thoughts orally, in writing and through the press in compliance with the laws of the State."

26. Article 74 of the Military Criminal Code provides:

"*Insults to the flag or the armed forces*

A member of the armed forces who insults the flag, the armed forces or an emblem of their command shall be punished by a term of imprisonment of at least six months. If he is an officer, he shall also be stripped of his rank."

27. A corresponding civilian offence is defined by Article 181 of the Criminal Code, which provides as follows:

"*Insults to authorities and to symbols*

1. Any person shall be punished with imprisonment for up to two years who:

a) publicly insults the Prime Minister of the country, the Government, Parliament, the Speaker of Parliament, the leaders of the political parties recognised by the Rules of Parliament and the judicial authorities;

b) insults or, as a display of hatred or contempt, damages or disfigures an emblem or symbol of State sovereignty or the President of the Republic.

2. Criticism in itself shall not constitute an insult of an authority."

28. A new Military Criminal Code entered into force in 1995. Article 58 of that Code provides:

"A member of the armed forces who, by speech, actions or any other means whatsoever, publicly expresses contempt for the flag, the armed forces or a symbol of their authority, shall be punished by a term of imprisonment of at least three months."

PROCEEDINGS BEFORE THE COMMISSION

29. Mr Grigoriades applied to the Commission on 17 March 1994. He alleged a violation of the right to freedom of expression guaranteed by Article 10 of the Convention. He also claimed to have been convicted under an imprecise provision of criminal law, contrary to Article 7 of the Convention.

30. The Commission declared the application (no. 24348/94) admissible on 4 September 1995. In its report of 25 June 1996 (Article 31), it expressed the opinion that there had been a violation of Article 10 of the Convention (twenty-eight votes to one) but not of Article 7 (unanimously). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

31. The Government concluded their memorial by expressing the opinion that the applicant's allegations that Articles 7 and 10 of the Convention had been violated were unfounded.

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1997), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

32. The applicant alleged that his conviction for insulting the army constituted a violation of Article 10 of the Convention, which provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Commission agreed with the applicant that there had been a violation of that provision. The Government disputed this.

A. Whether there has been an "interference" with the applicant's rights under Article 10

33. It was common ground that the applicant's conviction of insulting the army, and the sentence of three months imposed on him, constituted an interference with his freedom of expression, guaranteed by paragraph 1 of Article 10.

The Court sees no reason to hold otherwise.

B. Whether the interference was "prescribed by law"

34. It was not disputed by the applicant that his conviction had a basis in national law, namely Article 74 of the Military Criminal Code as in force at the time. On the other hand, the applicant maintained that that provision had not been precise enough to satisfy the foreseeability requirement that flows from the expression "prescribed by law".

The wording of the provision was, in his contention, over-broad. As had been recognised by the Greek Court of Cassation itself in its judgment concerning the present case, Article 74 did not define the concept of "insult" or specify acts considered to be insulting. Nor was there any case-law under that provision which might offer guidance.

The case-law cited by the Government concerning Article 181 of the Criminal Code, which defined the corresponding civilian offence of insulting authorities and symbols of authority, was irrelevant. Firstly, Article 181 of the Criminal Code was a different and unrelated provision in any case, and secondly, the expression used in that provision and accordingly construed by the case-law was based on a verb meaning "to insult", unlike Article 74 of the Military Criminal Code, which used another verb which could be more accurately translated as "to offend".

35. The Government argued that the offence of insulting the army under Article 74 of the Military Criminal Code was a specific instance of insulting authority as defined by Article 181 of the Criminal Code, so that the construction placed on the latter provision could serve to clarify the former as well.

36. The Commission considered that Article 74 of the Military Criminal Code did not differ in any way from other statutory provisions which made "insult" a criminal offence.

37. The Court reiterates that, according to its case-law, the relevant national law must be formulated with sufficient precision to enable the persons concerned – if need be with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

38. It is true that Article 74 of the Greek Military Criminal Code was couched in very broad terms. Nonetheless, in the Court's view, it met the above standard. On the ordinary meaning of the word "insult" – which is akin to the expression "offend" – it ought to have been clear to the applicant that he risked incurring a criminal sanction. It follows that the interference complained of was "prescribed by law".

C. Whether the interference pursued a legitimate aim

39. The Government contended that the measures taken against the applicant under Article 74 of the Military Criminal Code had been intended to safeguard the effectiveness of the army in fulfilling its purpose, which

was to protect Greek society against external or internal threats. They had therefore pursued the aims of protecting national security, territorial integrity and public safety, which were legitimate under Article 10 § 2.

40. The applicant offered no argument to the contrary. The Commission considered that the applicant's conviction pursued a legitimate aim "to the extent that it [had been] imposed to maintain discipline in the army".

41. The Court has no doubt that an effective military defence requires the maintenance of an appropriate measure of discipline in the armed forces and accordingly finds that the interference complained of pursued at any rate the legitimate aims of protecting national security and public safety invoked by the Government.

D. Whether the interference was "necessary in a democratic society"

1. Arguments before the Court

42. The applicant, with whom the Commission concurred in substance, argued that his conviction for insulting the army had not been necessary.

He pointed, first of all, to the factual context in which he had written the letter in question to his commanding officer. Throughout the two years of his military service, he had striven to improve the lot of conscripted soldiers. He alleged that it was as a result of this activity that a disciplinary penalty had been imposed on him in the form of an additional period of military service. When he had refused to serve for this additional period, he had been charged with desertion; it was at that point that, indignant at what he perceived as an injustice, he had written the letter. Ultimately, the trial courts had acquitted him of desertion and thus shown his indignation to have been justified.

Admittedly, the letter had contained strong views but they had to be seen as permissible criticism, the limits of which were wider with regard to the various arms of the executive than in relation to a private citizen. The letter did not contain any insults directed at any individual. More importantly, the letter was not a public document, having been sent only to the applicant's commanding officer; to the extent that it had later become public, that had been due solely to the latter's actions in bringing about the applicant's prosecution. In those circumstances, and despite the fact that the letter had been seen by one other conscript, its potential for undermining military discipline had been insignificant.

Finally, the applicant expressed the opinion that the penal sanction imposed, namely a term of imprisonment of three months, had been disproportionate. His commanding officer had had the option of imposing a disciplinary penalty instead of resorting to full-blown criminal proceedings, or a lesser sentence could have been imposed.

43. The Government did not agree that the sanction imposed on the applicant had gone beyond what could be considered "necessary in a democratic society".

Making it an offence to insult the army did not, in their view, affect the essence of the freedom of expression. It merely met the need to counter excessive use of that freedom, namely, by a member of the armed forces and against the army. In particular, given the special exigencies of military life, it was necessary to resort to the criminal law to maintain military discipline and thus the effectiveness and prestige of the armed forces.

The letter itself had been phrased in insulting terms, calling the Greek army a "criminal and terrorist apparatus". It had not contained any specific criticism or allegations of actual violations of the rights of conscripts.

The nature of the letter as a threat to discipline was also apparent from the fact that it had been addressed to a superior officer. The applicant's remarks had not been made in the more innocuous context of, for instance, an informal discussion between officers of the same rank.

Moreover, the applicant had had the letter delivered to his commanding officer by a taxi driver. That method of delivery did not offer the guarantees of privacy offered by the Greek postal service. In addition, the applicant had given a copy of the letter to a fellow conscript officer. In the circumstances, it was incorrect to consider the letter a mere private expression of opinions.

Finally, since the time the applicant had spent in prison was set off against the time spent in detention on remand and he had not sought a suspended sentence, as he might have done, the sanction imposed had not in itself been disproportionate.

2. The Court's assessment

44. The Court has stated the applicable principles as follows in its judgment in the case of Vogt v. Germany (judgment of 26 September 1995, Series A no. 323, pp. 25–26, § 52):

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or

disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established (see the following judgments: Handyside v. the United Kingdom, 7 December 1976, Series A no. 24, p. 23, § 49; Lingens v. Austria, 8 July 1986, Series A no. 103, p. 26, § 41; and Jersild v. Denmark, 23 September 1994, Series A no. 298, p. 26, § 37).

(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' (see the *Sunday Times* v. the United Kingdom (no. 2) judgment of 26 November 1991, Series A no. 217, p. 29, § 50). In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see the above-mentioned Jersild judgment, p. 26, § 31)."

45. Article 10 does not stop at the gates of army barracks. It applies to military personnel as to all other persons within the jurisdiction of the Contracting States. Nevertheless, as the Court has previously indicated, it must be open to the State to impose restrictions on freedom of expression where there is a real threat to military discipline, as the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining it (see the Vereinigung demokratischer Soldaten Österreichs and Gubi v Austria judgment of 19 December 1994, Series A no. 302, p. 17, § 36). It is not, however, open to the national authorities to rely on such rules for the purpose of frustrating the expression of opinions, even if these are directed against the army as an institution.

46. In the present case the applicant had a letter delivered to his commanding officer which the latter considered insulting to the armed forces (see paragraph 14 above). The commanding officer decided for that reason to take the matter further and to institute proceedings against the applicant under Article 74 of the Military Criminal Code (see paragraph 16 above).

47. It is true that the contents of the letter included certain strong and intemperate remarks concerning the armed forces in Greece. However, the Court notes that those remarks were made in the context of a general and lengthy discourse critical of army life and the army as an institution. The letter was not published by the applicant or disseminated by him to a wider audience – apart from one other officer who apparently had been given a copy of it – and it has not been alleged that any other person had knowledge of it. Nor did it contain any insults directed against either the recipient of the letter or any other person. Against such a background the Court considers the objective impact on military discipline to have been insignificant.

48. The Court accordingly considers that the prosecution and conviction of the applicant cannot be justified as "necessary in a democratic society" within the meaning of paragraph 2 of Article 10 (see paragraph 44 above). There has thus been a violation of that Article.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

49. The applicant also claimed that Article 74 of the Military Criminal Code was not sufficiently precise to satisfy the requirement of foreseeability. He alleged a violation of Article 7 of the Convention, which provides:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

50. This complaint coincides with the applicant's allegation that his conviction and sentence were not "prescribed by law". The Court refers to paragraph 38 above and finds, on the grounds there stated, that there has been no violation of Article 7.

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION

51. Article 50 of the Convention provides as follows:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicant sought damages as well as reimbursement of his costs and expenses.

A. Damage

52. The applicant claimed 5,000,000 drachmas (GRD) for non-pecuniary damage caused by his imprisonment and by the difficulties which, owing to his conviction, he had had in finding a job as a journalist.

53. The Government noted that the applicant had not had to spend a single day in prison following his conviction. The sentence had been set off against the time which he had spent in detention on remand on the charge of desertion. It had never been suggested that his detention as such had been in violation of the Convention.

54. The Delegate of the Commission did not comment.

55. The Court agrees with the Government. Given that the actual reason for the applicant's detention, the desertion charge, was not before the Court, no award related to the applicant's prison sentence can be made.

Nor can it be accepted without corroboration that the applicant would have found employment any sooner had he not been convicted.

It follows that no causal link has been established between the violation of Article 10 found and the damage alleged. That being so the Court holds that the finding of a violation provides sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered.

B. Costs and expenses

56. The applicant claimed GRD 1,000,000 in respect of costs and expenses incurred in the proceedings before the domestic courts.

His costs and expenses before the Convention institutions were itemised as follows:

(a) GRD 1,000,000 for the proceedings before the Commission;

(b) GRD 800,000 for the proceedings before the Court;

(c) GRD 500,000 for travel and subsistence expenses incurred in connection with his appearance and that of his representative before the Court.

His claims in respect of costs and expenses thus totalled GRD 3,300,000.

57. As regards the domestic proceedings, the Government noted that the applicant had been tried on two charges, on one of which (the desertion charge) he had been acquitted. Only the costs referable to the charge of insult of the army fell to be considered by the Court. They considered GRD 400,000 to be a reasonable sum.

58. As regards the Strasbourg proceedings, the Government did not contest the sum claimed in respect of the proceedings before the Commission. However, they pointed out that the applicant had not submitted a memorial to the Court and contended that the Court should award no more than GRD 250,000 for the proceedings before it. They further stated that the applicant's presence in person at the Court's hearing had served no useful purpose and therefore asked the Court to award only half the sum claimed in respect of travel and subsistence expenses, to cover only the costs incurred by his lawyer.

59. As regards the costs and expenses incurred in attending the hearing, the Court cannot agree with the Government that the applicant's presence served no useful purpose (see, *inter alia*, the *Sunday Times* v. the United Kingdom judgment of 6 November 1980, Series A no. 38, p. 16, § 33).

Deciding on an equitable basis, the Court awards the applicant a global sum of GRD 2,000,000, plus any value-added tax that may be payable, in respect of costs and expenses.

C. Default interest

60. According to the information available to the Court, the statutory rate of interest applicable in Greece at the date of adoption of the present judgment is 6% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by twelve votes to eight that there has been a violation of Article 10 of the Convention;
2. *Holds* unanimously that there has been no violation of Article 7 of the Convention;
3. *Holds* by seventeen votes to three
   (a) that the finding of a violation of Article 10 of the Convention constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage which the applicant may have sustained;

(b) that the respondent State is to pay the applicant, within three months, 2,000,000 (two million) drachmas, plus any value-added tax that may be payable, in respect of costs and expenses;

(c) that simple interest at an annual rate of 6% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 November 1997.

For the President
Signed: Rudolf BERNHARDT
Vice-President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Bernhardt and Mr Wildhaber;

(b) concurring opinion of Mr Jambrek;

(c) dissenting opinion of Sir John Freeland joined by Mr Russo, Mr Valticos, Mr Loizou and Mr Morenilla;

(d) joint dissenting opinion of Mr Gölcüklü and Mr Pettiti;

(e) dissenting opinion of Mr Casadevall.

Initialled: R. B.
Initialled: H. P.

CONCURRING OPINION OF JUDGES BERNHARDT AND WILDHABER

In paragraph 37 of its judgment, the Court reiterates that the relevant law must be formulated with sufficient precision. Earlier cases have repeatedly stated that, where a law confers a discretion, the scope of the discretion and the manner of its exercise must be indicated with sufficient clarity[1]. In the instant case, the issue is not so much the scope of the discretion but rather the alleged vagueness of the law. What the Court has said with respect to discretion could usefully be expanded so as to include also the problem of vagueness of the instant case. After the Grigoriades case therefore, the rule could be formulated as follows:

> "A law that uses general terms or confers a discretion is not in itself inconsistent with the requirement of sufficient precision and foreseeability, provided that the terms used are not too vague and the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against interference."

1. See the following judgments: Goodwin v. the United Kingdom, 27 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 497, § 31; Tolstoy Miloslavsky v. the United Kingdom, 13 July 1995, Series A no. 316-B, p. 71, § 37; Margareta and Roger Andersson v. Sweden, 25 February 1992, Series A no. 226-A, p. 25, § 75; Kruslin v. France, 24 April 1990, Series A no. 176-A, p. 23, § 30; Huvig v. France, 24 April 1990, Series A no. 176-B, p. 55, § 29; Silver and Others v. the United Kingdom, 25 March 1983, Series A no. 61, p. 33, § 88.

CONCURRING OPINION OF JUDGE JAMBREK

1. The key reasons for the finding of a violation in the present case are to be found in paragraph 47 of the judgment. There, the point was made that critical remarks were made "in the context" of a general and lengthy discourse critical of army life and the army as an institution, that they were not published or disseminated to a wider audience, that they were not directed against the recipient or any other person, and that therefore their impact on military discipline was insignificant. It is the aim of this opinion to amend and elaborate on these reasons in some respects.

2. A number of remarks made by the applicant and described in the judgment as "strong", "intemperate" or "insulting" may be characterised as "opinions", i.e., subjective attitudes whereby facts and ideas are assessed, in contrast to factual claims. The protection of "opinions" by Article 10 of the Convention relates both to their substance and to their form; the fact that their wording is offensive, shocking, disturbing or polemical does not take them outside the scope of protection.

3. In the proceedings in the Greek courts the impugned remarks were characterised as "insults". The Court notes that they were not directed against the recipient commanding officer, and that he himself considered them "insulting to the armed forces". The legal concept of an "insult" protects mainly personal honour. State institutions, and the army in particular, do not possess "personal honour" to be protected as a personality right. In this sense, the legitimate aim of the interference with the applicant's freedom of expression could hardly be the "protection of the rights and freedoms of others".

4. The remarks made by the applicant come close to the concept of a "collective insult" which is not directed at any individual. In the present case the critical and even derogatory remarks were directed at the army as a national institution, respect for which is protected by Greek law. According to the Court of Cassation judgment of 22 September 1993, the protected value is not only the army as an organisation, but also the army as an idea, thus symbolically related to "the defence of the freedom and independence of the country".

5. Defamation of the military may of course have an objective impact on military discipline. For that reason the army should also be protected against "insults" which aim at degrading its public acceptance and may thereby undermine fulfilment of its functions. On the other hand, the army, like other State institutions, should not be shielded from criticism. Nor may permissible criticism on relevant issues be prevented by fear of punishment (compare the judgment of the German Constitutional Court, BVerfGE 93, 266, "Soldiers are murderers").

6. I also agree, in general terms, with the logic of the American "flag burning" cases where, *inter alia*, the public interest to show proper respect for the national emblem could not justify government interference with the symbolic act of casting contempt upon the American flag. This act may be considered analogous to a "collective insult", directed at highly respected national values (see the following judgments of the United States Supreme Court: *Street v. New York*, 394 U.S. 576 (1969) ; *Texas v. Johnson*, 491 U.S. 397 (1989) ; *United States v. Eichman*, 496 U.S. 310 (1990)). "Symbolic speech", offensive even to the supreme national values, in my view deserves, *mutatis mutandis*, protection under Article 10 of the Convention whenever an interference is not proportional and necessary in a democratic society.

7. I would also suggest, as an *obiter dictum*, that limitations of the Convention, restricting the exercise of the right to freedom of expression, should be applied – and here I quote from the opinion of Mr Justice Jackson in *Board of Education v. Barnette*, 319 U.S. 624 (1943) – "with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organisation ... Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order" (quoted in *Street v. New York*, 394 U.S. 576 (1969).

DISSENTING OPINION OF JUDGE Sir John FREELAND, JOINED BY JUDGES RUSSO, VALTICOS, LOIZOU AND MORENILLA

1. We are unable to agree that there has been a violation of Article 10 of the Convention in this case.

2. Our disagreement centres on the question whether the interference with the applicant's right to freedom of expression represented by his conviction under Article 74 of the Military Criminal Code should be regarded, in the circumstances of this case, as "necessary in a democratic society" within the meaning of Article 10 § 2. Like the majority of the Court, we accept that that interference was "prescribed by law" and that it pursued a legitimate aim, in so far as it was intended to maintain order and discipline in the armed forces.

3. As the Court pointed out in its Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria judgment of 19 December 1994 (Series A no. 302, p. 17, § 36), Article 10 applies to servicemen just as it does to other persons within the jurisdiction of the Contracting States, but " … the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline …".

4. The primary purpose of military discipline is to ensure that in all circumstances, including situations of extreme stress, lawful orders from a superior in rank are unquestioningly and immediately carried out by the serviceman to whom they are addressed. The rigidity with which military discipline is enforced, and the nature of the legal rules adopted to ensure that it is not undermined, differ from time to time and from State to State. They are no doubt conditioned by a variety of factors, including national characteristics and military traditions as well as the extent of military readiness considered necessary at the relevant time by the State concerned.

5. At the time of the events which gave rise to the applicant's conviction, the Greek armed forces were apparently in a state of mobilisation as a consequence of circumstances existing in the area. The applicant was a reserve officer on probation holding the rank of second lieutenant. He had performed two years of military service, in the course of which he would undoubtedly have been trained in the requirements of military discipline. He claimed to have discovered abuse against conscripts in the course of his service, as a result of which he came into conflict with his superiors and, after disciplinary proceedings against him, was required to serve additional time in the army. On 10 May 1989, after having overstayed a period of leave and having been declared a deserter he sent to his commanding officer, not through the post but by the hand of a taxi driver, a letter in the terms set out in paragraph 14 of the judgment. On the same day he gave a copy of the letter to a fellow reserve officer.

6. The letter included references to the army as being "… an apparatus opposed to man and society …" and " … a criminal and terrorist apparatus which, by creating an atmosphere of intimidation and reducing to tatters the spiritual welfare of the radical youth, clearly aims at transforming people to mere parts of an apparatus of domination which ruins human nature and transforms human relations from relations of friendship and love to relations of dependence, through a hierarchy of fear guided by an illiberal and oppressing set of Standing Orders …". The applicant could not have assumed that this letter would remain a private matter as between himself and his commanding officer: quite apart from his disclosure of a copy to the fellow officer, he must have realised that it would be the duty of the commanding officer to make the contents of the letter known within the military hierarchy.

7. Whether or not the aim of the applicant throughout his letter was, as he claimed, that of "improving the living conditions of soldiers and creating the prerequisites for a more humane army", there can surely be no doubt that some of the language which he used (see above) could reasonably be regarded by the military authorities as calling into question the legitimacy of the army as an institution and hence the extent of his willingness to obey orders emanating within it – in short, as being the language of insubordination rather than that of permissible criticism. More than that, it could reasonably be regarded as being, if left unpunished, a possible encouragement to other soldiers to waver in their duty of obedience – a consideration which gained in importance because of the disclosure of a copy of the letter to a fellow officer and the risk that knowledge of its contents would go further.

8. In the circumstances, and having regard to the margin of appreciation left to the national authorities, we consider that there was sufficient justification for treating the actions of the applicant as having a significant potential for undermining military discipline and the maintenance of order in the army. As regards the proportionality of the measures taken against him, it is to be noted that he was immediately released in the wake of his conviction and subsequent unsuccessful appeals, the time spent in detention on remand having counted against his sentence of three months' imprisonment.

9. In the light of the above, we conclude that the interference with the applicant's freedom of expression is indeed properly to be treated as "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention and gave rise to no violation. It is no part of the Court's function to express a view on whether the means chosen by the national authorities to deal with the applicant's situation were or were not the most suitable, and we, accordingly, refrain from doing so.

JOINT DISSENTING OPINION OF JUDGES GÖLCÜKLÜ AND PETTITI

(*Translation*)

We voted with the minority against finding a violation because we consider that the Grand Chamber's decision departs from the European Court's case-law.

It has always been accepted that, when applying Article 10, the Court must take both paragraphs of that Article into account.

Interference by a State may be justified on public-order grounds.

It has always been accepted that military and prison discipline come within the sphere of public order and require rules that differ from those normally applying.

Every civilised State with an army has a military code on its statute book. Such codes have never been outlawed by any international instrument. They are based on the discipline to which soldiers and particularly officers in active service or in reserve are subject for so long as they have service obligations.

In all States it is an offence to insult the army. In every European State, the State, the army and patriotic public opinion demand that respect be shown for the nation's army, at least by its officers.

The case-law of the institutions of the European Convention on Human Rights on conscientious objectors is consistent with that approach (*idem* with regard to military courts; see the De Jong, Baljet and Van den Brink v. the Netherlands judgment of 22 May 1984, Series A no. 77). The Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 41, § 100 is instructive as to the Court’s position:

> “Of course, the freedom of expression guaranteed by Article 10 applies to servicemen just as it does to other persons within the jurisdiction of the Contracting States. However, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings …”

It is not, therefore, possible to compare the freedom of expression of a citizen who is no longer in the army with the more limited freedom of expression of a soldier required to respect rank while doing national service. On the other hand, historians are totally free to criticise the army.

Military justice is not prohibited by the European Convention on Human Rights. Military discipline is by its nature necessary in a democratic society, otherwise anarchy or anti-democratic subversion ensues, contrary to the aims of the Convention.

All the member States of the Council of Europe have disciplinary and sanction systems comparable to Greece's, which are acceptable even on the proportionality principle. To hold otherwise would be to change the very basis of the European Convention on Human Rights and to construe "public order" wrongly, both under domestic law and when concerned with the concept of European public order.

There is a risk that the Court's judgment will be misunderstood by the member States. Permitting a soldier or officer who still has military service obligations to publish material presenting military service as a criminal institution, without any risk of the soldier or officer responsible being prosecuted by the military or judicial authorities under the Military Code, seems unwise. The Court has relied too heavily on the sole criterion of the nature of the letter.

In our opinion, the Grand Chamber has distorted the meaning of the letter and in so doing has not followed the Court's case-law precluding any reopening of a national court's finding of fact where such finding is not contrary to the Convention. The domestic courts, after analysis of the letter, found that it was intended for the applicant's superiors. In our view the Court misconstrued the letter in holding that it was personal, private and not addressed to the military authorities.

As the letter contained a refusal to perform the additional period of service, it was official. As a result the applicant had to be discharged, which required that administrative steps be taken. Save on pain of prosecution for abuse of office, the officer could not withhold it and keep it quiet. He had a duty to bring it to the attention of his superiors. The fact that Mr Grigoriades did not publicise the letter and that it contained no insulting remarks about its addressee is wholly irrelevant to the application of Article 10 (paragraph 45 contradicts paragraph 44).

The letter necessarily came within the scope of acts covered by military disciplinary regulations. The whole of paragraph 45 results in an erroneous justification of Mr Grigoriades' conduct and a condemnation of the Greek State that fails to take into account paragraph 2 of Article 10.

Yet it is accepted in Europe that discipline is essential to maintain the authority of the army and that the army is essential to ensure that democracy is protected from subversion, in accordance with one of the major objectives of the European Convention on Human Rights. The positive results obtained by the international forces in Bosnia emphasise the need to ensure respect for their professional code of ethics, especially as they have for a number of years agreed to incorporate teaching on human rights.

DISSENTING OPINION OF JUDGE CASADEVALL

(*Translation*)

1. I voted in favour of finding that there has been no violation because I consider, in the light of the facts disclosed and in particular the letter sent by the applicant to his superior, that the Greek State has not infringed its obligations under Article 10 of the Convention.

2. It is true that freedom of expression constitutes one of the fundamental pillars of any democratic society and for that reason the States' margin of appreciation must be delimited as strictly as possible. However, paragraph 2 of Article 10 provides that the exercise of freedom of expression, which also carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary for the protection of certain legal interests.

3. Freedom of expression must include freedom to criticise, provided that the criticism is couched in terms that are not excessive and strike a fair balance with regard to the rights of others, order and morals. Certain remarks in the applicant's letter to his superior, such as "…The army remains a criminal and terrorist apparatus ..." to quote but one example, clearly constitute an insult, and even an outrage, to a State institution.

4. Since the case concerned the Greek army, in which the applicant was a probationary reserve officer with the rank of second lieutenant, there could be no difficulty in justifying the applicant's conviction by one of the legitimate aims set out in the second paragraph of Article 10 such as "the prevention of disorder" – because it was an offence which discredited a State institution ("prevention of disorder" in the wider sense given to it by the Court in the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 41, § 98) – and "... the functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings" (ibid., pp. 41–42, § 100).

5. Over and above the fact that the applicant was a member of the armed forces, insulting or offending State institutions (the army, judiciary, Parliament or even emblems) constitutes a punishable offence under the ordinary law in most member States of the Council of Europe and the criminal-law provisions concerned are, in my opinion, compatible with the Convention and in particular freedom of expression.

6. The interference in this case was prescribed by domestic law, pursued a legitimate aim and was necessary in a democratic society under paragraph 2 of Article 10.

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

COURT (PLENARY)

CASE OF GROPPERA RADIO AG AND OTHERS v. SWITZERLAND

(Application no. 10890/84)

JUDGMENT

STRASBOURG

28 March 1990

In the case of Groppera Radio AG and Others[*],

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 50 of the Rules of Court and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr J. PINHEIRO FARINHA,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr S. K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 23 and 24 November 1989 and 21 and 22 February 1990,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Swiss Confederation ("the Government") on 16 November 1988 and 31 January 1989 respectively, within the three-month period laid down by Article 32 §

[*] Note by the registry: The case is numbered 14/1988/158/214. The first number is the case's position on the list of the cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 10890/84) against Switzerland lodged with the Commission under Article 25 (art. 25) by a limited company incorporated under Swiss law, Groppera Radio AG, and three Swiss citizens, Mr Jürg Marquard, Mr Hans-Elias Fröhlich and Mr Marcel Caluzzi, on 9 February 1984.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) of the Convention and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 10 and 13 (art. 10, art. 13).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Mrs D. Bindschedler-Robert, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 24 November 1988, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr F. Gölcüklü, Mr F. Matscher, Mr L.-E. Pettiti, Mr J. De Meyer and Mrs E. Palm (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the lawyer for the applicants on the need for a written procedure (Rule 37 § 1). In accordance with the President's Order and instructions, the Registrar received the applicants' memorial on 8 May 1989 and the Government's memorial on 30 May. On 21 July the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 15 June that the oral proceedings should open on 21 November 1989 (Rule 38).

6. On 20 June the Chamber decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 50).

7. On 26 September the Commission's secretariat filed documents at the registry concerning the proceedings before the Commission.

8. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government
Mr O. JACOT-GUILLARMOD, Assistant Director,
Federal Office of Justice, Head of the International Affairs Division, *Agent*,
Mr B. MÜNGER, Federal Office of Justice,
Deputy Head of the International Affairs Division,
Mr P. KOLLER, Federal Department of Foreign Affairs,
Deputy Head of the Cultural Affairs Section,
Mr A. SCHMID, Head Office of the PTT,
Head of the General Legal Affairs Division,
Mr H. KIEFFER, Head Office of the PTT,
Head of the Frequency Management and Broadcasting Rights Section,
Mr P. NOBS, Head Office of the PTT,
Telecommunications Rights and Criminal Law Section,
Mr M. REGNOTTO, Federal Department of Transport,
Communications and Energy - Radio and Television Department, *Counsel*;
- for the Commission
Mr J. A. FROWEIN, *Delegate*;
- for the applicants
Mr L. MINELLI, Rechtsanwalt, *Counsel*.

The Court heard addresses by Mr Jacot-Guillarmod for the Government, by Mr Frowein for the Commission and by Mr Minelli for the applicants, as well as their replies to questions put by the Court and by three of its members individually.

9. The Agent of the Government and the representative of the applicants produced several documents at the hearing.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. Groppera Radio AG, a limited company incorporated under Swiss law, has its registered office at Zug (Canton of Zug) and produces radio programmes.

Mr Jürg Marquard, Mr Hans-Elias Fröhlich and Mr Marcel Caluzzi are all Swiss nationals. Mr Marquard is a publisher and lives at Zug; he runs Groppera Radio AG and is its statutory representative and sole shareholder. Mr Fröhlich, who is a journalist and an employee of Groppera Radio AG, lives at Thalwil (Canton of Zürich). Mr Caluzzi is likewise employed by the

company as a journalist and lives at Cernobbio in Italy but also has a home in Lucerne.

A. The background to the case

1. The Pizzo Groppera radio station

11. In 1979 an Italian private limited company, Belton s.r.l., built a radio station on the Pizzo Groppera - a 2,948 m peak in Italy, near Campodolcino, six kilometres from the Swiss border - for Groppera Radio's predecessor, Radio 24 AG (see paragraphs 14-15 below). The station used a 50 kW transmitter and a directional aerial with a gain of about 100 kW, such that the apparent power radiated was of the order of 5,000 kW. Using this transmitter, the most powerful in Europe, the station broadcast to Switzerland over a distance of 200 km to the north-west and thus reached nearly a third of the country's population, mainly in the Zürich area.

2. The situation from 13 November 1979 to 30 September 1983

12. From 13 November 1979 to 30 September 1983 the Pizzo Groppera station was managed by Belton s.r.l. but operated by its owner, Radio 24 AG, a company that Mr Roger Schawinski had set up in order to evade the State broadcasting monopoly in Switzerland. The programmes, which were broadcast on VHF and were wholly financed by Swiss advertisers, were intended for listeners between the ages of 15 and 40.

13. On 7 June 1982 the Federal Council adopted an Ordinance on local radio trials, thereby ending the monopoly of the Swiss Radio Broadcasting Company. Nearly three hundred applications were made for trials of this kind, including one by Radio 24 AG, which wanted to serve the Zürich area.

14. On 20 June 1983 the Federal Council issued thirty-six licences. One of these went to Radio 24 AG, but it was issued on condition that the broadcasts from the Pizzo Groppera should cease after 30 September 1983.

Mr Schawinski agreed to this but sold the station on the Pizzo Groppera to Mr Marquard.

3. The situation from 1 October to 31 December 1983

15. From 1 October 1983 Groppera Radio AG used the Pizzo Groppera station to broadcast, under the name of Sound Radio, a slightly altered schedule to the Zürich area, on the frequency that had been used by Radio 24. These programmes could be received not only by the owners of car radios and other personal sets but also by cable-network companies, which retransmitted them. They consisted of light music, information bulletins, commercials and programmes in which the programme-makers and listeners

communicated directly or indirectly with each other by telephone or over the air. Like Radio 24, Sound Radio broadcast only in the Zürich dialect.

16. Swiss local radio stations began broadcasting from 1 November 1983 and attracted a large number of listeners. They came into competition with Sound Radio, mainly because they could finance themselves through advertising, subject to certain conditions. An opinion poll carried out in the Zürich area and published on 1 December 1983 showed that Radio 24 reached 60% of listeners and Sound Radio 12%.

B. The proceedings in Switzerland

17. On 17 August 1983 the Federal Council issued an Ordinance relating to the Act governing correspondence by telegraph and telephone ("the 1983 Ordinance") to replace another of 10 December 1973. It came into force on 1 January 1984 and contained general provisions applicable to the licensing scheme.

It created a third category of licence for receiving installations - community-antenna installations - which was additional to categories 1 (private receiving) and 2 (public receiving). By Article 78 § 1 (a) of the Ordinance,

> "A community-antenna licence shall entitle the holder to:
>
> (a) operate the local distribution network defined in the licence and rebroadcast by this means radio and television programmes from transmitters which comply with the provisions of the International Telecommunication Convention of 25 October 1973 and the international Radio Regulations and with those of the international conventions and agreements concluded within the International Telecommunication Union;
>
> ..."

18. From 1 January 1984 most of the Swiss cable companies ceased to retransmit the programmes put out by Sound Radio.

Some of them, however, including the community-antenna co-operative of Maur and the surrounding district (Genossenschaft Gemeinschaftsantennenanlage Maur und Umgebung - "the co-operative"), continued to broadcast them.

1. The administrative proceedings

19. On 21 March 1984 the Zürich area telecommunications office of the national Post and Telecommunications Authority (PTT) informed the co-operative that Groppera Radio AG’s broadcasts, since they did not comply with the international rules in force, were unlawful, so that under Article 78 §§ 1 and 3 of the 1983 Ordinance retransmission was not covered by the community-antenna licence. It added that the co-operative would be

committing an offence if it continued to retransmit them, and it required the co-operative to cancel within thirty days all the technical arrangements made for receiving and broadcasting the programmes in question.

20. On 31 July 1984 this order was confirmed by the national head office of the PTT.

2. The judicial proceedings

21. The co-operative and two of its subscribers challenged this decision by bringing an administrative-law appeal in the Federal Court.

22. On 30 August 1984 the Pizzo Groppera transmitter was damaged by lightning. It ceased broadcasting and has never resumed since, although the applicants claimed that the damage was quickly repaired. Later, in an interview published in the Tages-Anzeiger Magazin on 13 December 1986, Mr Marquard acknowledged that he had made an error of business judgment in acquiring the radio station.

23. Groppera Radio AG joined the appeal by filing pleadings on 18 September 1984. It claimed that it too was a victim of the provisions of the 1983 Ordinance concerning community-antenna licences, as the restrictions they imposed considerably reduced the number of its listeners, thereby cutting its revenue and jeopardising its financial survival.

24. On 12 November 1984 the Federal Court informed the parties that it had learned that the Pizzo Groppera transmitter had been destroyed and would apparently not be repaired. As there was no interest in pursuing the proceedings, the court proposed striking out the appeals without taking a decision on the merits ("die Beschwerde ohne Sachentscheid abzuschreiben").

The applicants refused to consent to this.

25. The Federal Court gave judgment on 14 June 1985, after deliberating in public on the same day.

It ruled that the appeals were admissible inasmuch as they were directed not against the ban on retransmission itself but against the sanctions imposed by the PTT for disregarding the ban.

It went on to dismiss the appeals for the following reasons (translated from German):

> "3. The Court can normally only hear an administrative appeal if the appellant has a live (present or future) interest in taking proceedings. If the interest in taking proceedings has ceased to exist, the case becomes purely academic and must not continue unless special circumstances require a decision on the merits, for example where it would otherwise not be possible to give a binding ruling on matters of principle in time ...
>
> (a) the Maur community-antenna co-operative and its subscribers have only a contingent interest in taking proceedings, depending on whether Sound Radio is going to resume broadcasting; so long as there are no broadcasts, there is nothing to feed into

the cable network. If it is highly unlikely that the broadcasts will be resumed, there is no need to examine the merits of the appeal.

Groppera Radio AG claimed to have made all the arrangements necessary for restarting its broadcasts in the event of the present appeal's being held to have a suspensive effect (or of its succeeding). That statement, however, was unsupported by any evidence, although the burden of proof is on the appellant in this regard and Groppera's submission is open to serious doubt. The company claimed to have ceased its broadcasts - independently of the consequences of the station's having been struck by lightning - because of the PTT's ban on retransmission. Other reasons may have weighed more heavily, however. With the arrival of experimental local radio stations and a third frequency for Radio DRS [Direktion Radio und Fernsehen der deutschen und rätoromanischen Schweiz], the transmitter on the Pizzo Groppera had to face serious competition, including that from Radio 24; the transmitter's survival is accordingly no doubt in jeopardy irrespective of the ban on retransmission. That being so, Groppera Radio AG's gratuitous statement that it was ready to resume its activities is not sufficient to prove that the Maur community-antenna co-operative and its subscribers have a live interest in taking proceedings. It follows that there is no need to examine the merits of their appeal.

The Court does not need to determine the question whether there might be a live interest if the transmitter resumed or had already resumed its broadcasts, which are incompatible with international telecommunications law - subject to any contrary decision by the Italian courts and, possibly, by an international court of arbitration.

(b) For the same reasons there is no need to consider the merits of the appeal brought by Groppera Radio AG.

The company cannot plausibly maintain that if its appeal succeeded, it would resume its activities - which have been made impossible, short of new investment, by a storm that occurred after the appeal was brought - and would, furthermore, have the financial means to do so.

Moreover, this case is a wholly exceptional one. Transmitters which broadcast in contravention of national or international law cannot usually survive for long. Matters are different as regards the Pizzo Groppera transmitter only because proceedings are still pending in Italy and because hitherto none of the means of settling disputes provided for in Article 50 of the International Telecommunication Convention ... has been used. It is unlikely that a second case of this kind will arise, if only because of the doubtful profitability of such transmitters. There is therefore insufficient justification for determining, with an eye to the future, the issues raised by the case, some of which are extremely sensitive.

In any case, even if it were to be held that Groppera Radio AG had a possible interest in taking proceedings, its claim to retransmit again, through the co-operative's cable network, its probably unlawful ... broadcasts, after resuming them, would not deserve the law's protection."

Lastly, the court made an order for costs against Groppera Radio AG since its appeal could not succeed as the company had breached the law by attempting to circumvent a ban on retransmission that had been imposed by the PTT and that, moreover, did not concern it directly.

C. The proceedings in Italy

26. From 13 November 1979 onwards Radio 24 (Sound Radio's predecessor) broadcast to Switzerland from the Pizzo Groppera (see paragraph 12 above). On several occasions it changed its frequency in order to prevent interference with other radio stations.

On 21 December 1979, following complaints from the German and Swiss telecommunications authorities, the Italian Ministry of Post and Telecommunications prohibited Belton s.r.l. (the manager of the station - see paragraph 12 above) from continuing its operations and threatened to put its transmitter out of action. The transmitter closed down on 22 January 1980, was functioning again three days later and then ceased broadcasting on 29 January.

27. Belton s.r.l. brought proceedings in the Lombardy Regional Administrative Court, which on 11 March 1980 refused an application for a provisional broadcasting licence.

28. On 19 March 1980 the Chiavenna magistrate declared that the closing down of the transmitter was unlawful, and broadcasting resumed on 23 March.

29. On 3 October 1980 the PTT again demanded that the broadcasts should cease. On 11 October a second application (no. 2442/82) was made to the Lombardy Regional Administrative Court, but on 18 November that court refused a stay of execution. On 25 November the Pizzo Groppera transmitter closed down for the third time.

On 13 January 1981 the Consiglio di Stato granted an application for a stay of execution pending the proceedings in the Administrative Court, and Radio 24 began broadcasting again on 16 January.

30. In a judgment (no. 1515/81) of 1 October, which was filed at the registry on 4 December 1981, the Administrative Court held that Radio 24 was carrying on its activities in Italy unlawfully. The Pizzo Groppera station could not be considered as a local radio station under Italian law, since it had a broadcasting radius of more than 20 km and broadcast only to listeners living across the border. The court added that under Law no. 103 of 14 April 1975 ("new provisions concerning radio and television broadcasting"), the State had a monopoly of radio broadcasts intended for foreign countries. Lastly, the court upheld the closure order, which was executed on 21 January 1982.

31. On 4 May 1982, following an appeal by Belton s.r.l., the Consiglio di Stato adopted three decisions, the first of which was filed at the registry the next day and the other two on 26 October:

(i) an order (no. 124/82) staying execution of the judgment of 1 October 1981, so that Radio 24 was able to resume broadcasting on 9 May;

(ii) a judgment (no. 508/82) allowing the appeal in part and reserving a decision as to the rest; and

(iii) an order (no. 509/82) referring the case to the Constitutional Court - as sections 1, 2 and 45 of the 1975 Law appeared to raise a constitutional issue - and staying the proceedings.

32. The Constitutional Court gave its decision on 6 May 1987 in a judgment (no. 153/1987) which was filed at the registry on 13 May. It declared section 2(1) of the impugned Law to be unconstitutional as it did not make any provision for the possibility of broadcasting programmes abroad under licences issued to private companies by the State authorities.

II. SWITZERLAND AND INTERNATIONAL TELECOMMUNICATIONS LAW

A. The International Telecommunication Convention

33. The International Telecommunication Convention, which was concluded in the International Telecommunication Union on 25 October 1973 and revised on 6 November 1982, has been ratified by all the Council of Europe's member States. In Switzerland it has been published in full in the Official Collection of Federal Statutes (1976, p. 994, and 1985, p. 1093), and in the Compendium of Federal Law (0.784.16).

Article 33, entitled "Rational Use of the Radio Frequency Spectrum", provides:

> "Members shall endeavour to limit the number of frequencies and the spectrum space used to the minimum essential to provide in a satisfactory manner the necessary services. To that end they shall endeavour to apply the latest technical advances as soon as possible."

Article 35 § 1 reads:

> "All stations, whatever their purpose, must be established and operated in such a manner as not to cause harmful interference to the radio services or communications of other Members or of recognised private operating agencies, or of other duly authorised operating agencies which carry on radio service, and which operate in accordance with the provisions of the Radio Regulations."

34. The Convention is supplemented and clarified by three sets of administrative rules: the Radio Regulations, the Telegraph Regulations and the Telephone Regulations. Only the first of these is relevant in the instant case.

B. The Radio Regulations

35. The Radio Regulations date from 21 December 1959 and were likewise amended in 1982 and also on other occasions. They run to over a thousand pages and - except for numbers 422 and 725 - have not been

published in the Official Collection of Federal Statutes. The latter contains the following reference to them:

> "The administrative regulations relating to the International Telecommunication Convention of 25 October 1973 are not being published in the Official Collection of Federal Statutes. They may be consulted at the Head Office of the PTT, Library and Documentation, Viktoriastrasse 21, 3030 Berne, or may be obtained from the ITU, International Telecommunication Union, Place des Nations, 1202 Geneva."

Apart from number 584 (see paragraph 36 below), the provisions of the Radio Regulations relevant to the present case are the following:

Number 2020

> "No transmitting station may be established or operated by a private person or by any enterprise without a licence issued in an appropriate form and in conformity with the provisions of these Regulations by the Government of the country to which the station in question is subject ..."

Number 2666

> "In principle, except in the frequency band 3900-4000 kHz, broadcasting stations using frequencies below 5060 kHz or above 41 MHz shall not employ power exceeding that necessary to maintain economically an effective national service of good quality within the frontiers of the country concerned."

C. The Darmstadt plan

36. By number 584 of the Radio Regulations,

> "Broadcasting stations in the band 100-108 MHz in Region 1 shall be established and operated in accordance with an agreement and associated plan for the band 87.5-108 MHz to be drawn up by a regional broadcasting conference (see Resolution 510). Prior to the date of entry into force of this agreement, broadcasting stations may be introduced subject to agreement between administrations concerned, on the understanding that such an operation shall in no case prejudice the establishment of the plan."

37. The work of the conference contemplated in this provision resulted in the adoption in 1971 of a regional convention better known under the name of the Darmstadt plan. This instrument, which was superseded in 1984 by the "Geneva plan", governed the use of the 100-108 MHz frequency band and laid down a procedure for considering new applications for frequency allocations; it also indicated the position and characteristics of the transmitters concerned.

38. Unlike Switzerland, Italy has not acceded to the plan. Nor have the two countries concluded an individual agreement as required before a transmitter can broadcast from one national territory to another.

D. Switzerland's representations

39. The Swiss Government never jammed the broadcasts from the Pizzo Groppera in order to stop them. They did, however, make approaches to the Italian authorities and to the International Telecommunication Union.

1. The approaches to the Italian authorities

40. Two delegations, one Swiss and one Italian, met in Berne on 29 and 30 November 1979 to study the "problem of external transmitters situated on Italian territory and broadcasting programmes to Switzerland". The minutes of the meeting mentioned the following points:

> "1. The Italian delegation confirmed that on 22 November 1979 the 'Ministero delle Poste e delle Telecomunicazioni' sent a warning to the Belton company (Signor Fedele Tiranti) in Como, and receipt of the document was acknowledged on 23 November. The document stated that the transmitter had to confine the scope of its activities to Italian territory. Those in charge of the station had seven days in which to comply with this order, failing which their transmitter would be put out of action (disattivazione). The Swiss delegation expected immediate action. In accordance with the agreements concluded in Rome on 22 and 23 October 1979, the Italian delegation assured the Swiss delegation that the Italian Post and Telecommunications Authority would pursue the course of action already embarked on with the despatch of the warning (diffida), in order to halt the broadcasts to Switzerland. The Swiss delegation stated nonetheless that if nothing was done by 20 December 1979 and if the broadcasts still continued, the case would have to be submitted to the International Telecommunication Union (ITU).
>
> 2. As regards the external transmitters which were disrupting broadcasting in Switzerland, some measure of agreement was reached. The Italian side had already taken measures to implement the rules in force. One transmitter had even temporarily ceased functioning. Future arrangements would be examined on a case-by-case basis by the representatives of the two authorities, i.e. Mr Blaser for Switzerland and Mr Cito for Italy.
>
> 3. The Swiss delegation insisted on measures being taken, in accordance with the international agreements, against other transmitters sited in Italy which broadcast programmes intended mainly for Switzerland. The Italian delegation, which was willing to settle the problem in accordance with its international commitments, said that it could not for the time being participate in any official co-ordination procedure, mainly because there was currently no legal basis for it.
>
> 4. The Swiss delegation confirmed its position vis-à-vis the international agreements and stressed the need for them to be applied unrestrictedly by the co-signatory countries.
>
> 5. Given the importance of the issues in question, the two delegations decided to continue their negotiations early in 1980."

2. The approaches to the International Telecommunication Union

(a) The request for assistance from the Head Office of the PTT

41. In a letter of 20 January 1987 the Radio Rights Division (Head Office of the PTT) submitted a request for assistance to the chairman of the International Frequency Registration Board (International Telecommunication Union).

It indicated inter alia:

> "In Italy, especially in the Po valley, there are a large number of private radio and television broadcasting stations transmitting on frequencies which have not been co-ordinated with the Swiss Post and Telecommunications Authority. This state of affairs contravenes Articles 2 and 4 of the regional broadcasting agreements (Stockholm 1961, Geneva 1984) and numbers 1214 and 1215 of the Radio Regulations, international agreements to which the Swiss and Italian authorities are parties.
>
> Some of these stations broadcast programmes and advertising designed for listeners in neighbouring Swiss towns and employ power exceeding that necessary to maintain economically an effective national service of good quality within the frontiers of the country concerned, contrary to number 2666 of the Radio Regulations. Furthermore, these private stations interfere with the proper functioning of Swiss radio services. To give a better picture of the situation, we are enclosing copies of the reports of harmful interference that we have sent to the Italian authorities (since 1984), pursuant to Article 22, Appendix 23 of the Radio Regulations. You will also find a summary table of Italian private radio stations which, through their presence on the airwaves, are preventing the implementation of our frequency allocations.
>
> For more than six years now, the various representations made by the Swiss PTT to the Italian authorities with a view to a co-ordination of effort have unfortunately produced no significant result. It is for this reason that before, if need be, taking the steps provided for in Article 50, number 189, of the International Telecommunication Convention (Nairobi, 1982), the Swiss authorities request the Board to take, as soon as possible, all necessary measures to remedy this situation."

(b) The International Telecommunication Union's reply

42. On 8 July 1988 the chairman of the International Frequency Registration Board sent the Head Office of the Swiss PTT a copy of a letter sent the same day to the Italian Ministry of Post and Telecommunications informing it that frequency allocations were being used in breach of the Radio Regulations and regional agreements.

The most recent of the Board's representations to the Italian authorities was made in a telefaxed message on 29 November 1988, which read:

> "1. The Board has yet to receive any information about the solution of the cases of harmful interference reported by the Swiss authorities. Similar cases of harmful interference have recently been reported by the authorities of two other States.
>
> 2. On behalf of the International Frequency Registration Board I wish to express serious concern at the apparent lack of progress in eliminating the harmful interference

caused to radio and television broadcasting stations in Switzerland and at the fact that a chaotic situation seems to have developed in the region which, to say the least, renders the existing international treaties nugatory.

3. In your letter of 8 August 1988 you informed the Board that an agreement had been reached with the Swiss authorities, but no practical measure seems to have been taken. Your Department has not yet replied to the Board's letters of 3 April 1987, 21 August 1987 and 25 October 1988 and has not submitted any comments - as it was required to do under RR [Radio Regulations] 1444 - on the Board's investigation pursuant to RR 1438 and RR 1442 into the harmful interference caused to the Swiss authorities' radio and television broadcasting stations which was reported to you in the Board's letter of 8 July 1988.

...

6. The Board wishes to draw your Department's attention to the extremely serious situation currently prevailing.

In particular:

(I) The Board has concluded that the Italian authorities have failed to comply with the obligations which they freely undertook to fulfil in the International Telecommunication Convention, the Radio Regulations and the regional agreements.

(II) More than a hundred Italian stations are currently causing persistent harmful interference to officially authorised stations in three neighbouring countries.

(III) No means has been found of reducing this major interference, which continues to increase.

(IV) There has been no specific reply to the Board's letters.

7. In view of this situation, which has existed for several years now and has recently become alarmingly serious, the Board is bound to consider taking further measures with a view to overcoming the serious consequences for the authorities of France, Switzerland and Yugoslavia of the Italian authorities' failure to fulfil their obligations.

8. Copies of this telefax are being sent to the authorities of France, Switzerland and Yugoslavia."

The Board never received any reply from the Italian authorities.

PROCEEDINGS BEFORE THE COMMISSION

43. In their application of 9 February 1984 to the Commission (no. 10890/84), Groppera Radio AG and Mr Marquard, Mr Fröhlich and Mr Caluzzi relied on Article 10 (art. 10) of the Convention. They contended that the ban on cable retransmission in Switzerland of their broadcasts from

Italy infringed their right to impart information and ideas regardless of frontiers. They also claimed to be the victims of a breach of Article 13 (art. 13), for want of any remedy against a Federal Council Ordinance.

44. The Commission declared the application admissible on 1 March 1988. In its report of 13 October 1988 (made under Article 31) (art. 31), the Commission found that there had been a breach of Article 10 (art. 10) (by seven votes to six) but not of Article 13 (art. 13) (unanimously). The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS TO THE COURT

45. At the hearing the Government confirmed the final submissions in their memorial of 30 May 1989, in which they asked the Court to hold:

> "primarily, that the applicants lack the status of victims and that consequently they cannot claim a violation of the Convention;
>
> in the alternative, that the restrictions on freedom of expression formed part of the licensing system to which broadcasting enterprises may be subject in virtue of the third sentence of Article 10 § 1 (art. 10-1) of the Convention;
>
> in the further alternative, that the State interferences with the applicants' freedom of expression were justified under Article 10 § 2 (art. 10-2) of the Convention."

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

46. The Government submitted - as they had already done unsuccessfully before the Commission - that the applicants were not "victims" within the meaning of Article 25 § 1 (art. 25-1) of the Convention.

Only the community-antenna co-operative of Maur and the surrounding district had suffered interference with the exercise of its freedom of expression, namely the ban on cable transmission of programmes received over the air from the Pizzo Groppera. Groppera Radio AG, the Government claimed, had only an indirect legal interest, since at all events Sound Radio could still broadcast over the air and cover the Zürich area, including the

[*] Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 173 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

village of Maur. Furthermore, challenging the Federal Council's 1983 Ordinance would be tantamount to applying for a review of legislation in the abstract, which was in principle outside the jurisdiction of the Convention institutions. Nor could Mr Marquard, Mr Fröhlich and Mr Caluzzi claim to be victims on the ground that they were listeners living in the area covered by the co-operative, since they were not subscribers to its cable network.

47. By "victim" Article 25 (art. 25) means the person directly affected by the act or omission which is in issue, a violation being conceivable even in the absence of any detriment; the latter is relevant only to the application of Article 50 (art. 50) (see, in particular, the Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 21, § 42).

48. Like the Commission in its decision of 1 March 1988 on the admissibility of the application, and for similar reasons, the Court does not consider it necessary to examine whether the applicants can claim to have been victims during the period from 1 January 1984 (entry into force of the Federal Council's Ordinance of 17 August 1983) to 21 March 1984 (date of the order from the Zürich area telecommunications office of the PTT to the co-operative) or during the period following 30 August 1984, when the Pizzo Groppera station was damaged by lightning.

From 21 March to 30 August 1984, on the other hand, the applicants were directly affected by the 1983 Ordinance and by the administrative decisions of 21 March and 31 July 1984. Admittedly, these were not formally directed at the applicants, who continued to broadcast over the air freely, but their effects were fully felt by them. Since the co-operative was prohibited from feeding Sound Radio's programmes into its network, the applicants lost an appreciable proportion of their usual audience - the listeners living in areas where reception was poor or even impossible because of the mountainous nature of the country.

49. Nor, in relation to Article 25 (art. 25), is there any ground for distinguishing between the different applicants, despite obvious dissimilarities of status or rôle and the fact that Groppera Radio AG alone joined the co-operative's appeal to the Federal Court. All had a direct interest in the continued transmission of Sound Radio's programmes by cable: for the company and its sole shareholder and statutory representative, it was essential to keep the station's audience and therefore to maintain its financing from advertising revenue; for the employees, it was a matter of their job security as journalists.

50. Lastly, the Court cannot attach any importance to the fact that Mr Marquard, Mr Fröhlich and Mr Caluzzi were not subscribers to the co-operative's cable network. Before the Convention institutions they complained of interference with their freedom to impart information and ideas regardless of frontiers and not, other than in their observations of 29

August 1986 to the Commission, of an infringement of their freedom personally to receive such information and ideas.

51. In short, the applicants can claim to be victims of the alleged violation.

II. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

52. Groppera Radio AG, and also Mr Marquard, Mr Fröhlich and Mr Caluzzi, complained of the ban on cable retransmission in Switzerland of the programmes broadcast by Sound Radio from Italy. They relied on Article 10 (art. 10) of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Whether there was an interference

53. In the applicants' submission, the administrative decisions of 21 March and 31 July 1984 taken against the co-operative under the Federal Council's 1983 Ordinance interfered with their right to impart information and ideas regardless of frontiers; the decisions prevented subscribers to the cable networks from receiving the broadcasts from the Pizzo Groppera and thus amounted in effect to a ban on those programmes, which was the more serious as in Switzerland two-thirds of the population can receive broadcasts by cable, and the mountainous terrain often makes reception over the air difficult and sometimes even impossible.

54. Without expressly disputing that Article 10 (art. 10) was applicable, the Government denied that the applicants had any interest in taking proceedings. Sound Radio, they said firstly, used a transmitter of considerable power allowing it to "blanket" the Zürich area and had never been jammed. Secondly, the station had ceased broadcasting on 1 September 1984 not only because of the damage caused by the lightning but also, and more particularly, for economic reasons. Thirdly, it broadcast programmes whose content - mainly light music and commercials - could raise doubts as to whether they were "information" and "ideas".

55. The Court notes that the first two of the Government's submissions reiterate in substance the preliminary objection that has already been dismissed. As to the third submission, the Court does not consider it necessary to give on this occasion a precise definition of what is meant by "information" and "ideas". "Broadcasting" is mentioned in the Convention precisely in relation to freedom of expression. Like the Commission, the Court considers that both broadcasting of programmes over the air and cable retransmission of such programmes are covered by the right enshrined in the first two sentences of Article 10 § 1 (art. 10-1), without there being any need to make distinctions according to the content of the programmes. The disputed administrative decisions certainly interfered with the cable retransmission of Sound Radio's programmes and prevented the subscribers in the Maur area from receiving them by that means; they therefore amounted to "interference by public authority" with the exercise of the aforesaid freedom.

B. Whether the interference was justified

56. The Government submitted, in the alternative, that the interference was in keeping with paragraph 1 (art. 10-1) in fine, according to which Article 10 "shall not prevent States from requiring the licensing of broadcasting ... enterprises"; in the further alternative, they argued that it was justified under paragraph 2 (art. 10-2).

1. Paragraph 1, third sentence, of Article 10 (art. 10-1)

57. As to the first point, the applicants contended that Switzerland had no jurisdiction to regulate reception on its territory of programmes legally broadcast from abroad and retransmitted by cable. Since the Pizzo Groppera station was in Italy, only the Italian authorities might be entitled to grant Groppera Radio AG a licence within the meaning of the third sentence of Article 10 § 1 (art. 10-1). Furthermore, companies which operated cable networks each had a relatively large number of channels; the licences that were granted to them in Switzerland were for purely technical purposes and could not in any circumstances be used to dictate the choice of programmes.

In the Commission's view likewise, the third sentence of Article 10 § 1 (art. 10-1) could not justify the interference complained of. The condition to which the award and holding of the "community-antenna licence" were made subject by the administrative decisions of 21 March and 31 July 1984 was not designed to ensure compliance with a licence issued to a broadcasting enterprise operating under the Swiss system. The legitimacy of the restriction imposed on licensed cable companies by Article 78 § 1 (a) of the 1983 Ordinance could accordingly be assessed only under Article 10 § 2 (art. 10-2).

58. The Government disputed this contention. They did not deny that Groppera Radio AG was a broadcasting enterprise but they included in that category community-antenna companies which received programmes over the air and retransmitted them by cable. Furthermore, they distinguished between two national licensing systems: the Italian one, applicable to Groppera Radio AG, and the Swiss one, applicable to the co-operative. They considered that they had made legitimate use of the second system in refusing to endorse the application for a licence, as to have done so would have breached Switzerland's international undertakings - especially as Sound Radio used VHF, a frequency intended purely for national broadcasting - and would have been to disregard the conditions attaching to the licences granted to cable companies.

59. The Court agrees with the Government that the third sentence of Article 10 § 1 (art. 10-1) is applicable in the present case. What has to be determined is the scope of its application.

60. The insertion of the sentence in issue, at an advanced stage of the preparatory work on the Convention, was clearly due to technical or practical considerations such as the limited number of available frequencies and the major capital investment required for building transmitters. It also reflected a political concern on the part of several States, namely that broadcasting should be the preserve of the State. Since then, changed views and technical progress, particularly the appearance of cable transmission, have resulted in the abolition of State monopolies in many European countries and the establishment of private radio stations - often local ones - in addition to the public services. Furthermore, national licensing systems are required not only for the orderly regulation of broadcasting enterprises at the national level but also in large part to give effect to international rules, including in particular number 2020 of the Radio Regulations (see paragraph 35 above).

61. The object and purpose of the third sentence of Article 10 § 1 (art. 10-1) and the scope of its application must however be considered in the context of the Article as a whole and in particular in relation to the requirements of paragraph 2 (art. 10-2).

There is no equivalent of the sentence under consideration in the first paragraph of Articles 8, 9 and 11 (art. 8, art. 9, art. 11), although their structure is in general very similar to that of Article 10 (art. 10). Its wording is not unlike that of the last sentence of Article 11 § 2 (art. 11-2). In this respect, however, the two Articles (art. 10, art. 11) differ in their structure. Article 10 (art. 10) sets out some of the permitted restrictions even in paragraph 1 (art. 10-1). Article 11 (art. 11), on the other hand, provides only in paragraph 2 (art. 11-2) for the possibility of special restrictions on the exercise of the freedom of association by members of the armed forces, the police and the administration of the State, and it could be inferred from this that those restrictions are not covered by the requirements in the first

sentence of paragraph 2 (art. 11-2), except for that of lawfulness ("lawful"/"légitimes"). A comparison of the two Articles (art. 10, art. 11) thus indicates that the third sentence of Article 10 § 1 (art. 10-1), in so far as it amounts to an exception to the principle set forth in the first and second sentences, is of limited scope.

The Court observes that Article 19 of the 1966 International Covenant on Civil and Political Rights does not include a provision corresponding to the third sentence of Article 10 § 1 (art. 10-1). The negotiating history of Article 19 shows that the inclusion of such a provision in that Article had been proposed with a view to the licensing not of the information imparted but rather of the technical means of broadcasting in order to prevent chaos in the use of frequencies. However, its inclusion was opposed on the ground that it might be utilised to hamper free expression, and it was decided that such a provision was not necessary because licensing in the sense intended was deemed to be covered by the reference to "public order" in paragraph 3 of the Article (see Document A/5000 of the sixteenth session of the United Nations General Assembly, 5 December 1961, paragraph 23).

This supports the conclusion that the purpose of the third sentence of Article 10 § 1 (art. 10-1) of the Convention is to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2 (art. 10-2), for that would lead to a result contrary to the object and purpose of Article 10 (art. 10) taken as a whole.

62. The sentence in question accordingly applies in the instant case inasmuch as it permits the orderly control of broadcasting in Switzerland.

63. The Court notes that the Pizzo Groppera station as such admittedly came under Italian jurisdiction, but that the retransmission of its programmes by the Maur co-operative came under Swiss jurisdiction. The ban on retransmission was fully consistent with the Swiss local radio system established by the Federal Council in its Ordinance of 7 June 1982 (see paragraphs 13-14 above).

64. In sum, the interference was in accordance with the third sentence of paragraph 1 (art. 10-1); it remains to be determined whether it also satisfied the conditions in paragraph 2 (art. 10-2), that is to say whether it was "prescribed by law", had a legitimate aim or aims and was "necessary in a democratic society" in order to achieve them.

2. Paragraph 2 of Article 10 (art. 10-2)

(a) "Prescribed by law"

65. The applicants did not object to the fact that the Ordinance of 17 August 1983 referred to the rules of international law, but they did not consider these sufficiently accessible or precise for a citizen to be able to

adapt his behaviour to them - even after consulting a lawyer, if necessary. The applicants added that international telecommunications law was binding only on the States parties to the instruments in question; as Groppera Radio AG's transmitter came under Italian jurisdiction, any problem with applying that law therefore had to be resolved at inter-State level, if need be by resorting to the machinery provided for in Article 50 of the International Telecommunication Convention. In short, they claimed that the interference complained of was not "prescribed by law".

66. The Commission reached a similar conclusion. It noted that neither Article 78 § 1 (a) of the 1983 Ordinance nor the decision taken by the Zürich area telecommunications office of the PTT on 21 March 1984 (see paragraphs 17 and 19 above) mentioned any particular rule of international telecommunications law. The Commission also referred to the Swiss Federal Court's and the Italian Constitutional Court's judgments of 14 June 1985 and 6 May 1987 (see paragraphs 25 and 32 above) in order to advance the view that the question whether Groppera Radio AG was validly in possession of a "licence" within the meaning of number 2020 of the Radio Regulations (see paragraph 35 above) had not been resolved. To hold that in the instant case the persons concerned could know what the legal basis of the measure affecting Sound Radio was would amount to giving the authorities a quasi-discretionary power to ban any programme alleged to be contrary to public international law.

67. The Government submitted that, on the contrary, the national and international rules in issue satisfied the criteria of precision and accessibility identified in the Convention institutions' case-law.

On the first point the Government argued that the decision taken on 31 July 1984 by the national head office of the PTT referred to Article 78 § 1 (a) of the 1983 Ordinance and to several specific provisions of international telecommunications law (Article 35 of the International Telecommunication Convention and numbers 584 and 2666 of the Radio Regulations). They also emphasised the monistic concept followed in the Swiss legal system; this allowed individuals to rely on rules of international law in order to assert rights and obligations vested in or incumbent on the authorities or other individuals. Lastly, they stated that the applicants were by no means unaware of the international rules applicable in Switzerland. This was evidenced by two documents: the letter of 29 January 1980 from the PTT's national head office to all licensed community-antenna companies in the area in which Radio 24 (Sound Radio's predecessor) could be received and the Federal Court's judgment of 12 July 1982 in the case of Radio 24 Radiowerbung Zürich AG gegen Generaldirektion PTT (Judgments of the Swiss Federal Court, vol. 108, Part 1b, p. 264). These documents had clearly defined a legal position which the 1983 Ordinance expressed in legislative form.

As regards accessibility, the Government recognised that only the International Telecommunication Convention had been published in full in the Official Collection of Federal Statutes and in the Compendium of Federal Law. While the Radio Regulations had not been published in these - except for numbers 422 and 725 -, information was given in the Official Collection as to how they could be consulted or obtained (see paragraph 35 above). This practice was, the Government said, justified by the length of the text, which ran to more than a thousand pages. Moreover, the practice had been approved by the Federal Court (judgment of 12 July 1982 previously cited) and could be found in at least ten other member States of the Council of Europe. Lastly, it was consonant with the European Court's case-law on individuals' access to legal norms in common-law systems.

68. In the Court's view, the scope of the concepts of foreseeability and accessibility depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed.

In the instant case the relevant provisions of international telecommunications law were highly technical and complex; furthermore, they were primarily intended for specialists, who knew, from the information given in the Official Collection, how they could be obtained. It could therefore be expected of a business company wishing to engage in broadcasting across a frontier - like Groppera Radio AG - that it would seek to inform itself fully about the rules applicable in Switzerland, if necessary with the help of advisers. As the 1983 Ordinance and the International Telecommunication Convention had been published in full, such a company had only to acquaint itself with the Radio Regulations, either by consulting them at the PTT's head office in Berne or by obtaining them from the International Telecommunication Union in Geneva.

Nor can it be said that the various instruments considered above were lacking in the necessary clarity and precision. In short, the rules in issue were such as to enable the applicants and their advisers to regulate their conduct in the matter.

(b) Legitimate aim

69. The Government contended that the impugned interference pursued two aims recognised by the Convention.

The first of these was the "prevention of disorder" in telecommunications, the order in question being laid down in the International Telecommunication Convention and the Radio Regulations and being universally binding. Sound Radio had disregarded three basic principles of the international frequency order:

(a) the licensing principle, whereby the establishment or operation of a broadcasting station by a private person or by an enterprise was subject to

the issue of a licence (number 2020 of the Radio Regulations), as Sound Radio had never received a licence from the Italian authorities;

(b) the co-ordination principle, which required special agreements to be concluded between States where the frequency used was between 100 and 108 MHz (number 584 of the Radio Regulations), because there was no such agreement between Switzerland and Italy;

(c) the principle of economic use of the frequency spectrum (Article 33 of the International Telecommunication Convention and number 2666 of the Radio Regulations), because the Pizzo Groppera had the most powerful VHF transmitter in Europe.

The Government submitted, secondly, that the interference complained of was for the "protection of the ... rights of others", as it was designed to ensure pluralism, in particular of information, by allowing a fair allocation of frequencies internationally and nationally. This applied both to foreign radio stations, whose programmes had been lawfully retransmitted by cable long before the appearance of Radio 24, and to Swiss local radio stations, trials of which had been authorised in the Ordinance of 7 June 1982 (see paragraph 13 above).

The applicants merely denied that their activities had adversely affected any of the interests listed in paragraph 2 (art. 10-2).

The Commission expressed no view on this matter in its report, but before the Court its Delegate acknowledged the legitimacy of the first aim mentioned by the Government.

70. The Court finds that the interference in issue pursued both the aims relied on, which were fully compatible with the Convention, namely the protection of the international telecommunications order and the protection of the rights of others.

(c) "Necessary in a democratic society"

71. The applicants submitted that the ban affecting them did not answer a pressing social need; in particular, it went beyond the requirements of the aims being pursued. It was tantamount to censorship or jamming.

The Government stated that they had had no other recourse seeing that their representations to the Italian authorities continued to be fruitless, whether made direct or through the International Telecommunication Union. The refusal to grant the co-operative a redistribution licence related only to Sound Radio’s programmes and in no way affected the stations which complied with the criteria of Article 78 of the 1983 Ordinance; furthermore, it was dictated by technical necessity, since a cable’s capacity was not unlimited.

The Delegate of the Commission disagreed.

72. According to the Court’s settled case-law, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent an interference is necessary, but this margin goes hand in hand with

European supervision covering both the legislation and the decisions applying it; when carrying out that supervision, the Court must ascertain whether the measures taken at national level are justifiable in principle and proportionate (see, as the most recent authority, the Markt Intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989, Series A no. 165, pp. 19-20, § 33).

73. In order to verify that the interference was not excessive in the instant case, the requirements of protecting the international telecommunications order as well as the rights of others must be weighed against the interest of the applicants and others in the retransmission of Sound Radio's programmes by cable.

The Court reiterates, firstly, that once the 1983 Ordinance had come into force, most Swiss cable companies ceased retransmitting the programmes in question (see paragraph 18 above). Moreover, the Swiss authorities never jammed the broadcasts from the Pizzo Groppera, although they made approaches to Italy and the International Telecommunication Union (see paragraphs 39-42 above). Thirdly, the impugned ban was imposed on a company incorporated under Swiss law - the Maur co-operative - whose subscribers all lived on Swiss territory and continued to receive the programmes of several other stations. Lastly and above all, the procedure chosen could well appear necessary in order to prevent evasion of the law; it was not a form of censorship directed against the content or tendencies of the programmes concerned, but a measure taken against a station which the authorities of the respondent State could reasonably hold to be in reality a Swiss station operating from the other side of the border in order to circumvent the statutory telecommunications system in force in Switzerland.

The national authorities accordingly did not in the instant case overstep the margin of appreciation left to them under the Convention.

C. Conclusion

74. In conclusion, no breach of Article 10 (art. 10) is made out, as the disputed measure was in accordance with paragraph 1 (art. 10-1) in fine and satisfied the requirements of paragraph 2 (art. 10-2).

III. ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

75. In their original application Groppera Radio AG and Mr Marquard, Mr Fröhlich and Mr Caluzzi also relied on Article 13 (art. 13) of the Convention, claiming that they had not had an "effective remedy before a national authority" in order to have it determined whether Article 78 § 1 (a) of the 1983 Ordinance was compatible with the Convention, and in particular with Article 10 (art. 10).

They did not maintain this complaint in the subsequent proceedings before the Commission, however, nor did they pursue it before the Court; there is no need for the Court to consider the issue of its own motion.

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objection;

2. Holds by sixteen votes to three that there has been no breach of Article 10 (art. 10);

3. Holds unanimously that there is no need to consider the case under Article 13 (art. 13).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 March 1990.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Matscher; (b) concurring opinion of Judge Pinheiro Farinha; (c) dissenting opinion of Judge Pettiti; (d) dissenting opinion of Judge Bernhardt; (e) dissenting opinion of Judge De Meyer; (f) concurring opinion of Judge Valticos.

R.R.
M.-A.E.

CONCURRING OPINION OF JUDGE MATSCHER, APPROVED BY JUDGE BINDSCHEDLER-ROBERT

(Translation)

While recognising that paragraph 1 of Article 10 (art. 10-1) unquestionably applies in the instant case, I am firmly opposed to the statement - which is apparently unqualified and is in any case unnecessary for the reasoning - that whether this paragraph applies never depends on the content of the programme, however broadcast (see paragraph 55 in fine of the judgment).

One can very readily imagine programmes being broadcast which in no way amount to the communication of "information and ideas" and which therefore, on account of their content, do not come within the right protected by Article 10 § 1 (art. 10-1).

CONCURRING OPINION OF JUDGE PINHEIRO FARINHA

(Translation)

1. I concur with the majority in the result.

2. I voted in support of the view that there had not been a breach of Article 10 solely on the basis of the third sentence of paragraph 1 (art. 10-1): "the procedure chosen could well appear necessary in order to prevent evasion of the law", as "a measure taken against a station which the Swiss authorities could reasonably hold to be in reality a Swiss station operating from the other side of the border in order to circumvent the statutory telecommunications system in force in Switzerland" (see paragraph 73 of the judgment).

3. In my opinion, the lack of any licence in itself justified the interference.

We do not need to invoke paragraph 2 (art. 10-2). "National licensing systems are required not only for the orderly regulation of broadcasting enterprises at the national level but also in large part to give effect to international rules, including in particular number 2020 of the Radio Regulations" (see paragraph 60 of the judgment).

4. To my profound regret, I cannot accept paragraph 61 of the judgment. In my opinion, it is unacceptable to reason on the basis of the drafting history of a later instrument drawn up within a different community (the UN), not within the Council of Europe.

The third sentence is there; it has a meaning and authorises the methodical regulation of broadcasting in Switzerland.

To make licensing measures subject to the requirements of paragraph 2 (art. 10-2) would render the content of the third sentence of paragraph 1 (art. 10-1) nugatory.

The fact that the sentence was not included in the International Covenant on Civil and Political Rights is of no importance when interpreting paragraph 1 of Article 10 (art. 10-1) of the European Convention on Human Rights, in which it does occur.

5. There is no need for me to criticise paragraphs 65-73 of the judgment with a view to accepting or rejecting them, but I have serious difficulty in subscribing to the reasoning in paragraph 68. There was indeed no publication in the Swiss official gazette. I honestly doubt whether what may be acceptable in respect of European Community legislation included in the Community's Official Journal - which is regarded as an official gazette in the member States too - can be acceptable in respect of other international instruments.

6. In conclusion, there was no breach of Article 10 (art. 10) because no licence had been issued by the Swiss authorities (last sentence of paragraph 1) (art. 10-1).

DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I do not agree with the majority of the Court as to the interpretation of paragraph 1 (art. 10-1) or paragraph 2 of Article 10 (art. 10-2), or as to the result, and I voted in support of the view that there had been a breach.

To my mind, the error which led the majority to its decision was to have confused to some extent the technical and legal aspects of the issues relating to broadcasting, reception, transfrontier and national frequencies, the international VHF system and the rules governing cable networks.

This distinction, however, was an essential one for assessing the parties' relations and the application of Article 10 (art. 10) to the instant case. Belton s.r.l., which was in charge of the Pizzo Groppera station and in which the rights of management were vested for a given period, was an Italian company with its headquarters at Como (Italy).

Distinguishing between broadcasting and reception is a vital principle in the telecommunications field. The guiding principles may be summed up as follows:

(1) Broadcasting and reception are two separate things, except where the equipment, the place of broadcasting and the area of reception are indivisible.

(2) The distinction must be applied in respect both of jurisdiction where damage is alleged and of the application of national and international rules.

The central question was: in what way was the Maur co-operative's transmission by cable of programmes from the Pizzo Groppera transmitter unlawful or contrary to Swiss public order?

How could the Maur co-operative comply with the authorities' order to it?

The answers to these questions would no doubt establish that what was in issue was the content of the broadcasts.

But even in that case, how could the content have been altered to make it acceptable: by means of a quota of local news, cantonal music or advertising?

It is clear that such an order cannot fairly be made unless the recipient can comply with the legislation and regulations.

In recent European cases dealing with jurisdiction, copyright and tortious damage the applicable rules and systems have been looked at and analysed and the distinctions to be made according to various eventualities have been highlighted:

(a) the broadcasting itself is contrary to national law, or else reception is;

(b) the transmission across a frontier of a broadcast that is unlawful at national level or lawful and causing damage (cf. SNEP c. CLT judgment of

the Paris Court of Appeal referring to the Mines de Potasse judgment of the Court of Justice of the European Communities);

(c) the transmission across a frontier of a lawful broadcast whose reception is unlawful under the local law of the place of destination;

(d) the same situation, but with reception being lawful.

In the case of Groppera Radio AG the whole broadcast was made and recorded in Italy. The Swiss Government did not rely on the concept of damage in order to claim justification for their interference with the broadcasting. We come back to the question: how should the Groppera broadcasts have been made up in order to escape the Swiss ban?

Because of incomplete and uncertain data available to the Commission, the majority of the Court has wrongly taken the view that Belton s.r.l. was a Swiss company; but Belton is definitely a company incorporated under Italian law, in accordance with domestic law and with private international law. It follows that the broadcasts for which the Belton company was responsible during its period of management were a matter for Italian law and that it was from that legal angle that the issues of international telecommunications law had to be considered.

The proceedings which were brought in Italy by Belton s.r.l. to challenge the order of 3 October 1980 and were directed in particular against the Constitutional Court's decision of 28 July 1976 (no. 202) concerning Article 195 of the presidential decree of 29 May 1973 led to the decisions of 4 December 1981 by the Lombardy Administrative Court and of 4 May 1982 by the Consiglio di Stato, which referred the case to the Constitutional Court. In its decision of 6 May 1987 (no. 153) the Constitutional Court held that section 2 of the Law of 14 April 1979 on the broadcasting of programmes abroad was unconstitutional in that the Law made no provision for the possibility of such programmes being broadcast under a licensing system such as the one in Article 1 of the presidential decree of 29 March 1973.

Thus, as matters stood, there had been no final Italian decisions to the effect that the broadcasts from the Pizzo Groppera were unlawful when the Swiss authorities made their order concerning reception and broadcasting by cable.

In its decision of 4 May 1982 the Consiglio di Stato noted in one of its reasons that the measures challenged in the proceedings could not be interpreted as a general ban on broadcasts abroad where these were not pirate broadcasts (document Cour (89) 244-II, pp. 237-238).

It was pointed out in the Italian proceedings that the Pizzo Groppera station had adopted the frequencies 104 and 107.3 instead of the earlier one 456.825 in order to avoid objectionable interference.

The whole thrust of the Swiss Government's argument was that the ban was lawful because the broadcasting was unlawful under the rules of the International Telecommunication Union. They therefore based their stance

on the international rules and not on interference justified on grounds of morality or public interest.

Groppera Radio AG's broadcasts, however, had not been held to be contrary to those rules. The Swiss Government never initiated proceedings with the International Union or lodged a complaint against the Italian Government. On the contrary, they awaited the decision of the Italian Constitutional Court and took no action in the wake of it.

The Federal Court itself, in its decision of 14 June 1985, pointed to this failure: "hitherto none of the means of settling disputes provided for in Article 50 of the International Telecommunication Convention ... has been used." This was, moreover, consistent with the fact that the first notification to the Maur co-operative contained no reference to the international rules and that the second notification referred to irrelevant enactments and eventualities: jamming, piracy.

No final decision had been taken against the Maur co-operative, since it had appealed, together with Groppera Radio AG, to the Federal Court and the latter had not considered the merits of the case, holding that, owing to the accident that had damaged the Pizzo Groppera transmitter, the broadcasts had then ceased.

In Swiss law, therefore, there was no judgment on the merits against either the Maur co-operative or Groppera Radio AG.

Under international telecommunications law and the International Telecommunication Convention the use of the frequency spectrum is laid down in Articles 33 and 35 of the International Telecommunication Convention. The Radio Regulations refer to this in numbers 584, 2020 and 2666.

None of these provisions could be relied on, as the broadcasts came under Italian law and the Italian system and were a matter solely for the Belton company during its period of management; there was no effect which prevented the national service from being provided within Switzerland's frontiers. The lack of any special agreement between Switzerland and Italy did not alter the situation, as the approaches made by the Swiss authorities from 1979 onwards did not result in any joint findings that there had been any transfrontier or national infringements, pending the decision of the Constitutional Court.

The International Frequency Registration Board referred to the case of Italian stations causing harmful and persistent interference, but in the instant case the Swiss Government did not complain of harmful interference by Groppera Radio AG on Radio 24's former frequency under the name of Sound Radio. The Maur co-operative had been awarded a cable-network licence without any difficulty, as there was no shortage of such networks.

The applicants were therefore fully entitled to challenge before the Commission and the Court Switzerland's jurisdiction to control the cable

retransmission of programmes lawfully broadcast from abroad, since the Pizzo Groppera station was in Italy and under Italian jurisdiction.

The situation was not like that of a satellite used in order to avoid conventional over-the-air broadcasting, with reception being by cable or individual aerial (as in the case of the TDF1 - Chaîne Sept - Canal Plus dispute). There was therefore no danger that a coded or uncoded channel might use new radio frequencies.

The third sentence of Article 10 § 1 (art. 10-1) could not therefore justify the interference complained of since the issue was not one of making Belton s.r.l. and Groppera Radio AG subject to a Swiss licensing system.

Only paragraph 2 (art. 10-2) could have been open to discussion in respect of the content of the communication transmitted by cable, but the Swiss Government themselves were unable to rely on any justification for interference with the content.

In the instant case, frequencies were neither overloaded nor saturated such as to prevent the operation of other local radio stations; nor was there any lack of cable networks. The community-antenna licence awarded to the Maur co-operative in accordance with the 1983 Ordinance had not been withdrawn; but the order of 21 March 1984 instructing the co-operative to cease broadcasting Groppera Radio AG's programmes on its cable network on pain of a criminal penalty amounted to a ban. The Government were therefore wrong to maintain that, in the absence of any jamming, it was not possible to talk of censorship; surely to prevent a broadcast is to censor it? In fact, the intention was to protect local radio stations whose programmes were less popular with the public. The local authorities' policy was partly prompted by the problems of competition.

The majority of the Court refers in fine to evasion of the law; but how can the offence which such evasion would constitute be relied on when no such charge had been brought and no proceedings of this kind had been brought in either Italy or Switzerland!

Admittedly the scope of the judgment is circumscribed by the facts of the case and by the narrow grounds on which the case has been decided, but inasmuch as Article 10 (art. 10) was at the heart of a problem of retransmission across frontiers, I consider that it was necessary to state that the third sentence of paragraph 1 (art. 10-1) was not applicable and that the interference was not justified under Article 10 § 2 (art. 10-2).

Freedom of expression, which is a fundamental right including the right to receive a communication, is even more necessary in the field of telecommunications. The countries of Eastern Europe have been encouraged on the path to democracy thanks to broadcasts across frontiers and they wish to comply with the European Convention on Transfrontier Television. American and European case-law and legal literature on the subject agree in maintaining that this freedom extends to the sphere of telecommunications.

The European Court must uphold the protection and promotion of freedom of expression in the same spirit as the First Amendment to the Constitution of the United States and the proceedings of the United Nations (16th session). It must keep in mind Helvetius's statement that it is useful to think and to be able to say everything and the Virginia Declaration of Rights (1776): "the freedom of the Press is one of the greatest bulwarks of liberty".

Bibliography: C. Gavalda and L. Pettiti, Liberté d'expression, Paris, Ed. Lamy Audiovisuel; J.-P. Jacqué and L. Pettiti, Liberté d'expression, Montreal, Presse Universitaire de McGill.

Case-law: SNEP c. CLT, Paris Court of Appeal (distinction); Meredith, United States (extension of the case-law on the First Amendment and the press to the audio-visual media; mutatis mutandis, Virginia State Board of Pharmacy).

Professional opinion: Colloquy on "Freedom of Information and the Audio-Visual Revolution", European University Institute, Florence, 1989.

DISSENTING OPINION OF JUDGE BERNHARDT

Unlike the majority of the Court, I think that the legal basis for the interference by the Swiss authorities with freedom of expression in the present case is not sufficient under the Convention.

Admittedly, the case raises most difficult questions concerning the correct interpretation of Article 10 (art. 10) of the Convention. In the actual context, three points are of primary importance. (1) The second sentence of the Article expressly mentions freedom to receive and impart information "regardless of frontiers". This freedom of cross-boundary communication is an essential element of present-day democracy and must be taken into account when interpreting the other provisions in Article 10 (art. 10). (2) The third sentence of the first paragraph of this Article (art. 10-1) expressly permits the licensing of broadcasting enterprises. Even if modern technical developments permit a far greater number of radio and television enterprises and channels than was the case when the Convention was drafted, States still have the right and the duty to ensure the orderly regulation of communications, and this can only be achieved by a licensing system. Whether a licensing system can be used for preserving a State monopoly in this field in spite of the modern developments can be left open in the present context, since such a monopoly no longer exists in Switzerland. It seems also to be undisputed that a licensing system cannot be used for imposing censorship and cannot justify the suppression of legally permitted information and ideas. I further agree with the majority of the Court that the retransmission of radio programmes by cable can be made conditional on a licence, although under the terms of the third sentence of Article 10 § 1 (art. 10-1) this is by no means beyond doubt. It can hardly be doubted that the prohibition of such retransmission cannot be left to the unfettered discretion of the executive. This implies that the second paragraph of Article 10 (art. 10-2) comes into play and must be respected when a State operates a licensing system. (3) The question, therefore, is whether the interference by the Swiss authorities in the present case satisfies the requirements of Article 10 § 2 (art. 10-2), as developed in the case-law of the Convention organs. Among these requirements, a first condition is that a restriction must be "prescribed by law".

Here a first problem arises which has been discussed neither by the parties nor in the present judgment, but which needs further consideration. As far as can be seen, the Swiss legislature has until now never enacted any substantive provisions on broadcasting licences; instead it has given the Government, by means of Federal Act of 1922 governing correspondence by telegraph and telephone as interpreted in practice, complete freedom to regulate this field. (The Act primarily concerns telegraph and telephone communications, since in 1922 radio did not yet exist). Is the requirement in Article 10 § 2 (art. 10-2) that restrictions must be "prescribed by law"

really satisfied when a parliament confers unlimited or extremely broad powers on the executive, which becomes the law-making as well as the law-executing authority? I have doubts in this respect, but it is not necessary to discuss this question in extenso since I am convinced that the legal basis for the interference in question is not sufficient even if Article 78 of the Government's Ordinance of 17 August 1983 is taken as the starting-point. This Article merely refers to "the provisions of the International Telecommunication Convention and the international Radio Regulations", without giving any further details. I accept that under the Swiss system treaty law is part of domestic law. I also think that technical provisions contained in international texts do not all have to be published in the official gazette; it suffices that they are accessible, which is the case here. But what do these international norms mean and prescribe in the present context? It has never been clarified whether Italy violated its international obligations by permitting or tolerating the radio broadcasts in question. It has never been clarified whether Groppera Radio violated Italian law, including any international norm which is self-executing in Italy. It seems to me to be beyond doubt that Switzerland would not be in breach of any international obligation if it were to permit the retransmission by cable of the programme in question. Under international law it may have the right, but it clearly has no duty, to intervene and to prohibit such retransmission. Taking the foregoing into account and having regard to the only Swiss decision which explains in some detail the situation under Swiss law - that is the decision of 31 July 1984 of the head office of the Swiss Post and Telecommunications Authority -, I see no adequate and sufficiently clear legal provision which can be regarded as a basis for the interference in question.

In view of this conclusion, it is not necessary for me to inquire whether the other requirements of Article 10 § 2 (art. 10-2) are satisfied (purpose and necessity of the interference). I would not exclude that the interference in question could in the final event be found to be justified if it had had a solid legal basis. But this is not the case.

DISSENTING OPINION OF JUDGE DE MEYER

(Translation)

I. The licensing power of States in respect of radio and television broadcasting cannot be arbitrary or even discretionary. It can only be justified inasmuch as the exercise of it is necessary in order that over-the-air communications may function in an efficient and orderly manner and, above all, in order that freedom of expression should be secured as fully as possible[1].

It is only a policing power, under which States may at most take the measures necessary, having regard to the technical characteristics of the type of communication concerned, for satisfying as far as possible the needs and wishes of all interested parties and to enable them as far as possible to broadcast and receive what they wish to broadcast and receive, just as, in the same spirit, States may take measures to regulate the practical arrangements[2] for this kind of communication. The power can only affect radio and television broadcasting as means of communication and not the communication by these means itself - it cannot include a right to interfere with what is communicated, the content of the communication.

States' licensing power does not, as such, imply a power to deny certain individuals or categories of individual the right to avail themselves of freedom of expression by means of the media in question or to prohibit certain things or certain categories of things from being broadcast, transmitted or, above all, received in that way.

Complete or partial exclusions of this kind are not legitimate if they are not justified other than by the licensing power itself.

They are not legitimate unless they are restrictions which answer a pressing social need, which are proportionate to the legitimate aim pursued and which are justified on grounds that are not merely reasonable but

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[1] These principles have been clearly laid down by the United States Supreme Court: see Red Lion Broadcasting Co v. the Federal Communications Commission and US v. Radio Television News Directors Association (1969), 395 US 367, 23 LEd 2d 371, 89 SCt 1794; Columbia Broadcasting System v. Democratic National Committee (1973), 412 US 94, 36 LEd 2d 772, 93 SCt 2080; Federal Communications Commission v. National Citizens Committee for Broadcasting (1978), 436 US 775, 56 LEd 2d 697, 98 SCt 2896; Columbia Broadcasting System, American Broadcasting Companies & National Broadcasting Company v. Federal Communications Commission & al. (1981), 453 US 367, 69 LEd 2d 706, 101 SCt 2813; Federal Communications Commission v. League of Women Voters of California & al. (1984), 468 US 364, 82 LEd 2d 278, 104 SCt 3106; and City of Los Angeles & Department of Water and Power v. Preferred Communications (1986), 476 US 488, 90 LEd 2d 480, 106 SCt 2034.

[2] See on this point the case-law of the United States Supreme Court on "time, place and manner regulation" and, in particular, mutatis mutandis, Virginia State Board of Pharmacy & al. v. Virginia Citizens Consumers Council & al. (1976), 425 US 748, 48 LEd 2d 346, 96 SCt 1817, and Cox v. New Hampshire (1941), 312 US 569, 85 LEd 2d 1049, 61 SCt 762.

relevant and sufficient[3]; or else are non-discriminatory distinctions, that is to say distinctions which are objectively and reasonably justified and likewise proportionate to the legitimate aim pursued[4].

II. The right to freedom of expression exists "regardless of frontiers".

In the field of radio and television broadcasting, it follows from this that the broadcasting of programmes that can be received on the territory of other States and the reception of programmes broadcast from the territory of other States can, as such, be made subject to exclusions or restrictions.

This is so, however, only if the exclusions or restrictions were quite as justified and necessary in respect of programmes broadcast or received only within the frontiers of the State taking the measures and if the measures were also applied to such programmes.

III. In the instant case there is no doubt that by prohibiting the retransmission of the broadcasts in issue, which they considered to be unlawful, the authorities of the respondent State were, in all good faith, pursuing legitimate aims, and more particularly "the prevention of disorder" and the "protection of the rights of others"[5].

But it was not certain that these broadcasts were unlawful. They were still the subject of proceedings in Italy and, moreover, none of the methods of settlement provided for in Article 50 of the International Telecommunication Convention had been used[6]. "Due regard being had to the importance of freedom of expression in a democratic society"[7], such unlawfulness could not, so long as it had not been established with

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[3] See the following judgments: Handyside, 7 December 1976, Series A no. 24, pp. 22-24, §§ 48-50; The Sunday Times, 26 April 1979, Series A no. 30, pp. 36 and 38, §§ 59 and 62; Barthold, 25 March 1985, Series A no. 90, p. 25, § 55; Lingens, 8 July 1986, Series A no. 103, pp. 25-26, §§ 39-40; and Müller and Others, 24 May 1988, Series A no. 133, p. 21, § 32.

[4] See the following judgments: Case "relating to certain aspects of the laws on the use of languages in education in Belgium", 23 July 1968, Series A no. 6, p. 24, § 10; Marckx, 13 June 1979, Series A no. 31, p. 16, § 33; Rasmussen, 28 November 1984, Series A no. 87, p. 14, § 38; Abdulaziz, Cabales and Balkandali, 28 May 1985, Series A no. 94, pp. 35-36, § 72; James and Others, 21 February 1986, Series A no. 98, p. 44, § 75; Lithgow and Others, 8 July 1986, Series A no. 102, p. 66, § 177; Gillow, 24 November 1986, Series A no. 109, pp. 25-26, § 64; and Inze, 28 October 1987, Series A no. 126, p. 18, § 41.

[5] See paragraphs 69 and 70 of the judgment.

[6] See paragraphs 26-32 of the judgment and the extract of the Swiss Federal Court's decision of 14 June 1985, reproduced in paragraph 25.

[7] Barfod judgment of 22 February 1989, Series A no. 149, p. 12, § 28. (See also the Barthold judgment previously cited, p. 26, § 58, and the previously cited judgments in the cases of Handyside, p. 23, § 49, The Sunday Times, p. 40, § 65, Lingens, p. 26, § 41, and Müller and Others, p. 21, § 32.

certainty, be relied on to justify the ban on retransmitting the programmes[8] or, a fortiori, the need for such a ban in a democratic society.

Since the respondent State did not put forward any other justification, there was, in my opinion, a breach of the applicants' right to freedom of expression.

Ultimately, even if the unlawfulness of the broadcasts in issue had been duly established, it could not have sufficed on its own to justify the ban on retransmitting the programmes. It would still have been necessary to show why, in March and July 1984[9], it was essential to put an end to the reception, via a local cable network[10], of programmes broadcast from the territory of another State and which had in fact, since November 1979, been able to be received over a wide area of the respondent State's territory, containing nearly a third of the State's population[11], when, in particular, the financial viability of the broadcasts in issue had already been seriously jeopardised by the operation since November 1983 of local radio stations, which had been made legal in June 1982[12].

[8] See paragraphs 149-157 of the Commission's report.
[9] See paragraphs 19 and 20 of the judgment.
[10] According to Mr Jacot-Guillarmod's reply to Mr Walsh, at the end of the hearing on 21 November 1989, there were not very many subscribers to this network.
[11] See paragraph 11 of the judgment.
[12] See paragraphs 13-16 of the judgment. See also the Federal Court's decision cited in paragraph 25.

CONCURRING OPINION OF JUDGE VALTICOS

(Translation)

Like the majority of the Court I consider that there has been no breach of Article 10 (art. 10) of the Convention, but for different, simpler reasons.

It seems to me that the issue raised is one that in all events does not come within the ambit of Article 10 (art. 10). That provision refers to "freedom of expression", defined as including "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".

Can the view really be taken that this case raises an issue of freedom of expression, and in particular of the imparting of information and ideas? What was actually broadcast by the radio station in question? According to its own representative, Mr Minelli, at the public hearing on 21 November 1989, it broadcast light music, variety programmes, news and programmes in which listeners could take part. Apart from the news programmes, which were clearly bulletins of the type usual in broadcasts of this kind, these programmes were therefore essentially light entertainment and contained none of the kind of discussion or mere airing of views and expression of ideas or cultural or artistic events with which Article 10 (art. 10) is concerned. Mr Minelli moreover specified that the programming left political problems untouched and aimed to provide entertainment but also an opportunity for the expression of personal opinions on personal matters. This is far from the discussion of ideas and artistic expression. Besides, the radio station's essentially commercial objective accounts for the emphasis on mere entertainment in its programmes. Article 10 (art. 10) is certainly not designed to protect either commercial operations or mere entertainment. I therefore conclude that no issue arises under it and that consequently there can be no question of a breach in this case.

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

FIRST SECTION

CASE OF GÜNDÜZ v. TURKEY

(Application no. 35071/97)

JUDGMENT

STRASBOURG

4 December 2003

FINAL

14/06/2004

In the case of Gündüz v. Turkey,

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

Mr C.L. ROZAKIS, *President*,
Mr P. LORENZEN,
Mr G. BONELLO,
Mr R. TÜRMEN,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr V. ZAGREBELSKY, *judges*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 13 November 2003,

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

PROCEDURE

1. The case originated in an application (no. 35071/97) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Müslüm Gündüz ("the applicant"), on 21 January 1997.

2. The applicant, who was granted legal aid, was represented before the Court by Mr A. Çiftçi, a lawyer practising in Ankara. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. The object of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. In a decision of 29 March 2001, the Chamber declared the application admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1941. He is a retired labourer.

A. The television programme in issue

10. On 12 June 1995 the applicant took part in his capacity as the leader of Tarikat Aczmendi (a community describing itself as an Islamic sect) in a television programme, *Ceviz Kabuğu* ("Nutshell"), broadcast live on HBB, an independent channel.

11. It appears from the evidence before the Court that the programme started late in the evening of 12 June and lasted about four hours. Relevant excerpts from the programme are set out below.

> *Hulki Cevizoğlu (presenter – "H.C.")*: "Good evening ... There is a group that is grabbing public attention because of the black robes [*cüppe*] worn by its members, the sticks they carry and their habit of chanting [*zikir*]. How can this group be described – it is called a sect [*tarikat*], but is it really a community or group? We will be discussing the various characteristics of this group – the Aczmendis – with their leader, Mr Müslüm Gündüz, who will be talking to us live. We will also be phoning a number of guests to hear their views. On the subject of the black robes, we'll be talking on the phone to Ms N. Yargıcı, a stylist and expert on black clothing. We'll also be hearing the views of Mr T. Ateş and Mr B. Baykam on Kemalism[1]. As regards Nurculuk[2], we'll be calling one of its most important leaders. The Aczmendi group – or sect – has views on religious matters as well. We'll be discussing those with Mr Y. İşcan, of the Religious Affairs Department. And while we are on the subject, viewers may phone in with questions for the Aczmendis' leader, Mr Gündüz ..."

Ms Yargıcı, a stylist taking part in the programme via a telephone link, asked Mr Gündüz a number of questions about women's clothing. They discussed religious apparel and whether the clothing worn by the sect's members was in keeping with fashion or with Islam.

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1. Kemalist thought is inspired by the ideas of Mustafa Kemal Atatürk, the founder of the Republic of Turkey.
2. Nurculuk is an Islamic movement which was founded in the early twentieth century and is widespread in Turkey. The Aczmendi community claims to belong to it.

The presenter then discussed movements claiming to represent Islam and asked the applicant a number of questions on the subject. They also talked about methods of chanting. In this context Mr Gündüz stated:

Mr Gündüz ("M.G."): "Kemalism was born recently. It is a religion – that is, it is the name of a religion that has destroyed Islam and taken its place. Kemalism is a religion and secularism has no religion. Being a democrat also means having no religion ..."

H.C.: "You have already expressed those views on a programme on the Star channel ... We are now going to have Bedri Baykam on the line to see what he thinks about your comments. We are going to ask him, as a proponent of Kemalism, if it can be regarded as a religion."

H.C.: "Do you agree with Mr Gündüz's views on Kemalism? You are one of Turkey's foremost Kemalists."

Bedri Baykam ("B.B."): "I don't know where to begin after so many incorrect statements. For one thing, Kemalism is not a religion and secularism has nothing to do with having no religion. It is completely wrong to maintain that democracy has no religion."

Mr Baykam challenged Mr Gündüz's arguments and explained the concepts of democracy and secularism. He stated:

B.B.: "A sect such as the one you belong to may observe a religion. But concepts such as democracy, philosophy and free thought do not observe a religion, because they are not creatures who can establish a moral relationship with God. In a democracy all people are free to choose their religion and may choose either to adhere to a religion or to call themselves atheists. Those who wish to manifest their religion in accordance with their belief may do so. Moreover, [democracy] encompasses pluralism, liberty, democratic thought and diversity. This means that the people's desire will be fulfilled, because the people may elect party A today and party B tomorrow and then ask for a coalition to be formed the day after tomorrow. All that is dictated by the people. That is why, in a democracy, everything is free, and secularism and democracy are two related concepts. Secularism in no way means having no religion."

M.G.: "Tell me the name of the religion of secularism."

B.B.: "Secularism is freedom of the people and the principle that religious affairs may not interfere with affairs of State."

...

M.G.: "My brother, I say that secularism means having no religion. A democrat is a man with no religion. A Kemalist adheres to the Kemalist religion ..."

B.B.: "[Our ancestors were not without a religion.] True, our ancestors did not allow the establishment of a system based on sharia ... inspired by the Middle Ages, an undemocratic, totalitarian and despotic system that will not hesitate to cause bloodshed where necessary. And you call that 'having no religion' – that's your problem. But in a law-based, democratic, Kemalist and secular State all people are

free to manifest their religion. Behind closed doors, they may practise their religion through chanting, worship or prayer; they may read what they like, the Koran, the Bible or philosophy – that is their choice. So I'm sorry, but your views are demagoguery. Kemalism has no connection with religion. It respects religion; all people are entitled to believe in a religion of their choice."

M.G.: "Yes. But what I am saying is that a person who has no connection with religion has no religion. Isn't that so? ... I'm not insulting anyone. I am just saying that anyone calling himself a democrat, secularist or Kemalist has no religion ... Democracy in Turkey is despotic, merciless and impious [*dinsiz*] ... Because two days ago, six or seven of our friends were taken away while on the sect's premises [*dergah*] ..."

...

M.G.: "This secular democratic system is hypocritical [*ikiyüzlü ve münafık*] ...; it treats some people in one way and others in another way. In other words, we do not share democratic values. I swear that we are not appropriating democracy for ourselves. I am not taking refuge in its shadow. Don't be a hypocrite."

H.C.: "But it is thanks to democracy that you can say all that."

M.G.: "No, not at all. It is not thanks to democracy. We will secure our rights no matter what. What is democracy? It has nothing to do with that."

H.C.: "I repeat that if democracy did not exist, you would not have been able to say all that."

M.G.: "Why would I not have said it? I am saying these words while fully aware that they constitute a crime under the laws of tyranny. Why would I stop speaking? Is there any other way than death?"

The participants then entered into a debate on Islam and democracy.

M.G.: "According to Islam, no distinction can be made between the administration of a State and an individual's beliefs. For example, the running of a province by a governor in accordance with the rules of the Koran is equivalent to a prayer. In other words, manifesting your religion does not only mean joining in prayer or observing Ramadan ... Any assistance from one Muslim to another also amounts to a prayer. OK, we can separate the State and religion, but if [a] person has his wedding night after being married by a council official authorised by the Republic of Turkey, the child born of the union will be a *piç* [bastard]."

H.C.: "Do you mind ..."

M.G.: "That is how Islam sees it. I am not talking about the rules of democracy ..."

B.B.: "... In Turkey people are killed for not observing Ramadan. People are beaten at university. [Mr Gündüz] claims he is innocent, but people like that oppress society because they interfere with the way of life of others. In Turkey people who say they support sharia misuse it for demagogic purposes. As Mr Gündüz said, they want to destroy democracy and set up a regime based on sharia."

M.G.: “Of course, that will happen, that will happen ...”

12. The programme continued, the participants including Mr T. Ateş, a professor, Mr Y. İşcan, a representative of the Religious Affairs Department, and Mr Mehmet Kırkıncı, a prominent figure from Erzurum.

B. The criminal proceedings against the applicant

13. In an indictment preferred on 5 October 1995, the public prosecutor at the Istanbul National Security Court instituted criminal proceedings against the applicant on the ground that he had breached Article 312 §§ 2 and 3 of the Criminal Code by making statements during the television programme that incited the people to hatred and hostility on the basis of a distinction founded on religion.

14. On 1 April 1996 the National Security Court, after ordering an expert opinion, found the applicant guilty as charged and sentenced him to two years' imprisonment and a fine of 600,000 Turkish liras, pursuant to Article 312 §§ 2 and 3 of the Criminal Code.

15. The court held, in particular:

> “The defendant, Müslüm Gündüz, took part in his capacity as the leader of the Aczmendis in a television programme, *Ceviz Kabuğu*, broadcast live on the independent channel HBB. The purpose of the programme was to give a presentation of the community, whose followers had attracted public attention on account of the black robes they wore, the sticks they carried and their manner of chanting. Those taking part included the stylist Neslihan Yargıcı (via a telephone link), the artist Bedri Baykam, the scientist Toktamış Ateş, Mr Yaşar İşcan, an official from the Religious Affairs Department, and a certain Mehmet Kırkıncı, a prominent figure from Erzurum. The programme's introduction, which was chiefly intended to familiarise viewers with the Aczmendi community, focused on the origin of its members' special garments and on their habit of chanting. However, as the programme went on, the debate between Mr Baykam, Mr Ateş and the defendant turned to the concepts of secularism, democracy and Kemalism.
>
> During the debate, in which the participants had the opportunity to discuss the malfunctioning, usefulness and problems of institutions such as secularism and democracy in the context of social harmony, human rights and freedom of expression, the defendant Mr Gündüz made comments and used expressions contrary to that aim in stating (on page 21 of the transcript): 'anyone calling himself a democrat, secularist ... has no religion ... Democracy in Turkey is despotic, merciless and impious [*dinsiz*] ... This secular ... system is hypocritical [*ikiyüzlü ve münafık*] ...; it treats some people in one way and others in another way ... I am saying these words while fully aware that they constitute a crime under the laws of tyranny ... Why would I stop speaking? Is there any other way than death? ...' On page 27 [he states]: 'if [a] person has his wedding night after being married by a council official authorised by the Republic of Turkey, the child born of the union will be a *piç* ...'
>
> [In addition,] Mr Bedri Baykam told Mr Gündüz that the aim of the latter's supporters was to 'destroy democracy and set up a regime based on sharia', and the defendant replied: 'Of course, that will happen, that will happen.' [Furthermore,] the

defendant acknowledged before this Court that he had made those comments, and stated that the regime based on sharia would be established not by duress, force or weapons but by convincing and persuading the people.

Lastly, having regard to the fact that, in the passages quoted above and in his statements taken as a whole, the defendant, in the name of Islam, describes concepts such as democracy, secularism and Kemalism as impious [*dinsiz*], mixes religious and social affairs, and also uses the word 'impious' to describe democracy, the system regarded as the most suited to human nature, adopted by almost all States and supported by the overwhelming majority of the people making up our nation, the Court is satisfied beyond reasonable doubt that the defendant intended openly to incite the people to hatred and hostility on the basis of a distinction founded on religion. Furthermore, seeing that the offence in question was committed by means of mass communication, the defendant should be sentenced in accordance with Article 312 § 2 of the Criminal Code ...”

16. On 15 May 1996 the applicant appealed on points of law to the Court of Cassation. In his notice of appeal, referring to Article 9 of the Convention and Articles 24 (freedom of religion) and 25 (freedom of expression) of the Constitution, he relied on the protection of his right to freedom of religion and freedom of expression.

17. On 25 September 1996 the Court of Cassation upheld the judgment at first instance.

II. RELEVANT DOMESTIC LAW

18. The relevant provisions of the Criminal Code read as follows:

Article 312 §§ 2 and 3

“Non-public incitement to commit an offence

...

A person who incites the people to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions shall, on conviction, be liable to between one and three years' imprisonment and a fine ... If this incitement endangers public safety, the sentence shall be increased by one-third to one-half.

The penalties to be imposed on those who have committed the offences defined in the previous paragraph shall be doubled when they have done so by the means listed in Article 311 § 2.”

Article 311 § 2

“Public incitement to commit an offence

...

> Where incitement to commit an offence is done by means of mass communication, of whatever type – tape recordings, gramophone records, newspapers, press publications or other published material – by the circulation or distribution of printed papers or by the placing of placards or posters in public places, the terms of imprisonment to which convicted persons are liable shall be doubled ..."

19. The relevant part of section 19(1) of the Execution of Sentences Act (Law no. 647 of 13 July 1965) provides:

> "... persons who ... have been ordered to serve a custodial sentence shall be granted automatic parole when they have served half of their sentence, provided they have been of good conduct ..."

20. The solemnisation of marriage is governed by Articles 134 to 144 of the Civil Code. Article 134 provides that marriages are solemnised by a registrar, namely the mayor or an official delegated by the mayor in municipalities and *muhtars* in villages. Article 143 provides that a marriage contracted before a registrar is valid without a religious ceremony having to be conducted.

III. RELEVANT INTERNATIONAL INSTRUMENTS

21. Provisions relating to the prohibition of hate speech and all forms of intolerance and discrimination on grounds such as race, religion and belief are to be found in a number of international instruments, for example: the 1945 United Nations Charter (paragraph 2 of the Preamble, Article 1 § 3, Article 13 § 1 (b), Articles 55 (c) and 76 (c)), the 1948 Universal Declaration of Human Rights (Articles 1, 2 and 7), the 1966 International Covenant on Civil and Political Rights (Article 2 § 1, Article 20 § 2 and Article 26), the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (Articles 4 and 5) and the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Furthermore, the Vienna Declaration, adopted on 9 October 1993, expressed alarm at the present resurgence of racism, xenophobia and anti-Semitism and the development of a climate of intolerance. Among such instruments, Resolution no. 52/122 on the elimination of all forms of religious intolerance, adopted by the United Nations General Assembly on 12 December 1997, deals more specifically with the issue of religious intolerance.

Instruments dealing more directly with the issue of "hate speech" are: Recommendation No. R (97) 20 on "hate speech", adopted on 30 October 1997 by the Committee of Ministers of the Council of Europe, and General Policy Recommendation no. 7 of the European Commission against Racism and Intolerance on national legislation to combat racism and racial discrimination.

1. Recommendation No. R (97) 20 on "hate speech"

22. On 30 October 1997 the Committee of Ministers of the Council of Europe adopted Recommendation No. R (97) 20 on "hate speech" and the appendix thereto. The recommendation originated in the Council of Europe's desire to take action against racism and intolerance and, in particular, against all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance. The Committee of Ministers recommended that the member States' governments be guided by certain principles in their action to combat hate speech.

The appendix to the recommendation states that the term "hate speech" is to be "understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance...".

The recommendation lays down guidelines designed to underpin governments' efforts to combat all hate speech, for example the setting up of an effective legal framework consisting of appropriate civil-, criminal- and administrative-law provisions for tackling the phenomenon. It proposes, among other measures, that community-service orders be added to the range of possible penal sanctions and that the possibilities under the civil law be enhanced, for example by awarding compensation to victims of hate speech, affording them the right of reply or ordering retraction. Governments should ensure that within this legal framework any interference by the public authorities with freedom of expression is narrowly circumscribed on the basis of objective criteria and subject to independent judicial control.

2. General Policy Recommendation no. 7 of the European Commission against Racism and Intolerance on national legislation to combat racism and racial discrimination

23. On 13 December 2002 the Council of Europe's European Commission against Racism and Intolerance (ECRI) adopted a recommendation on key components which should feature in the national legislation of member States of the Council of Europe in order for racism and racial discrimination to be combated effectively.

24. The relevant parts of the recommendation read as follows:

"I. Definitions

1. For the purposes of this Recommendation, the following definitions shall apply:

(a) 'racism' shall mean the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.

(b) 'direct racial discrimination' shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

(c) 'indirect racial discrimination' shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

...

18. The law should penalise the following acts when committed intentionally:

(a) public incitement to violence, hatred or discrimination,

(b) public insults and defamation or

(c) threats

against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;

...

23. The law should provide for effective, proportionate and dissuasive sanctions for the offences set out in paragraphs 18, 19, 20 and 21. The law should also provide for ancillary or alternative sanctions."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

25. The applicant submitted that his conviction under Article 312 of the Criminal Code had infringed Article 10 of the Convention, which provides:

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

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

26. It was common ground between the parties that the measures giving rise to the instant case had amounted to interference with the applicant's right to freedom of expression. Such interference would constitute a breach of Article 10 unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in paragraph 2 and was "necessary in a democratic society" in order to achieve the aim or aims in question.

A. "Prescribed by law"

27. It was, moreover, undisputed that the interference had been "prescribed by law", the applicant's conviction being based on Article 312 of the Criminal Code.

B. Legitimate aim

28. Nor was it disputed that the interference had pursued legitimate aims, namely the prevention of disorder or crime, the protection of morals and, in particular, the protection of the rights of others.

C. "Necessary in a democratic society"

1. The parties' submissions

29. The Government argued, firstly, that freedom of expression did not entail freedom to proffer insults. The applicant could not lay claim to the protection of freedom of expression when using insulting words such as "*piç*" (bastard). Moreover, his conduct had been punishable by law. They asserted in that connection that Articles 311 and 312 of the Criminal Code punished anyone who openly incited the people to hatred or hostility on the basis of a distinction founded on membership of a religion or denomination.

30. The Government pointed out that during the television broadcast the applicant had expressed his opposition to democracy, yet he was now asserting the right to benefit from its advantages.

31. In the Government's submission, the interference in question should be deemed to have been necessary in a democratic society and to have met a pressing need. The applicant's comments had not merely been offensive or shocking but had also been likely to cause serious harm to morals and to

public order. Through his comments, which ran counter to the moral principles of a very large majority of the population, the applicant had severely jeopardised social stability. Furthermore, his comment that any child born of a marriage celebrated before a mayor was a "*piç*" had touched on a subject of great sensitivity to Turkish public opinion. It had called into question the morality, indeed the legitimacy, of families, accusing them of being immoral and of failing to observe the Islamic faith. The Government also emphasised the impact of such comments, made during a television programme shown across the country.

32. The Government further submitted that the applicant had been convicted not on account of his religion but for spreading hatred based on religious intolerance. On that account, he had also failed to comply with his duties under the second paragraph of Article 10 of the Convention.

33. The applicant contested the Government's arguments. He submitted that he had been taking part in a television debate that had been broadcast late at night and had lasted about four hours. A number of people had taken part in order to ascertain his views and had engaged in debate with him by asking questions or submitting counter-arguments.

34. The applicant maintained that his views, taken as a whole, were protected by freedom of expression. He had given examples and explanations on the basis of his personal beliefs. He had used the word "*piç*", which should be interpreted as "illegitimate child", in response to a question from the programme's presenter. In doing so he had intended to stress that civil marriage was contrary to the Islamic conception of marriage requiring all marriages to be solemnised by a cleric. The word had therefore not been an insult but rather a term commonly used to describe a particular situation from the standpoint of Islam.

35. As to the applicant's statements such as "democracy has no religion", he argued that they should be viewed in their context.

36. The applicant further submitted that there had been no pressing social need for his conviction. Nobody to whom his comments had allegedly referred had instituted court proceedings against him for defamation or insult.

2. The Court's assessment

(a) Relevant principles

37. Freedom of expression constitutes one of the essential foundations of any democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb (see *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49).

However, as is borne out by the wording itself of Article 10 § 2, whoever exercises the rights and freedoms enshrined in the first paragraph of that Article undertakes "duties and responsibilities". Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs (see, *mutatis mutandis*, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A, pp. 18-19, § 49, and *Wingrove v. the United Kingdom*, judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1956, § 52). Moreover, a certain margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion (see, *mutatis mutandis*, *Müller and Others v. Switzerland*, judgment of 24 May 1988, Series A no. 133, p. 22, § 35, and, as the most recent authority, *Murphy v. Ireland*, no. 44179/98, §§ 65-69, ECHR 2003-IX).

38. The test of whether the interference complained of was "necessary in a democratic society" requires the Court to determine whether it corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see The Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 38, § 62). In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

39. The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (ibid.).

40. The present case is characterised, in particular, by the fact that the applicant was punished for statements classified by the domestic courts as "hate speech". Having regard to the relevant international instruments (see paragraphs 22-24 above) and to its own case-law, the Court would emphasise, in particular, that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all

forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued (with regard to hate speech and the glorification of violence, see, *mutatis mutandis*, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 62, ECHR 1999-IV).

41. Furthermore, as the Court noted in *Jersild v. Denmark* (judgment of 23 September 1994, Series A no. 298, p. 25, § 35), there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention.

(b) Application of the above principles in the instant case

42. The Court must consider the impugned "interference" in the light of the case as a whole, including the content of the comments in issue and the context in which they were broadcast, in order to determine whether it was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, among other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I). Furthermore, the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference (see *Skałka v. Poland*, no. 43425/98, § 42, 27 May 2003).

43. The Court observes, firstly, that the programme in question was about a sect whose followers had attracted public attention. The applicant, who was regarded as the leader of the sect and whose views were already known to the public, was invited to take part in the programme for a particular purpose, namely to present the sect and its nonconformist views, including the notion that democratic values were incompatible with its conception of Islam. This topic was widely debated in the Turkish media and concerned a matter of general interest, a sphere in which restrictions on freedom of expression are to be strictly construed.

44. The Court further notes that the format of the programme was designed to encourage an exchange of views or even an argument, in such a way that the opinions expressed would counterbalance each other and the debate would hold the viewers' attention. It notes, as the domestic courts did, that in so far as the debate concerned the presentation of a sect and was limited to an exchange of views on the role of religion in a democratic society, it gave the impression of seeking to inform the public about a matter of great interest to Turkish society. It further points out that the applicant's conviction resulted not from his participation in a public discussion, but from comments which the domestic courts regarded as "hate speech" beyond the limits of acceptable criticism (see paragraph 15 above).

45. The main issue is therefore whether the national authorities correctly exercised their discretion in convicting the applicant for having made the statements in question (see, *mutatis mutandis*, *Murphy*, cited above, § 72).

46. In order to assess whether the "necessity" of the restriction on the applicant's freedom of expression has been established convincingly, the Court must examine the issue essentially from the standpoint of the reasoning adopted by the national courts. In this connection, the Court notes that the Turkish courts' conclusions related solely to the fact that the applicant had described contemporary secular institutions as "impious", had vehemently criticised concepts such as secularism and democracy and had openly campaigned for sharia (see paragraph 15 above).

47. The Turkish courts examined certain statements made by the applicant before reaching the conclusion that he was not entitled to the protection of freedom of expression. For the purposes of the instant case, the Court will divide the statements into three passages.

48. The first passage is the following:

> "... anyone calling himself a democrat [or] secularist ... has no religion ... Democracy in Turkey is despotic, merciless and impious [*dinsiz*] ...
>
> This secular ... system is hypocritical [*ikiyüzlü ve münafık*] ... it treats some people in one way and others in another way ...
>
> I am making these comments while fully aware that they represent a crime against the laws of tyranny. Why would I stop speaking? Is there any other way than death?"

In the Court's view, such comments demonstrate an intransigent attitude towards and profound dissatisfaction with contemporary institutions in Turkey, such as the principle of secularism and democracy. Seen in their context, however, they cannot be construed as a call to violence or as hate speech based on religious intolerance.

49. The second passage is the following:

> "... if [a] person has his wedding night after being married by a council official authorised by the Republic of Turkey, the child born of the union will be a *piç* ..."

In Turkish, "*piç*" is a pejorative term referring to children born outside marriage and/or born of adultery and is used in everyday language as an insult designed to cause offence.

Admittedly, the Court cannot overlook the fact that the Turkish people, being deeply attached to a secular way of life of which civil marriage is a part, may legitimately feel that they have been attacked in an unwarranted and offensive manner. It points out, however, that the applicant's statements were made orally during a live television broadcast, so that he had no possibility of reformulating, refining or retracting them before they were made public (see *Fuentes Bobo v. Spain*, no. 39293/98, § 46, 29 February 2000). Similarly, the Court observes that the Turkish courts, which are in a better position than an international court to assess the impact of such

comments, did not attach particular importance to that factor. Accordingly, the Court considers that, in balancing the interests of free speech and those of protecting the rights of others under the necessity test in Article 10 § 2 of the Convention, it is appropriate to attach greater weight than the national courts did, in their application of domestic law, to the fact that the applicant was actively participating in a lively public discussion (see, *mutatis mutandis*, *Nilsen and Johnsen*, cited above, § 52).

50. Lastly, the national courts sought to establish whether the applicant was campaigning for sharia. In that connection they held, in particular (see paragraph 15 above):

> "Mr Bedri Baykam told Mr Gündüz that the aim of the latter's supporters was to 'destroy democracy and set up a regime based on sharia', and the defendant replied: 'Of course, that will happen, that will happen.' [Furthermore,] the defendant acknowledged before this Court that he had made those comments, and stated that the regime based on sharia would be established not by duress, force or weapons but by convincing and persuading the people."

The Turkish courts considered that the means by which the applicant intended to set up a regime based on religious rules were not decisive.

51. As regards the relationship between democracy and sharia, the Court reiterates that in *Refah Partisi (the Welfare Party) and Others v. Turkey* ([GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 123, ECHR 2003-II) it noted, among other things, that it was difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia. It considered that sharia, which faithfully reflected the dogmas and divine rules laid down by religion, was stable and invariable and clearly diverged from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervened in all spheres of private and public life in accordance with religious precepts. The Court would point out, however, that *Refah Partisi (the Welfare Party) and Others* concerned the dissolution of a political party whose actions seemed to be aimed at introducing sharia in a State party to the Convention and which at the time of its dissolution had had the real potential to seize political power (ibid., § 108). Such a situation is hardly comparable with the one in issue in the instant case.

Admittedly, there is no doubt that, like any other remark directed against the Convention's underlying values, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention. However, the Court considers that the mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as "hate speech". Moreover, the applicant's case should be seen in a very particular context. Firstly, as has already been noted (see paragraph 43 above), the aim of the programme in question was to present the sect of which the applicant was the leader; secondly, the applicant's extremist views were already known and had been

discussed in the public arena and, in particular, were counterbalanced by the intervention of the other participants in the programme; and lastly, they were expressed in the course of a pluralistic debate in which the applicant was actively taking part. Accordingly, the Court considers that in the instant case the need for the restriction in issue has not been established convincingly.

52. In conclusion, having regard to the circumstances of the case as a whole and notwithstanding the national authorities' margin of appreciation, the Court considers that the interference with the applicant's freedom of expression was not based on sufficient reasons for the purposes of Article 10. This finding makes it unnecessary for the Court to pursue its examination in order to determine whether the two-year prison sentence imposed on the applicant, an extremely harsh penalty even taking account of the possibility of parole afforded by Turkish law, was proportionate to the aim pursued.

53. The applicant's conviction accordingly infringed Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

55. The applicant sought just satisfaction in the amount of 500,000 euros (EUR) for the non-pecuniary and pecuniary damage he had sustained. He did not seek the reimbursement of costs and expenses incurred before the Convention institutions and/or the domestic courts, and this is not a matter which the Court has to examine of its own motion (see *Colacioppo v. Italy*, judgment of 19 February 1991, Series A no. 197-D, p. 52, § 16).

56. The Government submitted that the finding of a violation would constitute sufficient just satisfaction.

57. With regard to pecuniary damage, the Court observes that the applicant has not adduced any evidence of the nature of the loss sustained and, furthermore, that he has not sought reimbursement of the fine imposed on him. No amount can therefore be awarded under that head.

With regard to non-pecuniary damage, the Court points out that it has found that the interference in question was not based on sufficient reasons for the purposes of Article 10 and that the penalty imposed on the applicant was extremely harsh (see paragraph 52 above). Accordingly, making its assessment on an equitable basis, it awards him EUR 5,000 in respect of non-pecuniary damage.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been a violation of Article 10 of the Convention;

2. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into Turkish liras at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 4 December 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN	Christos ROZAKIS
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Türmen is annexed to this judgment.

C.L.R.
S.N.

DISSENTING OPINION OF JUDGE TÜRMEN

I regret that I am unable to agree with the conclusion reached by the majority, although I have no difficulty in agreeing with their views until paragraph 46 of the judgment.

The applicant, during a highly popular TV programme broadcast live, stated that children born from marriages celebrated according to civil law (that is, not according to religious law) are "*piç*" (bastards). He went on to say: "That is how Islam sees it."

In the Turkish language "*piç*" is a pejorative word meaning illegitimate children. It is a very serious insult.

I agree with the majority view that "the Court cannot overlook the fact that the Turkish population, being deeply attached to a secular way of life of which civil marriage is a part, may legitimately feel that they have been attacked in an unwarranted and offensive manner" (paragraph 49 of the judgment).

The word "*piç*" as used by the applicant is clearly hate speech based on religious intolerance. Hate speech, both at national and international levels, comprises not only racial hatred but also incitement to hatred on religious grounds or other forms of hatred based on intolerance.

Recommendation No. R (97) 20 of the Committee of Ministers on "hate speech" defines hate speech as "covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance". Moreover, the recommendation requests the member States to establish a sound legal framework on hate speech and also asks the national courts to bear in mind that hate speech may be so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the Convention.

The European Commission against Racism and Intolerance, in paragraph 18 of its General Policy Recommendation no. 7, states:

> "The law should penalise the following acts when committed intentionally:
>
> (a) public incitement to violence, hatred or discrimination,
>
> (b) public insults and defamation ...
>
> ...
>
> against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality or national or ethnic origin;"

On the other hand, in national legislation, such as the Danish, French, German and Swiss Criminal Codes, hate speech also covers threats and insults on religious grounds and constitutes a punishable offence.

The applicant was sentenced under Article 312 of the Turkish Criminal Code for incitement to hatred, which is in line with the international texts on hate speech.

In the judgment, the majority do not contest the Turkish courts' decision on this account. There is nothing in the judgment, explicit or implicit, which may warrant the conclusion that the majority refuse to accept that the word "*piç*" is hate speech. On the contrary, the judgment makes extensive reference to international texts on hate speech and in paragraph 40 states: "The present case is characterised, in particular, by the fact that the applicant was punished for statements classified by the domestic courts as 'hate speech'. Having regard to the ... international instruments [on hate speech] and to its own case-law, the Court would emphasise, in particular, that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society."

It is also to be noted that while the judgment in paragraph 52 explicitly states that defending sharia does not constitute hate speech, it fails to do the same in connection with the word "*piç*".

If the majority accept or at least do not deny that "*piç*" is hate speech, then according to the Court's case-law such a remark should not have enjoyed the protection of Article 10 (see *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, pp. 24-25, § 33).

Hate speech is undeserving of protection. It contributes nothing to a meaningful public debate and therefore there is no reason to think that its regulation in any way harms any of the values which underlie the protection of freedom of expression.

On the other hand, the applicant could have expressed his criticisms on democracy and secularism perfectly well without using the word "*piç*", and thus contributed to free public debate (see *Constantinescu v. Romania*, no. 28871/95, § 74, ECHR 2000-VIII).

The present judgment is incompatible with the established case-law of the Court on a number of other points. In *Otto-Preminger-Institut v. Austria* (judgment of 20 September 1994, Series A no. 295-A, pp. 18-19, § 49) the Court stated:

> "... whoever exercises the rights and freedoms enshrined in the first paragraph of [Article 10] undertakes 'duties and responsibilities'. Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."

Furthermore, in the same judgment (pp. 20-21, § 56) the Court concluded:

> "... In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner ..."

In *Müller and Others v. Switzerland* (judgment of 24 May 1988, Series A no. 133), *Otto-Preminger-Institut* (cited above), and *Wingrove v. the United Kingdom* (judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V), the Court emphasised that "it is not possible to find ... a uniform European conception of morals ... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction'..." (see *Müller and Others*, cited above, p. 22, § 35).

Wingrove (cited above, pp. 1957-58, § 58) is even more specific about the State's margin of appreciation with regard to religious sensitivities:

> "... a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion ..."

In all three judgments referred to above, the Court found no violation of Article 10 on the grounds that the religious feelings of believers had been violated in an unwarranted and offensive manner and that the interference of the authorities to ensure religious peace did not constitute a breach of the Convention. In *Otto-Preminger-Institut* and *Wingrove* protection of religious feelings, and in *Müller* protection of the morals of others, outweighed the applicant's interests.

In the present case, it is not the religious feelings of believers but the feelings of a great majority of the Turkish population who choose to lead a secular life that were attacked.

I am concerned that the present judgment may be interpreted by the outside world to mean that the Court does not grant the same degree of protection to secular values as it does to religious values. Such a distinction, intentional or unintentional, is contrary to the letter and spirit of the Convention.

As Judge Pettiti rightly pointed out in his concurring opinion in *Wingrove*, "the rights of others" as mentioned in paragraph 2 of Article 10 cannot be restricted solely to the rights of religious believers. The rights of secular people are also included in this expression.

In the present judgment the majority reached the conclusion that the conviction of the applicant by the Turkish courts infringed Article 10. However, they accepted that:

(a) the word "*piç*" is hate speech and the applicant was convicted for hate speech and not for participating in a public debate (paragraph 44);

(b) Contracting States enjoy a wide margin of appreciation in respect of offensive remarks in moral and especially religious fields (paragraph 37);

(c) the word "*piç*" is an attack on the feelings of secular people in an unwarranted and offensive manner (paragraph 49).

Against all these findings, which might have been a convincing reasoning for finding no violation, the majority reached the conclusion of violation on one single ground: that the Turkish court in its decision of 1 April 1996 had not given enough weight to the word "*piç*". This is simply not correct.

In the reasons for its decision, the court specifically mentions the applicant's statement regarding the children of those who are married by civil law being "*piç*". This sentence is one of the main elements in the decision that led to the applicant's conviction. It is true that the Turkish court also examined other statements by the applicant and came to the conclusion that the applicant's statements in their entirety constituted incitement to hatred.

I agree with this approach, because the applicant was speaking on the programme from the vantage point of a religious authority. He claimed that he was acting with the will of God. He asserted that his strong words against democracy and secularism and his advocacy of a regime based on sharia reflected God's wishes. Therefore, those who did not share his opinions and who defended democracy and secularism were depicted as ungodly. In my opinion, this is a good example of hate speech.

I am not persuaded by the argument in paragraph 49 that because the applicant was participating in a lively debate his remarks about children being "*piç*" were in accordance with Article 10. In a live TV broadcast, the target is the public, rather than other participants. Therefore, the moment the word "*piç*" is pronounced, it reaches the public to whom it would have caused offence (see, *mutatis mutandis*, *Wingrove*, cited above, pp. 1959-60, § 63).

Moreover, the argument that such a declaration was made during a live broadcast, making it impossible for the applicant to reformulate or retract it, is not correct because the interviewer provided him with the opportunity to correct his statement. Instead of doing so, he chose to reinforce it by qualifying it in religious terms.

Lastly, whatever the decision on the merits, when regard is had to all the particular circumstances of the case and to the Court's case-law (see, among many other authorities, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 56, ECHR 1999-VIII; *Skałka v. Poland*, no. 43425/98, § 48, 27 May 2003; and *Thoma v. Luxembourg*, no. 38432/97, § 74, ECHR 2001-III), it is regrettable that the Chamber decided to award the applicant a sum for non-pecuniary damage, whereas it could have taken the view that the finding of a violation constituted in itself sufficient just satisfaction.

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

COURT (CHAMBER)

CASE OF HADJIANASTASSIOU v. GREECE

(Application no. 12945/87)

JUDGMENT

STRASBOURG

16 December 1992

In the case of Hadjianastassiou v. Greece[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[**] and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr Thór VILHJÁLMSSON,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Sir John FREELAND,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 June and 23 November 1992,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 12 July 1991, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12945/87) against the Hellenic Republic lodged with the Commission under Article 25 (art. 25) by a Greek national, Mr Constantinos Hadjianastassiou, on 17 December 1986.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Greece recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 and 10 (art. 6, art. 10) of the Convention.

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[*] The case is numbered 69/1991/321/393. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr N. Valticos, the elected judge of Greek nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 29 August 1991, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr J. Cremona, Mr Thór Vilhjálmsson, Mr J. De Meyer, Mrs E. Palm, Mr I. Foighel, Mr R. Pekkanen and Sir John Freeland (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

Subsequently, Mr S. K. Martens, substitute judge, replaced Mr Cremona, who had left the Court on the expiry of his term of office and whose successor had taken up his duties before the hearing (Rules 2 para. 3 and 22 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Greek Government ("the Government"), the Delegate of the Commission and the applicant's lawyer on the organisation of the procedure (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 14 February 1992 and the Government's memorial on 28 February. On 2 June the Secretary to the Commission informed the Registrar that the Delegate would submit oral observations.

On 12 March the Commission had produced various documents as the Registrar, at the Government's request, had asked it to do.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 June 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government
  Mr P. KAMARINEAS, Adviser
  at the Legal Council of State, *Agent*,
  Miss F. DEDOUSSI, Member
  of the Legal Council of State, *Counsel*;
- for the Commission
  Mr C.L. ROZAKIS, *Delegate*;
- for the applicant
  Mr R. NISAND, avocat, *Counsel*.

The Court heard addresses by the above-mentioned representatives and by Mr Hadjianastassiou in person, as well as their answers to its questions.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

6. Mr Hadjianastassiou, a Greek national, is an aeronautical engineer. At the material time he was a captain in the air force.

As the officer in charge of a project for the design and production of a guided missile, he submitted, in 1982, a report to the Air Force Technological Research Centre ("K.E.T.A.") on the missile on which he had been working. In January 1983 he communicated to a private company ("ELFON Ltd") another technical study on guided missiles, which he had prepared himself.

A. The proceedings before the Athens Permanent Air Force Court

7. On 4 July 1984 a chamber of the Permanent Air Force Court of Athens (Diarkes Stratodikeio Athinon) charged the applicant and another person with disclosing military secrets (Article 97 of the Military Criminal Code, see paragraph 21 below).

On 22 October 1984 the court found Mr Hadjianastassiou guilty of having transmitted to ELFON a series of ten items of information together with "all the technical and theoretical data" appearing in the K.E.T.A. report. It sentenced him to two years and six months' imprisonment.

B. The proceedings before the Courts-Martial Appeal Court

8. The applicant and the prosecutor at the Courts-Martial Appeal Court (Epitropos tou Anatheoritikou Dikastiriou) appealed from that judgment.

9. Following a hearing held on 28 February and 1 March 1985, the Courts-Martial Appeal Court appointed two experts - professors at the Athens Polytechnic School - who, with two other experts, designated by the applicant, compared the two studies.

In their report of 26 September 1985 the two professors concluded as follows:

> "... in our opinion, the two studies, for the K.E.T.A. and ELFON, follow different methods, the two missiles are different and the second is not a copy of the first ... . Nevertheless, some transfer of technical knowledge inevitably occurred ... . It is not possible to determine the extent of such transfer beyond what is mentioned above under (b), (c) and (d), because the ELFON study and even more so the K.E.T.A. report were shoddily drafted and were full of imprecisions and omissions; it should be stressed that in both studies the aerodynamic data are erroneous ..."

They noted that Mr Hadjianastassiou had some technical knowledge, acquired during his studies in the United States. However, his participation

in the K.E.T.A. project had enriched his experience. The components of the missile and some of the theoretical data contained in the two studies could be found in various manuals included in the file and regarded as "available literature". These manuals were not classified as "secret", but it was not established that they were accessible to private individuals.

10. At a new hearing held on 21 and 22 November 1985 the Courts-Martial Appeal Court took evidence from nineteen witnesses on whether the two studies contained common data, whether the information which had formed the basis of the studies was freely available in scientific literature and whether the K.E.T.A. study had been classified as a "military secret".

11. After the hearing the Courts-Martial Appeal Court deliberated in private and considered the following questions formulated by its President:

> "1. Is Constantinos Hadjianastassiou guilty of having, between October 1982 and March 1983, unlawfully and intentionally communicated and disclosed to third parties military plans and information classified as secret and which had to remain secret in the military interests of the Greek State? [In particular, is he guilty of having] ..., in October 1982, after having contacted the company ELFON Ltd ... with a view to preparing and drawing up for the latter's benefit a study on guided missiles, for a financial consideration to be agreed with the said company when the work was in progress, unlawfully and intentionally, (a) communicated to the above-mentioned company general information concerning the guided missile which was being designed at the K.E.T.A. and its technical characteristics, although as project officer for the K.E.T.A. missile he knew that such information was secret and that the military interests of the Greek State required that it be kept secret; (b) transmitted to the same company several elements deriving from the study, relating to the project and on the same subject-matter, of the K.E.T.A. and from the whole production programme of the Greek guided missile ("laser kit") which existed at the centre and which concerned principally the dimensional diagram of the missile, its external geometry, its perimetric plan, its aerodynamic elements, its Nd-YAG laser type, its dynamic model, its dome, its schematic diagram, its seeker's fairing, its basic electronics data, as well as any other theoretical or technical elements contained in the ELFON Ltd study ..., which was elaborated entirely on the basis of the information transmitted and disclosed by him to the company and derived from the corresponding K.E.T.A. project and study, although he knew, in his capacity as project officer ..., that the information was secret and that the military interests of the Greek State required that it be kept secret?
>
> 2. Has it been established ... that, when he disclosed these military secrets, the accused believed, erroneously, that he was entitled to proceed in such a way or [, on the other hand,] that he reasonably believed that, having drawn up the K.E.T.A. study and used his own knowledge, he was entitled to elaborate a new study and submit it through the intermediary of the company ELFON Ltd to the Weapons Industry Department? Was this belief justifiable?
>
> 3. Has it been established ... that the military secrets thus disclosed, namely the general information which [the accused] communicated to the ELFON company concerning the guided missile ... and its technical characteristics, were of minor importance?

4. Should certain factors be taken into account in mitigation, namely that, prior to committing the above- mentioned act, the accused had led an honest and well-ordered private, family and professional life?

... "

12. According to the record of the deliberations, the Courts- Martial Appeal Court replied in the affirmative to questions 1 (a) (four votes to one), 3 and 4 (unanimously) and in the negative to questions 1 (b) (four votes to one) and 2 (three votes to two).

13. Giving judgment in Mr Hadjianastassiou's presence on 22 November 1985, it sentenced him for disclosure of military secrets of minor importance (Article 97 para. 2 of the Military Criminal Code, see paragraph 21 below) to a suspended term of five months' imprisonment, from which it deducted the four months and fourteen days which he had spent in detention on remand.

14. The President of the Courts-Martial Appeal Court read out the judgment, which did not refer to the questions put to the members of the court.

15. In order to obtain the text of these questions and the replies given, the applicant asked, on 23 November 1985, to see the record of the hearing. The registrar allegedly told him that he would have to wait for the "finalised version" of the judgment.

C. The proceedings before the Court of Cassation

16. On 26 November 1985 - within the five days prescribed in Article 425 para. 1 of the Military Criminal Code (see paragraph 24 below) - Mr Hadjianastassiou appealed to the Court of Cassation ; in his appeal, which was a page long, he alleged "the erroneous application and interpretation of the provisions under which he [had been] convicted, namely Article 97 para. 2 of the Military Criminal Code".

17. He received a copy of the appeal judgment on 16 December; it was very short and did not state the grounds on which it was based, merely referring to the fixing of sentence.

18. On 23 December 1985 the applicant again demanded that the record be communicated to him; he received it on 10 January 1986. This document, which was detailed and reproduced in full the six questions and the replies obtained, ended as follows:

"...

The Court, by four votes to one ..., finds the accused Hadjianastassiou guilty of disclosing military secrets, which offence was committed in Attica between October 1982 and March 1983.

By three votes to two ..., the Court dismisses the defence request that Article 31 para. 2 of the Criminal Code (not guilty in the event of mistake) be applied.

The Court unanimously accepts that the military secrets communicated are of minor importance.

The Court unanimously accepts the factors pleaded in mitigation (Article 84 para. 2 (a) of the Criminal Code).

Having regard to the following Articles: ... Article 97 para. 2 taken in conjunction with paragraph 1 and with Article 98 (e) ..., Articles 366, 368 ... of the Military Criminal Code, ...;

... having regard to the gravity of the acts carried out, to the accused's personality, to the damage caused by the offence, to the specific nature of the offence, to the specific circumstances under which the offence was committed, to the degree of criminal intent on the part of the accused, to his character, to his personal and social situation, and to his conduct before and after the commission of the offence;

The Court sentences the accused to five months' imprisonment and orders him to pay the costs ...

It deducts from the above-mentioned term ... the period of four months and fourteen days spent in detention on remand and sets at sixteen days the term still to be served.

In view of the fact that the accused has no previous convictions and has never been sentenced to prison, and having regard to the circumstances under which the offence was committed, the Court considers it appropriate to suspend the remainder of the sentence ...

For these reasons,

Having regard to Articles 99, 100 and 104 of the Criminal Code,

The Court orders that the outstanding term of imprisonment be suspended for a period of three years.

..."

19. The hearing in the Court of Cassation (Areios Pagos) took place on 11 April 1986.

On 14 April Mr Hadjianastassiou filed a memorial in support of his oral pleadings. In his submission the wording of his appeal was sufficient to rule out any danger of its being dismissed for lack of precision. He complained of the shortness of the time-limit for appealing against the decisions of the military courts and the fact that it was impossible for the persons concerned to gain access, in good time, to the contents of the contested judgments. He also challenged the ground on which his conviction rested: the communication of "general information" on the K.E.T.A. missile, the charge which the Courts-Martial Appeal Court found to be proved, did not justify the application of Article 98 of the Military Criminal Code as that provision

concerned the disclosure of secret information of military importance, a charge of which the Courts-Martial Appeal Court had acquitted him by its reply to question 1 (b) (see paragraph 11 above). In his view, at the most his case might fall under Article 96 (see paragraph 21 below).

20. On 18 June 1986 the Court of Cassation declared the appeal inadmissible on the following grounds:

> "By the appeal before the Court ..., in which it is sought to have judgment no. 616/1985 of the Athens Courts-Martial Appeal Court set aside, the [applicant] challenges the aforesaid judgment on the ground of erroneous application and interpretation of the provisions under which he was convicted, namely Article 97 para. 2 of the Military Criminal Code. However, this sole ground of appeal, as formulated above, is vague inasmuch as it does not identify any concrete and specific error in the contested judgment which could constitute the basis of the complaint alleging the erroneous application and interpretation of the above-mentioned provision; the appeal must therefore be declared inadmissible by virtue of Articles 476 para. 1 and 513 para. 1 of the Code of Criminal Procedure."

II. THE RELEVANT DOMESTIC LAW

A. The disclosure of military secrets

21. The Military Criminal Code provides as follows:

Article 96

"Communication of military information

Any serviceman or any person employed by the armed forces who, without the consent of the military authorities, communicates or makes public by any means whatsoever information or assessments concerning the army shall be sentenced to a term of imprisonment not exceeding six months."

Article 97

"Disclosure of military secrets

1. Any serviceman or any person employed by the armed forces who unlawfully and intentionally gives or communicates to others documents, plans, or other objects or secret information of military importance or allows such documents, plans, objects or information to be given or communicated to others, shall be sentenced to a term of imprisonment (katheirxi), or, where the above has been given or communicated to a foreign State or to an agent or a spy of a foreign State, to dishonourable discharge and death.

2. ... where the [information] communicated is of minor importance, the convicted person shall be sentenced to a term of imprisonment (filakisi) of not less than six months ..."

Article 98

"Secret information

'Secret information of military importance' means information concerning the Greek State or its allies which relates to:

...

(e) any object officially classified as secret.

..."

B. The courts' obligation to give the reasons for their decisions

22. The relevant provisions of the 1975 Constitution are worded as follows:

Article 93 para. 3

"All court judgments must be specifically and thoroughly reasoned and shall be pronounced in a public sitting ..."

Article 96

"...

4. Special laws may provide for:

(a) Questions relating to the army, navy and air force tribunals, which shall have no jurisdiction over civilians.

(b) Questions relating to prize courts.

5. The courts specified under sub-paragraph (a) of the preceding paragraph shall be composed of a majority of members of the judicial branch of the armed forces, who enjoy the guarantees of independence, as regards their person and their office, provided for in Article 87 para. 1 of the present Constitution. The provisions of paragraphs 2 to 4 of Article 93 shall be applicable to the hearings and judgments of these courts. The detailed rules for the implementation of the provisions of the present paragraph and the date of their entry into force shall be specified by statute."

23. According to the consistent case-law of the Court of Cassation, the failure to give reasons in the decisions of the military courts does not render them void. The application to these courts of Article 93 para. 3 of the Constitution requires, under the terms of Article 96 para. 5, the adoption of special laws, and this has not yet happened (judgments nos. 470/1975, 483/1979, 18/1980, 647/1983, 531-535/1984 (Nomiko Vima 1984, p. 1070) and 1494/1986). It is sufficient that such a decision answers the questions

put by the President; the questions must indicate accurately all the offences of which the defendant is accused so as to make it possible for a subsequent review by the Court of Cassation to ensure that the provisions of the criminal law have been properly applied to the facts in question as found by the military courts of first or second instance (judgments nos. 456/1986 and 1494/1986).

C. Appeals from the decisions of the military courts

1. The Military Criminal Code

24. The following texts are relevant here:

Article 366

"Formulation of questions. Principal question

1. The President shall put the questions concerning each accused.

2. The principal question shall be based on the operative part of the committal decision ... and shall include the question whether the accused is guilty ... as charged ..."

Article 368

"Supplementary questions (Parepomena zitimata)

In order to supplement the principal question or the alternative question, supplementary questions may be put concerning the accusation and factors aggravating, mitigating or expunging (exalipsin) the offence."

Article 425 para. 1

"Time-limit

Any appeal to the Court of Cassation (anairesi) must be filed within five days of the delivery of the judgment or, where the judgment has been delivered in the absence of the person convicted or his representative, of its notification ..."

Article 426

"Grounds for appeal to the Court of Cassation

Only the following grounds of appeal may be relied upon:

...

(B) The erroneous application or interpretation of the substantive provisions of the criminal law."

2. The Code of Criminal Procedure

25. The Code of Criminal Procedure provides, inter alia, as follows:

Article 473 para. 3

"Time-limit for appealing

The time-limit for filing an appeal with the Court of Cassation begins to run on the date on which the final text of the judgment is entered into the register of the criminal court in question. It shall be so entered within fifteen days, failing which the President of the criminal court shall be liable to disciplinary sanctions."

Article 509 para. 2

"Memorial for an appeal to the Court of Cassation

In addition to the grounds invoked in the appeal ..., further submissions may be made in a supplementary memorial, which must be lodged with the office of the principal public prosecutor at the Court of Cassation not later than fifteen days before the hearing ...; once this time-limit has expired such memorials shall be inadmissible ..."

3. The relevant case-law of the Court of Cassation

26. According to the case-law of the Court of Cassation (judgments nos. 656/1985 (Nomiko Vima 1985, p. 891), 1768/1986, 205/1988 (Nomiko Vima 1988, p. 588) and 565/1988), Article 473 para. 3 of the Code of Criminal Procedure does not apply to appeals on points of law from the decisions of the military courts, as the time-limit for such appeals is fixed by Article 425 of the Military Criminal Code (see paragraph 24 above).

The grounds of appeal to the Court of Cassation must be set out in the initial appeal memorial. As regards "the erroneous application and interpretation of the substantive provisions of the criminal law", the appeal must specify clearly the errors which are alleged to have been made in the contested judgment (judgments nos. 234/1968, 459/1987, 1366/1987 (Nomiko Vima 1987, p. 1659) and 1454/1987, as well as the judgment given by the Court of Cassation in the present case).

Finally, supplementary submissions may be taken into account only if the initial appeal memorial sets out at least one ground which is found to be admissible and sufficiently substantiated (judgments nos. 242/1951, 341/1952, 248/1958, 472/1970, 892/1974, 758/1979 (Nomiko Vima 1980, p. 56), 647/1983, 1438/1986 and 1453/1987).

PROCEEDINGS BEFORE THE COMMISSION

27. Mr Hadjianastassiou applied to the Commission on 17 December 1986. He relied on Article 6 (art. 6), complaining that the lack of reasons in the judgment of the Courts-Martial Appeal Court and the shortness of the time-limit for appealing had prevented him from further substantiating his appeal to the Court of Cassation. He maintained in addition that his conviction for the disclosure of military secrets of secondary importance had infringed his right to freedom of expression guaranteed under Article 10 (art. 10).

28. The Commission declared the application (no. 12945/87) admissible on 4 October 1990. In its report of 6 June 1991 (made under Article 31) (art. 31), it expressed the unanimous opinion that there had been a violation of Article 6 paras. 1 and 3 (b) (art. 6-1, art. 6-3-b), but not of Article 10 (art. 10).

The full text of the Commission's opinion is reproduced as an annex to this judgment[*].

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 (art. 6)

29. Mr Hadjianastassiou relied on paragraphs 1 and 3 (b) of Article 6 (art. 6-1, art. 6-3-b), which are worded as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> ..."

He complained of the failure to give reasons in the judgment read out on 22 November 1985 by the President of the Courts-Martial Appeal Court and the shortness of the time-limit for appealing to the Court of Cassation.

[*] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 252 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

Despite being present at the hearing, he had not discovered the precise reasons for his conviction until 10 January 1986, which had meant that his appeal on points of law had been bound to fail.

30. The Government contested this view, to which the Commission subscribed in substance. In the former's opinion, the applicant had been aware of the content of the questions put by the President of the Courts-Martial Appeal Court. Questions nos. 2 and 4 had been based on arguments put forward by Mr Hadjianastassiou himself in the Permanent Air Force Court. The reply to question no. 3, which had been formulated for the first time on appeal, was given expressly in the judgment read out by the President. As regards the question concerning the communication of information of "military importance", the President had divided it into two parts - 1 (a) and 1 (b) (see paragraph 11 above) - in order to take into account the conclusions of the experts and to show leniency to the accused, whose sentence had moreover been reduced. In addition, the questions, far from marking the conclusion of the court's deliberations, had given rise to keen argument during the trial. In short, it had been entirely possible for Mr Hadjianastassiou to submit detailed and admissible grounds for appeal within the statutory time-limit.

31. As the requirements of paragraph 3 of Article 6 (art. 6-3) constitute specific aspects of the right to a fair trial, guaranteed under paragraph 1 (art. 6-1), the Court will examine the complaint under both provisions taken together.

32. The Court notes at the outset that although Article 93 para. 3 of the Greek Constitution (see paragraph 22 above) requires all court judgments to be specifically and thoroughly reasoned, under Article 96 para. 5 the application of this requirement to the military courts is subject to the adoption of a special law. Such a law has still to be enacted. In the meantime the Court of Cassation can review the proper application of the criminal law by those courts only through the questions put by the presidents and the replies given by their colleagues, from which the reasoning is elicited.

33. The Contracting States enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6 (art. 6). The national courts must, however, indicate with sufficient clarity the grounds on which they based their decision. It is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him. The Court's task is to consider whether the method adopted in this respect has led in a given case to results which are compatible with the Convention.

34. In this instance the judgment read out by the President of the Courts-Martial Appeal Court contained no mention of the questions as they appeared in the record of the hearing (see paragraphs 11 and 18 above). Admittedly it referred to Article 366 et seq. of the Military Criminal Code

(see paragraph 24 above) and described the information communicated as of minor importance, but it was not based on the same grounds as the decision of the Permanent Air Force Court. Question 1 (a), dealing with the communication of "general information concerning the guided missile" which had to be kept secret, appeared for the first time in the proceedings before the appeal court. When, the day after the delivery of the judgment, the applicant sought to obtain the full text of the questions, the registrar allegedly informed him that he would have to wait for the "finalised version" of the judgment (see paragraph 15 above). In his appeal on points of law, filed within the five-day time-limit laid down in Article 425 para. 1 of the Military Criminal Code (see paragraph 24 above), Mr Hadjianastassiou could rely only on what he had been able to hear or gather during the hearing and could do no more than refer generally to Article 426.

35. In the Government's contention, the applicant could have made further submissions by means of an additional memorial, pursuant to Article 509 para. 2 of the Code of Criminal Procedure (see paragraph 25 above); if he had not availed himself of this possibility, it had been because he had had no ground for appeal to put forward.

36. The Court is not persuaded by this argument. When Mr Hadjianastassiou received the record of the hearing, on 10 January 1986, he was barred from expanding upon his appeal on points of law. According to a consistent line of cases, additional submissions may be taken into account only if the initial appeal sets out at least one ground which is found to be admissible and sufficiently substantiated (see paragraph 26 above).

37. In conclusion, the rights of the defence were subject to such restrictions that the applicant did not have the benefit of a fair trial. There has therefore been a violation of paragraph 3 (b) of Article 6, taken in conjunction with paragraph 1 (art. 6-3-b, art. 6-1).

II. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

38. In Mr Hadjianastassiou's submission, his conviction by the military courts also infringed Article 10 (art. 10), which provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

39. It should be recalled that the applicant, a serving officer, was convicted and sentenced for having disclosed military information of minor importance. The study in question was intended for communication to a private arms manufacturing company for a fee.

Of course, the freedom of expression guaranteed by Article 10 (art. 10) applies to servicemen just as it does to other persons within the jurisdiction of the Contracting States (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 41, para. 100). Moreover information of the type in question does not fall outside the scope of Article 10 (art. 10), which is not restricted to certain categories of information, ideas or forms of expression (see the markt intern Verlag GmbH and Klaus Beermann v. Germany judgment of 20 November 1989, Series A no. 165, p. 17, para. 26).

40. Accordingly, the sentence imposed by the Permanent Air Force Court, then reduced by the Courts-Martial Appeal Court (see paragraphs 7 and 13 above), constituted an interference with the exercise of the applicant's right to the freedom of expression. Such interference infringes Article 10 (art. 10) unless it was "prescribed by law", pursued one or more of the legitimate aims set out in paragraph 2 (art. 10-2) and was "necessary in a democratic society" in order to attain the aforesaid aims.

A. Was the interference "prescribed by law"?

41. According to Mr Hadjianastassiou, the first of these conditions was not satisfied because the "law" was not sufficiently foreseeable. The application by the Courts-Martial Appeal Court of Articles 97 and 98 of the Military Criminal Code had been erroneous (see paragraph 21 above); although these provisions had served as the basis for that court's decision, it had not mentioned any specific secret data that had been transferred to ELFON.

42. The Court notes, however, that the wording of the provisions in question (see paragraph 21 above) was not incompatible with the manner in which the Courts-Martial Appeal Court interpreted and applied them. Pointing out that it is primarily for the national courts to interpret and apply domestic law (see, among other authorities, the Kruslin v. France judgment of 24 April 1990, Series A no. 176-A, p. 21, para. 29), the Court finds, like the Government and the Commission, that the interference was "prescribed by law".

B. Did the interference pursue a legitimate aim?

43. Clearly the contested sentence was intended to punish the disclosure of information on an arms project classified as secret, and therefore to

protect "national security", a legitimate aim for the purposes of Article 10 para. 2 (art. 10-2).

C. Was the interference "necessary in a democratic society"?

44. Mr Hadjianastassiou denied that the interference was necessary. He argued that a routine technical study based entirely on his own documentation could not be regarded as damaging to national security. By its reply to question 1 (b) (see paragraphs 11 and 12 above), the Courts-Martial Appeal Court had acknowledged the lack of any relationship between the study effected for the air force and that for ELFON. In his view, there should have been regulations prohibiting serving Greek officers from working for private undertakings or allowing them to do so provided that they did not divulge military secrets; the Courts-Martial Appeal Court had not identified a single such secret divulged by him.

45. In this instance the project for the manufacture of a guided missile undertaken by the air force was classified as a "military secret". The applicant's conviction in the appeal court was, however, based on the disclosure of "general information" which military interests required to be kept secret; the experts appointed by the appeal court had concluded prior to its decision that, although the two studies had employed different methods, none the less "some transfer of technical knowledge [had] inevitably occurred" (see paragraph 9 above).

Like the Government, the Court takes the view that the disclosure of the State's interest in a given weapon and that of the corresponding technical knowledge, which may give some indication of the state of progress in its manufacture, are capable of causing considerable damage to national security.

46. It is also necessary to take into account the special conditions attaching to military life and the specific "duties" and "responsibilities" incumbent on the members of the armed forces (see the Engel and Others judgment, cited above, p. 41, para. 100). The applicant, as the officer at the K.E.T.A. in charge of an experimental missile programme, was bound by an obligation of discretion in relation to anything concerning the performance of his duties.

47. In the light of these considerations, the Greek military courts cannot be said to have overstepped the limits of the margin of appreciation which is to be left to the domestic authorities in matters of national security. Nor does the evidence disclose the lack of a reasonable relationship of proportionality between the means employed and the legitimate aim pursued.

In conclusion, no violation of Article 10 (art. 10) has been established.

III. APPLICATION OF ARTICLE 50 (art. 50)

48. According to Article 50 (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

Under this provision Mr Hadjianastassiou claimed the reimbursement of his costs and expenses incurred first in the Greek courts (650,000 drachmas), and then before the Convention organs (300,000 drachmas and 29,260 French francs).

The Government considered these claims to be excessive, because they far exceeded the fee scales applicable to the legal profession as laid down by Greek law. They stated that they were willing to pay 100,000 drachmas in the event of a finding of a violation.

49. The Court observes that it is not bound in this context by domestic scales or criteria (see, inter alia, the Granger v. the United Kingdom judgment of 28 March 1990, Series A no. 174, p. 20, para. 55).

Like the Commission, it takes the view that, for the costs incurred in Greece, only those referable to the Court of Cassation proceedings - 220,000 drachmas - can be reimbursed. The sums claimed in respect of the Strasbourg proceedings are consistent with the criteria laid down in the case-law and should therefore be awarded in their entirety.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of paragraphs 1 and 3 (b) of Article 6, taken together (art. 6-1, art. 6-3-b);

2. Holds that there has been no violation of Article 10 (art. 10);

3. Holds that the respondent State is to pay to the applicant, within three months, for costs and expenses, 29,260 (twenty-nine thousand two hundred and sixty) French francs and 520,000 (five hundred and twenty thousand) drachmas;

4. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 December 1992.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the concurring opinion of Mr De Meyer is annexed to this judgment.

R. R.
M.-A. E.

CONCURRING OPINION OF JUDGE DE MEYER

(*Translation*)

Like the other members of the Chamber I take the view that there has not been a breach of the right to freedom of expression in this case, but my reasons are simpler than those set out in paragraphs 39 to 47 of the judgment. They are as follows:

1. The applicant was convicted and sentenced under Article 97 para. 2 of the Military Criminal Code[1] for having disclosed secret information of minor importance[2].

2. Because the members of the armed forces have special "duties and responsibilities", they must of necessity be barred from communicating to third parties, unless duly authorised to do so, information and ideas of the kind in issue in the present case, even if such ideas and information are the fruit of their own work.

This is particularly the case where the information and ideas in question have been classified as secret by the competent authorities.

3. Where military personnel are found to have contravened this prohibition, it is for the courts within whose jurisdiction they fall to apply to them the penalties laid down by law.

4. In the present case it has not been shown that, in their treatment of the applicant, the Greek courts misused the powers vested in them in this sphere.

[1] See paragraph 21 of the judgment.
[2] See paragraph 13 of the judgment.

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

COURT (PLENARY)

CASE OF HANDYSIDE v. THE UNITED KINGDOM

(Application no. 5493/72)

JUDGMENT

STRASBOURG

7 December 1976

In the Handyside case,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

Mr. G. BALLADORE PALLIERI, *President*,
Mr. H. MOSLER,
Mr. M. ZEKIA,
Mr. G. WIARDA,
Mrs. H. PEDERSEN,
Mr. THÓR VILHJÁLMSSON,
Mr. S. PETRÉN,
Mr. R. RYSSDAL,
Mr. A. BOZER,
Mr. W. GANSHOF VAN DER MEERSCH,
Sir Gerald FITZMAURICE,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. D. EVRIGENIS,
Mr. H. DELVAUX,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 8 and 9 June and from 2 to 4 November 1976,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The Handyside case was referred to the Court by the European Commission of Human Rights (hereinafter referred to as "the Commission"). The case originated in an application against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission on 13 April 1972 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") by a United Kingdom citizen, Mr. Richard Handyside.

2. The Commission’s request, to which was attached the report provided for under Article 31 (art. 31) of the Convention, was lodged with the registry of the Court on 12 January 1976, within the period of three months laid down by Articles 32 para. 1 and 47 (art. 32-1, art. 47). The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration made by the United Kingdom recognising the compulsory jurisdiction of the

Court (Article 46) (art. 46). The purpose of the Commission's request is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Article 10 of the Convention and Article 1 of the Protocol (art. 10, P1-1) of 20 March 1952 (hereinafter referred to as "Protocol No. 1").

3. On 20 January 1976, the President of the Court drew by lot, in the presence of the Registrar, the names of five of the seven judges called upon to sit as members of the Chamber; Sir Gerald Fitzmaurice, the elected judge of British nationality, and Mr. G. Balladore Pallieri, the President of the Court, were ex officio members under Article 43 (art. 43) of the Convention and Rule 21 para. 3 (b) of the Rules of Court respectively. The five judges thus designated were Mr. H. Mosler, Mr. M. Zekia, Mr. G. Wiarda, Mrs. H. Pedersen and Mr. S. Petrén (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

Mr. Balladore Pallieri assumed the office of President of the Chamber in accordance with Rule 21 para. 5.

4. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Government of the United Kingdom (hereinafter called "the Government") and the delegates of the Commission regarding the procedure to be followed; having regard to their concurring statements, the President decided by an Order of 6 February 1976 that it was not necessary at that stage for memorials to be filed. He also instructed the Registrar to invite the Commission to produce certain documents and these were received at the registry on 11 February.

5. On 29 April 1976, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court, "considering that the case raise[d] serious questions affecting the interpretation of the Convention ...".

6. On the same day, the Court held a preparatory meeting to consider the oral stage of the procedure. At this meeting it compiled a list of questions which it sent to the Commission and to the Government, requesting them to supply the required information in the course of their addresses.

7. After consulting, through the Registrar, the Agent of the Government and the delegates of the Commission, the President decided by an Order of 3 May 1976 that the oral hearings should open on 5 June.

8. The oral hearings were held in public at the Human Rights Building, Strasbourg, on 5 and 7 June 1976.

There appeared before the Court:

- for the Government:

Mr. P. FIFOOT, Legal Counsellor,
Foreign and Commonwealth Office, Barrister-at-Law,
Agent and *Counsel*,

Mr. G. SLYNN, Q.C., Recorder of Hereford,
Mr. N. BRATZA, Barrister-at-Law, *Counsel*,

Mr. A.H. HAMMOND, Assistant Legal Adviser, Home Office,
Mr. J.C. DAVEY, Principal, Home Office, *Advisers*;
- for the Commission:
Mr. G. SPERDUTI, *Principal Delegate*,
Mr. S. TRECHSEL, *Delegate*,
Mr. C. THORNBERRY, who had represented the applicant before the Commission, assisting the Delegates under Rule 29 para. 1, second sentence.

The Court heard the addresses and submissions of Mr. Fifoot and Mr. Slynn for the Government and of Mr. Sperduti, Mr. Trechsel and Mr. Thornberry for the Commission, as well as their replies to the questions put by the Court and several judges.

AS TO THE FACTS

Historical

9. The applicant, Mr. Richard Handyside, is proprietor of the publishing firm "Stage 1" in London which he opened in 1968. He has published, among other books, The Little Red Schoolbook (hereinafter called "the Schoolbook"), the original edition of which was the subject of the present case and a revised edition of which appeared on 15 November 1971.

10. The applicant's firm had previously published Socialism and Man in Cuba, by Che Guevara, Major Speeches, by Fidel Castro, and Revolution in Guinea, by Amilcar Cabral. Since 1971 four further titles have appeared, namely Revolution in the Congo, by Eldridge Cleaver, a book of writings from the Women's Liberation Movement called Body Politic, China's Socialist Revolution, by John and Elsie Collier, and The Fine Tubes Strike, by Tony Beck.

11. The British rights of the Schoolbook, written by Søren Hansen and Jesper Jensen, two Danish authors, had been purchased by the applicant in September 1970. The book had first been published in Denmark in 1969 and subsequently, after translation and with certain adaptations, in Belgium, Finland, France, the Federal Republic of Germany, Greece, Iceland, Italy, the Netherlands, Norway, Sweden and Switzerland as well as several non-European countries. Furthermore it circulated freely in Austria and Luxembourg.

12. After having arranged for the translation of the book into English the applicant prepared an edition for the United Kingdom with the help of a group of children and teachers. He had previously consulted a variety of people about the value of the book and intended publication in the United Kingdom on 1 April 1971. As soon as printing was completed he sent out several hundred review copies of the book, together with a press release, to

a selection of publications from national and local newspapers to educational and medical journals. He also placed advertisements for the book in various publications including The Bookseller, The Times Educational and Literary Supplements and Teachers World.

13. On 22 March 1971, the Daily Mirror published an account of the book's contents, and other accounts appeared in The Sunday Times and the Sunday Telegraph on 28 March. Further reports were carried by the Daily Telegraph on 29 and 30 March; they also indicated that representations would be made to the Director of Public Prosecutions demanding that action should be taken against the publication of the book. The Schoolbook was also the subject of further extensive press comment, some favourable and some not, immediately after and around the time of the seizure referred to below.

14. After receipt of a number of complaints, on 30 March 1971 the Director of Public Prosecutions asked the Metropolitan Police to undertake enquiries. As a result of these, on 31 March 1971, a successful application was made for a warrant under section 3 of the Obscene Publications Acts 1959/1964 to search the premises occupied by Stage 1 in London. The warrant was issued in the applicant's absence but in accordance with the procedure laid down by English law and a copy of the Schoolbook was before the judicial authority which issued the warrant. It was executed on the same day and 1,069 copies of the book were provisionally seized together with leaflets, posters, showcards and correspondence relating to its publication and sale.

15. Acting on the advice of his lawyers the applicant continued distributing copies of the book in the subsequent days. After the Director of Public Prosecutions had received information that further copies had been taken to Stage 1's premises after the search, further successful applications were made on 1 April 1971 (in conditions similar to those described above) to search again those premises and also the premises of the printers of the book. Later that day altogether 139 copies of the book were seized at Stage 1's premises and, at the printer's, 20 spoiled copies of the book, together with correspondence relating to it and the matrix with which the book was printed. About 18,800 copies of a total print of 20,000 copies were missed and subsequently sold, for example, to schools which had placed orders.

16. On 8 April 1971, a Magistrates' Court issued, under section 2 (1) of the Obscene Publications Act 1959, as amended by section 1 (1) of the Obscene Publications Act 1964, two summonses against the applicant for the following offences:

(a) on 31 March 1971 having in his possession 1,069 obscene books entitled "The Little Red Schoolbook" for publication for gain;

(b) on 1 April 1971, having in his possession 139 obscene books entitled "The Little Red Schoolbook" for publication for gain.

The summonses were served on the applicant on the same day. He thereupon ceased distribution of the book and advised bookshops accordingly but, by that time, some 17,000 copies were already in circulation.

17. The summonses were answerable on 28 May 1971 at Clerkenwell Magistrates' Court but, on the application of the Director of Public Prosecutions, the case was adjourned until 29 June. On that day the applicant appeared at Lambeth Magistrates' Court to which the case had been transferred, having consented to the case being heard and determined in summary proceedings by a magistrate rather than by a judge and a jury on indictment. He claims that this choice was dictated by his financial plight and the need to avoid the delays inherent in the indictment procedure although this is questioned by the Government. Having been granted legal aid, he was represented by counsel. On 1 July 1971, after witnesses had been called for both prosecution and defence, the applicant was found guilty of both offences and fined £25 on each summons and ordered to pay £110 costs. At the same time the court made a forfeiture order for the destruction of the books by the police.

18. On 10 July 1971 notices of appeal against both convictions were received by the Metropolitan Police from the applicant's solicitors. The grounds stated were "that the magistrate's decision was wrong and against the weight of the evidence". The appeal was heard before the Inner London Quarter Sessions on 20, 21, 22, 25 and 26 October 1971. At this hearing witnesses gave evidence on behalf of the prosecution and on behalf of the applicant. Judgment was delivered on 29 October 1971: the decision at first instance was upheld and the applicant was ordered to pay another £854 costs. The material seized as described above was then destroyed.

The applicant did not exercise his right of making a further appeal to the Court of Appeal since he did not dispute that the judgment of 29 October 1971 had correctly applied English law.

19. Whilst the Schoolbook was not the subject of proceedings in Northern Ireland, the Channel Islands or the Isle of Man, the same was not true of Scotland.

Indeed a Glasgow bookseller was charged under a local Act. However he was acquitted on 9 February 1972 by a stipendiary magistrate who considered that the book was not indecent or obscene within the meaning of that Act. It does not appear from the file whether the case concerned the original or the revised edition.

Further, a complaint was brought under Scottish law against Stage 1 in respect of the revised edition. It was dismissed on 8 December 1972 by an Edinburgh court solely on the ground that the accused could not have the necessary mens rea. In January 1973 the Procurator Fiscal announced that he would not appeal against this decision; he also did not avail himself of his right to initiate criminal proceedings against Mr. Handyside personally.

The Schoolbook

20. The original English language edition of the book, priced at thirty pence a copy, had altogether 208 pages. It contained an introduction headed "All grown-ups are paper tigers", an "Introduction to the British edition", and chapters on the following subjects: Education, Learning, Teachers, Pupils and The System. The chapter on Pupils contained a twenty-six page section concerning "Sex" which included the following sub-sections: Masturbation, Orgasm, Intercourse and petting, Contraceptives, Wet dreams, Menstruation, Child-molesters or "dirty old men", Pornography, Impotence, Homosexuality, Normal and abnormal, Find out more, Venereal diseases, Abortion, Legal and illegal abortion, Remember, Methods of abortion, Addresses for help and advice on sexual matters. The Introduction stated: "This book is meant to be a reference book. The idea is not to read it straight through, but to use the list of contents to find and read about the things you're interested in or want to know more about. Even if you're at a particularly progressive school you should find a lot of ideas in the book for improving things."

21. The applicant had planned the distribution of the book through the ordinary book-selling channels although it was said at the appeal hearing to have been accepted that the work was intended for, and intended to be made available to, school-children of the age of twelve and upwards.

22. Pending the appeal hearing, the applicant consulted his legal advisers concerning a revision of the Schoolbook to avoid further prosecutions; apparently he tried to consult the Director of Public Prosecutions as well, but in vain. It was decided to eliminate or re-write the offending lines which had been attacked before the Magistrates' Court by the prosecution but to do so necessitated, in some cases, re-writing substantially more than these criticised sentences. There were other alterations made to the text by way of general improvement, for example in response to comments and suggestions from readers and the updating of changed data (addresses, etc.).

23. The revised edition was published on 15 November 1971. After consulting the Attorney General, the Director of Public Prosecutions announced on 6 December 1971 that the new edition would not be the subject of a prosecution. This publication took place after the Quarter Sessions judgment but the revision of the Schoolbook had been completed, and the printing of the new version was in train, well before.

Domestic law

24. The action against the Schoolbook was based on the Obscene Publications Act 1959, as amended by the Obscene Publications Act 1964 (hereinafter called "the 1959/1964 Acts").

25. The relevant extracts from the 1959/1964 Acts, read together, are as follows:

Section 1

"(1) For the purposes of this act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

(2) In this Act 'article' means any description of article containing

or embodying matter to be read or looked at or both, any sound record,

and any film or other record of a picture or pictures.

..."

Section 2

"(1) Subject as hereinafter provided, any person who, whether for gain or not, publishes an obscene article or who has an obscene article for publication for gain (whether gain to himself or gain to another) shall be liable -

(a) on summary conviction to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding six months;

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding three years or both.

... A person shall be deemed to have an article for publication for gain if with a view to such publication he has the article in his ownership, possession or control.

...

(4) A person publishing an article shall not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offence that the matter is obscene.

..."

Section 3

"(1) If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting that, in any premises ... specified in the information, obscene articles are, or are from time to time, kept for publication for gain, the justice may issue a warrant ... empowering any constable to enter (if need be by force) and search the premises ... within fourteen days from the date of the warrant, and to seize and remove any articles found therein ... which the constable has reason to believe to be obscene articles and to be kept for publication for gain.

(2) A warrant under the foregoing subsection shall, if any obscene articles are seized under the warrant, also empower the seizure and removal of any documents found in the premises ... which relate to a trade or business carried on at the premises ...

(3) Any articles seized ... shall be brought before a justice of the peace ... who ... may thereupon issue a summons to the occupier of the premises ... to appear ... before a magistrates' court ... to show cause why the articles or any of them should not be forfeited; and if the court is satisfied, as respects any of the articles, that at the time when they were seized they were obscene articles kept for publication for gain, the court shall order those articles to be forfeited.

...

(4) In addition to the person summoned, any other person being the owner, author or maker of any of the articles brought before the court, or any other person through whose hands they had passed before being seized, shall be entitled to appear before the court ... to show cause why they should not be forfeited.

(5) Where an order is made under this section for the forfeiture of any articles, any person who appeared, or was entitled to appear, to show cause against the making of the order may appeal to quarter sessions; and no such order shall take effect until the expiration of fourteen days after the day on which the order is made, or, if before the expiration thereof notice of appeal is duly given or application is made for the statement of a case for the opinion of the High Court, until the final determination or abandonment of the proceedings on the appeal or case.

...

(7) For the purposes of this section the question whether an article is obscene shall be determined on the assumption that copies of it would be published in any manner likely having regard to the circumstances in which it was found, but in no other manner.

...

... Where articles are seized under section 3 ... and a person is convicted under section 2 ... of having them for publication for gain, the court on his conviction shall order the forfeiture of those articles.

Provided that an order made by virtue of this subsection (including an order so made on appeal) shall not take effect until the expiration of the ordinary time within which an appeal in the matter of the proceedings in which the order was made may be instituted or, where such an appeal is duly instituted, until the appeal is finally decided or abandoned;

..."

Section 4

"(1) A person shall not be convicted of an offence against section 2 of this Act and an order for forfeiture shall not be made under the foregoing section if it is proved that publication of the article in question is justified as being for the public good on the

ground that it is in the interests of science, literature, art of learning, or of other objects of general concern.

(2) It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or to negative the said ground."

Section 5

"...

(3) This Act shall not extend to Scotland or to Northern Ireland."

26. At the time of the events under review, the authorities frequently adopted a non-contentious procedure ("disclaimer/caution procedure") rather than instituting, as in this case, criminal proceedings. However it could only be used when the individual admitted that the article was obscene and consented to its destruction. The procedure constituted no more than a matter of practice and was abandoned in 1973 following criticisms expressed in a judicial decision.

The judgment of the Inner London Quarter Sessions

27. At the appeal hearing two principal issues were examined by the court, namely, first, whether or not the Crown had proved beyond reasonable doubt that the Schoolbook was an obscene article within the meaning of the 1959/1964 Acts; and secondly, if so, whether or not the applicant had established the defence under section 4 of the 1959/1964 Acts to the effect that he had shown, on a balance of probabilities, that publication of the book was justified as being for the public good.

28. The court first dealt with the issue of obscenity. Following a decision in another case the court noted that it had to be satisfied that the persons who it was alleged were likely to read the article would constitute a significant proportion. It also accepted the meaning of the words "deprave and corrupt" as it had been explained in that other case and about which there had been no dispute between the parties.

29. Following further previous case-law, the court had decided that expert evidence should be admitted on the question of whether the Schoolbook was obscene. Such evidence, though not normally admissible for this purpose but only in connection with the defence under section 4 of the 1959/1964 Acts, could be heard in the present case which was concerned with the effect of the article upon children.

The court had therefore heard seven witnesses on behalf of the prosecution and nine on behalf of the applicant, being experts in various fields, in particular those of psychiatry and teaching; the views they had expressed were very different. After they had been heard, the applicant had argued that, when one had the sincere opinion of many highly-qualified experts against the prosecution’s case, it was impossible to say that the

tendency to deprave and corrupt had been established with certainty. The court was unable to accept this submission: in its judgment of 29 October 1971 it pointed out that there was an almost infinite variation in the relevant background of the children who would be in one way or another affected by the book, so that it was difficult to speak of "true facts" in this case. The views of the applicant's witnesses had been those approaching the extreme of one wing of the more broadly varied outlook on the education and upbringing of children, whereas the evidence given on behalf of the prosecution tended to cover the views of those who, although clearly tending in the opposite direction, were less radical. Particularly, when looking at the evidence on behalf of the applicant, the court had been driven to the conclusion that most of the witnesses were so uncritical of the book looked at as a whole, and so unrestrained in their praise of it, as to make them at times less convincing than otherwise they might have been. In summary the court considered that a good deal of the witnesses had been so single-minded in an extreme point of view as to forfeit in a large measure the power to judge with that degree of responsibility which makes the evidence of any great value on a matter of this sort.

30. Concerning the Schoolbook itself, the court first stressed that it was intended for children passing through a highly critical stage of their development. At such a time a very high degree of responsibility ought to be exercised by the courts. In the present case, they had before them, as something said to be a perfectly responsible adult opinion, a work of an extreme kind, unrelieved by any indication that there were any alternative views; this was something which detracted from the opportunity for children to form a balanced view on some of the very strong advice given therein.

31. The court then briefly examined the background. For example, looking at the book as a whole, marriage was very largely ignored. Mixing a very one-sided opinion with fact and purporting to be a book of reference, it would tend to undermine, for a very considerable proportion of children, many of the influences, such as those of parents, the Churches and youth organisations, which might otherwise provide the restraint and sense of responsibility for oneself which found inadequate expression in the book.

The court reached the conclusion that, on the whole, and quite clearly through the mind of the child, the Schoolbook was inimical to good teacher/child relationships; in particular, there were numerous passages that it found to be subversive, not only to the authority but to the influence of the trust between children and teachers.

32. Passing to the tendency to deprave and corrupt, the court considered the atmosphere of the book looked at as a whole, noting that the sense of some responsibility for the community as well as to oneself, if not wholly absent, was completely subordinated to the development of the expression of itself by the child. As indications of what it considered to result in a

tendency to deprave and corrupt, the court quoted or referred to the following:

A. Passage headed "Be yourself" (p. 77):

"Maybe you smoke pot or go to bed with your boyfriend or girlfriend - and don't tell your parents or teachers, either because you don't dare to or just because you want to keep it secret.

Don't feel ashamed or guilty about doing things you really want to do and think are right just because your parents or teachers might disapprove. A lot of these things will be more important to you later in life than the things that are 'approved of'."

The objectionable point was that there was no reference there to the illegality of smoking pot which was only to be found many pages further on in an entirely different part of the book. Similarly there was no specific mention at all in the book of the illegality of sexual intercourse by a boy who has attained the age of fourteen and a girl who has not yet attained sixteen. It had to be remembered that the Schoolbook was indicated as a work of reference and that one looked up the part which one wanted rather than read it as a whole book.

B. The passage (pp. 97-98) headed "Intercourse and petting" under the main heading "Sex": to lay this before children as young as many of those who the court considered would read the book, without any injunction about restraint or unwisdom, was to produce a tendency to deprave and corrupt.

C. The passage - (pp. 103 to 105) - under the heading of "Pornography" and particularly the following:

"Porn is a harmless pleasure if it isn't taken seriously and believed to be real life. Anybody who mistakes it for reality will be greatly disappointed.

But it's quite possible that you may get some good ideas from it and you may find something which looks interesting and that you haven't tried before."

Unfortunately, the sane and sensible first paragraph quoted above was immediately followed by a passage suggesting to children that in pornography they might find some good ideas which they might adopt. This was to raise the real likelihood that a substantial number of children would feel it incumbent upon them to look for and practise such things. Moreover, just on the previous page there was the following passage: "But there are other kinds - for example pictures of intercourse with animals or pictures of

people hurting each other in various ways. Pornographic stories describe the same sort of thing." The court considered that, although it was improbable that young people would be likely to commit sexual offences with animals as a result of this, the possibility that they should practise some other forms of cruelty to one another, for sexual satisfaction, was a real likelihood in the case of a significant number of children if this got into the hands of children at a disturbed, unsettled and sexually excited stage of their lives. Such acts might very well be criminal offences just like smoking pot and sexual intercourse between a boy of at least fourteen and a girl not yet sixteen. The expression "to deprave and corrupt" must include the admission of or the encouragement to commit criminal offences of that kind.

33. The court concluded "in the light of the whole of the book that this book or this article on sex or this section or chapter on pupils, whichever one chooses as an article, looked at as a whole does tend to deprave and corrupt a significant number, significant proportion, of the children likely to read it". Such children would, it was satisfied, include a very substantial number aged under sixteen.

34. The court finally dealt with the issue of the defence under section 4 of the 1959/1964 Acts. It stated that no doubt there were many features about the book which, taken by themselves, were good. The unfortunate thing was that so frequently the good was intermixed with things that were bad and detracted from it.

For example, much of the information about contraceptives (pp. 98-102) was very relevant and desirable which should be laid before very many children who might not otherwise readily have access to it. But it was damaged by the suggestion, backed by the recommendation to take direct action if the school authorities would not give way that every school should have at least one contraceptive vending machine (p. 101).

Similarly, the treatment of the subject of homosexuality (pp. 105-107) was a factual, very compassionate, understanding and valuable statement. But again, no matter how good one assessed the value of this section, it was hopelessly damning by its setting and context, and the fact that it, only, contained any suggestion of a stable relationship in relation to sex and that marriage received no such treatment at all. Moreover, there was a very real danger that this passage would create in the minds of children a conclusion that that kind of relationship was something permanent.

Again, there were passages with regard to venereal diseases (pp. 110-111), contraception (pp. 98-102) and abortion (pp. 111-116), containing dispassionately and sensibly, and on the whole completely accurately, a great deal of advice which ought not to be denied to young children. However, on the balance of probabilities, these matters could not outweigh what the court was convinced had a tendency to deprave and corrupt. The court asked itself whether, granted the degree of indecency which it found, the good likely to result from the Schoolbook was such that it ought,

nevertheless, to be published in the public interest; it regretfully came to the conclusion that the burden on the appellant to show that "publication of the article in question is justified as being for the public good" had not been discharged.

Further details concerning the revised edition

35. The passages from the original edition of the Schoolbook whose "extreme" tone or "subversive" aspects had been emphasised by the judgment of 29 October 1971 (paragraphs 30 and 31 above) are repeated either with no, or with no important, changes in the revised edition which was prepared before that date but published on 15 November 1971 (paragraphs 22-23 above).

Of the passages cited by Quarter Sessions as striking examples of the tendency to deprave and corrupt (paragraph 32 above), one was not altered (p. 77, "Be yourself"). On the other hand, the others were fairly extensively softened (pp. 97-98, "Intercourse and petting", and pp. 103-105, "Pornography") and on page 95 of the work there is now a mention of the illegality of sexual intercourse with a girl under sixteen.

Furthermore, the revised edition no longer has any reference to the installation in schools of contraceptive vending machines and points out, on page 106, that homosexual tendencies are often temporary.

PROCEEDINGS BEFORE THE COMMISSION

36. In his application, lodged with the Commission on 13 April 1972, Mr. Handyside complained that the action in the United Kingdom against himself and the Schoolbook was in breach of his right to freedom of thought, conscience and belief under Article 9 (art. 9) of the Convention, his right to freedom of expression under Article 10 (art. 10) of the Convention and his right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1 (P1-1). He also maintained that, contrary to Article 14 (art. 14) of the Convention, the United Kingdom had failed to secure to him the above rights without discrimination on the ground of political or other opinion; that the proceedings brought against him had been contrary to Article 7 (art. 7) of the Convention; and finally that the respondent Government were also in breach of Articles 1 and 13 (art. 1, art. 13) of the Convention. He also itemised the losses he had incurred as a result of the action in question, which included £14,184 in quantified damages and further unquantified items.

37. In its decision of 4 April 1974, the Commission accepted the application insofar as it concerned allegations under Article 10 of the Convention and Article 1 of Protocol No. 1 (art. 10, P1-1), but declared it inadmissible insofar as it concerned Articles 1, 7, 9, 13 and 14 (art. 1, art. 7,

art. 9, art. 13, art. 14) of the Convention. It decided on the same date to consider, ex officio, any issue which might arise from the circumstances of the case under Articles 17 and 18 (art. 17, art. 18) of the Convention and notified the parties of this a few days later.

38. In its report of 30 September 1975, the Commission expressed the opinion:

- by eight votes to five, with one abstention, that there had been no violation of Article 10 (art. 10) of the Convention;

- that neither the provisional seizure (eleven votes) nor the forfeiture and destruction of the Schoolbook (nine votes to four, with one abstention) had violated Article 1 of Protocol No. 1 (P1-1);

- by twelve votes in favour, with two abstentions, that further discussion under Article 17 (art. 17) of the Convention was unnecessary;

- unanimously, that no breach of Article 18 (art. 18) of the Convention had been established.

The report contains various separate opinions.

FINAL SUBMISSIONS MADE TO THE COURT

39. The following final submissions were made to the Court at the oral hearing on 7 June 1976:

- for the Commission:

> "May it please the Court to say and to judge
>
> (1) whether, in consequence of the legal proceedings instituted in the United Kingdom against the applicant as publisher of The Little Red Schoolbook, proceedings which led to the seizure and confiscation of that publication and the sentencing of the applicant to payment of a fine and costs, there was or was not a violation of the Convention, in particular of Article 10 and of Article 1 of Protocol No. 1 (art. 10, P1-1);
>
> (2) if so, whether the applicant should be afforded just satisfaction in accordance with Article 50 (art. 50) of the Convention, of a nature and amount to be determined by the Court."

- for the Government:

> "... the United Kingdom Government have noted the submissions made by the delegates, and as to the first of them we would ask the Court to say that in this matter there was no violation.
>
> As to the second matter ..., I think I should say this that this Court has not been addressed at this stage on any matter with regard to satisfaction and it is wholly premature for that issue to be one that is to be considered by the Court at this stage. If it is to be considered - if our submission is right on the first issue, it will not be -, then there is an occasion for further argument on that matter."

40. In reply to an observation by the Agent of the Government, the Commission's principal delegate stated that, when using the words "in particular", he had meant to indicate the two Articles which were to be taken into consideration by the Court.

AS TO THE LAW

41. On 4 April 1974, following a hearing in the presence of the parties on both merits and admissibility, the Commission accepted the application insofar as it concerned Article 10 of the Convention and Article 1 of Protocol No. 1 (art. 10, P1-1), but declared it inadmissible to the extent that Mr. Handyside invoked Articles 1, 7, 9, 13 and 14 (art. 1, art. 7, art. 9, art. 13, art. 14) of the Convention. A few days later, the Commission advised the parties that it would take into consideration Articles 17 and 18 (art. 17, art. 18) as well. However, in its report of 30 September 1975 (paragraphs 170 and 176), it expressed the opinion, in agreement with the applicant and the Government (paragraphs 92 and 128), that Article 17 (art. 17) is of no application in this case.

In reply to a question from the Court, the delegates of the Commission specified that the allegations not retained on 4 April 1974 (Articles 1, 7, 9, 13 and 14 of the Convention) (art. 1, art. 7, art. 9, art. 13, art. 14) related to the same facts as did those based on Article 10 of the Convention and Article 1 of Protocol No. 1 (art. 10, P1-1). They were accordingly not separate complaints but mere legal submissions or arguments that had been put forward along with others. However, the provisions of the Convention and of the Protocol form a whole; once a case is duly referred to it, the Court may take cognisance of every question of law arising in the course of the proceedings and concerning facts submitted to its examination by a Contracting State or by the Commission. Master of the characterisation to be given in law to these facts, the Court is empowered to examine them, if it deems it necessary and if need be ex officio, in the light of the Convention and the Protocol as a whole (see, inter alia, the judgment of 23 July 1968 on the merits of the "Belgian Linguistic" case, Series A no. 6, p. 30, para. 1, and the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 29, para. 49).

The Court, bearing in mind Mr. Handyside's original application as well as certain statements made before the Court (see, inter alia, paragraphs 52 and 56 below), finds that it should have regard to Article 14 (art. 14) of the Convention in addition to Articles 10 and 18 and Article 1 of Protocol No. 1 (art. 10, art. 18, P1-1). It shares the opinion of the Commission that Articles 1, 7, 9, 13 and 17 (art. 1, art. 7, art. 9, art. 13, art. 17) are not relevant in this case.

I. ON THE ALLEGED VIOLATION OF ARTICLE 10 (art. 10) OF THE CONVENTION

42. The applicant claims to be the victim of a violation of Article 10 (art. 10) of the Convention which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

43. The various measures challenged - the applicant’s criminal conviction, the seizure and subsequent forfeiture and destruction of the matrix and of hundreds of copies of the Schoolbook - were without any doubt, and the Government did not deny it, "interferences by public authority" in the exercise of his freedom of expression which is guaranteed by paragraph 1 (art. 10-1) of the text cited above. Such interferences entail a "violation" of Article 10 if they do not fall within one of the exceptions provided for in paragraph 2 (art. 10-2), which is accordingly of decisive importance in this case.

44. If the "restrictions" and "penalties" complained of by Mr. Handyside are not to infringe Article 10 (art. 10), they must, according to paragraph 2 (art. 10-2), in the first place have been "prescribed by law". The Court finds that this was the case. In the United Kingdom legal system, the basis in law for the measures in question was the 1959/1964 Acts (paragraphs 14-18, 24-25 and 27-34 above). Besides, this was not contested by the applicant who further admitted that the competent authorities had correctly applied those Acts.

45. Having thus ascertained that the interferences complained of satisfied the first of the conditions in paragraph 2 of Article 10 (art. 10-2), the Court then investigated whether they also complied with the others. According to the Government and the majority of the Commission, the interferences were "necessary in a democratic society", "for the protection of ... morals".

46. Sharing the view of the Government and the unanimous opinion of the Commission, the Court first finds that the 1959/1964 Acts have an aim that is legitimate under Article 10 para. 2 (art. 10-2), namely, the protection of morals in a democratic society. Only this latter purpose is relevant in this case since the object of the said Acts - to wage war on "obscene"

publications, defined by their tendency to "deprave and corrupt" - is linked far more closely to the protection of morals than to any of the further purposes permitted by Article 10 para. 2 (art. 10-2).

47. The Court must also investigate whether the protection of morals in a democratic society necessitated the various measures taken against the applicant and the Schoolbook under the 1959/1964 Acts. Mr. Handyside does not restrict himself to criticising these Acts as such: he also makes - from the viewpoint of the Convention and not of English law - several complaints concerning their application in his case.

The Commission's report and the subsequent hearings before the Court in June 1976 brought to light clear-cut differences of opinion on a crucial problem, namely, how to determine whether the actual "restrictions" and "penalties" complained of by the applicant were "necessary in a democratic society", "for the protection of morals". According to the Government and the majority of the Commission, the Court has only to ensure that the English courts acted reasonably, in good faith and within the limits of the margin of appreciation left to the Contracting States by Article 10 para. 2 (art. 10-2). On the other hand, the minority of the Commission sees the Court's task as being not to review the Inner London Quarter Sessions judgment but to examine the Schoolbook directly in the light of the Convention and of nothing but the Convention.

48. The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (judgment of 23 July 1968 on the merits of the "Belgian Linguistic" case, Series A no. 6, p. 35, para. 10 in fine). The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Article 26) (art. 26).

These observations apply, notably, to Article 10 para. 2 (art. 10-2). In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. The Court notes at this juncture that, whilst the adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), is not synonymous with "indispensable" (cf., in Articles 2 para. 2 (art. 2-2) and 6 para. 1 (art. 6-1), the words "absolutely necessary" and "strictly

necessary" and, in Article 15 para. 1 (art. 15-1), the phrase "to the extent strictly required by the exigencies of the situation"), neither has it the flexibility of such expressions as "admissible", "ordinary" (cf. Article 4 para. 3) (art. 4-3), "useful" (cf. the French text of the first paragraph of Article 1 of Protocol No. 1) (P1-1), "reasonable" (cf. Articles 5 para. 3 and 6 para. 1) (art. 5-3, art. 6-1) or "desirable". Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.

Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force (Engel and others judgment of 8 June 1976, Series A no. 22, pp. 41-42, para. 100; cf., for Article 8 para. 2 (art. 8-2), De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 45-46, para. 93, and the Golder judgment of 21 February 1975, Series A no. 18, pp. 21-22, para. 45).

49. Nevertheless, Article 10 para. 2 (art. 10-2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19) (art. 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court. In this respect, the Court refers to Article 50 (art. 50) of the Convention ("decision or ... measure taken by a legal authority or any other authority") as well as to its own case-law (Engel and others judgment of 8 June 1976, Series A no. 22, pp. 41-42, para. 100).

The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.

From another standpoint, whoever exercises his freedom of expression undertakes "duties and responsibilities" the scope of which depends on his

situation and the technical means he uses. The Court cannot overlook such a person's "duties" and "responsibilities" when it enquires, as in this case, whether "restrictions" or "penalties" were conducive to the "protection of morals" which made them "necessary" in a "democratic society".

50. It follows from this that it is in no way the Court's task to take the place of the competent national courts but rather to review under Article 10 (art. 10) the decisions they delivered in the exercise of their power of appreciation.

However, the Court's supervision would generally prove illusory if it did no more than examine these decisions in isolation; it must view them in the light of the case as a whole, including the publication in question and the arguments and evidence adduced by the applicant in the domestic legal system and then at the international level. The Court must decide, on the basis of the different data available to it, whether the reasons given by the national authorities to justify the actual measures of "interference" they take are relevant and sufficient under Article 10 para. 2 (art. 10-2) (cf., for Article 5 para. 3 (art. 5-3), the Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 24-25, para. 12, the Neumeister judgment of 27 June 1968, Series A no. 8, p. 37, para. 5, the Stögmüller judgment of 10 November 1969, Series A no. 9, p. 39, para. 3, the Matznetter judgment of 10 November 1969, Series A no. 10, p. 31, para. 3, and the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 42, para. 104).

51. Following the method set out above, the Court scrutinized under Article 10 para. 2 (art. 10-2) the individual decisions complained of, in particular, the judgment of the Inner London Quarter Sessions.

The said judgment is summarised in paragraphs 27-34 above. The Court reviewed it in the light of the case as a whole; in addition to the pleadings before the Court and the Commission's report, the memorials and oral explanations presented to the Commission between June 1973 and August 1974 and the transcript of the proceedings before the Quarter Sessions were, inter alia, taken into consideration.

52. The Court attaches particular importance to a factor to which the judgment of 29 October 1971 did not fail to draw attention, that is, the intended readership of the Schoolbook. It was aimed above all at children and adolescents aged from twelve to eighteen. Being direct, factual and reduced to essentials in style, it was easily within the comprehension of even the youngest of such readers. The applicant had made it clear that he planned a widespread circulation. He had sent the book, with a press release, to numerous daily papers and periodicals for review or for advertising purposes. What is more, he had set a modest sale price (thirty pence), arranged for a reprint of 50,000 copies shortly after the first impression of 20,000 and chosen a title suggesting that the work was some kind of handbook for use in schools.

Basically the book contained purely factual information that was generally correct and often useful, as the Quarter Sessions recognised. However, it also included, above all in the section on sex and in the passage headed "Be yourself" in the chapter on pupils (paragraph 32 above), sentences or paragraphs that young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offences. In these circumstances, despite the variety and the constant evolution in the United Kingdom of views on ethics and education, the competent English judges were entitled, in the exercise of their discretion, to think at the relevant time that the Schoolbook would have pernicious effects on the morals of many of the children and adolescents who would read it.

However, the applicant maintained, in substance, that the demands of the "protection of morals" or, to use the wording of the 1959/1964 Acts, of the war against publications likely to "deprave and corrupt", were but a pretext in his case. The truth of the matter, he alleged, was that an attempt had been made to muzzle a small-scale publisher whose political leanings met with the disapproval of a fragment of public opinion. Proceedings were set in motion, said he, in an atmosphere little short of "hysteria", stirred up and kept alive by ultra-conservative elements. The accent in the judgment of 29 October 1971 on the anti-authoritarian aspects of the Schoolbook (paragraph 31 above) showed, according to the applicant, exactly what lay behind the case.

The information supplied by Mr. Handyside seems, in fact, to show that letters from members of the public, articles in the press and action by Members of Parliament were not without some influence in the decision to seize the Schoolbook and to take criminal proceedings against its publisher. However, the Government drew attention to the fact that such initiatives could well have been explained not by some dark plot but by the genuine emotion felt by citizens faithful to traditional moral values when, towards the end of March 1971, they read in certain newspapers extracts from the book which was due to appear on 1 April. The Government also emphasised that the proceedings ended several months after the "campaign" denounced by the applicant and that he did not claim that it had continued in the intervening period. From this the Government concluded that the "campaign" in no way impaired dispassionate deliberation at the Quarter Sessions.

For its part the Court finds that the anti-authoritarian aspects of the Schoolbook as such were not held in the judgment of 29 October 1971 to fall foul of the 1959/1964 Acts. Those aspects were taken into account only insofar as the appeal court considered that, by undermining the moderating influence of parents, teachers, the Churches and youth organisations, they aggravated the tendency to "deprave and corrupt" which in its opinion

resulted from other parts of the work. It should be added that the revised edition was allowed to circulate freely by the British authorities despite the fact that the anti-authoritarian passages again appeared there in full and even, in some cases, in stronger terms (paragraph 35 above). As the Government noted, this is hard to reconcile with the theory of a political intrigue.

The Court thus allows that the fundamental aim of the judgment of 29 October 1971, applying the 1959/1964 Acts, was the protection of the morals of the young, a legitimate purpose under Article 10 para. 2 (art. 10-2). Consequently, the seizures effected on 31 March and 1 April 1971, pending the outcome of the proceedings that were about to open, also had this aim.

53. It remains to examine the "necessity" of the measures in dispute, beginning with the said seizures.

If the applicant is right, their object should have been at the most one or a few copies of the book to be used as exhibits in the criminal proceedings. The Court does not share this view since the police had good reasons for trying to lay their hands on all the stock as a temporary means of protecting the young against a danger to morals on whose existence it was for the trial court to decide. The legislation of many Contracting States provides for a seizure analogous to that envisaged by section 3 of the English 1959/1964 Acts.

54. A series of arguments which merit reflection was advanced by the applicant and the minority of the Commission concerning the "necessity" of the sentence and the forfeiture at issue.

Firstly, they drew attention to the fact that the original edition of the Schoolbook was the object of no proceedings in Northern Ireland, the Isle of Man and the Channel Islands and of no conviction in Scotland and that, even in England and Wales, thousands of copies circulated without impediment despite the judgment of 29 October 1971.

The Court recalls that section 5 (3) of the 1959/1964 Acts provides that they shall not extend to Scotland or to Northern Ireland (paragraph 25 in fine above). Above all, it must not be forgotten that the Convention, as is shown especially by its Article 60 (art. 60), never puts the various organs of the Contracting States under an obligation to limit the rights and freedoms it guarantees. In particular, in no case does Article 10 para. 2 (art. 10-2) compel them to impose "restrictions" or "penalties" in the field of freedom of expression; it in no way prevents them from not availing themselves of the expedients it provides for them (cf. the words "may be subject"). The competent authorities in Northern Ireland, the Isle of Man and the Channel Islands may, in the light of local conditions, have had plausible reasons for not taking action against the book and its publisher, as may the Scottish Procurator Fiscal for not summonsing Mr. Handyside to appear in person in Edinburgh after the dismissal of the complaint under Scottish law against

Stage 1 in respect of the revised edition (paragraph 19 above). Their failure to act – into which the Court does not have to enquire and which did not prevent the measures taken in England from leading to revision of the Schoolbook - does not prove that the judgment of 29 October 1971 was not a response to a real necessity, bearing in mind the national authorities' margin of appreciation.

These remarks also apply, mutatis mutandis, to the circulation of many copies in England and Wales.

55. The applicant and the minority of the Commission also stressed that the revised edition, albeit little different in their view from the first, was not the object of proceedings in England and Wales.

The Government charged them with minimising the extent of the changes made to the original text of the Schoolbook: although the changes were made between the conviction at first instance on 1 July 1971 and the appeal judgment of 29 October 1971, they were said to relate to the main passages cited by the Quarter Sessions as showing particularly clearly a tendency to "deprave and corrupt". The Government claimed that the Director of Public Prosecutions must have taken the view that the changes dispensed him from invoking the 1959/1964 Acts again.

In the Court's view, the absence of proceedings against the revised edition, which differed fairly extensively from the original edition on the points at issue (paragraphs 22-23 and 35 above), rather suggests that the competent authorities wished to limit themselves to what was strictly necessary, an attitude in conformity with Article 10 (art. 10) of the Convention.

56. The treatment meted out to the Schoolbook and its publisher in 1971 was, according to the applicant and the minority of the Commission, all the less "necessary" in that a host of publications dedicated to hard core pornography and devoid of intellectual or artistic merit allegedly profit by an extreme degree of tolerance in the United Kingdom. They are exposed to the gaze of passers-by and especially of young people and are said generally to enjoy complete impunity, the rare criminal prosecutions launched against them proving, it was asserted, more often than not abortive due to the great liberalism shown by juries. The same was claimed to apply to sex shops and much public entertainment.

The Government countered this by the remark, supported by figures, that the Director of Public Prosecutions does not remain inactive nor does the police, despite the scanty manpower resources of the squad specialising in this field. Moreover, they claim that, in addition to proceedings properly so called, seizures were frequently made at the relevant time under the "disclaimer/caution procedure" (paragraph 26 above).

In principle it is not the Court's function to compare different decisions taken, even in apparently similar circumstances, by prosecuting authorities and courts; and it must, just like the respondent Government, respect the

independence of the courts. Furthermore and above all, the Court is not faced with really analogous situations: as the Government pointed out, the documents in the file do not show that the publications and entertainment in question were aimed, to the same extent as the Schoolbook (paragraph 52 above), at children and adolescents having ready access thereto.

57. The applicant and the minority of the Commission laid stress on the further point that, in addition to the original Danish edition, translations of the "Little Book" appeared and circulated freely in the majority of the member States of the Council of Europe.

Here again, the national margin of appreciation and the optional nature of the "restrictions" and "penalties" referred to in Article 10 para. 2 (art. 10-2) prevent the Court from accepting the argument. The Contracting States have each fashioned their approach in the light of the situation obtaining in their respective territories; they have had regard, inter alia, to the different views prevailing there about the demands of the protection of morals in a democratic society. The fact that most of them decided to allow the work to be distributed does not mean that the contrary decision of the Inner London Quarter Sessions was a breach of Article 10 (art. 10). Besides, some of the editions published outside the United Kingdom do not include the passages, or at least not all the passages, cited in the judgment of 29 October 1971 as striking examples of a tendency to "deprave and corrupt".

58. Finally, at the hearing on 5 June 1976, the delegate expounding the opinion of the minority of the Commission maintained that in any event the respondent State need not have taken measures as Draconian as the initiation of criminal proceedings leading to the conviction of Mr. Handyside and to the forfeiture and subsequent destruction of the Schoolbook. The United Kingdom was said to have violated the principle of proportionality, inherent in the adjective "necessary", by not limiting itself either to a request to the applicant to expurgate the book or to restrictions on its sale and advertisement.

With regard to the first solution, the Government argued that the applicant would never have agreed to modify the Schoolbook if he had been ordered or asked to do so before 1 April 1971: was he not strenuously disputing its "obscenity"? The Court for its part confines itself to finding that Article 10 (art. 10) of the Convention certainly does not oblige the Contracting States to introduce such prior censorship.

The Government did not indicate whether the second solution was feasible under English law. Neither does it appear that it would have been appropriate in this case. There would scarcely have been any sense in restricting to adults sales of a work destined above all for the young; the Schoolbook would thereby have lost the substance of what the applicant considered to be its raison d’être. Moreover, he did not advert to this question.

59. On the strength of the data before it, the Court thus reaches the conclusion that no breach of the requirements of Article 10 (art. 10) has been established in the circumstances of the present case.

II. ON THE ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 (P1-1)

60. The applicant in the second place alleges the violation of Article 1 of Protocol No. 1 (P1-1) which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

61. The complaint concerns two distinct measures, namely, the seizure on 31 March and 1 April 1971 of the matrix and of hundreds of copies of the Schoolbook, on the one hand, and their forfeiture and subsequent destruction following the judgment of 29 October 1971, on the other. Both measures interfered with Mr. Handyside’s right "to the peaceful enjoyment of his possessions". The Government do not contest this but, in agreement with the majority of the Commission, maintain that justification for the measures is to be found in the exceptions attached by Article 1 of the Protocol (P1-1) to the principle enunciated in its first sentence.

62. The seizure complained of was provisional. It did no more than prevent the applicant, for a period, from enjoying and using as he pleased possessions of which he remained the owner and which he would have recovered had the proceedings against him resulted in an acquittal.

In these circumstances, the Court thinks that the second sentence of the first paragraph of Article 1 (P1-1) does not come into play in this case. Admittedly the expression "deprived of his possessions", in the English text, could lead one to think otherwise but the structure of Article 1 (P1-1) shows that that sentence, which originated moreover in a Belgian amendment drafted in French (Collected Edition of the "travaux préparatoires", document H (61) 4, pp. 1083, 1084, 1086, 1090, 1099, 1105, 1110-1111 and 1113-1114), applies only to someone who is "deprived of ownership" ("privé de sa propriété").

On the other hand the seizure did relate to "the use of property" and thus falls within the ambit of the second paragraph. Unlike Article 10 para. 2 (art. 10-2) of the Convention, this paragraph sets the Contracting States up as sole judges of the "necessity" for an interference. Consequently, the

Court must restrict itself to supervising the lawfulness and the purpose of the restriction in question. It finds that the contested measure was ordered pursuant to section 3 of the 1959/1964 Acts and following proceedings which it was not contested were in accordance with the law. Again, the aim of the seizure was "the protection of morals" as understood by the competent British authorities in the exercise of their power of appreciation (paragraph 52 above). And the concept of "protection of morals" used in Article 10 para. 2 (art. 10-2) of the Convention, is encompassed in the much wider notion of the "general interest" within the meaning of the second paragraph of Article 1 of the Protocol (P1-1).

On this point the Court thus accepts the argument of the Government and the opinion of the majority of the Commission.

63. The forfeiture and destruction of the Schoolbook, on the other hand, permanently deprived the applicant of the ownership of certain possessions. However, these measures were authorised by the second paragraph of Article 1 of Protocol No. 1 (P1-1), interpreted in the light of the principle of law, common to the Contracting States, where under items whose use has been lawfully adjudged illicit and dangerous to the general interest are forfeited with a view to destruction.

III. ON THE ALLEGED VIOLATION OF ARTICLE 18 (art. 18) OF THE CONVENTION

64. Mr. Handyside is of the opinion that, contrary to Article 18 (art. 18), he underwent "restrictions" pursuing a "purpose" mentioned neither by Article 10 (art. 10) of the Convention nor by Article 1 of Protocol No. 1 (P1-1).

This complaint does not support examination since the Court has already concluded that the said restrictions concerned aims that were legitimate under these two last-mentioned Articles (art. 10, P1-1) (paragraphs 52, 62 and 63 above).

IV. ON THE ALLEGED VIOLATION OF ARTICLE 14 (art. 14) OF THE CONVENTION

65. In the early stages of the proceedings initiated before the Commission by the applicant, he claimed to be the victim of a violation of Article 14 (art. 14) of the Convention which provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

66. On 4 April 1974 the Commission rejected the application on this point as being manifestly ill-founded. However, the Court was of the opinion that it should also have regard to Article 14, taken together with Article 10 (art. 14+10) of the Convention and Article 1 of Protocol No. 1 (art. 14+P1-1) (paragraph 41 above): some of Mr. Handyside's complaints, made after as well as before the decision of 4 April 1974 and with or without express reference to Article 14 (art. 14), raise the question of an arbitrary difference in treatment.

However, the data before the Court do not show that he suffered discrimination in the enjoyment of his freedom of expression and his property rights. In particular, they do not reveal that he was persecuted on account of his political leanings (paragraph 52 above). Neither does it appear that the pornographic publications and entertainment which he said profited by an extreme degree of tolerance in the United Kingdom were aimed, to the same extent as the Schoolbook, at children and adolescents having ready access thereto (paragraph 56 above). Finally, the documents in the file do not disclose that the measures taken against the applicant and the book departed from other decisions, taken in similar cases, to the point of constituting a denial of justice or a manifest abuse (Engel and others judgment of 8 June 1976, Series A no. 22, p. 42, para. 103).

V. ON THE APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

67. Having found no violation of Protocol No. 1 (P1) or of the Convention, the Court concludes that the question of the application of Article 50 (art. 50) does not arise in this case.

FOR THESE REASONS, THE COURT

1. Holds by thirteen votes to one that there has been no breach of Article 10 (art. 10) of the Convention;

2. Holds unanimously that there has been no breach either of Article 1 of Protocol No. 1 (P1-1) or of Articles 14 and 18 (art. 14, art. 18) of the Convention.

Done in French and in English, the French text being authentic, at the Human Rights Building, Strasbourg, this seventh day of December, one thousand nine hundred and seventy-six.

Giorgio BALLADORE PALLIERI

Marc-André EISSEN

Judges Mosler and Zekia have annexed their separate opinions to the present judgment, in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 50 para. 2 of the Rules of Court.

G. B.P.
M.-A.E.

SEPARATE OPINION OF JUDGE MOSLER

(Translation)

1. I differ from the Court's reasoning on one point only. However, it is so decisive for the question of whether or not there has been a violation in this case that my view on this point of detail has compelled me to vote against paragraph 1 of the operative provisions of the judgment. I am not convinced that the measures taken by the British authorities, including the judgment of the Inner London Quarter Sessions, were "necessary", within the meaning of Article 10 para. 2 (art. 10-2), for the achievement of their aim, namely the protection of morals. Paragraph 2 of Article 10 (art. 10-2) allows the States to subject the exercise of everyone's right to freedom of expression to restrictions and penalties only if they are measures necessary, in a democratic society, for certain aims considered to be legitimate exceptions to the right guaranteed by paragraph 1 (art. 10-1). These aims include the protection of morals which is relied on by the Government. In the absence of one of the factors which, when found in combination, entitle the State to avail itself of the exception to the right to freedom of expression, paragraph 2 (art. 10-2) does not apply and the individual's right must be respected without any interference. However, my interpretation of the word "necessary" and my conception of its application to the impugned measures do not, in part, coincide with the Court's view. They have thus led to my contrary vote although I entirely approve the other reasons contained in the judgment and, inter alia, the opinions expressed on certain questions of principle concerning the scope of the Convention in relation to the States' domestic legal systems and the definition of certain elements of the rights guaranteed and the exceptions permitted.

In order to leave no doubt about my agreement with the opinion of the Court insofar as it follows and develops more precisely existing case-law or adopts new and well-defined standpoints, I should like to emphasise that I accept in particular the passages on the Court's independence in the characterisation of facts (paragraph 41), on the respective powers of the Court and of the national authorities (problem of the "margin of appreciation" - cf., inter alia, paragraph 50) and on the examination of measures intended to protect morals in a democratic society (cf., inter alia, paragraph 48).

2. The measures inflicted on the applicant thus had a legitimate aim. They were taken pursuant to legislation that cannot be criticised under Article 10 para. 2 (art. 10-2). Nobody disputes their conformity with this legislation. They were "prescribed by law" within the meaning of the Convention.

However, the Court's supervision cannot stop there. Since the criteria in Article 10 para. 2 (art. 10-2) are autonomous concepts (cf. most recently,

mutatis mutandis, the Engel and others judgment of 8 June 1976, Series A no. 22, p. 34, para. 81), the Court must investigate both whether it was "necessary", for the domestic authorities, to have recourse to the means they employed to achieve the aim and whether they overstepped the national margin of appreciation with a resultant violation of the common standard guaranteed by an autonomous concept.

What is "necessary" is not the same as what is indispensable (paragraph 48 of the judgment). Such a definition would be too narrow and would not correspond to the usage of this word in domestic law. On the other hand, it is beyond question that the measure must be appropriate for achieving the aim. However, a measure cannot be regarded as inappropriate, and hence not "necessary", just because it proves ineffectual by not achieving its aim. A measure likely to be effectual under normal conditions cannot be deprived of its legal basis after the event by failure to attain the success which it might have had in more favourable circumstances.

The greater part of the first edition of the book circulated without impediment. The measures taken by the competent authorities and confirmed by the Inner London Quarter Sessions prevented merely the distribution of under 10 per cent of the impression. The remainder, that is about 90 per cent, reached the public including probably, to a large extent, the adolescents meant to be protected (cf. the address of Mr. Thornberry at the hearing on 7 June 1976). The measures in respect of the applicant thus had so little success that they must be taken as ineffectual in relation to the aim pursued. In fact young people were not protected against the influence of the book that had been qualified as likely to "deprave and corrupt" them by the authorities, acting within their legitimate margin of appreciation.

The ineffectualness of the measures would in no way prevent their being considered appropriate if it had been due to circumstances beyond the influence and control of the authorities. However, that was not the case. Certainly it cannot be presumed that the measures were not taken in good faith and with the genuine intention of preventing the book’s circulation. Above all, the carefully reasoned judgment of the Inner London Quarter Sessions excludes such a presumption. Nevertheless, from an objective point of view, the measures actually taken against the book’s circulation could never have achieved their aim without being accompanied by other measures against the 90 per cent of the impression. Yet nothing in the case file, in particular in the addresses of those appearing before the Court, shows that action of this kind was attempted.

Under Article 10 para. 2 (art. 10-2), the authorities’ action in certain respects and their lack of action in others must be viewed as a whole. The aim, legitimate under Article 10 para. 2 (art. 10-2), of restricting freedom of expression in order to protect the morals of the young against The Little Red Schoolbook, is one and indivisible. The result of the authorities’ action as well as of their inaction must be attributed to the British State. It is

responsible for the application of measures that were not appropriate with regard to the aim pursued because they covered only one small part of the object of the prosecution without taking the others into account.

Accordingly the measures chosen by the authorities were, by their very nature, inappropriate.

Furthermore some attendant facts must be reviewed.

I leave aside the fact, apparently not disputed between the State, the Commission and the applicant, that publications far more "obscene" than The Little Red Schoolbook were readily accessible to anyone in the United Kingdom. Assuming this to be correct, it does not prevent the authorities from having recourse to measures of prohibition against a book intended in particular for schoolchildren.

On the other hand, the diversity of the approaches adopted in different regions of the United Kingdom (paragraph 19 of the judgment) raises doubts about the necessity of the measures taken in London. Undoubtedly the Convention does not compel the Contracting States to pass uniform legislation for all the territory under their jurisdiction. Nevertheless, it does oblige them to act in such a way that the level of protection guaranteed by the Convention is maintained throughout the whole of that territory. In this case it is difficult to understand why a measure that was not thought necessary outside England and Wales was deemed to be so in London.

There remains the question whether the application of the contested measures, which were inappropriate from an objective point of view, fell within the margin left to the domestic institutions to choose between different measures having a legitimate aim and to assess their potential effectualness. In my view, the reply must be negative because of the clear lack of proportion between that part of the impression subjected to the said measures and that part whose circulation was not impeded. Admittedly the result of the action taken was the punishment of Mr. Handyside in accordance with the law, but this result does not by itself justify measures that were not apt to protect the young against the consequences of reading the book.

3. It must follow that the action complained of was not "necessary", within the meaning of Article 10 para. 2 (art. 10-2), with regard to the aim pursued. Such a measure is not covered by the exceptions to which freedom of expression can be subjected, even if the aim is perfectly legitimate and if the qualification of what is moral in a democratic society remained within the framework of the State’s margin of appreciation.

The right enshrined in Article 10 para. 1 (art. 10-1) is so valuable for every democratic society that the criterion of necessity, which, when combined with other criteria, justifies an exception to the principle, must be examined from every aspect suggested by the circumstances.

It is only for this reason that I have regretfully voted against paragraph 1 of the operative provisions. As for paragraph 2, concerning Article 1 of

Protocol No. 1 (P1-1) and two other Articles, I have rejoined the majority as I was bound by the prior decision on Article 10 (art. 10) and, on this basis, was quite able to accept the Court's reasons.

SEPARATE OPINION OF JUDGE ZEKIA

The Court, in arriving at the conclusion that Article 1 of Protocol No. 1 (P1-1) has not been contravened by the forfeiture and destruction of the matrix and copies of the "Little Red Schoolbook", in paragraph 63 stated the following:

> "63. The forfeiture and destruction of the Schoolbook, on the other hand, permanently deprived the applicant of the ownership of certain possessions. However, these measures were authorised by the second paragraph of Article 1 of Protocol No. 1 (P1-1), interpreted in the light of the principle of law, common to the Contracting States, where under items whose use has been lawfully adjudged illicit and dangerous to the general interest are forfeited with a view to destruction."

In considering the legality of the seizure of the matrix and of hundreds of copies of the Schoolbook, which took place on 31 March and 1 April 1971, I concede that the second paragraph of Article 1 of Protocol No. 1 (P1-1) is relevant. The said paragraph (P1-1) speaks of the right of a State if necessary for the general interest to control the use of the property. It deals with the right of a State, provided the conditions stated therein have been complied with, to interfere with the possessory rights of the owner who is at liberty to make use of his property in any way he likes as long as such usage does not go against the law.

The seizure under review was made in pursuance of a warrant issued by a judge under section 3 of the "Obscene Publications Acts 1959/1964". The object of a seizure might very well be to prevent the commission or the furtherance of an offence connected with the protection of morals; it might also be to secure an article for its being produced before the court as an exhibit or even as "corpus delicti". Such an article may constitute the subject-matter of the prosecution and therefore there is nothing wrong in its seizure by an authorised person.

The English court on 1 July 1971, applying the relevant provision of the aforesaid Acts after the completion of the trial, ordered the forfeiture of the matrix and books already seized. The order was confirmed by the appeal court on 29 October 1971 and the books and articles already forfeited were destroyed.

In ascertaining the legality of the order of forfeiture and the destruction of the items involved, in my view, the first paragraph of Article 1 of Protocol No. 1 (P1-1) fits in more precisely than any other paragraph of the Protocol. The first paragraph relates to deprivation of possession. Surely the forfeiture and destruction of an article owned by somebody else amount to deprivation of possession of such owner. Coming to the other requirements prescribed for the legality of such deprivation; the enabling Acts empowering forfeiture and destruction are admittedly not incompatible with relevant provisions of the Convention. Protection of morals is undoubtedly

of public interest and the conditions set out in the aforesaid Acts for ordering forfeiture and destruction have been observed.

I consider it more appropriate therefore to base the legality of the order of forfeiture and destruction complained of on the first paragraph of Article 1 of Protocol No. 1 (P1-1). I am content in rendering my interpretation to confine myself to the wording of the text of the first paragraph and to attach the ordinary meaning to the words used therein.

EUROPEAN COMMISSION OF HUMAN RIGHTS

FIRST CHAMBER

Application No. 25062/94

Gerd Honsik

against

Austria

REPORT OF THE COMMISSION

(adopted on 28 October 1997)

TABLE OF CONTENTS

I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is an Austrian citizen, born in 1941 and residing in Königstetten. He was represented before the Commission by Mr H. Schaller, a lawyer practising in Traiskirchen (Austria).

3. The application is directed against Austria. The respondent Government were represented by their Agent, Ambassador F. Cede, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

4. The case concerns the length of criminal proceedings against the applicant. The applicant invokes Article 6 para. 1 of the Convention.

B. The proceedings

5. The application was introduced on 12 August 1994 and registered on 1 September 1994.

6. On 18 October 1995 the Commission (First Chamber) decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on the admissibility and merits of the applicant's complaint relating to the length of the proceedings. It declared the remainder of the application inadmissible.

7. The Government's written observations were submitted on 17 January 1996. The applicant replied on 15 April 1996.

8. On 27 February 1997 the Commission declared admissible the remainder of the application.

9. The text of the Commission's decision on admissibility was sent to the parties on 12 March 1997 and they were invited to submit such further information or observations on the merits as they wished. No observations were submitted.

10. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

11. The present Report has been drawn up by the Commission (First Chamber) in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

Mrs	J. LIDDY, President
MM	M.P. PELLONPÄÄ
	A. WEITZEL
	L. LOUCAIDES
	B. MARXER
	B. CONFORTI
	N. BRATZA
	I. BÉKÉS
	G. RESS
	A. PERENI?
	C. BÎRSAN
	K. HERNDL
	M. VILA AMIGÓ
Mrs	M. HION
Mr	R. NICOLINI

12. The text of this Report was adopted on 28 October 1997 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

13. The purpose of the Report, pursuant to Article 31 of the Convention, is:

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

14. The Commission's decisions on the admissibility of the application are annexed hereto.

15. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

16. On 16 December 1986 the Investigating Judge of the Vienna Regional Court (Landesgericht) instituted preliminary investigations (Voruntersuchung) against the applicant on the suspicion that articles written, published and distributed by the applicant in his periodical "Halt" constituted National Socialist activities within the meaning of the National Socialist Prohibition Act (Verbotsgesetz). The investigations related to articles which denied the existence of gas chambers in concentration camps under the National Socialist regime and mass extermination therein. The Investigating Judge also appointed a medical expert, J.M., to prepare a report on the effects of toxic gas and its use for killing people.

17. On 28 January 1987 the Investigating Judge appointed an expert on contemporary history, G.J., to prepare a report on the existence of gas chambers in concentration camps under the National Socialist regime and their use for mass extermination.

18. On 4 September 1987 the Investigating Judge instructed the expert Prof. G.J. to confine his report to the Auschwitz concentration camp.

19. Subsequently the Investigating Judge urged on several occasions the expert to submit his report to the court. In February 1988 the expert G.J. informed the Investigating Judge that he could not complete his report before autumn 1988. In January 1989 he postponed this date to summer 1989 and in November 1989 he informed the court that he could no longer state when the report would be ready.

20. On 7 November 1989 the Investigating Judge asked the medical expert J.M. when his report would be ready. On 10 November 1989 the expert replied that he had thought that his report would no longer be required. In any event, he could not accept the appointment because of his work-load.

21. On 11 December 1989 G.J. informed the Investigating Judge that he hoped to complete the report before the end of 1989. No report was received by the court at that date.

22. On 12 June 1990 the Vienna Public Prosecutor's Office (Staatsanwaltschaft) preferred a bill of indictment against the applicant.

23. On 19 September 1990 the Vienna Court of Appeal (Oberlandesgericht) dismissed the applicant's objection (Einspruch) against the bill of indictment.

24. In December 1990 the Presiding Judge of the Vienna Court of Assizes (Geschwornengericht) at the Vienna Regional Court (Landesgericht), before which the trial of the applicant was to take place, urged the expert G.J. to submit his report.

25. On 10 January 1991 the expert G.J. submitted an interim report explaining what research he had carried out meanwhile.

26. On 31 March 1992 Mr Schaller was appointed ex officio counsel for the applicant.

27. On 22 April 1992 the defence submitted an extensive request for the taking of evidence relating to the existence of gas chambers in concentration camps.

28. On 27 April 1992 the trial of the applicant commenced. Further hearings were held on 28, 29 and 30 April and 4 and 5 May 1992. On 29 and 30 April 1992 the expert Prof G.J. presented his report orally. He concluded that in the Auschwitz-Birkenau concentration camp at least several hundred thousand persons were killed, a considerable part of them by use of toxic gas.

29. On 5 May 1992 the Court of Assizes convicted the applicant. Having regard to previous convictions it sentenced the applicant to an additional term of imprisonment (Zusatzstrafe) of one year, six months and ten days.

30. On 12 October 1992 the applicant lodged a plea of nullity and an appeal against the sentence. On 5 January 1993 the Procurator General (Generalprokurator) submitted his observations on the applicant's appeal and plea of nullity. On 28 May, 17 November, 22 November 1993, 8 February and 11 February 1994 the defence replied to the Procurator General's observations.

31. On 16 February 1994 the Supreme Court (Oberster Gerichtshof) dismissed the applicant's plea of nullity. It found that the Court of Assizes had acted correctly when it refused to take the evidence proposed by the applicant. It referred in this respect to its previous case-law according to which the existence of gas chambers in concentration camps and the systematic mass exterminations which had occurred there were facts of common knowledge in regard to which evidence need not be taken. Furthermore it had constantly held that the denial of these historic facts and the discrediting of reports thereof as false propaganda constituted in itself an offence under the National Socialism Prohibition Act. As regards the applicant's appeal against sentence, the Supreme Court noted that the applicant was of unknown abode. Once the applicant had been found the case would be remitted to the Court of Appeal to decide on the appeal against the sentence.

III. OPINION OF THE COMMISSION

A. Complaint declared admissible

32. The Commission has declared admissible the applicant's complaint that his case was not heard within a reasonable time.

B. Point at issue

33. The only point at issue is whether there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

C. As regards Article 6 (Art. 6) of the Convention

34. Article 6 para. 1 (Art. 6-1) of the Convention, as far as material to the case, read as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by an independent and impartial tribunal established by law ...."

35. The Commission finds that the period to be taken into consideration started on 16 December 1986, when preliminary investigations were opened against the applicant, and ended on 16 February 1994, when the Supreme Court dismissed the applicant's plea of nullity. The proceedings thus lasted for seven years and two months. The Commission notes that the Austrian courts have not yet decided on the applicant's appeal against the sentence because, after the Supreme Court's decision, the applicant is, for the time being, of unknown abode. For this reason the Commission finds that the period after 16 February 1994 cannot be taken into consideration in assessing the length of the proceedings (cf. No. 7438/76, Dec. 15.12.80, D.R. 23, p. 5).

36. The Commission recalls that the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to its complexity, the conduct of the parties and the conduct of the authorities dealing with the case. In this instance the circumstances call for an overall assessment (see e.g. Eur. Court HR, Vernillo v. Italy judgment of 20 February 1991, Series A no. 198, p. 12, para. 30).

37. In the applicant's view the proceedings at issue were not complex. He refers to the Supreme Court's case law according to which the existence of gas chambers in concentration camps and the systematic mass exterminations which had occurred there were facts of common knowledge in regard to which evidence need not be taken. The applicant emphasizes that it had taken the expert years to prepare his report and even when the trial took place he had not even finished his written report but had to give his expert opinion orally. The Austrian courts failed to take sufficient steps in order to accelerate the proceedings. As early as 1989 it had become clear that the expert would not be able to deliver his report in due time and that he should be replaced.

38. The Government submit that the case was particularly complex as it necessitated the preparing of an expert opinion in the field of contemporary history on a very complicated issue, namely mass extermination of Jews by the Nazi regime and the existence of gas chambers. Such an expert report was necessary in order to refute arguments advanced by so-called "revisionist" historians. The expert appointed, Prof. G.J., had to examine numerous documents on this question which in the course of time had been dispersed over various archives throughout the world, and in particular documents in archives which had only recently become accessible. These circumstances considerably prolonged the

fulfilment of his task. However, the courts themselves had dealt rather expeditiously with the applicant's case. The Regional Court repeatedly urged the expert to deliver his report and monitored the progress of his research. Having regard to the particular circumstances of the case the Government find that the criminal proceedings against the applicant have been conducted within a reasonable time as required by Article 6 para. 1 (Art. 6-1) of the Convention.

39. The Commission finds that the present case may be considered as being of some complexity, in particular as, in the opinion of the Vienna Regional Court, it necessitated the taking of expert opinions.

40. The Commission notes that the period of five years and four months at first instance is largely attributable to the time spent by the expert on contemporary history in preparing a report on the killing of persons by use of toxic gas under the National Socialist Regime. The Commission observes that it was the Vienna Regional Court which appointed Prof. G.J. as expert in the proceedings at issue. It was the slow progress of the work of the expert which caused the delay in the proceedings at first instance. As the expert had been appointed by the court, delays caused by the expert are in principle attributable to the Austrian authorities (see Eur. Court HR, Scopelliti v. Italy judgment of 23 November 1993, Series A no. 278, p. 9, para. 23; Zappia v. Italy judgment of 26 September 1996, para. 25, to be published in Reports 1996-I).

41. However, the Commission observes that it was in the applicant's interests that such evidence be reviewed for the purpose of his trial. Indeed, on 22 April 1992, five years after the opening of the proceedings, the defence still perceived a need for such evidence and it is to be noted that in his application to the Commission the applicant continued to maintain that the expert was wrong (cf. Partial Decision as to the Admissibility of 18 October 1995). Where the conduct of the defence is such as to seek evidence on a matter of notorious public knowledge, which under domestic law does not need to be proved and where the court in its discretion and entirely in the interest of the defence, instructs that such evidence be taken, then the responsibility for the ensuing avoidable delays may be shared by the applicant, and is so shared in the present case.

42. In assessing whether delays caused by a court appointed expert lead to an unreasonable length of the proceedings at issue the Commission has further to take into account the object and nature of the requested expert report and whether the authorities have taken sufficient steps in order to ensure that the expert submits his report in time. As regards the first element, the Commission notes that Prof. G.J. was appointed as expert for contemporary history to give an opinion on questions of facts which went back to over fifty years and which involved events which took place in Germany and many European countries during the German occupation. The Commission finds that the opinion of an expert on matters relating to history are of a different nature from expert advice on, for example, medical issues for which it is normally sufficient that the expert carries out one examination of the patient before preparing his report. In the present case the Government submits, and this is not disputed by the applicant, that Prof. G.J. had to examine numerous documents on this question which in the course of time had been dispersed over various archives throughout the world, and in particular documents in archives which had only recently become accessible. It is apparent that such a task cannot be carried out within a short period. As regards the second element, the Commission observes that the Regional Court repeatedly enquired into the progress of the expert's work and, on several occasions urged the expert to submit his report. The Commission also attaches importance to the fact that the Regional Court not merely waited for the expert report to be concluded but, while it was still waiting for the report, took all necessary steps in order to ensure that the trial could take place.

43. Having regard to these particular circumstances, including the conduct of the parties and authorities, the Commission finds that the proceedings were concluded within a reasonable time as required by Article 6 para. 1 (Art. 6-1) of the Convention.

CONCLUSION

44. The Commission concludes, by nine votes to six, that in the present case there has been no violation of Article 6 para. 1 (Art. 6-1) of the Convention.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber

(Or. French)

CONCURRING OPINION OF Mr B. CONFORTI

Je souscris à la conclusion de la majorité de la Chambre et même, pour une large partie, au raisonnement qui l'a conduite à déclarer la non-violation de l'article 6 par. 1. Comme la majorité, je crois que l'Etat ne peut être tenu pour entièrement responsable de la durée excessive d'une procédure lorsque, comme dans le cas d'espèce, la défense a demandé des preuves sur des événements qui sont universellement connus (et universellement condamnés !), et lorsque la Cour a donné suite à cette demande dans l'intérêt de la défense elle-même (voir Rapport, par. 41).

Ceci dit, il est peut-être opportun avant tout de préciser qu'il ne s'agit pas, comme la majorité le dit, d'un "partage" de responsabilité entre le requérant et les autorités nationales. Il s'agit plutôt de reconnaître, comme la Cour l'a récemment affirmé, que l'Etat ne peut être tenu pour responsable lorsque le comportement des autorités nationales ne constitue pas la "cause principale" de la longueur de la procédure (voir l'arrêt Ciricosta et Viola c. Italie du 4 décembre 1995, série A n(337-A, p. 10, par. 28) et donc lorsque la cause principale réside dans le comportement du requérant.

Il faut ensuite se demander si dans le cas du requérant, comme dans d'autres cas semblables, il ne faut pas aller un peu plus loin dans l'élaboration du critère du "comportement du requérant". A mon avis, dans les affaires de longueur de procédure, qu'il s'agisse d'une procédure civile ou d'une procédure pénale, il n'est pas seulement question des comportements "procéduraux" du requérant, tels que la demande de renvois, la non-utilisation de recours visant à accélérer le procès, la demande de preuves inutiles, etc. Il faut au contraire également considérer si, compte tenu du fond du procès, la personne qui vient se plaindre à Strasbourg a tiré ou non un profit évident dans le prolongement du procès. Dans l'affirmative, si l'on veut se placer du point de vue d'une justice matérielle et non formelle, on ne peut considérer le comportement des autorités judiciaires nationales, même si celles-ci auraient pu s'opposer au prolongement comme la "cause principale" de la longueur de la procédure. En d'autres termes, l'intérêt du requérant au prolongement du procès doit être pris en considération autant que son comportement dans la procédure.

Dans le cas d'espèce le requérant avait tiré un profit certain dans le prolongement du procès, ses demandes d'expertises et de preuves tout à fait inutiles visant manifestement à renforcer sa propagande absurde sur la non-existence de chambres à gaz sous le régime nazi. Cet élément m'a semblé décisif pour conclure à la non-violation et cela malgré l'attitude très et trop tolérante du juge national à l'égard des demandes du requérant.

(Or. English)

DISSENTING OPINION OF Mr K. HERNDL
JOINED BY MM A. WEITZEL, L. LOUCAIDES, I. BÉKÉS, A. PERENI?,
Mrs M. HION

I do not share the majority's view that in the present case the criminal proceedings instituted against the applicant were concluded within a reasonable time and that consequently there has been no violation of Article 6 para. 1 of the Convention.

My reasons for disagreeing with that view are the following.

Objectively speaking the length of the incriminated proceedings is certainly above the threshold established for the element of "reasonable time" under Article 6 para. 1. A duration of seven years and two months for criminal proceedings conducted in two instances is certainly too long and ought to have been declared a breach of Article 6 para. 1, taking into account the jurisprudence of the Commission in similar cases. The only mitigating circumstance I can see is the simple fact that the applicant was not taken into custody and remained in liberty throughout the proceedings (until he absconded, being currently "of unknown abode"). It might therefore be argued that there was no apparent necessity for a particular acceleration of the court proceedings in this case, including the taking of evidence, and that accordingly it was preferable to obtain additional elements of evidence on certain historic facts. I can see no other reason why one waited so long for the opinion of the expert historian. It is, however, legitimate to raise the question whether it was indeed necessary and advisable to request such an expert opinion, given the Supreme Court's existing case law according to which "the existence of gas chambers in concentration camps and the systematic mass extermination which had occurred there were facts of common knowledge in regard to which evidence need not be taken".

It is uncontested (see para. 40) that the main reason for the principal delay which occurred in the present case, was the fact that it took the expert historian who had been appointed by the court on 28 January 1987 (i.e. shortly after preliminary investigations against the applicant had been opened) until 29 April 1992 - more than five years -to present his opinion to the court, and then only orally.

As the majority rightly point out, delays caused by a court appointed expert are normally attributable to the State party (see para. 40 and the jurisprudence of the Court quoted there). Accordingly the State party has to be held responsible for any breach of the Convention resulting from such delays. In the present case however, the majority introduce the element of "shared responsibility" and emphasize that "the responsibility for ensuing avoidable delays may be shared by the applicant, and is so shared by the applicant in the present case" (see para. 41 in fine).

This would indeed seem to be a new approach. To throw, within the framework of criminal proceedings, on the applicant the responsibility for the consequences of procedural requests made by the defence, or to make the applicant share such responsibility, would in my view run counter to basic assumptions underlying Article 6. As the Court has stated in the Eckle case, in criminal matters Article 6 does not require applicants to actively co-operate with the judicial authorities. No reproach can be levelled against such applicants for having made full use of the remedies available under the domestic law (Eur. Court HR, Eckle v. Germany judgment of 15 July 1982, Series A no. 51, p. 36, para. 82).

Inasmuch as the conduct of the applicant has to be taken into account, it is difficult to see by what means he did contribute to extending the length of the actual proceedings. It does not appear from the file that it was the applicant or the defence which are at the origin of the Investigating Judge's decision of 28 January 1997 to appoint Mr G.J., an expert on contemporary history, to prepare a report "on the existence of gas chambers in concentration camps under the National Socialist regime and their use for mass extermination". The applicant made no such request, and in fact the defence rested until one week before the trial when on 22 April 1992 it came forward with new and rather exaggerated requests for the taking of additional evidence relating to the same issue.

The unavoidable conclusion is therefore that the responsibility for the delay in the submission of the expert's opinion lies with the expert himself and hence with the State party, as the expert had been appointed by the court. It is true that the Investigating Judge repeatedly took steps with a view to extracting the opinion from the expert, and that apparently it was the expert who stalled although his terms of reference had meanwhile been limited to one concentration camp only (Auschwitz).

In November 1989, almost three years after his appointment, the expert even informed the court that he could no longer state when his report would be ready. At that stage, at the latest, it would have been the duty of the competent organs of the State party to take some decisive action. Again, all this has to be seen against the background of the Supreme Court's jurisprudence, that the contested facts were facts of common knowledge. To attempt, in this context, to justify the expert's five year delay by pointing to the complexity of his task and the fact that "he had to examine numerous documents on this question which in the course of time had been dispersed over various archives throughout the world, and in particular documents in archives which had only recently become accessible", would seem, in fact, rather incongruous.

To sum up: the length of the proceedings in the present case is excessive in objective terms. The responsibility for the delays rests with the State party. It is not shared, and as a matter of principle cannot be shared (except marginally) by the applicant whose defence was entitled to put forward requests for the taking of evidence, but in fact did so only on 22 April 1992 and not earlier.

Finally, if one so wishes, one could contrast the conclusion at which the majority arrived in the present case with the conclusion of the Commission in the case of E.L. against Austria (application No. 23019/93). There the Commission unanimously considered that the length of the proceedings (which started in September 1988 and which had not been terminated by the end of 1996) did indeed violate Article 6 para. 1. In the latter case however the applicant E.L. had submitted, in his defence, about 300 expert opinions and about 12.500 pages of requests for the taking of evidence (including motions that necessitated the dispatch of letters rogatory to judicial authorities in foreign countries such as the U.S.A and the then U.S.S.R.), had continuously challenged for bias judges and prosecutors and had appealed against almost every procedural decision of the court. Nevertheless the Commission - and rightly so - gave less weight to the applicant's conduct than to the duty of the State authorities to respect Article 6, and consequently held that the "reasonable time" had been exceeded. Should the Commission not have come to a similar conclusion in the present case?

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

FOURTH SECTION

CASE OF HRICO v. SLOVAKIA

(Application no. 49418/99)

JUDGMENT

STRASBOURG

20 July 2004

FINAL

20/10/2004

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Hrico v. Slovakia,

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

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mrs V. STRÁŽNICKÁ,
Mr J. CASADEVALL,
Mr R. MARUSTE,
Mr L. GARLICKI,
Mrs E. FURA-SANDSTRÖM, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 29 June 2004,

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

PROCEDURE

1. The case originated in an application (no. 49418/99) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovakian national, Mr Andrej Hrico ("the applicant"), on 7 May 1999.

2. The applicant was represented by Mr A. Fuchs, a lawyer practising in Košice. The Slovakian Government ("the Government") were represented by their Agent, Mr P. Vršanský, succeded by Mr P. Kresák in that function as from 1 April 2003.

3. The applicant alleged that his right to freedom of expression had been violated.

4. The application was allocated to the former Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

6. By a decision of 16 September 2003, the Court declared the application admissible.

7. The Government, but not the applicant, filed observations on the merits (Rule 59 § 1). The applicant replied to the Government's observations. The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1949 and lives in Košice.

9. At the relevant time the applicant was the publisher and editor in chief of the weekly *Domino efekt*. In 1994 and 1995 the weekly published three articles which concerned civil proceedings for defamation pending before the Slovakian courts. The proceedings were between Mr Slobodník, a Minister who became later a Member of Parliament, and Mr Feldek, a poet and publicist who had published a statement alleging, *inter alia*, that Mr Slobodník had a fascist past. The relevant parts of the articles, which were not written by the applicant, read as follows.

1. Article published on 1 April 1994

"Quo vadis, Slovakian justice? (A shameful judgment delivered by the Supreme Court)

When the Bratislava City Court put an end to the first round of the judicial dispute between Mr Slobodník and Mr Feldek dismissing the former minister's action for protection of his personality rights, voices could be heard alleging that the outcome of the appellate proceedings before the Supreme Court would be different. They argued that [the Supreme Court] judges were 'different'. Those views came true and Slovakia faces further ridicule at the international level. The Supreme Court chamber presided over by [judge Š. - the article mentioned the full name of the judge] did not disappoint.

A tragicomic farce

The Slovakian poet and writer Ľubomír Feldek (who opted for Czech nationality in the meantime) stated in 1992 that Mr Dušan Slobodník, who had just become the Minister of Culture of the Slovak Republic, should not exercise the post of a minister in a democratic state as he had a fascist past... The statement was based on facts which were generally known: during World War II Slobodník had been a member of the Hlinka Youth and he had participated in a terrorist course in Sekule organised under the auspices of that organisation. Several participants in that course (it should be mentioned that Dušan Slobodník was not among them) had been later involved in the killing of the inhabitants of [a] village...

Feldek, who never alleged that Slobodník was a murderer or a criminal ... expressed the view of a citizen of a free society who considered that a person who had belonged to the Hlinka Youth and who had been close to people who later killed members of the civilian population, should not be a minister of a democratic state. Nothing more and nothing less...

[Instead of retiring from the post] Slobodník filed an action for protection of his personality rights and thus gave rise to a case which, in a certain way, is tragicomic... [and in the course of which Mr Slobodník] failed to show that he had not been a

member of the Hlinka Youth and that he had not participated in the course in Sekule. [Mr Slobodník] thus failed to disprove the facts on the basis of which Feldek had declared that he had a fascist past. We simply recall that a decree by President Beneš of 1945 provided that the Hlinka Youth was to be considered as a fascist organisation.

Strange reasoning

The Bratislava City Court took all the above facts into account and ... dismissed the action of Slobodník. [The City Court judge] ...thus established the very best case-law for the newly born democracy and warned every politician that his or her past may and even must be the object of an increased interest by the public.

At the hearing held on 22 March 1994 [the Supreme Court] judge Š. took the opposite approach in that he ordered Feldek to pay 200,000 Slovakian korunas [SKK] to Slobodník and to apologise to the latter [in the press]... Thus [judge Š.] warned all citizens of the Slovak Republic that, should they come to the conclusion that the moral profile of a politician is incompatible with the exercise of the public function entrusted to him or her, they had better keep quiet.

[Judge Š.] also showed the strength of his spirit when giving reasons for the judgment. 1. Hlinka Youth ... was, in principle, a very good organisation which had been abused by politicians, 2. Feldek not only caused damage to Slobodník, but also to the whole of Slovakia, the Prime Minister, the Movement for a Democractic Slovakia, the Government and the Parliament, ... 4. the post-war retribution decrees enacted in Czechoslovakia were the result of a conspiracy between President Beneš and the communists.

[Judge Š.] revises history

...

[It should be recalled that] the Czechoslovak legal rules on retribution, of which the decrees by President Beneš form a part, were adopted in accordance with the principles of the United Nations Commission for the Investigation of War Crimes established in London on 20 October 1943. They were further based on the ... agreement on the establishment of the International Military Tribunal of 8 August 1945 and the Report on the Berlin Conference held in Potsdam... Such retribution rules were adopted by practically all European states which had been occupied by Nazi Germany during the war and which had to take a position with respect to collaborators and traitors.

The words which [judge Š.] used in order to justify his judgment directly call in question the attitude which, after World War II, the democratic states in Europe took towards fascism and those who had served it.

It should be said, however, that [judge Š.] had no choice. When he wanted to reach the decision which he reached, no other reasoning was available – it simply did not exist... When I wish to say A, that is that the past of a person who was a member of the Hlinka Youth and who took part in the course in Sekule is not a fascist one, I am obliged to say also B, that is that I do not recognise the law which defines the Hlinka Youth as a fascist organisation. As the case may be, I will add that the Hlinka Youth was a good organisation and things are settled.

Thus, quo vadis, Slovakian justice? Slobodník is said to look forward to the international court in Strasbourg. However, a Slovakian citizen, having in mind such 'objective' decisions of the 'independent' and 'impartial' Supreme Court does not have many reasons for being pleased. Even if he or she is successful at first instance, the chances of obtaining justice after a possible appeal to the Supreme Court are slight as has been shown by the case Feldek v. Slobodník."

2. Interview published on 12 August 1994

On 12 August 1994 the weekly *Domino efekt* published an interview with the former president of the Constitutional Court who was the lawyer of Mr Feldek in the defamation proceedings brought by Mr Slobodník. It was entitled "Slovakia is governed by an absolute legal chaos" and the relevant parts read:

- "The press stated that [judge Š.], who decided the case of Slobodník against Feldek in the way he did and in which you were the advocate of the poet, is a candidate of the Christian-Social Union in the [parliamentary] election. What do you think about it?

- ... It is ... unusual that a judge, whose task it is to guarantee the objectiveness and impartiality in a democratic society, manifests his political views in public. Having one's name included in the list of candidates of a political party undoubtedly represents such a manifestation of political views.

- Let's talk about the particular inscription of [judge Š.] on the election list of a particular party, namely the Christian-Social Union...

- One should see that that party has a clear position as regards the period between 1939 and 1945. To put it mildly - it does not condemn that period. And this is the core of the problem - [judge Š.], who decided the case of Slobodník against Feldek, that is a dispute in which one of the main points at issue had been the behaviour of one of the participants during the period of the Slovakian State, is the candidate of a party which does not condemn the Slovakian State or the regime by which it was governed, on the contrary...

... Section 54 of the Judiciary and Judges Act clearly provides that one of the principal obligations of judges is that 'a judge shall abstain from any action which could impair the dignity of the judicial function or jeopardise the trust in independent, impartial and just decision-making of the courts'...

- Do you think that [judge Š.] had internally decided 'the case of Feldek' long before the delivery of the judgment and that all the fuss in the court room served nothing?

- There is nothing else that I can think. The performance of that judge has no other explanation. In particular, I can say that, after the delivery of the judgment, I learned that the Supreme Court judges had expected such a decision to be taken. The views of [judge Š.] as regards the case or as regards the existence of the Slovakian State during World War II were known...

The appeal against the Bratislava City Court judgment, which was in favour of Mr Feldek, was transmitted to the Supreme Court on 22 February 1994... The case was decided upon on 23 March ... that is with the rapidity of a missile, and one can hardly find another case examined by the Supreme Court which was dealt with the same promptness."

3. Article published on 16 June 1995

"See you soon in Strasbourg (Not even death will separate the couple Slobodník – Feldek)

The judicial proceedings in the case Slobodník v. Feldek which have lasted three years have not been ended by the decision delivered by the cassation chamber of the Supreme Court. Even the latter has not found the courage to quash in full the legal farce ('*paškvil'* [The Short Dictionary of the Slovakian Language (Slovak Academy of Sciences, Bratislava, 1989, p. 282) defines "*paškvil*" as (i) a satirical and offensive piece of writing or as (ii) an unsuccessful imitation of something.]) produced by [judge Š.] on 23 March 1994. The aforesaid judge quashed the decision delivered by the City Court in Bratislava and granted the whole claim lodged by Slobodník.

Two jokes were thus produced out of one... [To the extent that the claim by Mr Slobodník was granted by the cassation chamber of the Supreme Court], Feldek will bring the case ... before the European Court of Human Rights in Strasbourg.

Thus Slovakian justice was open to ridicule. To make things clear – the Slovak Republic has no chances of success in Strasbourg. The existing case-law of [the European Court of Human Rights] comprises a sufficient number of examples where that court used a phrase protecting freedom of expression as such, which every politician in a democratic state should be acquainted with: 'The limits of admissible criticism are wider as regards a politician and narrower in the case of a private person'. It is easy and clear at the same time and the cassation chamber of the Supreme Court (like [Mr] Slobodník) has not grasped it...

A different fact is relevant: Feldek has to apologise for a civic 'value judgment' whereas this is not acceptable for the free world. 'Value judgments' expressed publicly are not, in accordance with the established European practice and also in accordance with the European Convention on Human Rights, susceptible of proof...

Should we admit (as we did in fact) [that a journalist who publishes his or her value judgments in respect of a public figure be obliged to prove the truth of such statements], a situation would arise which has nothing to do with democracy and with the principles of a democratic society. Citizens will simply fear making 'value judgments' because they will be under the threat of a sanction. As a result, the vital sap of democracy will dry out – namely an open debate on issues of public interest.

The Supreme Court failed to understand these principles which ... are simple and easy to understand and which are respected by the democratic world as something that is 'given'. Or, as the case might be, it did not want to understand.

P.S. I will dare make a 'value judgment' despite the position which 'value judgments' have in this country thanks to this case law. In my view, the Supreme Court of the Slovak Republic did NOT WANT to respect the European principles of

the protection of the freedom of expression. It would have sufficed if the judges had read the Constitution of the Slovak Republic. In particular Article 11 where it is written in black and white."

10. On 20 September 1995 judge Š. filed an action under Article 11 et seq. of the Civil Code for protection of his personal rights against the applicant. The plaintiff claimed that the above articles interfered grossly with his civil and professional honour and also with his authority as a Supreme Court judge. The plaintiff further claimed that the applicant be ordered to publish an apology and to pay him SKK 150,000 in compensation for non-pecuniary damage.

11. In his reply the applicant stated that the author of the above articles had informed the public about the judicial proceedings in a case which attracted public attention. The contested statements were value judgments and the articles contained permissible criticism of a public figure.

12. On 3 July 1996 the Košice 1 District Court delivered a judgment in which it ordered the applicant to publish, in the weekly *Domino efekt*, the following statement:

"a) ... the article 'A shameful judgment delivered by the Supreme Court; Quo vadis, Slovakian justice', which presented [judge Š.], the president of a chamber of the Supreme Court in a negative light and which ridiculed the proceedings conducted by him,

b) ... the interview with the former president of the Constitutional Court published on 12 August 1994 in which it is stated that [judge Š.] made up his mind on the outcome of the proceedings long before the delivery of the judgment,

c) the phrase ... 'Even the latter has not found courage to quash in full the legal farce produced by [judge Š.] on 23 March 1994' which was published in the article 'Not even death will separate the couple Slobodník – Feldek; See you soon in Strasbourg' published on 16 June 1995,

interfere grossly and without any justification with the civil and professional honour of [judge Š.] for which [the applicant], as the editor of the newspaper Domino efekt makes a public apology to [judge Š.]..."

13. The applicant was further ordered to pay the plaintiff SKK 50,000 in compensation for non-pecuniary damage and to pay the court fees and the plaintiff's costs.

14. The District Court found that the limits of objective and acceptable criticism had been exceeded in that the above articles comprised such expressions as "tragicomic farce", "shameful judgment", "strange reasoning" and "legal farce". The first and the third article were capable of giving the readers the impression that the plaintiff had been biased. The District Court further recalled that the judgment criticised in the articles was delivered by an appellate chamber of three judges. However, the articles referred to the plaintiff as if he were the only author of the judgment. The District Court recalled that a chamber of the appellate court always decides

after deliberations in the presence of a typist. A majority of votes is required and the presiding judge is the last to vote. The District Court also recalled that judges are independent when deciding on matters before them and that the cassation chamber of the Supreme Court had not found any procedural shortcomings in the proceedings leading to the judgment criticised in the above articles.

15. When deciding to grant non-pecuniary damages to the plaintiff the District Court noted that the above articles criticised, repeatedly and without justification, a judge of the Supreme Court whereby his dignity and position in the society had been considerably affected.

16. The applicant and the plaintiff appealed. The applicant argued that the District Court had failed to apply the law correctly and that it had decided arbitrarily. The applicant submitted that the statements in question were value judgments which were based on facts explicitly set out in the articles. He therefore requested that the first instance judgment, to the extent that it granted the action, be overturned. The plaintiff failed to submit any reasons and subsequently he maintained that he had not appealed.

17. On 24 June 1997 the Košice Regional Court overturned the first instance judgment in that it dismissed the action of judge Š. The Regional Court's judgment stated that the applicant had ceased being the editor of *Domino efekt* in February 1997. As he was not the author of the articles in question, he no longer had standing to be a defendant in the case. The new editor could not be sued as he was not a general successor to the rights and obligations relating to the weekly. The plaintiff's claim that an apology be published in the weekly could not, therefore, be granted.

18. The Regional Court also examined the merits of the case and found that the phrase "Even the latter has not found courage to quash in full the legal farce produced by [judge Š.] on 23 March 1994" published on 16 June 1995 represented an attack against the authority of the courts as such and that it was not proportionate to the aim pursued, namely to criticise the reasons for the Supreme Court judgment presented orally by judge Š. However, no satisfaction could be granted in this respect as the applicant had lost standing in the case.

19. On 9 September 1997 the plaintiff filed an appeal on points of law in which he challenged the conclusions reached by the Regional Court.

20. On 29 May 1998 the cassation chamber of the Supreme Court quashed the Regional Court's judgment of 24 June 1997. The Supreme Court held that the appellate court had decided erroneously and instructed the latter to take further evidence. As regards the merits of the case in particular, the court of cassation held that because of their expressive character the applicant's statements were disproportionate to the aim pursued, namely to criticise a judicial decision or the public activities of judge Š. In the Supreme Court's view, those statements clearly indicated

that the applicant had intended to offend judge Š., to humiliate and discredit him. Limits of acceptable criticism had been thereby exceeded.

21. On 11 March 1999 the Košice Regional Court upheld the part of the Košice 1 District Court's judgment of 3 July 1996 by which the applicant had been ordered to pay SKK 50,000, together with the statutory default interest, to the defendant in compensation for non-pecuniary damage. The Regional Court further dismissed the remainder of the plaintiff's action.

22. The judgment stated that the plaintiff had failed to submit reasons for his appeal. Accordingly, the Regional Court could review the first instance judgment only to the extent that it had been appealed against by the applicant. The Regional Court dismissed the claim that an apology be published in *Domino efekt* as (i) the editing rights had been transferred to a different person and the name of the weekly had changed and (ii) the plaintiff had failed to amend his action so that a judgment in this respect could be enforced. The Regional Court noted that the plaintiff had failed to specify which parts of the article published on 1 April 1994 interfered with his personal rights. The relevant part of the action was therefore also dismissed.

23. As regards the merits of the remaining part of the case, the Regional Court recalled, with reference to Article 10 of the Convention and the relevant provisions of the Constitution, that judges enjoyed special protection as regards the criticism of the way in which they exercised their function. This was dictated by the requirement of impartiality of judges. The latter could be jeopardised if the society tolerated unjustified criticism of a judge for a decision delivered by him or her.

24. The judgment further stated that the situation is different in cases where a judge makes public his or her intention to become involved in politics, and where the decision on a case to be subsequently taken by such a judge is linked to the political views presented by him or her. By failing to withdraw from a case in such circumstances the judge concerned deliberately exposes himself or herself to the threat of criticism by the public, notwithstanding that the decision in question was lawful. The Regional Court therefore held that, when a judge decided to become involved in politics, he or she became a person of public interest and, as such, he or she no longer enjoyed special protection as regards the limits of acceptable criticism.

25. The Regional Court recalled that it was bound by the views expressed in the judgment delivered by the cassation chamber of the Supreme Court on 29 May 1998. It therefore concluded that the contested statements in the articles published on 12 August 1994 and on 16 June 1995 interfered with the personal rights of the plaintiff, whereby his dignity and the esteem for his person in society had been considerably diminished. The expressive character of the terms used was disproportionate to the aim pursued, namely the criticism of a judicial decision or the plaintiff's

involvement in public life. Those terms clearly showed that the purpose of the statements was to offend, to humiliate and to discredit the criticised person. Accordingly, the plaintiff was entitled to compensation for non-pecuniary damage which he had thus suffered.

26. On 19 April 1999 judge Š. filed an appeal on points of law. It was dismissed by the Supreme Court on 28 September 2000.

II. RELEVANT DOMESTIC LAW

27. The right to protection of a person's dignity, honour, reputation and good name is guaranteed by Article 11 et seq. of the Civil Code.

28. According to Article 11, any natural person has the right to protection of his or her personality, in particular of his or her life and health, civil and human dignity, privacy, name and personal characteristics.

29. Pursuant to Article 13 (1), any natural person has the right to request that unjustified infringement of his or her personal rights should be stopped and the consequences of such infringement eliminated, and to obtain appropriate satisfaction.

30. Article 13 (2) provides that in cases where the satisfaction obtained under Article 13 (1) is insufficient, in particular because a person's dignity and position in society have been considerably diminished, the injured person is entitled to compensation for non-pecuniary damage.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

31. The applicant complained that his right to freedom of expression had been violated. He relied on Article 10 of the Convention which provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Arguments of the parties

1. The Government

32. The Government argued that the interference complained of had been in accordance with the provisions of Article 11 et seq. of the Civil Code and that it had pursued the legitimate aim of maintaining the authority and impartiality of the judiciary and also protection of the reputation and rights of the judge concerned.

33. The interference corresponded to an urgent social need, namely to protect the judiciary from unjustified statements and from exaggerated value judgments capable of undermining its authority. With reference to the reasons set out in the domestic courts' decisions, the Government maintained that the principal aim of the statements in question had been to attack and offend a representative of the judiciary. Those statements did not contribute to a general debate on an issue of public interest.

34. In particular, in the first and the third articles published on 1 April 1994 and on 16 June 1995 respectively, there was no indication that the author criticised judge Š. also for his registration on the electoral list of a political party. Such registration did not imply that the judge had become a publicly known politician the limits of acceptable criticism in respect of whom were wider.

35. The articles in question contained both statements of facts which had no factual basis and value judgments derived therefrom which were exaggerated. Since at the time of their publication there had been no final decision on the case to which the articles related, the statements were capable of interfering with smooth and impartial administration of justice.

36. The articles were not balanced as the author had given no possibility to the criticised judge to take a standpoint on the allegations concerning his person. Considering the impact of the articles on the professional reputation of judge Š. but also on the judiciary as a whole, the applicant exceeded the limits of acceptable criticism in that he had permitted them to be published.

37. The amount which the applicant was ordered to pay in compensation was not excessive and it was lower than the amount originally claimed by the judge concerned. The Government concluded that the interference complained of was not disproportionate to the legitimate aim pursued and considered that there had been no violation of Article 10.

2. The applicant

38. The applicant maintained that the interference with his right to freedom of expression cannot be regarded as "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention. In particular, the statements in question were value judgments which were based on facts. At the relevant time the judge concerned was included in the

election list of a political party. As such, he was also a person of public interest and had to accept a wider scope of criticism in respect of his actions.

39. The purpose of the articles in question had been to criticise the fact that judge Š. decided on a matter linked to the past of Slovakia on which the political party which had included him on its list in the parliamentary election had specific views. The applicant maintained that, at the relevant time, the person of the judge concerned had been well known to the public. He denied that the purpose of the articles had been to offend or humiliate the judge.

B. The Court's assessment

40. The Court reiterates the following fundamental principles in this area:

(a) An interference with a person's freedom of expression entails a violation of Article 10 of the Convention if it does not fall within one of the exceptions provided for in paragraph 2 of that Article. The Court therefore has to examine in turn whether such interference was "prescribed by law", whether it had an aim or aims that is or are legitimate under Article 10 § 2 and whether it was "necessary in a democratic society" for the aforesaid aim or aims (see *Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, § 45).

(b) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I).

(c) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see the Barfod v. Denmark judgment of 22 February 1989, Series A no. 149, § 28). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, p. 23, § 31).

(d) The truth of an opinion, by definition, is not susceptible of proof. It may, however, be excessive, in particular in the absence of any factual basis (see the De Haes and Gijsels v. Belgium judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, § 47).

(e) The press plays an essential role in a democratic society. Although it must not overstep certain bounds, regarding in particular protection of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest, including those relating to justice. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Perna v. Italy* [GC], no. 48898/99, § 39, 6 May 2003, with further references).

(f) The matters of public interest on which the press has the right to impart information and ideas, in a way consistent with its duties and responsibilities, include questions concerning the functioning of the judiciary. However, the work of the courts, which are the guarantors of justice and which have a fundamental role in a State governed by the rule of law, needs to enjoy public confidence. It should therefore be protected against unfounded attacks, especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying (see the Prager and Oberschlick v. Austria judgment of 26 April 1995, Series A no. 313, § 34).

(g) There is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV). Moreover, the limits of acceptable criticism are wider as regards a public figure, such as a politician, than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his words and deeds by journalists and the public at large, and he must consequently display a greater degree of tolerance (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 42, or *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1567, § 54).

2. Application of the aforementioned principles to the instant case

41. The Court finds, and it has not been disputed between the parties, that the interference complained of was prescribed by law, namely Article 11 et seq. of the Civil Code, and that it pursued the legitimate aim of maintaining the authority of the judiciary and of protection of the reputation and rights of the judge concerned. Thus the only point at issue is whether the interference was necessary in the democratic society.

42. The final judicial decision complained of by the applicant had for its basis the articles published on 12 August 1994 and on 16 June 1995 respectively, but not the first article which had been published on 1 April 1994.

43. In the interview published on 12 August 1994 a lawyer expressed the opinion that judge Š. had made up his mind about the case in question long before the delivery of a judgment on it. Reference was made to the fact that the judge had been included in the election list of a political party which, in the lawyer's view, had specific views as regards the period to which the subject-matter of the case related. The article published on 16 June 1995 stated that the second instance judgment "produced by judge Š." on 23 March 1994 was "a legal farce" and criticised the fact that the court of cassation had not quashed it in full. The main part of that article analysed the prospect of the case before the European Court of Human Rights to which the unsuccessful defendant was expected to submit it.

44. In their judgments of 29 May 1998 and 11 March 1999 respectively the cassation chamber of the Supreme Court and the Košice Regional Court found that the contested statements interfered with the personal rights of the plaintiff, whereby his dignity and the esteem for his person in society had been considerably diminished. The character of the terms used was disproportionate. Those terms clearly showed that the purpose of the statements was to offend, to humiliate and to discredit the criticised person. In the final decision on the case the Regional Court therefore concluded that the plaintiff was entitled to compensation for non-pecuniary damage which he had thus suffered.

45. Underlying both the interview and the impugned article was the undisputed fact that judge Š. was a candidate for election on the list of the Christian-Social Union, a party which had a clear and widely-known stance on the position taken by the Slovakian authorities during the period between 1939 and 1945. The view which was expressed or implicit in both the interview and the article was that a judge who had made public his intention to become involved in politics and to support the party in question should have withdrawn from defamation proceedings which directly concerned the alleged activities and fascist past of the plaintiff, a former Government minister, during World War II. This was expressly recognised in the judgment of 11 March 1999 of the Košice Regional Court in which it was noted that, where a judge failed to withdraw from a case in which the decision in the case was linked to the political views of the judge concerned, he deliberately exposed himself to the threat of criticism by the public. This expression of opinion is in the Court's view to be seen as a value judgment on a matter of public interest which cannot be said to have been devoid of any factual basis.

46. Admittedly, the terms used in the impugned article – in particular, the description of the judgment to which judge Š. was a party as "a legal

farce" – were strong. The article further indicated that judge Š. had been responsible for the judgment whereas it had been adopted by a panel of three judges. However, as acknowledged by the Regional Court, the limits of acceptable criticism are wider in respect of a judge who enters political life. Moreover, the Court recalls its constant case-law to the effect not only that the protection of Article 10 extends to opinions which may shock or offend but that journalistic freedom covers possible recourse to a degree of exaggeration. It has to be noted in this context that judge Š. presided over the appellate court's panel and that he was responsible for the delivery of its judgment. In addition, the Court observes that this was the only express reference to judge Š. in the article in question, which contained no further expressions of a similar nature.

47. Considering the relevant texts as a whole, the Court finds that it cannot be said that the purpose of the statements in question was to offend, to humiliate and to discredit the criticised person.

48. The Court also notes that the judicial proceedings in which the criticised judge had been involved and which were commented upon in the articles under consideration related to an issue of general concern on which a political debate existed (see *Feldek v. Slovakia*, no. 29032/95, § 81, ECHR 2001-VIII).

49. In these circumstances, the standards applied by the Slovakian courts were not compatible with the principles embodied in Article 10 and the reasons which they adduced to justify the interference cannot be regarded as "sufficient". The relatively small amount which the applicant was ordered to pay to the plaintiff cannot affect the position.

50. There has therefore been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

52. The applicant claimed compensation for damage and for costs and expenses incurred by him.

A. Damage

53. The applicant claimed 50,000 [*Note*: The equivalent of approximately 1,250 euros.] Slovakian korunas (SKK) in compensation for pecuniary damage. That sum corresponded to the amount which he had been order to the plaintiff in defamation proceedings which form the subject-

matter of his application. The applicant further claimed SKK 1,000,000 in compensation for damage of non-pecuniary nature. He argued that the outcome of the proceedings had affected his good name, family life and professional reputation.

54. The Government argued that the applicant had suffered no damage as there had been no violation of Article 10. In any event, the amount claimed in respect of non-pecuniary damage was excessive and not supported by any evidence.

55. The Court notes that the applicant suffered pecuniary damage in that he had been ordered to pay the plaintiff SKK 50,000. It therefore awards 1,250 euros (EUR), that is the equivalent of this sum to the applicant.

56. As to the applicant's claim for non-pecuniary damage, the Court considers that the applicant sustained prejudice as a result of the breach of Article 10 found. Having regard to the relevant circumstances, it awards the applicant EUR 1,000 under this head.

B. Costs and expenses

57. The applicant claimed SKK 31,184 [*Note*: The equivalent of approximately EUR 780.] in respect of costs and expenses. That sum comprised SKK 21,650 which the applicant had incurred in the domestic proceedings and SKK 9,534 in respect of the proceedings before the Court.

58. The Government contended that the applicant had failed to show the existence of a causal link between the sum claimed and the alleged breach of Article 10 of the Convention.

59. The Court considers that the amounts claimed are reasonable and awards the applicant EUR 780 under this head.

C. Default interest

60. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;

2. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into Slovakian korunas at the rate applicable at the date of settlement, plus any tax that may be chargeable:

(i) EUR 1,250 (one thousand two hundred and fifty euros) in respect of pecuniary damage;

(ii) EUR 1,000 (one thousand euros) in respect of non-pecuniary damage;

(iii) EUR 780 (seven hundred and eighty euros) in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 July 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

In the case of Informationsverein Lentia and Others v. Austria*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr R. Bernhardt,
Mr F. Matscher,
Mr L.-E. Pettiti,
Mr A. Spielmann,
Mrs E. Palm,
Mr F. Bigi,
Mr A.B. Baka,
Mr G. Mifsud Bonnici,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 29 May and 28 October 1993,

Delivers the following judgment, which was adopted on the last-mentioned date:

_____
Notes by the Registrar

* The case is numbered 36/1992/381/455-459. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

_____

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 26 October 1992, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in five applications (nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by "Informationsverein Lentia", Mr Jörg Haider, "Arbeitsgemeinschaft Offenes Radio", Mr Wilhelm Weber and "Radio Melody GmbH", all Austrian legal or natural persons, on 16 April 1987, 15 May 1989, 27 September 1989, 18 September 1989 and 20 August 1990.

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts

of the case disclosed a breach by the respondent State of its obligations under Articles 10 and 14 (art. 10, art. 14) of the Convention.

3. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30); the President gave the lawyers in question leave to use the German language (Rule 27 para. 3).

4. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 13 October 1992, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Bernhardt, Mr L.-E. Pettiti, Mr A. Spielmann, Mrs E. Palm, Mr F. Bigi, Mr A.B. Baka and Mr G. Mifsud Bonnici (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

5. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Austrian Government ("the Government"), the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 15 April and the applicants' memorials - with their claims under Article 50 (art. 50) of the Convention - on 29 and 31 March and on 13 April 1993. On 27 April the Commission produced various documents, which the Registrar had requested on the President's instructions.

6. On 29 March 1993 the President had authorised, by virtue of Rule 37 para. 2, "Article 19" and "Interights" (two international human rights organisations) to submit written observations on specific aspects of the case. Their observations reached the registry on 11 May.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 May 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr F. Cede, Ambassador, Legal Adviser at the Ministry of Foreign Affairs, Agent,
Mrs S. Bernegger, Federal Chancellery, Adviser;

(b) for the Commission

Mr J.A. Frowein, Delegate;

(c) for the applicants

Mr D. Böhmdorfer, Rechtsanwalt,
Mr W. Haslauer, Rechtsanwalt,
Mr T. Höhne, Rechtsanwalt,
Mr G. Lehner, Rechtsanwalt,
Mr H. Tretter, Counsel.

The Court heard addresses by the above-mentioned representatives, as well as their replies to its questions.

AS TO THE FACTS

I. The particular circumstances of the case

A. Informationsverein Lentia

8. The first applicant, an association of co-proprietors and residents of a housing development in Linz, comprising 458 apartments and 30 businesses, proposed to improve the communication between its members by setting up an internal cable television network. The programmes were to be confined to questions of mutual interest concerning members' rights.

9. On 9 June 1978 the first applicant applied for an operating licence under the Telecommunications Law (Fernmeldegesetz, see paragraph 17 below). As the Linz Regional Post and Telecommunications Head Office (Post- und Telegraphendirektion) had not replied within the six-month time-limit laid down in Article 73 of the Code of Administrative Procedure (Allgemeines Verwaltungsverfahrensgesetz), the association applied to the National Head Office (Generaldirektion für die Post- und Telegraphenverwaltung), attached to the Federal Ministry of Transport (Bundesministerium für Verkehr).

The National Head Office rejected the application on 23 November 1979. In its view, Article 1 para. 2 of the Constitutional Law guaranteeing the independence of broadcasting (Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks, "the Constitutional Broadcasting Law", see paragraph 19 below) had vested in the federal legislature exclusive authority to regulate this activity; it had exercised that authority only once, by enacting the Law on the Austrian Broadcasting Corporation (Bundesgesetz über die Aufgaben und die Einrichtung des Österreichischen Rundfunks, see paragraph 20 below). It followed that no other person could apply for such licence as any application would lack a legal basis. Furthermore there had been no violation of Article 10 (art. 10) of the Convention since the legislature - in its capacity as a maker of constitutional laws (Verfassungsgesetzgeber) - had merely availed itself of its power to set up a system of licences in accordance with the third sentence of paragraph 1 (art. 10-1).

10. Thereupon the first applicant complained to the Constitutional Court of a breach of Article 10 (art. 10); the court gave judgment on 16 December 1983.

It took the view that the freedom to set up and operate radio and television broadcasting stations was subject to the powers accorded to the legislature under paragraph 1 in fine and paragraph 2 of Article 10 (art. 10-1, art. 10-2) (Gesetzesvorbehalt). Accordingly, an administrative decision could infringe that provision only if it proved to have no legal basis, or its legal basis was unconstitutional or again had been applied in an arbitrary manner (in denkunmöglicher Weise an[ge]wendet). In addition, the Constitutional Broadcasting Law had instituted a system which made all activity of this type subject to the grant of a licence (Konzession) by the federal legislature. This system was intended to ensure objectivity and diversity of opinions (Meinungsvielfalt), and would be ineffective if it were possible for everybody to obtain the requisite authorisation. As

matters stood, the right to broadcast was restricted to the Austrian Broadcasting Corporation (Österreichischer Rundfunk, ORF), as no implementing legislation had been enacted in addition to the law governing that organisation.

Contrary to its assertions, the first applicant had in fact intended to broadcast within the meaning of the constitutional law, because its programmes were to be directed at a general audience of variable composition. The broadcasting law therefore provided a legal basis for the decision in issue.

Consequently, the Constitutional Court rejected the complaint and remitted it to the Administrative Court.

11. On 10 September 1986 the Administrative Court in substance adopted the grounds relied on by the Constitutional Court and in its turn dismissed the first applicant's claim.

B. Jörg Haider

12. From 1987 to 1989 the second applicant elaborated a project for the setting up, with other persons, of a private radio station in Carinthia. He subsequently gave up the idea after a study had shown him that according to the applicable law as interpreted by the Constitutional Court he would not be able to obtain the necessary licence. As a result he never applied for one.

C. Arbeitsgemeinschaft Offenes Radio (AGORA)

13. The third applicant, an Austrian association and a member of the Fédération européenne des radios libres (FERL - European Federation of Free Radios), plans to establish a radio station in southern Carinthia in order to broadcast, in German and Slovene, non-commercial radio programmes, whose makers already operate an authorised mobile radio station in Italy.

14. In 1988 AGORA applied for a licence. Its application was refused by the Klagenfurt Regional Post and Telecommunications Head Office on 19 December 1989 and by the National Head Office in Vienna on 9 August 1990. On 30 September 1991, on the basis of its own case-law (see paragraph 10 above), the Constitutional Court dismissed an appeal from that decision.

D. Wilhelm Weber

15. The fourth applicant is a shareholder of an Italian company operating a commercial radio which broadcasts to Austria and he wishes to carry out the same activity in that country. However, in view of the legislation in force, he decided not to make any application to the appropriate authorities.

E. Radio Melody GmbH

16. The fifth applicant is a private limited company incorporated under Austrian law. On 8 November 1988 it asked the Linz Regional Post and Telecommunications Head Office to allocate it a frequency so that it could operate a local radio station which it hoped to launch in Salzburg. On 28 April 1989 its application was rejected, a decision confirmed on 12 July 1989 by the National Head Office and on 18 June 1990 by the Constitutional Court, which based its decision on

its judgment of 16 December 1983 (see paragraph 10 above).

II. The relevant domestic law

A. The Telecommunications Law of 13 July 1949 ("Fernmeldegesetz")

17. According to the Telecommunications Law of 13 July 1949, "the right to set up and operate telecommunications installations (Fernmeldeanlagen) is vested exclusively in the federal authorities (Bund)" (Article 2 para. 1). The latter may however confer on natural or legal persons the power to exercise that right in respect of specific installations (Article 3 para. 1). No licence is required in certain circumstances, including the setting up of an installation within the confines of a private property (Article 5).

B. The Ministerial Ordinance of 18 September 1961 concerning private telecommunications installations ("Verordnung des Bundesministeriums für Verkehr und Elektrizitätswirtschaft über Privatfernmeldeanlagen")

18. The Ministerial Ordinance of 18 September 1961 concerning private telecommunications installations lays down inter alia the conditions for setting up and operating private telecommunications installations subject to federal supervision. According to the case-law, it cannot however constitute the legal basis for the grant of licences.

C. The Constitutional Law of 10 July 1974 guaranteeing the independence of broadcasting ("Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks")

19. According to Article 1 of the Constitutional Law of 10 July 1974 guaranteeing the independence of broadcasting,

> "...
>
> 2. Broadcasting shall be governed by more detailed rules to be set out in a federal law. Such a law must inter alia contain provisions guaranteeing the objectivity and impartiality of reporting, the diversity of opinions,balanced programming and the independence of persons and bodies responsible for carrying out the duties defined in paragraph 1.
>
> 3. Broadcasting within the meaning of paragraph 1 shall be a public service."

D. The Law of 10 July 1974 on the Austrian Broadcasting Corporation ("Bundesgesetz über die Aufgaben und die Einrichtung des Österreichischen Rundfunks")

20. The Law of 10 July 1974 on the National Broadcasting Corporation established the Austrian Broadcasting Corporation with the status of an autonomous public-law corporation.

It is under a duty to provide comprehensive news coverage of major political, economic, cultural and sporting events; to this end, it has to broadcast, in compliance with the requirements of objectivity and diversity of views, in particular current affairs, news reports,

commentaries and critical opinions (Article 2 para. 1 (1)), and to do so via at least two television channels and three radio stations, one of which must be a regional station (Article 3). Broadcasting time must be allocated to the political parties represented in the national parliament and to representative associations (Article 5 para. 1).

A supervisory board (Kommission zur Wahrung des Rundfunkgesetzes) rules on all disputes concerning the application of the above-mentioned law which fall outside the jurisdiction of an administrative authority or court (Articles 25 and 27). It is composed of seventeen independent members, including nine judges, appointed for terms of four years by the President of the Republic on the proposal of the Federal Government.

E. The case-law concerning "passive" cable broadcasting

21. On 8 July 1992 the Administrative Court decided that the Constitutional Law of 10 July 1974 (see paragraph 19 above) did not cover "passive" broadcasting via cable, in other words the broadcasting in their entirety by cable of programmes picked up by an aerial. Consequently, the mere fact that such programmes originated from a foreign station and were directed principally or exclusively at an Austrian audience could not constitute grounds for refusing the licence necessary for this type of operation.

F. Subsequent developments

22. On 1 January 1994 a Law on regional radio stations is to enter into force (Regionalradiogesetz, Official Gazette (Bundesgesetzblatt) no. 1993/506). It will allow the authorities under certain conditions to grant private individuals or private corporations licences to set up and operate regional radio stations.

PROCEEDINGS BEFORE THE COMMISSION

23. The applicants lodged applications with the Commission on various dates between 16 April 1987 and 20 August 1990 (applications nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90). They maintained that the impossibility of obtaining an operating licence was an unjustified interference with their right to communicate information and infringed Article 10 (art. 10) of the Convention. The first and third applicants also complained of a discrimination contrary to Article 14, read in conjunction with Article 10 (art. 14+10). The fifth applicant alleged in addition a breach of Article 6 (art. 6), inasmuch as it had not been able to bring the dispute before a "tribunal" within the meaning of that provision.

24. The Commission ordered the joinder of the applications on 13 July 1990 and 14 January 1992. On 15 January 1992 it found the complaints concerning Articles 10 and 14 (art. 10, art. 14) admissible, declaring that relating to Article 6 (art. 6) inadmissible. In its report of 9 September 1992 (made under Article 31) (art. 31), it expressed the following opinion:

(a) that there had been a violation of Article 10 (art. 10) (unanimously as regards the first applicant and by fourteen votes to one for the others);

(b) that it was not necessary also to examine the case from the point of view of Article 14 (art. 14) (unanimously as regards

the first applicant and by fourteen votes to one for the third applicant).

The full text of the Commission's opinion and of the separate opinions contained in the report is reproduced as an annex to this judgment*.

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* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 276 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

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THE GOVERNMENT'S FINAL SUBMISSIONS

25. The Government asked the Court "to find that there had been no violation of Article 10 (art. 10), either taken on its own or in conjunction with Article 14 (art. 14+10)".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

26. The applicants complained that they had each been unable to set up a radio station or, in the case of Informationsverein Lentia, a television station, as under Austrian legislation this right was restricted to the Austrian Broadcasting Corporation. They asserted that this constituted a monopoly incompatible with Article 10 (art. 10), which provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Government contested this claim, whereas the Commission in substance accepted it.

27. The Court observes that the restrictions in issue amount to an "interference" with the exercise by the applicants of their freedom to impart information and ideas; indeed this was common ground between the participants in the proceedings. The only question which arises is therefore whether such interference was justified.

In this connection the fact that Mr Haider and Mr Weber never applied for a broadcasting licence (see paragraphs 12 and 15 above) is

of no consequence; before the Commission the Government accepted that those two applicants could be regarded as victims and the Government did not argue to the contrary before the Court.

28. In the Government's contention, sufficient basis for the contested interference is to be found in paragraph 1 in fine, which, in their view, has to be interpreted autonomously. In the alternative, they argued that it also satisfied the conditions laid down in paragraph 2.

29. The Court reiterates that the object and purpose of the third sentence of Article 10 para. 1 (art. 10-1) and the scope of its application must be considered in the context of the Article as a whole and in particular in relation to the requirements of paragraph 2 (art. 10-2), to which licensing measures remain subject (see the Groppera Radio AG and Others v. Switzerland judgment of 28 March 1990, Series A no. 173, p. 24, para. 61, and the Autronic AG v. Switzerland judgment of 22 May 1990, Series A no. 178, p. 24, para. 52). It is therefore necessary to ascertain whether the rules in question complied with both of these provisions.

A. Paragraph 1, third sentence (art. 10-1)

30. In the Government's view, the licensing system referred to at the end of paragraph 1 allows States not only to regulate the technical aspects of audio-visual activities, but also to determine their place and role in modern society. They argued that this was clear from the wording of the third sentence of paragraph 1 (art. 10-1), which was less restrictive than that of paragraph 2 and of Article 11 (art. 11-2) and thus allowed more extensive interference by the public authorities with the freedom in question. By the same token, it left the States a wider margin of appreciation in defining their media policy and its implementation. This could even take the form of a public broadcasting service monopoly in particular in cases where, as in Austria, that was the State's sole means of guaranteeing the objectivity and impartiality of news, the balanced reporting of all shades of opinion and the independence of the persons and bodies responsible for the programmes.

31. According to the applicants, the rules in force in Austria, and in particular the monopoly of the Austrian Broadcasting Corporation, essentially reflect the authorities' wish to secure political control of the audio-visual industry, to the detriment of pluralism and artistic freedom. By eliminating all competition, the rules served in addition to protect the Austrian Broadcasting Corporation's economic viability at the cost of a serious encroachment on the freedom to conduct business. In short, they did not comply with the third sentence of paragraph 1.

32. As the Court has already held, the purpose of that provision is to make it clear that States are permitted to regulate by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects (see the above-mentioned Groppera Radio AG and Others judgment, Series A no. 173, p. 24, para. 61). Technical aspects are undeniably important, but the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments.

This may lead to interferences whose aims will be legitimate under the third sentence of paragraph 1, even though they do not correspond to any of the aims set out in paragraph 2. The compatibility of such interferences with the Convention must nevertheless be assessed in the light of the other requirements of paragraph 2.

33. The monopoly system operated in Austria is capable of contributing to the quality and balance of programmes, through the supervisory powers over the media thereby conferred on the authorities. In the circumstances of the present case it is therefore consistent with the third sentence of paragraph 1. It remains, however, to be determined whether it also satisfies the relevant conditions of paragraph 2.

B. Paragraph 2 (art. 10-2)

34. The interferences complained of were, and this is not disputed by any of the participants in the proceedings, "prescribed by law". Their aim has already been held by the Court to be a legitimate one (see paragraphs 32-33 above). On the other hand, a problem arises in connection with the question whether the interferences were "necessary in a democratic society".

35. The Contracting States enjoy a margin of appreciation in assessing the need for an interference, but this margin goes hand in hand with European supervision, whose extent will vary according to the circumstances. In cases such as the present one, where there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10 (art. 10-1), the supervision must be strict because of the importance - frequently stressed by the Court - of the rights in question. The necessity for any restriction must be convincingly established (see, among other authorities, the Autronic AG judgment, cited above, Series A no. 178, pp. 26-27, para. 61).

36. The Government drew attention in the first place to the political dimension of the activities of the audio-visual media, which is reflected in Austria in the aims fixed for such media under Article 1 para. 2 of the Constitutional Broadcasting Law, namely to guarantee the objectivity and impartiality of reporting, the diversity of opinions, balanced programming and the independence of persons and bodies responsible for programmes (see paragraph 20 above). In the Government's view, only the system in force, based on the monopoly of the Austrian Broadcasting Corporation, made it possible for the authorities to ensure compliance with these requirements. That was why the applicable legislation and the charter of the Austrian Broadcasting Corporation made provision for the independence of programming, the freedom of journalists and the balanced representation of political parties and social groups in the managing bodies.

In opting to keep the present system, the State had in any case merely acted within its margin of appreciation, which had remained unchanged since the adoption of the Convention; very few of the Contracting States had had different systems at the time. In view of the diversity of the structures which now exist in this field, it could not seriously be maintained that a genuine European model had come into being in the meantime.

37. The applicants maintained that to protect public opinion from manipulation it was by no means necessary to have a public monopoly in

the audio-visual industry, otherwise it would be equally necessary to have one for the press. On the contrary, true progress towards attaining diversity of opinion and objectivity was to be achieved only by providing a variety of stations and programmes. In reality, the Austrian authorities were essentially seeking to retain their political control over broadcasting.

38. The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive (see, for example, mutatis mutandis, the Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59). Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.

39. Of all the means of ensuring that these values are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station. The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need.

As a result of the technical progress made over the last decades, justification for these restrictions can no longer today be found in considerations relating to the number of frequencies and channels available; the Government accepted this. Secondly, for the purposes of the present case they have lost much of their raison d'être in view of the multiplication of foreign programmes aimed at Austrian audiences and the decision of the Administrative Court to recognise the lawfulness of their retransmission by cable (see paragraph 21 above). Finally and above all, it cannot be argued that there are no equivalent less restrictive solutions; it is sufficient by way of example to cite the practice of certain countries which either issue licences subject to specified conditions of variable content or make provision for forms of private participation in the activities of the national corporation.

40. The Government finally adduced an economic argument, namely that the Austrian market was too small to sustain a sufficient number of stations to avoid regroupings and the constitution of "private monopolies".

41. In the applicant's opinion, this is a pretext for a policy which, by eliminating all competition, seeks above all to guarantee to the Austrian Broadcasting Corporation advertising revenue, at the expense of the principle of free enterprise.

42. The Court is not persuaded by the Government's argument. Their assertions are contradicted by the experience of several European States, of a comparable size to Austria, in which the coexistence of private and public stations, according to rules which vary from country to country and accompanied by measures preventing the development of private monopolies, shows the fears expressed to be groundless.

43. In short, like the Commission, the Court considers that the interferences in issue were disproportionate to the aim pursued and

were, accordingly, not necessary in a democratic society. There has therefore been a violation of Article 10 (art. 10).

44. In the circumstances of the case, this finding makes it unnecessary for the Court to determine whether, as was claimed by some of the applicants, there has also been a breach of Article 14, taken in conjunction with Article 10 (art. 14+10) (see, inter alia, the Airey v. Ireland judgment of 9 October 1979, Series A no. 32, p. 16, para. 30).

II. APPLICATION OF ARTICLE 50 (art. 50)

45. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The Court examined the applicants' claims in the light of the observations of the participants in the proceedings and the criteria laid down in its case-law.

A. Damage

46. Only two applicants sought compensation for pecuniary damage: "Informationsverein Lentia" in the amount of 900,000 Austrian schillings and "Radio Melody" 5,444,714.66 schillings.

They based their claims on the assumption that they would not have failed to obtain the licences applied for if the Austrian legislation had been in conformity with Article 10 (art. 10). This is, however, speculation, in view of the discretion left in this field to the authorities, as the Delegate of the Commission correctly pointed out. No compensation is therefore recoverable under this head.

B. Costs and expenses

47. As regards costs and expenses, the applicants claimed respectively 136,023.54 schillings ("Informationsverein Lentia"), 513,871.20 schillings (Haider), 390,115.20 schillings ("AGORA"), 519,871.20 schillings (Weber) and 605,012.40 schillings ("Radio Melody").

The Government took the view that the first of those amounts was reasonable and that it should, however, in their view, be increased to 165,000 schillings to take account of the proceedings before the Court.

Making an assessment on an equitable basis, the Court awards 165,000 schillings each to the applicants "Informationsverein Lentia", "AGORA" and "Radio Melody", for the proceedings conducted in Austria and in Strasbourg. Mr Haider and Mr Weber, who appeared only before the Convention institutions, are entitled to 100,000 schillings each.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 10 (art. 10);

2. Holds that it is not necessary also to examine the case under Article 14 read in conjunction with Article 10 (art. 14+10);

3. Holds that Austria is to pay, within three months, in respect of costs and expenses, 165,000 (one hundred and sixty-five thousand) Austrian schillings to each of the applicants "Informationsverein Lentia", "AGORA" and "Radio Melody", and 100,000 (one hundred thousand) Austrian schillings each to the applicants Haider and Weber;

4. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 November 1993.

Signed: Rolv RYSSDDAL
President

Signed: Marc-André EISSEN
Registrar

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

FORMER FIRST SECTION

CASE OF METROPOLITAN CHURCH OF BESSARABIA AND OTHERS v. MOLDOVA

(Application no. 45701/99)

JUDGMENT

STRASBOURG

13 December 2001

FINAL

27/03/2002

In the case of Metropolitan Church of Bessarabia and Others v. Moldova,

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

Mrs E. PALM, *President*,
Mrs W. THOMASSEN,
Mr L. FERRARI BRAVO,
Mr C. BÎRSAN,
Mr J. CASADEVALL,
Mr B. ZUPANČIČ,
Mr T. PANȚÎRU, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 2 October and 5 December 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 45701/99) against the Republic of Moldova lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the Metropolitan Church of Bessarabia (*Mitropolia Basarabiei şi Exarhatul Plaiurilor*) and twelve Moldovan nationals, Mr Petru Păduraru, Mr Petru Buburuz, Mr Vasile Petrache, Mr Ioan Eşanu, Mr Victor Rusu, Mr Anatol Goncear, Mr Valeriu Cernei, Mr Gheorghe Ioniță, Mr Valeriu Matciac, Mr Vlad Cubreacov, Mr Anatol Telembici and Mr Alexandru Magola ("the applicants"), on 3 June 1998. The applicant Vasile Petrache died in autumn 1999.

2. The applicants alleged in particular that the Moldovan authorities' refusal to recognise the Metropolitan Church of Bessarabia infringed their freedom of religion and association and that the applicant Church was the victim of discrimination on the ground of religion.

3. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

4. The application was assigned to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 7 June 2001, the Chamber declared the application admissible [*Note by the Registry*. The Court's decision is obtainable from

the Registry]. It further decided to strike out of the Court's list that part of the application which concerned the applicant Vasile Petrache, who had died.

6. The applicants and the Moldovan Government ("the Government") each filed observations on the merits (Rule 59 § 1).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 2 October 2001 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*
Mr I. MOREI, Minister of Justice,
Mr V. PÂRLOG, Head of the Department of the Government Agent and International Relations, Ministry of Justice, *Agent*,
Mr G. ARMAŞU, Director, Religious Affairs Department, *Adviser*;

(b) *for the applicants*
Mr J.W. MONTGOMERY,
Mr A. DOS SANTOS, Barristers practising in London, *Counsel*.

The Court heard addresses by Mr Montgomery and Mr Morei.

8. On 25 September 2001, in accordance with Rule 61 § 3, the President of the Chamber had authorised the Metropolitan Church of Moldova to submit written observations on certain aspects of the case. These observations had been received on 10 September 2001.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The first applicant, the Metropolitan Church of Bessarabia, is an autonomous Orthodox Church having canonical jurisdiction in the territory of the Republic of Moldova. The other applicants are Moldovan nationals who are members of the eparchic council of the first applicant. They are: Mr Petru Păduraru, Archbishop of Chişinău, Metropolitan of Bessarabia and living in Chişinău; Mr Petru Buburuz, prosyncellus, living in Chişinău; Mr Ioan Eşanu, protosyncellus, living in Călăraşi; Mr Victor Rusu, protopresbyter, living in Lipnic, Ocnița; Mr Anatol Goncear, a priest living in Zubreşti, Străşeni; Mr Valeriu Cernei, a priest living in

Sloveanca, Sângerei; Mr Gheorghe Ioniță, a priest living in Crasnoarmeisc, Hâncești; Mr Valeriu Matciac, a priest living in Chişinău; Mr Vlad Cubreacov, member of the Moldovan parliament and of the Parliamentary Assembly of the Council of Europe, and living in Chişinău, Mr Anatol Telembici, living in Chişinău; and Mr Alexandru Magola, Chancellor of the Metropolitan Church of Bessarabia, living in Chişinău.

A. Creation of the applicant Church and proceedings to secure its official recognition

1. Creation of the Metropolitan Church of Bessarabia

10. On 14 September 1992 the applicant natural persons joined together to form the applicant Church – the Metropolitan Church of Bessarabia – a local, autonomous Orthodox Church. According to its articles of association, it took the place, from the canon-law point of view, of the Metropolitan Church of Bessarabia which had existed until 1944.

In December 1992 it was attached to the patriarchate of Bucharest.

11. The Metropolitan Church of Bessarabia adopted articles of association which determined, among other matters, the composition and administration of its organs, the training, recruitment and disciplinary supervision of its clergy, the ecclesiastical hierarchy and rules concerning its assets. In the preamble to the articles of association the principles governing the organisation and operation of the applicant Church are defined as follows:

> "The Metropolitan Church of Bessarabia is a local, autonomous Orthodox Church attached to the patriarchate of Bucharest. The traditional ecclesiastical denomination 'Metropolitan Church of Bessarabia' is of a historically conventional nature and has no link with current or previous political situations. The Metropolitan Church of Bessarabia has no political activities and will have none in future. It shall carry on its work in the territory of the Republic of Moldova. The Metropolitan Church of Bessarabia shall have the status of an exarchate of the country. According to canon law, communities of the Moldovan diaspora may also become members. No charge shall be made for the accession of individual members and communities living abroad.
>
> In the context of its activity in the Republic of Moldova, it shall respect the laws of the State and international human rights law. Communities abroad which have adhered for the purposes of canon law to the Metropolitan Church of Bessarabia shall establish relations with the authorities of the States concerned, complying with their legislation and the relevant provisions of international law. The Metropolitan Church of Bessarabia shall cooperate with the authorities of the State in the sphere of culture, education and social assistance. The Metropolitan Church of Bessarabia does not make any claim of an economic or any other kind against other Churches or religious organisations. The Metropolitan Church of Bessarabia maintains ecumenical relations with other Churches and religious movements and considers that fraternal dialogue is the only proper form of relationship between Churches.

Priests of the Metropolitan Church of Bessarabia working in Moldovan territory shall be Moldovan citizens. When nationals of foreign States are invited to come to Moldova to carry on a religious activity or citizens of the Republic of Moldova are sent abroad for the same purpose, the legislation in force must be complied with.

Members of the Metropolitan Church of Bessarabia shall be citizens of the Republic of Moldova who have joined together on a voluntary basis to practise their religion in common, in accordance with their own convictions, and on the basis of the precepts of the Gospel, the Apostolic Canons, Orthodox canon law and Holy Tradition.

Religious services held in all the communities of the Metropolitan Church of Bessarabia shall include special prayers for the authorities and institutions of the State, couched in the following terms: 'We pray, as always, for our country, the Republic of Moldova, for its leaders and for its army. May God protect them and grant them peaceful and honest lives, spent in obedience to the canons of the Church.' "

12. To date, the Metropolitan Church of Bessarabia has established 117 communities in Moldovan territory, three communities in Ukraine, one in Lithuania, one in Latvia, two in the Russian Federation and one in Estonia. The communities in Latvia and Lithuania have been recognised by the State authorities and have legal personality.

Nearly one million Moldovan nationals are affiliated to the applicant Church, which has more than 160 clergy.

The Metropolitan Church of Bessarabia is recognised by all the Orthodox patriarchates with the exception of the patriarchate of Moscow.

2. Administrative and judicial proceedings to secure official recognition of the applicant Church

13. Pursuant to the Religious Denominations Act (Law no. 979-XII of 24 March 1992), which requires religious denominations active in Moldovan territory to be recognised by means of a government decision, the applicant Church applied for recognition on 8 October 1992. It received no reply.

14. It made further applications on 25 January and 8 February 1995. On a date which has not been specified the Religious Affairs Department refused these applications.

15. On 8 August 1995 the applicant Petru Păduraru, relying on Article 235 of the Code of Civil Procedure (which governs judicial review of administrative acts contrary to recognised rights), brought civil proceedings against the government in the Court of First Instance of the Buiucani district of Chişinău. He asked for the decisions refusing to recognise the applicant Church to be set aside. The court ruled in his favour and, on 12 September 1995, ordered recognition of the Metropolitan Church of Bessarabia.

16. On 15 September 1995 the Buiucani public prosecutor appealed against the Buiucani Court of First Instance's decision of 12 September 1995.

17. On 18 October 1995 the Supreme Court of Justice set aside the decision of 12 September 1995 on the ground that the courts did not have jurisdiction to consider the applicant Church's application for recognition.

18. On 13 March 1996 the applicant Church filed a fresh application for recognition with the government. On 24 May 1996, having received no reply, the applicants brought civil proceedings against the government in the Chişinău Court of First Instance, seeking recognition of the Metropolitan Church of Bessarabia. On 19 July 1996 that court gave judgment against the applicants.

19. On 20 August 1996 the applicants again filed an application for recognition, which went unanswered.

20. The applicants appealed to the Chişinău Municipal Court (*Tribunal municipiului*) against the judgment of 19 July 1996. In a judgment of 21 May 1997, against which no appeal lay, the Municipal Court quashed the impugned judgment and allowed the applicants' claim.

21. However, following a reform of the Moldovan judicial system, the file was sent to the Moldovan Court of Appeal for trial *de novo*.

22. On 4 March 1997 the applicants again applied to the government for recognition. On 4 June 1997, not having received any reply, they referred the matter to the Court of Appeal, seeking recognition of the Metropolitan Church of Bessarabia, relying on their freedom of conscience and freedom of association for the purpose of practising their religion. The resulting action was joined to the case already pending before the Court of Appeal.

23. In the Court of Appeal the government alleged that the case concerned an ecclesiastical conflict within the Orthodox Church in Moldova (the Metropolitan Church of Moldova), which could be resolved only by the Romanian and Russian Orthodox Churches, and that any recognition of the Metropolitan Church of Bessarabia would provoke conflicts in the Orthodox community.

24. The Court of Appeal allowed the applicants' claim in a decision of 19 August 1997. It pointed out, firstly, that Article 31 §§ 1 and 2 of the Moldovan Constitution guaranteed freedom of conscience and that that freedom should be exercised in a spirit of tolerance and respect for others. In addition, the various denominations were free to organise themselves according to their articles of association, subject to compliance with the laws of the Republic. Secondly, it noted that from 8 October 1992 the applicant Church, acting pursuant to sections 14 and 15 of the Religious Denominations Act, had filed with the government a number of applications for recognition, but that no reply had been forthcoming. By a letter of 19 July 1995 the Prime Minister had informed the applicants that the government could not consider the application of the Metropolitan Church of Bessarabia without interfering with the activity of the Metropolitan Church of Moldova. The Court of Appeal further noted that while the applicant Church's application for recognition had been ignored, the

Metropolitan Church of Moldova had been recognised by the government on 7 February 1993, as an eparchy dependent on the patriarchate of Moscow.

The Court of Appeal dismissed the government's argument that recognition of the Metropolitan Church of Moldova made it possible to satisfy the wishes of all Orthodox believers. It pointed out that the term denomination was not to be reserved for catholicism or orthodoxy, but should embrace all faiths and various manifestations of religious feelings by their adherents, in the form of prayers, ritual, religious services or divine worship. It noted that from the point of view of canon law the Metropolitan Church of Moldova was part of the Russian Orthodox Church and therefore dependent on the patriarchate of Moscow, whereas the Metropolitan Church of Bessarabia was attached to the Romanian Orthodox Church and therefore dependent on the patriarchate of Bucharest.

The Court of Appeal held that the government's refusal to recognise the applicant Church was contrary to the freedom of religion, as guaranteed not only by the Religious Denominations Act but also by Article 18 of the Universal Declaration of Human Rights, Article 5 of the International Covenant on Economic, Social and Cultural Rights and Article 18 of the International Covenant on Civil and Political Rights, to all of which Moldova was party. Noting that the representative of the government had taken the view that the applicant Church's articles of association complied with domestic legislation, the Court of Appeal ordered the government to recognise the Metropolitan Church of Bessarabia and to ratify its articles of association.

25. The government appealed against the above decision on the ground that the courts did not have jurisdiction to try such a case.

26. In a judgment of 9 December 1997 the Supreme Court of Justice set aside the decision of 19 August 1997 and dismissed the applicants' action on the grounds that it was out of time and manifestly ill-founded.

It noted that, according to Article 238 of the Code of Civil Procedure, one month was allowed for an appeal against a government decision alleged to infringe a recognised right. The time allowed began to run either on the date of the decision announcing the government's refusal or, if the they did not reply, one month after the lodging of the application. The Supreme Court of Justice noted that the applicants had submitted their application to the government on 4 March 1997 and lodged their appeal on 4 June 1997; it accordingly ruled their action out of time.

It went on to say that, in any event, the government's refusal of the applicants' application had not infringed their freedom of religion as guaranteed by international treaties, and in particular by Article 9 of the European Convention on Human Rights, because they were Orthodox Christians and could manifest their beliefs within the Metropolitan Church

of Moldova, which the government had recognised by a decision of 7 February 1993.

The Supreme Court of Justice considered that the case was simply an administrative dispute within a single Church, which could be settled only by the Metropolitan Church of Moldova, since any interference by the State in the matter might aggravate the situation. It held that the State's refusal to intervene in this conflict was compatible with Article 9 § 2 of the European Convention on Human Rights.

Lastly, it noted that the applicants could manifest their beliefs freely, that they had access to Churches and that they had not adduced evidence of any obstacle whatsoever to the practice of their religion.

27. On 15 March 1999 the applicants again applied to the government for recognition.

28. By a letter dated 20 July 1999 the Prime Minister refused on the ground that the Metropolitan Church of Bessarabia was not a religious denomination in the legal sense but a schismatic group within the Metropolitan Church of Moldova.

He informed the applicants that the government would not allow their application until a religious solution to the conflict had been found, following the negotiations in progress between the patriarchates of Russia and Romania.

29. On 10 January 2000 the applicants lodged a further application for recognition with the government. The Court has not been informed of the outcome of that application.

3. Recognition of other denominations

30. Since the adoption of the Religious Denominations Act, the government has recognised a number of denominations, some of which are listed below.

On 7 February 1993 the government ratified the articles of association of the Metropolitan Church of Moldova, attached to the patriarchate of Moscow. On 28 August 1995 it recognised the Orthodox Eparchy of the Old Christian Liturgy of Chișinău, attached to the Russian Orthodox Church of the Old Liturgy, whose head office was in Moscow.

On 22 July 1993 the government recognised the "Seventh-Day Adventist Church". On 19 July 1994 it decided to recognise the "Seventh-Day Adventist Church – Reform Movement".

On 9 June 1994 the government ratified the articles of association of the "Federation of Jewish (Religious) Communities" and on 1 September 1997 those of the "Union of Communities of Messianic Jews".

4. Reaction of various national authorities

31. Since it was first set up, the Metropolitan Church of Bessarabia has regularly applied to the Moldovan authorities to explain the reasons for its creation and to seek their support in obtaining official recognition.

32. The government asked several ministries for their opinion about whether to recognise the applicant Church.

On 16 October 1992 the Ministry of Culture and Religious Affairs informed the government that it was favourable to the recognition of the Metropolitan Church of Bessarabia.

On 14 November 1992 the Ministry of Financial Affairs informed the government that it could see no objection to the recognition of the Metropolitan Church of Bessarabia.

On 8 February 1993 the Ministry of Labour and Social Protection declared that it was favourable to the recognition of the applicant Church.

In a letter of 8 February 1993 the Ministry of Education emphasised the need for the rapid recognition of the Metropolitan Church of Bessarabia in order to avoid any discrimination against its adherents, while pointing out that its articles of association could be improved upon.

On 15 February 1993 the Secretariat of State for Privatisation stated that it was favourable to the recognition of the Metropolitan Church of Bessarabia, while proposing certain amendments to its articles of association.

33. On 11 March 1993, in reply to a letter from the Bishop of Bălți, writing on behalf of the Metropolitan of Bessarabia, the Moldovan parliament's Cultural and Religious Affairs Committee noted that the delay in registering the Metropolitan Church of Bessarabia was aggravating the social and political situation in Moldova, even though its actions and articles of association complied with Moldovan legislation. The committee therefore asked the government to recognise the applicant Church.

34. A memorandum from the Religious Affairs Department, dated 21 November 1994, summarised the situation as follows:

> "For nearly two years an ecclesiastical group known under the name of the Metropolitan Church of Bessarabia has been operating illegally in Moldovan territory. No positive result has been obtained in spite of our sustained efforts to put a stop to its activity (discussions between members of the so-called Church, priests, Mr G.E., Mr I.E. ..., representatives of the State and believers from the localities in which its adherents are active, Mr G.G., Minister of State, and Mr N.A., Deputy Speaker; all the organs of local and national administrative bodies have been informed of the illegal nature of the group, etc.).
>
> In addition, although priests and adherents of the Church have been forbidden to take part in divine service, for failure to comply with canon law, they have nevertheless continued their illegal activities in the churches and have also been invited to officiate on the occasion of various public activities organised, for example, by the Ministries of Defence and Health. The management of the Bank of Moldova and the National Customs Service have not acted on our request for liquidation of the

group's bank accounts and strict supervision of its priests during their numerous crossings of the border.

The activity of the so-called Church is not limited to attracting new adherents and propagating the ideas of the Romanian Church. It also has all the means necessary for the work of a Church, it appoints priests, including nationals of other States ..., trains clergy, builds churches and many, many other things.

It should also be mentioned that the group's activity (more political than religious) is sustained by forces both from within the country (by certain mayors and their villages, by opposition representatives, and even by some MPs) and from outside (by decision no. 612 of 12 November 1993 the Romanian government granted it 399,400,000 lei to finance its activity ...

The activity of this group is causing religious and socio-political tension in Moldova and will have unforeseeable repercussions ...

The Religious Affairs Department notes:

(a) Within Moldovan territory there is no territorial administrative unit with the name of Bessarabia which might justify setting up a religious group named 'Metropolitan Church of Bessarabia'. The creation of such a group and recognition of its articles of association would constitute a wrongful anti-State act – a negation of the sovereign and independent State which the Republic of Moldova constitutes.

(b) The Metropolitan Church of Bessarabia was set up to take the place of the former Eparchy of Bessarabia, founded in 1925 and recognised by Decree no. 1942 promulgated on 4 May 1925 by the King of Romania. Legal recognition of the validity of those acts would imply recognition of their present-day effects within Moldovan territory.

(c) All Orthodox parishes in Moldovan territory have been registered as constituent parts of the of the Orthodox Church of Moldova (the Metropolitan Church of Moldova), whose articles of association were ratified by the government in its decision no. 719 of 17 November 1993.

In conclusion:

1. If nothing is done to put a stop to the activity of the so-called Metropolitan Church of Bessarabia, the result will be destabilisation not just of the Orthodox Church but of the whole of Moldovan society.

2. Recognition of the Metropolitan Church of Bessarabia (Old Style) and ratification of its articles of association by the government would automatically entail the disappearance of the Metropolitan Church of Moldova."

35. On 20 February 1996, following a question in Parliament asked by the applicant Vlad Cubreacov, a Moldovan MP, the Deputy Prime Minister wrote a letter to the Speaker explaining the reasons for the government's

refusal to recognise the Metropolitan Church of Bessarabia. He said that the applicant Church was not a denomination distinct from the Orthodox Church but a schismatic group within the Metropolitan Church of Moldova and that any interference by the State to resolve the conflict would be contrary to the Moldovan Constitution. He pointed out that the political party to which Mr Cubreacov belonged had publicly expressed disapproval of the Supreme Court of Justice's decision of 9 December 1997, that Mr Cubreacov himself had criticised the government for their refusal to recognise "this phantom metropolitan Church" and that he continued to support it by exerting pressure in any way he could, through statements to the media and approaches to the national authorities and international organisations. The letter ended with the assertion that the "feverish debates" about the Metropolitan Church of Bessarabia were purely political.

36. On 29 June 1998 the Religious Affairs Department sent the Deputy Prime Minister its opinion on the question of recognition of the Metropolitan Church of Bessarabia.

It pointed out in particular that not since 1940 had there been an administrative unit in Moldova with the name "Bessarabia" and that the Orthodox Church had been recognised on 17 November 1993 under the name of the Metropolitan Church of Moldova, of which the Metropolitan Church of Bessarabia was a "schismatic element". It accordingly considered that recognition of the applicant Church would represent interference by the State in the affairs of the Metropolitan Church of Moldova, and that this would aggravate the "unhealthy" situation in which the latter Church was placed. It considered that the articles of association of the applicant Church could not be ratified since they merely "reproduce[d] those of the Orthodox Church of another country".

37. On 22 June 1998 the Ministry of Justice informed the government that it did not consider the articles of association of the Metropolitan Church of Bessarabia to be contrary to Moldovan legislation.

38. By letters of 25 June and 6 July 1998 the Ministry of Labour and Social Protection and the Ministry of Financial Affairs again informed the government that they could see no objection to recognition of the Metropolitan Church of Bessarabia.

39. On 7 July 1998 the Ministry of Education informed the government that it supported recognition of the Metropolitan Church of Bessarabia.

40. On 15 September 1998 the Cultural and Religious Affairs Committee of the Moldovan parliament sent the government, for information, a copy of a report by the Ministry of Justice of the Russian Federation, which showed that on 1 January 1998 there were at least four different Orthodox Churches in Russia, some of which had their head offices abroad. The Committee expressed the hope that the above-mentioned report would assist the government to resolve certain similar

problems, particularly the problem concerning the Metropolitan Church of Bessarabia's application for recognition.

41. In a letter sent on 10 January 2000 to the applicant Vlad Cubreacov, the Deputy Attorney-General expressed the view that the government's refusal to reply to the Metropolitan Church of Bessarabia's application for recognition was contrary to the freedom of religion and to Articles 6, 11 and 13 of the Convention.

42. In a decision of 26 September 2001 the government approved the amended version of Article 1 of the Metropolitan Church of Moldova's articles of association, worded as follows:

> "The Orthodox Church of Moldova is an independent Church and is the successor in law to ... the Metropolitan Church of Bessarabia. While complying with the canons and precepts of the Holy Apostles, Fathers of the Church and the Ecumenical Synods, and the decisions of the Universal Apostolic Church, the Orthodox Church of Moldova operates within the territory of the State of the Republic of Moldova in accordance with the provisions of the legislation in force."

43. In a letter received by the Court on 21 September 2001 the President of the Republic of Moldova expressed his concern about the possibility that the applicant Church might be recognised. He said that the issue could be resolved only by negotiation between the Russian and Romanian patriarchates, since it would be in breach of Moldovan legislation if the State authorities were to intervene in the conflict. Moreover, if the authorities were to recognise the Metropolitan Church of Bessarabia, this would have unforeseeable consequences for Moldovan society.

5. International reactions

44. In its Opinion no. 188 (1995) to the Committee of Ministers on Moldova's application for membership of the Council of Europe, the Parliamentary Assembly of the Council of Europe noted the Republic of Moldova's willingness to fulfil the commitments it had entered into when it lodged its application for membership on 20 April 1993.

These commitments, which had been reaffirmed before the adoption of the above-mentioned opinion, included an undertaking to "confirm complete freedom of worship for all citizens without discrimination" and to "ensure a peaceful solution to the dispute between the Moldovan Orthodox Church and the Bessarabian Orthodox Church".

45. In its annual report for 1997 the International Helsinki Federation for Human Rights criticised the Moldovan government's refusal to recognise the Metropoltitan Church of Bessarabia. The report stated that as a result of this refusal many churches had been transferred to the ownership of the Metropolitan Church of Moldova. It drew attention to allegations that members of the applicant Church's clergy had been subjected to physical violence without receiving the slightest protection from the authorities.

46. In its 1998 report the Federation criticised the Religious Denominations Act, and in particular section 4 thereof, which denied any protection of the freedom of religion to the adherents of religions not recognised by a government decision. It pointed out that this section was a discriminatory instrument which enabled the government to make it difficult for the adherents of the Metropolitan Church of Bessarabia to bring legal proceedings with a view to reclaiming church buildings which belonged to them. In addition, the report mentioned acts of violence and vandalism to which the applicant Church and its members were subjected.

B. Alleged incidents affecting the Metropolitan Church of Bessarabia and its members

47. The applicants reported a number of incidents during which members of the clergy or adherents of the applicant Church had allegedly been intimidated or prevented from manifesting their beliefs.

48. The Government did not dispute that these incidents had taken place.

1. Incidents in Gârbova (Ocnița)

49. In 1994 the assembly of Christians of the village of Gârbova (Ocnița) decided to join the Metropolitan Church of Bessarabia. The Metropolitan of Bessarabia therefore appointed T.B. as the parish priest.

50. On 7 January 1994, when T.B. went to the church to celebrate the Christmas mass, the mayor of Gârbova, T.G., forbade him to enter. When the villagers came out of the church to protest, the mayor locked the door and, without further explanation, ordered T.B. to leave the village within twenty-four hours.

51. The mayor summoned a new assembly of the Christians of the village on 9 January 1994. On that date he informed the villagers that T.B. had been stripped of his post as the village priest because he belonged to the Metropolitan Church of Bessarabia. He introduced a new parish priest who belonged to the Metropolitan Church of Moldova. The assembly rejected the mayor’s proposal.

52. The mayor called a new assembly of the Christians of the village on 11 January 1994. On that date he introduced to the villagers a third priest, also from the Metropolitan Church of Moldova. He was likewise rejected by the assembly, which expressed its preference for T.B.

53. In those circumstances, S.M., the chairman of the parish council, was summoned by the mayor and the manager of the local collective farm, who urged him to persuade the villagers to accept T.B.’s removal from office. The chairman of the parish council refused.

54. On 13 January 1994 S.M. was arrested on his way to church. He was pinned down by five policemen, then thrown into a police van and taken first to the town hall, where he was savagely beaten. He was then taken into police custody at Ocnița police station, where he was upbraided for showing favour to the Metropolitan Church of Bessarabia. He was not informed of the reasons for his arrest. He was released after being detained for three days.

55. Following these incidents T.B. left the parish.

2. Parish of Saint Nicholas, Făleşti

56. In a letter of 20 May 1994 the vice-president of the provincial council for the province (*raion*) of Făleşti rebuked G.E., priest of the parish of Saint Nicholas and a member of the Metropolitan Church of Bessarabia, for having celebrated the Easter service on 9 May 1994 in the town cemetery, that being an act contrary to the Religious Denominations Act because the Metropolitan Church of Bessarabia was illegal. For the same reason he was forbidden to conduct divine service in future whether inside a church or in the open air. The vice-chairman of the provincial council warned G.E. not to implement a plan he had to invite priests from Romania to attend divine service on 22 May 1994, given that he had not first obtained official authorisation, as required by section 22 of the Religious Denominations Act.

57. In November 1994 G.E. was fined 90 lei (MDL) for officiating as a priest of an unrecognised Church, the Metropolitan Church of Bessarabia. The Court of First Instance upheld the penalty, but reduced the amount of the fine to MDL 54 on the ground that G.E. did not hold any office within the Church concerned.

58. On 27 October 1996, before the beginning of divine service in the parish church, several persons, led by a priest of the Metropolitan Church of Moldova, violently assaulted G.E., drawing blood, and asked him to join the Metropolitan Church of Moldova. They also attacked the priest's wife, tearing her clothes.

59. G.E. managed to escape into the church, where the service was taking place, but he was pursued by his assailants, who began to fight with the congregation. A policeman sent to the scene managed to persuade the aggressors to leave the church.

60. On 15 November 1996 the parish meeting published a declaration expressing the parishioners' indignation about the acts of violence and intimidation to which members of the Metropolitan Church of Bessarabia were subjected, requested the authorities to cease to condone such acts and demanded official recognition for their Church.

61. On 6 June 1998 the applicant Petru Păduraru, Metropolitan of Bessarabia, received two anonymous telegrams warning him not to go to Făleşti. He did not lodge any complaint about this.

3. Parish of Saint Alexander, Călăraşi

62. On 11 July 1994 the applicant Ioan Eşanu, priest of the parish of Saint Alexander, was summoned by the president of the Călăraşi provincial council to a discussion about the Metropolitan Church of Bessarabia.

That discussion was also attended by the mayor of Călăraşi, the secretary of the provincial council and the parish clerk. The president of the provincial council criticised the applicant for his membership of the applicant Church, which made him a fellow-traveller of those who supported union with Romania. He then gave him one week to produce a certificate attesting to recognition of the Metropolitan Church of Bessarabia, failing which he would have to leave the parish.

4. Parish of Cania (Cantemir)

63. In a letter of 24 November 1994 to the Metropolitan of Bessarabia, V.B., a Romanian national, priest of the parish of Cania, reported that he was under intense pressure from the authorities of the province of Cantemir, who had upbraided him for belonging to the applicant Church.

64. On 19 January 1995 V.B. was summoned to the police station in Cantemir, where he was served with a government decision cancelling his residence and work permits and ordering him to leave Moldovan territory within seventy-two hours and to hand over the permits concerned to the relevant authorities.

5. Incidents in Chişinău

65. On 5 April 1995 Vasile Petrache, priest of the parish of Saint Nicholas, informed the Metropolitan of Bessarabia that the windows of the church, which was affiliated to the Metropolitan Church of Bessarabia, had been broken during incidents that had taken place on the nights of 27 to 28 March and 3 to 4 April 1995.

66. A similar attack occurred in the night of 13 to 14 May 1995. Vasile Petrache lodged a complaint on each occasion, asking the police to intervene in order to prevent further attacks taking place.

67. In the night of 3 to 4 September 1996 a grenade was thrown by unknown persons into the house of the Metropolitan of Bessarabia, causing damage. The applicant lodged a complaint about this at the police station in Chişinău.

68. In autumn 1999, after the death of Vasile Petrache, the Metropolitan of Bessarabia appointed the applicant Petru Buburuz as the parish priest of Saint Nicholas.

Following that appointment the church of Saint Nicholas was occupied by representatives of the Metropolitan Church of Moldova, who locked it and prevented the adherents of the applicant Church from entering. They also took possession of the parish documents and seal.

69. On 8 December 1999 the police issued a summons against Petru Buburuz for organising a public meeting in front of Saint Nicholas's church on 28 November 1999 without first obtaining the authorisation required for public meetings.

70. On 28 January 2000 Judge S. of the Buiucani Court of First Instance discontinued the proceedings on the ground that the applicant had not organised a meeting but had merely celebrated a mass in his capacity as priest at the request of about a hundred believers who were present. Judge S. also noted that the mass had been celebrated on the square, as the church door had been locked.

6. Incident in Buiucani (Chişinău)

71. In the night of 3 to 4 September 1996 a grenade was thrown into the house of P.G., a member of the clergy of the applicant Church. On 28 September 1996 P.G. was threatened by six persons unknown to him. He immediately lodged a criminal complaint.

72. In a letter of 22 November 1996 to the President of Moldova, the Minister of the Interior expressed his regret about the slow progress of the investigations into P.G.'s complaints and informed him that on that account disciplinary penalties had been imposed on the police officers responsible for the inquiry.

7. Parish of Octombrie (Sângerei)

73. In a report of 22 June 1998 to the Metropolitan of Bessarabia the parish clerk complained of the actions of one M., a priest of the Metropolitan Church of Moldova, who was trying, with the help of the mayor of Bălți, to oust P.B., a priest of the applicant Church, and have the village church closed.

No complaint was lodged with the authorities on this subject.

8. Incidents in Cucioaia (Ghiliceni)

74. On 23 August 1999, according to the applicants, Police Captain R., claiming to be acting on the orders of his superior officer, Lieutenant-Colonel B.D., placed seals on the door of the church of Cucioaia (Ghiliceni) and forbade V.R., a priest of the applicant Church, who regularly officiated there, to enter and continue to conduct divine service. After a complaint by the people of the village, the applicant Vlad Cubreacov wrote to the Prime Minister on 26 August 1998 to ask him for an explanation.

The incident was also reported in the 26 August 1998 issue of the newspaper *Flux*.

The Government asserted that following the above complaint the Ministry of the Interior ordered an inquiry. The inquiry showed that it was

not a policeman but a member of the Metropolitan Church of Moldova, Archdeacon D.S., who had placed the seals on the church door.

9. Parish of Badicul Moldovenesc (Cahul)

75. On 11 April 1998, at about midnight, the parish priest was woken by persons unknown to him who were trying to force open the presbytery door. He was threatened with death if he did not give up the idea of creating a new parish in Cahul.

76. On 13 April 1998 he was threatened with death by one I.G., a priest of the Metropolitan Church of Moldova. On the same day he complained to the police.

10. Parish of Mărinici (Nisporeni)

77. After leaving the Metropolitan Church of Moldova in July 1997 to join the applicant Church, the priest of the parish of Mărinici and his family received threats on a number of occasions from various priests of the Metropolitan Church of Moldova. The windows of his house were broken and, on 2 February 1998, he was attacked in the street and beaten by strangers, who told him not to meddle with "those things" anymore.

78. The parish priest consulted a forensic physician, who issued a certificate detailing the injuries that had been inflicted on him. He subsequently lodged a criminal complaint with the Cecani police.

79. The Moldovan newspapers regularly reported incidents described as acts of intimidation against the clergy and worshippers of the Metropolitan Church of Bessarabia.

11. Incident at Floreni

80. On 6 December 1998 one V.J., a priest of the Metropolitan Church of Moldova, and other persons accompanying him broke open the door of the village church and occupied it. When the parish priest, V.S., a member of the applicant Church, arrived to take the Sunday service he was prevented from entering. The stand-off continued until the villagers belonging to the applicant Church arrived on the scene.

12. Incident at Leova

81. In a report sent to the Metropolitan of Bessarabia on 2 February 2001, N.A., priest of the parish of Leova, stated that the church in Leova had suffered acts of vandalism and that he himself and other parishioners had been the target of public acts of intimidation and death threats from one G.C., a priest of the Metropolitan Church of Moldova. Such acts were repeated on a number of further occasions without any protection being offered by the municipal council to parishioners who were members of the applicant Church.

C. Incidents affecting the assets of the Metropolitan Church of Bessarabia

1. Incident at Floreni

82. The Christians of the village of Floreni joined the applicant Church on 12 March 1996 and formed a local community of that Church on 24 March 1996. They also had a chapel built where mass could be celebrated.

83. On 29 December 1997 the government adopted decision no. 1203, granting the Metropolitan Church of Moldova a right of use in respect of the land on which the chapel built by the Metropolitan Church of Bessarabia was situated. That decision was confirmed by a decree of 9 March 1998 issued by the Floreni municipal council.

84. Following a request by the Metropolitan Church of Bessarabia for the right to use the land concerned, in view of the fact that its chapel was built on it, the National Land Registry replied to the Church's adherents in the parish of Floreni that "the local public authorities [were] not able to adopt such a decision since the Metropolitan Church of Bessarabia [had] no recognised legal personality in Moldova".

2. Incident relating to a humanitarian gift from the American association "The Church of Jesus Christ of Latter-Day Saints"

85. On 17 February 2000 the Metropolitan of Bessarabia asked the government Committee for Humanitarian Aid to authorise entry into Moldovan territory of goods to the value of 9,000 United States dollars (USD) sent from the United States, and to classify the goods concerned as humanitarian aid. That request was refused on 25 February 2000.

86. On 25 February 2000 the applicant Vlad Cubreacov asked the committee to inform him of the reasons for its refusal. He pointed out that the gift (of second-hand clothes), sent by the Church of Jesus Christ of Latter-Day Saints, had been given a transit visa by the Ukrainian authorities, who accepted that it was a humanitarian gift. However, the goods had been held up by the Moldovan customs since 18 February 2000, so that the addressee was obliged to pay USD 150 per day of storage. The applicant repeated his request for the goods to be allowed to enter Moldovan territory as a humanitarian gift.

87. On 28 February 2000 the Deputy Prime Minister of Moldova authorised the entry of this humanitarian gift into Moldovan territory.

D. Questions relating to the personal rights of the applicant Church's clergy

88. Vasile Petrache, a priest of the applicant Church, was refused a retirement pension on the ground that he was not a minister of a recognised denomination.

II. RELEVANT DOMESTIC LAW

A. The Constitution of 29 July 1994

89. Article 31 of the Moldovan Constitution, concerning freedom of conscience, provides:

> "1. Freedom of conscience is guaranteed. It must be manifested in a spirit of tolerance and mutual respect.
>
> 2. Freedom of worship is guaranteed. Religious denominations shall organise themselves according to their own articles of association, in compliance with the law.
>
> 3. Any manifestation of discord is forbidden in relations between religious denominations.
>
> 4. Religious denominations shall be autonomous and separated from the State, and shall enjoy the latter's support, including facilities granted for the purpose of providing religious assistance in the army, hospitals, prisons, mental institutions and orphanages."

B. The Religious Denominations Act (Law no. 979-XII of 24 March 1992)

90. The relevant provisions of the Religious Denominations Act, as published in the Official Gazette no. 3/70 of 1992, read as follows:

Section 1 – Freedom of conscience

> "The State shall guarantee freedom of conscience and freedom of religion within Moldovan territory. Everyone shall have the right to manifest his belief freely, either alone or in community with others, to propagate his belief and to worship in public or in private, on condition that such worship is not contrary to the Constitution, the present Act or the legislation in force."

Section 4 – Intolerance on denominational grounds

> "Intolerance on denominational grounds, manifested by acts which interfere with the free operation of a religious denomination recognised by the State, shall be an offence punished in accordance with the relevant legislation."

Section 9 – Religious denominations' freedom of organisation and operation

"Denominations shall be free to organise and operate freely on condition that their practices and rites do not contravene the Constitution, the present Act or the legislation in force.

Where that is not the case, denominations shall not qualify for State recognition."

Section 14 – Recognition of religious denominations

"In order to be able to organise and operate, denominations must be recognised by means of a government decision.

Where a denomination fails to comply with the conditions laid down by the first paragraph of section 9 of the present Act, recognition may be withdrawn under the same procedure."

Section 15 – Articles of association

"To qualify for recognition, each denomination shall submit to the Government, for scrutiny and approval, the articles of association governing its organisation and operation. The articles of association must contain information on its system of organisation and administration and on the fundamental principles of its beliefs."

Section 21 – Associations and foundations

"Associations and foundations which pursue a religious aim, in whole or in part, shall enjoy religious rights and shall be subject to the obligations arising from the legislation on religious denominations."

Section 22 – Clergy, invitation and delegation

"Leaders of denominations having republican and hierarchical rank ..., and all persons employed by religious denominations, must be Moldovan citizens.

Denominations which wish to take foreign nationals into their employ to conduct religious activities, or to delegate Moldovan citizens to conduct religious activities abroad, must in every case seek and obtain the agreement of the State authorities."

Section 24 – Legal personality

"Denominations recognised by the State shall be legal persons ..."

Section 35 – Publishing and liturgical objects

"Only denominations recognised by the State and registered in accordance with the relevant legislation may

(a) produce and market objects specific to the denomination concerned;

(b) found periodicals for the faithful, or publish and market liturgical, theological or ecclesiastical books necessary for practice of the religion concerned;

(c) lay down scales of charges for pilgrimages and touristic activities in the denomination's establishments;

(d) organise, within Moldovan territory or abroad, exhibitions of liturgical objects, including exhibitions of items for sale;

...

For the purposes of the present section, the term 'liturgical objects' shall mean liturgical vessels, metal and lithographic icons, crosses, crucifixes, church furniture, cross-shaped pendants or medallions framing religious images specific to each denomination, religious objects sold from door to door, etc. The following items shall be assimilated with liturgical objects: religious calendars, religious postcards and leaflets, albums of religious works of art, films and labels portraying places of worship or objects of religious art, other than those which form part of the national cultural heritage, products necessary for worship, such as incense and candles, including decorations for weddings and christenings, material and embroidery for the production of liturgical vestments and other objects necessary for practice of a religion."

Section 44 – Recruitment of clergy and employees by religious denominations

"Bodies affiliated to religious denominations or institutions and enterprises set up by them may engage staff in accordance with labour legislation."

Section 45 – Contracts

"Clergy and employees of religious denominations shall be engaged under a written contract ..."

Section 46 – Legal status

"Clergy and employees of religious denominations or the institutions and enterprises set up by them shall have the same legal status as the employees of organisations, institutions and enterprises, so that labour legislation shall be applicable to them."

Section 48 – State pensions

"Whatever pensions are paid by religious denominations, their clergy and employees shall receive State pensions, in accordance with the Moldovan State Pensions Act."

C. The Code of Civil Procedure

91. Article 28/2, as amended by Law no. 942-XIII of 18 July 1996, determines the jurisdiction of the Court of Appeal as follows:

"1. The Court of Appeal shall examine at first instance applications against organs of the central administration and their officials on account of illegal or *ultra vires* acts which infringe citizens' rights."

92. Article 37, on the participation of several plaintiffs or defendants in the same trial, provides:

"The action may be brought by a number of plaintiffs jointly or against more than one defendant. Each of the plaintiffs and defendants shall act independently of the others.

Co-plaintiffs and co-defendants may designate one of their number to prosecute the action ..."

93. Article 235, on the right to appeal against unlawful acts of the administration, provides:

"Any natural or legal person who considers that his rights have been infringed by an administrative act or the unjustified refusal of an administrative organ ... to examine his application concerning a legal right shall be entitled to ask the competent court to set aside the relevant act or uphold the infringed right."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

94. The applicants alleged that the Moldovan authorities' refusal to recognise the Metropolitan Church of Bessarabia infringed their freedom of religion, since only religions recognised by the government could be practised in Moldova. They asserted in particular that their freedom to manifest their religion in community with others was frustrated by the fact that they were prohibited from gathering together for religious purposes and by the complete absence of judicial protection of the applicant Church's assets. They relied on Article 9 of the Convention, which provides:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

A. Arguments submitted to the Court

1. The applicants

95. Citing *Manoussakis and Others v. Greece* (judgment of 26 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1361, § 37), the applicants alleged that the refusal to recognise the applicant

Church infringed their freedom of religion, since the lack of authorisation made it impossible to practise their religion. They submitted that a State could require a prior registration procedure for religious denominations without breaching Article 9 of the Convention provided that registration did not become an impediment to believers' freedom of religion. But in the present case the refusal to recognise did not have any basis which was acceptable in a democratic society. In particular, the applicants asserted that the applicant Church and its members could not be criticised for any activity which was illegal or contrary to public order.

96. The applicants submitted that in a democratic society any group of believers who considered themselves to be different from others should be able to form a new Church, and that it was not for the State to determine whether or not there was a real distinction between these different groups or what beliefs should be considered distinct from others.

Similarly, it was not for the State to favour one Church rather than another by means of recognition, or to censor the name of a Church solely on the ground that it referred to a closed chapter of history.

Consequently, in the present case, the Moldovan State was not entitled to decide whether the applicant Church was a separate entity or a grouping within another Church.

2. The Government

97. The Government accepted that the right to freedom of religion included the freedom to manifest one's religion through worship and observance, but considered that in the present case the refusal to recognise the applicant Church did not amount to a prohibition of its activities or those of its members. The members of the applicant Church retained their freedom of religion, both as regards their freedom of conscience and as regards the freedom to manifest their beliefs through worship and practice.

98. The Government further submitted that the applicant Church, as an Orthodox Christian Church, was not a new denomination, since Orthodox Christianity had been recognised in Moldova on 7 February 1993 at the same time as the Metropolitan Church of Moldova. There was absolutely no difference, from the religious point of view, between the applicant Church and the Metropolitan Church of Moldova.

The creation of the applicant Church had in reality been an attempt to set up a new administrative organ within the Metropolitan Church of Moldova. The State could not interfere in the conflict within the Metropolitan Church of Moldova without infringing its duty of neutrality in religious matters.

At the hearing on 2 October 2001 the Government submitted that this conflict, apparently an administrative one, concealed a political conflict between Romania and Russia; were it to intervene by recognising the applicant Church, which it considered to be a schismatic group, the

consequences were likely to be detrimental to the independence and territorial integrity of the young Republic of Moldova.

B. The third party

99. The third party submitted that the present application originated in an administrative conflict within the Metropolitan Church of Moldova. It asserted that the applicant Church had been set up by clergy of the Metropolitan Church of Moldova who, prompted by their personal ambition, had decided to split away from it. As the schismatic activity of the applicant Petru Păduraru had been contrary to the canons of the Russian Orthodox Church, the patriarch of Moscow had forbidden him to conduct divine service. However, in breach of canon law, and without consulting either the patriarchate of Moscow or the Moldovan civil authorities, the patriarchate of Bucharest had decided to recognise the schismatic Church. The conflict thus generated should therefore be resolved only by negotiations between the Romanian and Russian patriarchates.

100. The third party contended that the applicant Church was based on ethnic criteria and that its recognition by the government would therefore not only constitute interference by the State in religious matters but would also have detrimental consequences for the political and social situation in Moldova and would encourage the existing nationalist tendencies there. In addition, such recognition would prejudice the friendly relations between Moldova and Ukraine.

C. The Court's assessment

101. The Court reiterates at the outset that a Church or ecclesiastical body may, as such, exercise on behalf of its adherents the rights guaranteed by Article 9 of the Convention (see *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, § 72, ECHR 2000-VII). In the present case the Metropolitan Church of Bessarabia may therefore be considered an applicant for the purposes of Article 34 of the Convention.

1. Whether there was an interference

102. The Court must therefore determine whether there was an interference with the applicants' right to freedom of religion on account of the refusal to recognise the applicant Church.

103. The Government submitted that the refusal to recognise the applicant Church did not prevent the applicants from holding beliefs or manifesting them within the Orthodox Christian denomination recognised by the State, namely the Metropolitan Church of Moldova.

104. The applicants asserted that, according to Moldovan law, only religions recognised by the State may be practised and that refusing to recognise the applicant Church therefore amounted to forbidding it to operate, both as a liturgical body and as an association. The applicants who are natural persons may not express their beliefs through worship, since only a denomination recognised by the State can enjoy legal protection.

105. The Court notes that, according to the Religious Denominations Act, only religions recognised by government decision may be practised.

In the present case the Court observes that, not being recognised, the applicant Church cannot operate. In particular, its priests may not conduct divine service, its members may not meet to practise their religion and, not having legal personality, it is not entitled to judicial protection of its assets.

The Court therefore considers that the government's refusal to recognise the applicant Church, upheld by the Supreme Court of Justice's decision of 9 December 1997, constituted interference with the right of the applicant Church and the other applicants to freedom of religion, as guaranteed by Article 9 § 1 of the Convention.

106. In order to determine whether that interference entailed a breach of the Convention, the Court must decide whether it satisfied the requirements of Article 9 § 2, that is whether it was "prescribed by law", pursued a legitimate aim for the purposes of that provision and was "necessary in a democratic society".

2. Whether the interference was prescribed by law

107. The applicants accepted that the interference in question was prescribed by the Religious Denominations Act. They asserted nevertheless that the procedure laid down by the Act had been misapplied, since the real reason for refusal to register had been political; the Government had neither submitted nor proved that the applicant Church had failed to comply with the laws of the Republic.

108. The Government made no observation on this point.

109. The Court refers to its established case-law to the effect that the terms "prescribed by law" and "in accordance with the law" in Articles 8 to 11 of the Convention not only require that the impugned measures have some basis in domestic law, but also refer to the quality of the law in question, which must be sufficiently accessible and foreseeable as to its effects, that is formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct (see The Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 31, § 49; *Larissis and Others v. Greece*, judgment of 24 February 1998, *Reports* 1998-I, p. 378, § 40; *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 31, ECHR 1999-VIII; and *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V).

For domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI).

The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see *Hashman and Harrup*, cited above, § 31, and *Groppera Radio AG and Others v. Switzerland*, judgment of 28 March 1990, Series A no. 173, p. 26, § 68).

110. In the present case the Court notes that section 14 of the Law of 24 March 1992 requires religious denominations to be recognised by a government decision and that, according to section 9 of the same law, only denominations whose practices and rites are compatible with the Moldovan Constitution and legislation may be recognised.

Without giving a categorical answer to the question whether the above-mentioned provisions satisfy the requirements of foreseeability and precision, the Court is prepared to accept that the interference in question was "prescribed by law" before deciding whether it pursued a "legitimate aim" and was "necessary in a democratic society".

3. Legitimate aim

111. At the hearing on 2 October 2001 the Government submitted that the refusal to allow the application for recognition lodged by the applicants was intended to protect public order and public safety. The Moldovan State, whose territory had repeatedly passed in earlier times from Romanian to Russian control and vice versa, had an ethnically and linguistically varied population. That being so, the young Republic of Moldova, which had been independent since 1991, had few strengths it could depend on to ensure its continued existence, but one factor conducive to stability was religion, the majority of the population being Orthodox Christians. Consequently, recognition of the Moldovan Orthodox Church, which was subordinate to the patriarchate of Moscow, had enabled the entire population to come together within that Church. If the applicant Church were to be recognised, that tie was likely to be lost and the Orthodox Christian population dispersed among a number of Churches. Moreover, under cover of the applicant Church, which was subordinate to the patriarchate of Bucharest, political forces were at work, acting hand-in-glove with Romanian interests favourable to reunification between Bessarabia and Romania. Recognition

of the applicant Church would therefore revive old Russo-Romanian rivalries within the population, thus endangering social stability and even Moldova's territorial integrity.

112. The applicants denied that the measure complained of had been intended to protect public order and public safety. They alleged that the Government had not shown that the applicant Church had constituted a threat to public order and public safety.

113. The Court considers that States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety (see *Manoussakis and Others*, cited above, p. 1362, § 40, and *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 84, ECHR 2001-IX).

Having regard to the circumstances of the case, the Court considers that the interference complained of pursued a legitimate aim under Article 9 § 2, namely protection of public order and public safety.

4. Necessary in a democratic society

(a) General principles

114. The Court refers to its settled case-law to the effect that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to "manifest [one's] religion" alone and in private or in community with others, in public and within the circle of those whose faith one shares. Bearing witness in words and deeds is bound up with the existence of religious convictions. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (see *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 17, § 31, and *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 34, ECHR 1999-I). Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance. Nevertheless, Article 9 does not protect every act motivated or inspired by a religion or belief (see *Kalaç v. Turkey*, judgment of 1 July 1997, *Reports* 1997-IV, p. 1209, § 27).

115. The Court has also said that, in a democratic society, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the

interests of the various groups and ensure that everyone's beliefs are respected (see *Kokkinakis*, cited above, p. 18, § 33).

116. However, in exercising its regulatory power in this sphere and in its relations with the various religions, denominations and beliefs, the State has a duty to remain neutral and impartial (see *Hasan and Chaush*, cited above, § 78). What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principle characteristics of which is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome (see *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports* 1998-I, p. 27, § 57). Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other (see *Serif v. Greece*, no. 38178/97, § 53, ECHR 1999-IX).

117. The Court further observes that in principle the right to freedom of religion for the purposes of the Convention excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed. State measures favouring a particular leader or specific organs of a divided religious community or seeking to compel the community or part of it to place itself, against its will, under a single leadership, would also constitute an infringement of the freedom of religion. In democratic societies the State does not need to take measures to ensure that religious communities remain or are brought under a unified leadership (see *Serif*, cited above, § 52). Similarly, where the exercise of the right to freedom of religion or of one of its aspects is subject under domestic law to a system of prior authorisation, involvement in the procedure for granting authorisation of a recognised ecclesiastical authority cannot be reconciled with the requirements of paragraph 2 of Article 9 (see, *mutatis mutandis*, *Pentidis and Others v. Greece*, judgment of 9 June 1997, *Reports* 1997-III, p. 995, § 46).

118. Moreover, since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords (see *Hasan and Chaush*, cited above, § 62).

In addition, one of the means of exercising the right to manifest one's religion, especially for a religious community, in its collective dimension, is the possibility of ensuring judicial protection of the community, its

members and its assets, so that Article 9 must be seen not only in the light of Article 11, but also in the light of Article 6 (see, *mutatis mutandis*, *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, *Reports* 1998-IV, p. 1614, § 40, and *Canea Catholic Church v. Greece*, judgment of 16 December 1997, *Reports* 1997-VIII, pp. 2857 and 2859, §§ 33 and 40-41, and opinion of the Commission, p. 2867, §§ 48-49).

119. According to its settled case-law, the Court leaves to States party to the Convention a certain margin of appreciation in deciding whether and to what extent an interference is necessary, but that goes hand in hand with European supervision of both the relevant legislation and the decisions applying it. The Court's task is to ascertain whether the measures taken at national level are justified in principle and proportionate.

In order to determine the scope of the margin of appreciation in the present case the Court must take into account what is at stake, namely the need to maintain true religious pluralism, which is inherent in the concept of a democratic society (see *Kokkinakis*, cited above, p. 17, § 31). Similarly, a good deal of weight must be given to that need when determining, as paragraph 2 of Article 9 requires, whether the interference corresponds to a "pressing social need" and is "proportionate to the legitimate aim pursued" (see, *mutatis mutandis*, among many other authorities, *Wingrove v. the United Kingdom*, judgment of 25 November 1996, *Reports* 1996-V, p. 1956, § 53). In exercising its supervision, the Court must consider the interference complained of on the basis of the file as a whole (see *Kokkinakis*, cited above, p. 21, § 47).

(b) Application of the above principles

120. The Government submitted that the interference complained of was necessary in a democratic society. In the first place, to recognise the applicant Church the State would have had to give up its position of neutrality in religious matters, and in religious conflicts in particular, which would have been contrary to the Moldovan Constitution and Moldovan public policy. It was therefore in order to discharge its duty of neutrality that the Government had urged the applicant Church to settle its differences with the Metropolitan Church of Moldova first.

Secondly, the refusal to recognise, in the Government's submission, was necessary for national security and Moldovan territorial integrity, regard being had to the fact that the applicant Church engaged in political activities, working towards the reunification of Moldova with Romania, with the latter country's support. In support of their assertions, they mentioned articles in the Romanian press favourable to recognition of the applicant Church by the Moldovan authorities and reunification of Moldova with Romania.

Such activities endangered not only Moldova's integrity but also its peaceful relations with Ukraine, part of whose present territory had been

under the canonical jurisdiction of the Metropolitan Church of Bessarabia before 1944.

The Government further asserted that the applicant Church was supported by openly pro-Romanian Moldovan parties, who denied the specificity of Moldova, even sometimes during debates in Parliament, thus destabilising the Moldovan State. In that connection, they mentioned the Christian Alliance for the Reunification of Romania, set up on 1 January 1993, whose affiliates included a number of associations and a political party represented in the Moldovan parliament, the Christian Democratic Popular Front, which had welcomed the reappearance of the Metropolitan Church of Bessarabia.

Thirdly, in the Government's submission, the refusal to recognise the applicant Church had been necessary to preserve social peace and understanding among believers. The aggressive attitude of the applicant Church, which sought to draw other Orthodox Christians to it and to swallow up the other Churches, had led to a number of incidents which, without police intervention, could have caused injury or loss of life.

Lastly, the Government emphasised that, although they had not recognised the Metropolitan Church of Bessarabia, the Moldovan authorities were acting in a spirit of tolerance and permitted the applicant Church and its members to continue their activities without hindrance.

121. The applicants submitted that the refusal to recognise the Metropolitan Church of Bessarabia was not necessary in a democratic society. They asserted that all the arguments put forward by the Government were without foundation and unsubstantiated and that they did not correspond to a "pressing social need". There was nothing in the file to show that the applicants had intended or carried on or sought to carry on activities capable of undermining Moldovan territorial integrity, national security or public order.

They alleged that the government, by refusing recognition even though it had recognised other Orthodox Churches, had failed to discharge its duty of neutrality for preposterously fanciful reasons.

Non-recognition had made it impossible for the members of the applicant Church to practise their religion because, under the Religious Denominations Act, the activities of a particular denomination and freedom of association for religious purposes may be exercised only by a denomination recognised by the State. Similarly, the State provided its protection only to recognised denominations and only those denominations could defend their rights in the courts. Consequently, the clergy and members of the applicant Church had not been able to defend themselves against the physical attacks and persecution which they had suffered, and the applicant Church had not been able to protect its assets.

The applicants denied that the State had tolerated the applicant Church and its members. They alleged, on the contrary, not only that State agents

had permitted acts of intimidation which members of the applicant Church had suffered at the hands of other believers but also that in a number of cases State agents had participated in such acts.

122. The Court will examine in turn the arguments put forward by the Government in justification of the interference and the proportionality of that interference in relation to the aims pursued.

(i) Arguments put forward in justification of the interference

(α) Upholding Moldovan law and Moldovan constitutional principles

123. The Court notes that Article 31 of the Moldovan Constitution guarantees freedom of religion and enunciates the principle of religious denominations' autonomy *vis-à-vis* the State, and that the Religious Denominations Act (the Law of 24 March 1992) lays down a procedure for the recognition of religious denominations.

The Government submitted that it was in order to comply with the above principles, including the duty of neutrality as between denominations, that the applicant Church had been refused recognition and instead told first to settle its differences with the already recognised Church from which it wished to split, namely the Metropolitan Church of Moldova.

The Court notes first of all that the applicant Church lodged a first application for recognition on 8 October 1992 to which no reply was forthcoming, and that it was only later, on 7 February 1993, that the State recognised the Metropolitan Church of Moldova. That being so, the Court finds it difficult, at least for the period preceding recognition of the Metropolitan Church of Moldova, to understand the Government's argument that the applicant Church was only a schismatic group within the Metropolitan Church of Moldova, which had been recognised.

In any event, the Court observes that the State's duty of neutrality and impartiality, as defined in its case-law, is incompatible with any power on the State's part to assess the legitimacy of religious beliefs, and requires the State to ensure that conflicting groups tolerate each other, even where they originated in the same group. In the present case, the Court considers that by taking the view that the applicant Church was not a new denomination and by making its recognition depend on the will of an ecclesiastical authority that had been recognised – the Metropolitan Church of Moldova – the State failed to discharge its duty of neutrality and impartiality. Consequently, the Government's argument that refusing recognition was necessary in order to uphold Moldovan law and the Moldovan Constitution must be rejected.

(β) Threat to territorial integrity

124. The Court notes in the first place that in its articles of association, in particular in the preamble thereto, the applicant Church defines itself as an autonomous local Church, operating within Moldovan territory in

accordance with the laws of that State, and whose name is a historical one having no link with current or previous political situations. Although its activity is mainly religious, the applicant Church states that it is also prepared to cooperate with the State in the fields of culture, education and social assistance. It further declares that it has no political activity.

The Court considers those principles to be clear and perfectly legitimate.

125. At the hearing on 2 October 2001 the Government nevertheless submitted that in reality the applicant Church was engaged in political activities contrary to Moldovan public policy and that, were it to be recognised, such activities would endanger Moldovan territorial integrity.

The Court reiterates that while it cannot be ruled out that an organisation's programme might conceal objectives and intentions different from the ones it proclaims, to verify that it does not the Court must compare the content of the programme with the organisation's actions and the positions it defends (see *Sidiropoulos and Others*, cited above, p. 1618, § 46). In the present case it notes that there is nothing in the file which warrants the conclusion that the applicant Church carries on activities other than those stated in its articles of association.

As to the press articles mentioned above, although their content, as described by the Government, reveals ideas favourable to reunification of Moldova with Romania, they cannot be imputed to the applicant Church. Moreover, the Government have not argued that the applicant Church had prompted such articles.

Similarly, in the absence of any evidence, the Court cannot conclude that the applicant Church is linked to the political activities of the above-mentioned Moldovan organisations (see paragraph 120 above), which are allegedly working towards unification of Moldova with Romania. Furthermore, it notes that the Government have not contended that the activity of these associations and political parties is illegal.

As for the possibility that the applicant Church, once recognised, might constitute a danger to national security and territorial integrity, the Court considers that this is a mere hypothesis which, in the absence of corroboration, cannot justify a refusal to recognise it.

(γ) Protection of social peace and understanding among believers

126. The Court notes that the Government did not dispute that incidents had taken place at meetings of the adherents and members of the clergy of the applicant Church (see paragraphs 47-87 above). In particular, conflicts have occurred when priests belonging to the applicant Church tried to celebrate mass in places of worship to which the adherents and clergy of the Metropolitan Church of Moldova laid claim for their exclusive use, or in places where certain persons were opposed to the presence of the applicant Church on the ground that it was illegal.

On the other hand, the Court notes that there are certain points of disagreement between the applicants and the Government about what took place during these incidents.

127. Without expressing an opinion on exactly what took place during the events concerned, the Court notes that the refusal to recognise the applicant Church played a role in the incidents.

(ii) Proportionality in relation to the aims pursued

128. The Government submitted that although the authorities had not recognised the applicant Church they acted in a spirit of tolerance and permitted it to continue its activities without hindrance. In particular, its members could meet, pray together and manage assets. As evidence, they cited the numerous activities of the applicant Church.

129. The Court notes that, under Law no. 979-XII of 24 March 1992, only religions recognised by a government decision may be practised in Moldova. In particular, only a recognised denomination has legal personality (section 24), may produce and sell specific liturgical objects (section 35) and engage clergy and employees (section 44). In addition, associations whose aims are wholly or partly religious are subject to the obligations arising from the legislation on religious denominations (section 21).

That being so, the Court notes that in the absence of recognition the applicant Church may neither organise itself nor operate. Lacking legal personality, it cannot bring legal proceedings to protect its assets, which are indispensable for worship, while its members cannot meet to carry on religious activities without contravening the legislation on religious denominations.

As regards the tolerance allegedly shown by the government towards the applicant Church and its members, the Court cannot regard such tolerance as a substitute for recognition, since recognition alone is capable of conferring rights on those concerned.

The Court further notes that on occasion the applicants have not been able to defend themselves against acts of intimidation, since the authorities have fallen back on the excuse that only legal activities are entitled to legal protection (see paragraphs 56, 57 and 84 above).

Lastly, it notes that when the authorities recognised other liturgical associations they did not apply the criteria which they used in order to refuse to recognise the applicant Church and that no justification has been put forward by the Government for this difference in treatment.

130. In conclusion, the Court considers that the refusal to recognise the applicant Church has such consequences for the applicants' freedom of religion that it cannot be regarded as proportionate to the legitimate aim pursued or, accordingly, as necessary in a democratic society, and that there has been a violation of Article 9 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 9

131. The applicant Church further submitted that it was the victim of discrimination on account of the authorities' unjustified refusal to recognise it, whereas they had recognised other Orthodox Churches and had also recognised several different associations which all claimed allegiance to a single religion. It relied on Article 14 of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

132. According to the Government, as the Orthodox Christian religion had been recognised in the form of the Metropolitan Church of Moldova, there was no justification for recognising in addition the applicant Church, which also claimed allegiance to the Orthodox Christian religion. The applicant Church was not a new denomination but a schismatic group whose beliefs and liturgy did not differ in any way from those of the Metropolitan Church of Moldova. The Government admitted that the Orthodox Eparchy of Chişinău, which was attached to the Russian Orthodox Church of the Old Liturgy, whose head office was in Moscow, had been recognised even though it was not a new denomination, but submitted that the difference in treatment was based on an ethnic criterion, since the adherents and clergy of the Orthodox Eparchy of Chişinău were all of Russian origin.

133. The applicants submitted that the reason given to the applicant Church for refusing to recognise it was neither reasonable nor objective, because when the authorities recognised other denominations they had not applied the criteria of believers' ethnic origins or the newness of the denomination. They pointed out, for instance, that the authorities had recognised two Adventist Churches and two Jewish associations, which were not organised along ethnic lines.

134. The Court considers that the allegations relating to Article 14 of the Convention amount to a repetition of those submitted under Article 9. Accordingly, there is no cause to examine them separately.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

135. The applicants asserted that domestic law did not afford any remedy for the complaints they had submitted to the Court. They alleged a violation of Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

136. The Government submitted that in the present case, since the applicants' complaints were civil in nature, the requirements of Article 13 were absorbed by those of Article 6 of the Convention.

137. The Court reiterates that the effect of Article 13 is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they comply with their obligations under this provision (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, pp. 1869-70, § 145). The remedy required by Article 13 must be "effective", both in practice and in law. However, such a remedy is required only for complaints that can be regarded as "arguable" under the Convention.

138. The Court observes that the applicants' complaint that the refusal to recognise the applicant Church had infringed their right to the freedom of religion guaranteed by Article 9 of the Convention was undoubtedly arguable (see paragraph 130 above). The applicants were therefore entitled to an effective domestic remedy within the meaning of Article 13. Accordingly, the Court will examine whether such a remedy was available to the applicant Church and the other applicants.

139. It notes that in its judgment of 9 December 1997 the Supreme Court of Justice held that the government's refusal to reply to the application for recognition lodged by the applicant Church had not been unlawful, nor had it been in breach of Article 9 of the Convention, since the applicants could manifest their religion within the Metropolitan Church of Moldova. However, in doing so the Supreme Court of Justice did not reply to the applicants' main complaints, namely their wish to join together and manifest their religion collectively within a Church distinct from the Metropolitan Church of Moldova and to have the right of access to a court to defend their rights and protect their assets, given that only denominations recognised by the State enjoyed legal protection. Consequently, not being recognised by the State, the Metropolitan Church of Bessarabia had no rights it could assert in the Supreme Court of Justice.

Accordingly, the appeal to the Supreme Court of Justice based on Article 235 of the Code of Civil Procedure was not effective.

140. Moreover, the Court notes that although the Religious Denominations Act makes the activity of a religious denomination conditional upon government recognition and the obligation to comply with the laws of the Republic, it does not contain any specific provision governing the recognition procedure and making remedies available in the event of a dispute.

The Government did not mention any other remedy of which the applicants could have made use.

Consequently, the Court considers that the applicants were unable to obtain redress from a national authority in respect of their complaint relating to their right to the freedom of religion. There has therefore been a violation of Article 13 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLES 6 AND 11 OF THE CONVENTION

141. The applicants further complained that the refusal to recognise the applicant Church was preventing it from acquiring legal personality, thus depriving it of its right of access to a court, as guaranteed by Article 6 of the Convention, so that any complaint relating to its rights, and in particular its property rights, could be determined. In addition, they alleged that the refusal to recognise, coupled with the authorities' stubborn persistence in holding to the view that the applicants could practise their religion within the Metropolitan Church of Moldova, infringed their freedom of association, contrary to Article 11 of the Convention.

142. Having taken Articles 6 and 11 into account in the context of Article 9 (see paragraphs 118 and 129 above), the Court considers that there is no cause to examine them separately.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

143. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

144. The applicants did not claim any sum in respect of pecuniary damage, but asked for 160,000 French francs (FRF) for non-pecuniary damage.

145. The Government did not comment on this point.

146. The Court considers that the violations it has found must undoubtedly have caused the applicants non-pecuniary damage which it assesses, on an equitable basis, at 20,000 euros (EUR).

B. Costs and expenses

147. Having received from the Council of Europe FRF 7,937.10 in legal aid for the appearance of the applicant Vlad Cubreacov at the hearing before

the Court, the applicants requested only the reimbursement of the lawyers' fees they had incurred for the proceedings before the Court, namely FRF 8,693.89 for the Moldovan lawyer who had prepared their application and 3,550 pounds sterling for the British counsel who had defended the applicants' interests in the present proceedings and presented argument at the hearing.

148. The Government did not comment on this point.

149. Having regard to the vouchers supplied by the applicants, and ruling on an equitable basis, the Court awards the applicants the sum of EUR 7,025 for costs and expenses, plus any sum which may be chargeable in value-added tax.

C. Default interest

150. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 4.26% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 9 of the Convention;

2. *Holds* that it is not necessary to examine the case also from the standpoint of Article 14 of the Convention taken in conjunction with Article 9;

3. *Holds* that there has been a violation of Article 13 of the Convention;

4. *Holds* that it is not necessary to determine whether there have been violations of Articles 6 and 11 of the Convention;

5. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:

(i) EUR 20,000 (twenty thousand euros), to be converted into Moldovan lei at the rate applicable on the date of settlement, for non-pecuniary damage;

(ii) EUR 7,025 (seven thousand and twenty-five euros) for costs and expenses, plus any sum which may be chargeable in value-added tax;

(b) that simple interest at an annual rate of 4.26% shall be payable on the above sums from the expiry of the above-mentioned three months until settlement;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in French, and notified in writing on 13 December 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President

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

COURT (GRAND CHAMBER)

CASE OF JERSILD v. DENMARK

(Application no. 15890/89)

JUDGMENT

STRASBOURG

23 September 1994

In the case of Jersild v. Denmark[*],

The European Court of Human Rights, sitting as a Grand Chamber pursuant to Rule 51 of the Rules of Court and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr R. BERNHARDT,
Mr F. GÖLCÜKLÜ,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr A. SPIELMANN,
Mr N. VALTICOS,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr G. MIFSUD BONNICI,
Mr J. MAKARCZYK,
Mr D. GOTCHEV,
Mr B. REPIK,
Mr A. PHILIP, *ad hoc judge*,

and also of Mr H. PETZOLD, *Acting Registrar*,

Having deliberated in private on 22 April and 22 August 1994,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court on 9 September 1993 by the European Commission of Human Rights ("the Commission") and on 11 October 1993 by the Government of the Kingdom of Denmark ("the Government"), within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated

[*] Note by the Registrar. The case is numbered 36/1993/431/510. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

in an application (no. 15890/89) against Denmark lodged with the Commission under Article 25 (art. 25) by a Danish national, Mr Jens Olaf Jersild, on 25 July 1989.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Denmark recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 44 and 48 (art. 44, art. 48). The object of the request and of the Government's application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr I. Foighel, the elected judge of Danish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). However, on 20 September 1993 Mr Foighel withdrew from the case pursuant to Rule 24 para. 2. On 24 September 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Macdonald, Mrs E. Palm, Mr R. Pekkanen, Mr M.A. Lopes Rocha, Mr G. Mifsud Bonnici, Mr J. Makarczyk and Mr D. Gotchev (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). By letter of 29 October the Agent of the Government notified the Registrar of the appointment of Mr K. Waaben as an ad hoc judge; in a letter of 16 November the Agent informed the Registrar that Mr Waaben had withdrawn and that they had therefore appointed Mr A. Philip to replace him (Article 43 of the Convention and Rule 23) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 18 February 1994 and the applicant's memorial on 20 February. In a letter of 7 March the Secretary to the Commission informed the Registrar that the Delegate did not wish to reply in writing.

5. On 23 February 1994 the President, having consulted the Chamber, had granted leave to Human Rights Watch, a New York based non-governmental human rights organisation, to submit observations on specific aspects of the case (Rule 37 para. 2). The latter's comments were filed on 23 March.

On 23 February the Chamber had authorised (Rule 41 para. 1) the applicant to show the video-recording of the television programme in issue

in his case to the judges taking part in the proceedings. A showing was held shortly before the hearing on 20 April.

6. On 23 February the Chamber had also decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51). The President and the Vice-President, Mr R. Bernhardt, as well as the other members of the Chamber being ex officio members of the Grand Chamber, the names of the additional nine judges were drawn by lot by the President in the presence of the Registrar on 24 February (Rule 51 para. 2 (a) to (c)), namely Mr F. Gölcüklü, Mr C. Russo, Mr A. Spielmann, Mr N. Valticos, Mr S.K. Martens, Mr A.N. Loizou, Mr J.M. Morenilla, Mr L. Wildhaber and Mr B. Repik.

7. On various dates between 22 March and 15 April 1994 the Commission produced a number of documents and two video-cassettes, as requested by the Registrar on the President's instructions, and the applicant submitted further details on his claims under Article 50 (art. 50) of the Convention.

8. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 April 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr T. LEHMANN, Ambassador,
Legal Adviser, Ministry of Foreign Affairs, *Agent*,
Mr M.B. ELMER, Deputy Permanent Secretary,
Chief Legal Adviser, Ministry of Justice,
Ms J. RECHNAGEL, Minister Counsellor,
Ministry of Justice,
Mr J. LUNDUM, Head of Section, Ministry of Justice, *Advisers*;

- for the Commission

Mr C.L. ROZAKIS, *Delegate*;

- for the applicant

Mr K. BOYLE, Barrister, Professor of Law
at the University of Essex,
Mr T. TRIER, advokat, Lecturer of Law
at the University of Copenhagen, *Counsel*,
Mrs L. JOHANNESSEN, lawyer, *Adviser*.

The Court heard addresses by Mr Rozakis, Mr Lehmann, Mr Elmer, Mr Boyle and Mr Trier, and also replies to a question put by the President.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

9. Mr Jens Olaf Jersild, a Danish national, is a journalist and lives in Copenhagen. He was at the time of the events giving rise to the present case, and still is, employed by Danmarks Radio (Danish Broadcasting Corporation, which broadcasts not only radio but also television programmes), assigned to its Sunday News Magazine (Søndagsavisen). The latter is known as a serious television programme intended for a well-informed audience, dealing with a wide range of social and political issues, including xenophobia, immigration and refugees.

A. The Greenjackets item

10. On 31 May 1985 the newspaper Information published an article describing the racist attitudes of members of a group of young people, calling themselves "the Greenjackets" ("grønjakkerne"), at Østerbro in Copenhagen. In the light of this article, the editors of the Sunday News Magazine decided to produce a documentary on the Greenjackets. Subsequently the applicant contacted representatives of the group, inviting three of them together with Mr Per Axholt, a social worker employed at the local youth centre, to take part in a television interview. During the interview, which was conducted by the applicant, the three Greenjackets made abusive and derogatory remarks about immigrants and ethnic groups in Denmark. It lasted between five and six hours, of which between two and two and a half hours were video-recorded. Danmarks Radio paid the interviewees fees in accordance with its usual practice.

11. The applicant subsequently edited and cut the film of the interview down to a few minutes. On 21 July 1985 this was broadcast by Danmarks Radio as a part of the Sunday News Magazine. The programme consisted of a variety of items, for instance on the martial law in South Africa, on the debate on profit-sharing in Denmark and on the late German writer Heinrich Böll. The transcript of the Greenjackets item reads as follows [(I): TV presenter; (A): the applicant; (G): one or other of the Greenjackets]:

> (I) "In recent years, a great deal has been said about racism in Denmark. The papers are currently publishing stories about distrust and resentment directed against minorities. Who are the people who hate the minorities? Where do they come from? What is their mentality like? Mr Jens Olaf Jersild has visited a group of extremist youths at Østerbro in Copenhagen.
>
> (A) The flag on the wall is the flag of the Southern States from the American Civil War, but today it is also the symbol of racism, the symbol of the American movement, the Ku Klux Klan, and it shows what Lille Steen, Henrik and Nisse are.

Are you a racist?

(G) Yes, that's what I regard myself as. It's good being a racist. We believe Denmark is for the Danes.

(A) Henrik, Lille Steen and all the others are members of a group of young people who live in Studsgårdsgade, called STUDSEN, in Østerbro in Copenhagen. It is public housing, a lot of the inhabitants are unemployed and on social security; the crime rate is high. Some of the young people in this neighbourhood have already been involved in criminal activities and have already been convicted.

(G) It was an ordinary armed robbery at a petrol station.

(A) What did you do?

(G) Nothing. I just ran into a petrol station with a ... gun and made them give me some money. Then I ran out again. That's all.

(A) What about you, what happened?

(G) I don't wish to discuss that further.

(A) But, was it violence?

(G) Yes.

(A) You have just come out of ... you have been arrested, what were you arrested for?

(G) Street violence.

(A) What happened?

(G) I had a little fight with the police together with some friends.

(A) Does that happen often?

(G) Yes, out here it does.

(A) All in all, there are 20-25 young people from STUDSEN in the same group.

They meet not far away from the public housing area near some old houses which are to be torn down. They meet here to reaffirm among other things their racism, their hatred of immigrants and their support for the Ku Klux Klan.

(G) The Ku Klux Klan, that's something that comes from the States in the old days during - you know - the civil war and things like that, because the Northern States wanted that the niggers should be free human beings, man, they are not human beings, they are animals, right, it's completely wrong, man, the things that happened. People should be allowed to keep slaves, I think so anyway.

(A) Because blacks are not human beings?

(G) No, you can also see that from their body structure, man, big flat noses, with cauliflower ears etc., man. Broad heads and very broad bodies, man, hairy, you are looking at a gorilla and compare it with an ape, man, then it is the same [behaviour], man, it's the same movements, long arms, man, long fingers etc., long feet.

(A) A lot of people are saying something different. There are a lot of people who say, but ...

(G) Just take a picture of a gorilla, man, and then look at a nigger, it's the same body structure and everything, man, flat forehead and all kinds of things.

(A) There are many blacks, for example in the USA, who have important jobs.

(G) Of course, there is always someone who wants to show off, as if they are better than the white man, but in the long run, it's the white man who is better.

(A) What does Ku Klux Klan mean to you?

(G) It means a great deal, because I think what they do is right. A nigger is not a human being, it's an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called.

(A) Henrik is 19 years old and on welfare. He lives in a rented room in Studsgårdsgade. Henrik is one of the strongest supporters of the Klan, and he hates the foreign workers, 'Perkere' [a very derogatory word in Danish for immigrant workers].

(G) They come up here, man, and sponge on our society. But we, we have enough problems in getting our social benefits, man, they just get it. Fuck, we can argue with those idiots up there at the social benefit office to get our money, man, they just get it, man, they are the first on the housing list, they get better flats than us, man, and some of our friends who have children, man, they are living in the worst slum, man, they can't even get a shower in their flat, man, then those 'Perkere'-families, man, go up there with seven kids, man, and they just get an expensive flat, right there and then. They get everything paid, and things like that, that can't be right, man, Denmark is for the Danes, right?

It is the fact that they are 'Perkere', that's what we don't like, right, and we don't like their mentality - I mean they can damn well, I mean ... what's it called ... I mean if they feel like speaking Russian in their homes, right, then it's okay, but what we don't like is when they walk around in those Zimbabwe-clothes and then speak this hula-hula language in the street, and if you ask them something or if you get into one of their taxis then they say: I don't know where it is, you give directions right.

(A) Is it not so that perhaps you are a bit envious that some of the 'Perkere' as you call them have their own shops, and cars, they can make ends ...

(G) It's drugs they are selling, man, half of the prison population in 'Vestre' are in there because of drugs, man, half of those in Vestre prison anyway, they are the people who are serving time for dealing drugs or something similar.

They are in there, all the 'Perkere', because of drugs, right. [That] must be enough, what's it called, there should not be drugs here in this country, but if it really has to be

smuggled in, I think we should do it ourselves, I mean, I think it's unfair that those foreigners come up here to ... what's it called ... make Denmark more drug dependent and things like that.

We have painted their doors and hoped that they would get fed up with it, so that they would soon leave, and jumped on their cars and thrown paint in their faces when they were lying in bed sleeping.

(A) What was it you did with that paint - why paint?

(G) Because it was white paint, I think that suited them well, that was the intended effect.

(A) You threw paint through the windows of an immigrant family?

(G) Yes.

(A) What happened?

(G) He just got it in his face, that's all. Well, I think he woke up, and then he came out and shouted something in his hula-hula language.

(A) Did he report it to the police?

(G) I don't know if he did, I mean, he won't get anywhere by doing that.

(A) Why not?

(G) I don't know, it's just kid's stuff, like other people throwing water in people's faces, he got paint in his. They can't make anything out of that.

(A) Per Axholt, known as 'Pax' [(P)], is employed in the youth centre in Studsgårdsgade. He has worked there for several years, but many give up a lot sooner because of the tough environment. Per Axholt feels that the reasons why the young people are persecuting the immigrants is that they are themselves powerless and disappointed.

What do you think they would say that they want, if you asked them?

(P) Just what you and I want. Some control over their lives, work which may be considered decent and which they like, a reasonable economic situation, a reasonably functioning family, a wife or a husband and some children, a reasonable middle-class life such as you and I have.

(A) They do many things which are sure to prevent them from getting it.

(P) That is correct.

(A) Why do you think they do this?

(P) Because they have nothing better to do. They have been told over a long period that the means by which to achieve success is money. They won't be able to get money legitimately, so often they try to obtain it through criminal activity. Sometimes they succeed, sometimes not, and that's why we see a lot of young people in that situation go to prison, because it doesn't work.

(A) How old were you when you started your criminal activities?

(G) I don't know, about 14 I guess.

(A) What did you do?

(G) The first time, I can't remember, I don't know, burglary.

(A) Do you have what one might call a criminal career?

(G) I don't know if you can call it that.

(A) You committed your first crime when you were 14.

(G) Well, you can put it that way, I mean, if that is a criminal career. If you have been involved in crime since the age of 15 onwards, then I guess you can say I've had a criminal career.

(A) Will you tell me about some of the things you have done?

(G) No, not really. It's been the same over and over again. There has been pinching of videos, where the 'Perkere' have been our customers, so they have money. If people want to be out here and have a nice time and be racists and drink beer, and have fun, then it's quite obvious you don't want to sit in the slammer.

(A) But is the threat of imprisonment something that really deters people from doing something illegal?

(G) No, it's not prison, that doesn't frighten people.

(A) Is that why you hear stories about people from out here fighting with knives etc., night after night. Is the reason for this the fact that they are not afraid of the police getting hold of them?

(G) Yes, nothing really comes of it, I mean, there are no bad consequences, so probably that's why. For instance fights and stabbings and smashing up things ... If you really get into the joint it would be such a ridiculously small sentence, so it would be, I mean ... usually we are released the next day. Last time we caused some trouble over at the pub, they let us out the next morning. Nothing really comes of it. It doesn't discourage us, but there were five of us, who just came out and then we had a celebration for the last guy, who came out yesterday, they probably don't want to go in again for some time so they probably won't commit big crimes again.

(A) You would like to move back to Studsgårdsgade where you grew up, but we know for sure that it's an environment with a high crime rate. Would you like your child to grow up like you?

(G) No, and I don't think she will. Firstly, because she is a girl, statistics show that the risk is not that high, I mean they probably don't do it, but you don't have to be a criminal because you live in an environment with a high crime rate. I just wouldn't accept it, if she was mugging old women and stealing their handbags.

(A) What if she was among those beating up the immigrants etc. What then?

(G) That would be okay. I wouldn't have anything against that.

(I) We will have to see if the mentality of this family changes in the next generation. Finally, we would like to say that groups of young people like this one in STUDSEN at Østerbro, have been formed elsewhere in Copenhagen."

B. Proceedings in the City Court of Copenhagen

12. Following the programme no complaints were made to the Radio Council, which had competence in such matters, or to Danmarks Radio but the Bishop of Ålborg complained to the Minister of Justice. After undertaking investigations the Public Prosecutor instituted criminal proceedings in the City Court of Copenhagen (Københavns Byret) against the three youths interviewed by the applicant, charging them with a violation of Article 266 (b) of the Penal Code (straffeloven) (see paragraph 19 below) for having made the statements cited below:

"... the Northern States wanted that the niggers should be free human beings, man, they are not human beings, they are animals."

"Just take a picture of a gorilla, man, and then look at a nigger, it's the same body structure and everything, man, flat forehead and all kinds of things."

"A nigger is not a human being, it's an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called."

"It is the fact that they are 'Perkere', that's what we don't like, right, and we don't like their mentality ... what we don't like is when they walk around in those Zimbabwe-clothes and then speak this hula-hula language in the street ..."

"It's drugs they are selling, man, half of the prison population in 'Vestre' are in there because of drugs ... they are the people who are serving time for dealing drugs ..."

"They are in there, all the 'Perkere', because of drugs ..."

The applicant was charged, under Article 266 (b) in conjunction with Article 23 (see paragraph 19 below), with aiding and abetting the three youths; the same charge was brought against the head of the news section of Danmarks Radio, Mr Lasse Jensen.

13. In the City Court counsel for the applicant and Mr Jensen called for their acquittal. He argued that the conduct of the applicant and Mr Jensen could in no way be compared to that of the other three defendants, with whose views they did not sympathise. They sought merely to provide a realistic picture of a social problem; in fact the programme only provoked resentment and aroused pity in respect of the three other defendants, who had exposed themselves to ridicule on their own terms. Accordingly, it was by no means the intention of Danmarks Radio to persuade others to subscribe to the same views as the Greenjackets, rather the contrary. Under the relevant law a distinction had to be drawn between the persons who made the statements and the programme editors, the latter enjoying a special freedom of expression. Having at that time a broadcasting monopoly, Danmarks Radio was under a duty to impart all opinions of public interest in a manner that reflected the speaker's way of expressing himself. The public also had an interest in being informed of notoriously bad social attitudes, even those which were unpleasant. The programme was broadcast in the context of a public debate which had resulted in press comments, for instance in Information, and was simply an honest report on the realities of the youths in question. Counsel, referring inter alia to the above-mentioned article in Information, also pointed to the fact that no consistent prosecution policy had been followed in cases of this nature.

14. On 24 April 1987 the City Court convicted the three youths, one of them for having stated that "niggers" and "foreign workers" were "animals", and two of them for their assertions in relation to drugs and "Perkere". The applicant was convicted of aiding and abetting them, as was Mr Jensen, in his capacity as programme controller; they were sentenced to pay day-fines (dagsbøder) totalling 1,000 and 2,000 Danish kroner, respectively, or alternatively to five days' imprisonment (hæfte).

As regards the applicant, the City Court found that, following the article in Information of 31 May 1985, he had visited the Greenjackets and after a conversation with Mr Axholt, amongst others, agreed that the three youths should participate in a television programme. The object of the programme had been to demonstrate the attitude of the Greenjackets to the racism at Østerbro, previously mentioned in the article in Information, and to show their social background. Accordingly, so the City Court held, the applicant had himself taken the initiative of making the television programme and, further, he had been well aware in advance that discriminatory statements of a racist nature were likely to be made during the interview. The interview had lasted several hours, during which beer, partly paid for by Danmarks Radio, was consumed. In this connection the applicant had encouraged the

Greenjackets to express their racist views, which, in so far as they were broadcast on television, in itself constituted a breach of Article 266 (b) of the Penal Code. The statements were broadcast without any counterbalancing comments, after the recordings had been edited by the applicant. He was accordingly guilty of aiding and abetting the violation of Article 266 (b).

C. Proceedings in the High Court of Eastern Denmark

15. The applicant and Mr Jensen, but not the three Greenjackets, appealed against the City Court's judgment to the High Court of Eastern Denmark (Østre Landsret). They essentially reiterated the submissions made before the City Court and, in addition, the applicant explained that, although he had suspected that the Greenjackets' statements were punishable, he had refrained from omitting these from the programme, considering it crucial to show their actual attitude. He assumed that they were aware that they might incur criminal liability by making the statements and had therefore not warned them of this fact.

16. By judgment of 16 June 1988 the High Court, by five votes to one, dismissed the appeal.

The dissenting member was of the view that, although the statements by the Greenjackets constituted offences under Article 266 (b) of the Penal Code, the applicant and Mr Jensen had not transgressed the bounds of the freedom of speech to be enjoyed by television and other media, since the object of the programme was to inform about and animate public discussion on the particular racist attitudes and social background of the youth group in question.

D. Proceedings in the Supreme Court

17. With leave the applicant and Mr Jensen appealed from the High Court judgment to the Supreme Court (Højesteret), which by four votes to one dismissed the appeal in a judgment of 13 February 1989. The majority held:

> "The defendants have caused the publication of the racist statements made by a narrow circle of persons and thereby made those persons liable to punishment and have thus, as held by the City Court and the High Court, violated Article 266 (b) in conjunction with Article 23 of the Penal Code. [We] do not find that an acquittal of the defendants could be justified on the ground of freedom of expression in matters of public interest as opposed to the interest in the protection against racial discrimination. [We] therefore vote in favour of confirming the judgment [appealed from]."

Justice Pontoppidan stated in his dissent:

> "The object of the programme was to contribute to information on an issue - the attitude towards foreigners - which was the subject of extensive and sometimes

emotional public debate. The programme must be presumed to have given a clear picture of the Greenjackets' views, of which the public was thus given an opportunity to be informed and form its own opinion. In view of the nature of these views, any counterbalancing during or immediately before or after would not have served a useful purpose. Although it concerned a relatively small group of people holding extreme views, the programme had a fair degree of news and information value. The fact that the defendants took the initiative to disseminate such views is not of paramount importance for the assessment of their conduct. In these circumstances and irrespective of the fact that the statements rightly have been found to be in violation of Article 266 (b), I question the advisability of finding the defendants guilty of aiding and abetting the violation of this provision. I therefore vote in favour of the defendants' acquittal."

18. When the Supreme Court has rendered judgment in a case raising important issues of principle it is customary that a member of the majority publishes a detailed and authoritative statement of the reasons for the judgment. In keeping with this custom, Justice Hermann on 20 January 1990 published such a statement in the Weekly Law Journal (Ugeskrift for Retsvæsen, 1989, p. 399).

As regards the conviction of the applicant and Mr Jensen, the majority had attached importance to the fact that they had caused the racist statements to be made public. The applicant's item had not been a direct report on a meeting. He had himself contacted the three youths and caused them to make assertions such as those previously made in Information, which he knew of and probably expected them to repeat. He had himself cut the recording of the interview, lasting several hours, down to a few minutes containing the crude comments. The statements, which would hardly have been punishable under Article 266 (b) of the Penal Code had they not been made to a wide circle ("videre kreds") of people, became clearly punishable as they were broadcast on television on the applicant's initiative and with Mr Jensen's approval. It was therefore beyond doubt that they had aided and abetted the dissemination of the statements.

Acquitting the applicant and Mr Jensen could only be justified by reasons clearly outweighing the wrongfulness of their actions. In this connection, the interest in protecting those grossly insulted by the statements had to be weighed up against that of informing the public of the statements. Whilst it is desirable to allow the press the best possible conditions for reporting on society, press freedom cannot be unlimited since freedom of expression is coupled with responsibilities.

In striking a balance between the various interests involved, the majority had regard to the fact that the statements, which were brought to a wide circle of people, consisted of series of inarticulate, defamatory remarks and insults spoken by members of an insignificant group whose opinions could hardly be of interest to many people. Their news or information value was not such as to justify their dissemination and therefore did not warrant acquitting the defendants. This did not mean that extremist views could not be reported in the press, but such reports must be carried out in a more

balanced and comprehensive manner than was the case in the television programme in question. Direct reports from meetings which were a matter of public interest should also be permitted.

The minority, on the other hand, considered that the right to information overrode the interests protected by Article 266 (b) of the Penal Code.

Finally, Justice Hermann noted that the compatibility of the impugned measures with Article 10 (art. 10) of the Convention was not raised during the trial.

II. RELEVANT DOMESTIC LAW

A. The Penal Code

19. At the relevant time Article 266 (b) of the Penal Code provided:

> "Any person who, publicly or with the intention of disseminating it to a wide circle ("videre kreds") of people, makes a statement, or other communication, threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin or belief shall be liable to a fine or to simple detention or to imprisonment for a term not exceeding two years."

Article 23, paragraph 1, reads:

> "A provision establishing a criminal offence shall apply to any person who has assisted the commission of the offence by instigation, advice or action. The punishment may be reduced if the person in question only intended to give assistance of minor importance or to strengthen an intent already resolved or if the offence has not been completed or an intended assistance failed."

B. The 1991 Media Liability Act

20. The 1991 Media Liability Act (Medieansvarsloven, 1991:348), which entered into force on 1 January 1992, that is after the events giving rise to the present case, lays down rules inter alia on criminal liability in respect of television broadcasts. Section 18 provides:

> "A person making a statement during a non-direct broadcast (forskudt udsendelse) shall be responsible for the statement under general statutory provisions, unless:
>
> (1) the identity of the person concerned does not appear from the broadcast; or
>
> (2) [that person] has not consented to the statement being broadcast; or
>
> (3) [he or she] has been promised that [he or she] may take part [in the broadcast] without [his or her] identity being disclosed and reasonable precautions have been taken to this effect.

In the situations described in paragraph 1, sub-paragraphs (1) to (3) above, the editor is responsible for the contents of the statements even where a violation of the law has occurred without intent or negligence on his part ..."

Pursuant to section 22:

"A person who reads out or in any other manner conveys a text or statement, is not responsible for the contents of that text or statement."

III. INSTRUMENTS OF THE UNITED NATIONS

21. Provisions relating to the prohibition of racial discrimination and the prevention of propaganda of racist views and ideas are to be found in a number of international instruments, for example the 1945 United Nations Charter (paragraph 2 of the Preamble, Articles 1 para. 3, 13 para. 1 (b), 55 (c) and 76 (c)), the 1948 Universal Declaration of Human Rights (Articles 1, 2 and 7) and the 1966 International Covenant on Civil and Political Rights (Articles 2 para. 1, 20 para. 2 and 26). The most directly relevant treaty is the 1965 International Convention on the Elimination of All Forms of Racial Discrimination ("the UN Convention"), which has been ratified by a large majority of the Contracting States to the European Convention, including Denmark (9 December 1971). Articles 4 and 5 of that Convention provide:

Article 4

"States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:

(a) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

..."

Article 5

"In compliance with the fundamental obligation laid down in ... this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(d) ...

viii. the right to freedom of opinion and expression;

..."

The effects of the "due regard" clause in Article 4 has given rise to differing interpretations and the UN Committee on the Elimination of Racial Discrimination ("the UN Committee" - set up to supervise the implementation of the UN Convention) was divided in its comments on the applicant's conviction. The present case had been presented by the Danish Government in a report to the UN Committee. Whilst some members welcomed it as "the clearest statement yet, in any country, that the right to protection against racial discrimination took precedence over the right to freedom of expression", other members considered that "in such cases the facts needed to be considered in relation to both rights" (Report of the Committee to the General Assembly, Official Records, Forty-Fifth Session, Supplement No. 18 (A/45/18), p. 21, para. 56).

PROCEEDINGS BEFORE THE COMMISSION

22. In his application (no. 15890/89) of 25 July 1989 to the Commission the applicant complained that his conviction violated his right to freedom of expression under Article 10 (art. 10) of the Convention.

23. On 8 September 1992 the Commission declared the application admissible. In its report of 8 July 1993 (Article 31) (art. 31), the Commission expressed the opinion that there had been a violation of Article 10 (art. 10) (by twelve votes to four).

The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS MADE BY THE GOVERNMENT TO THE COURT

24. At the hearing on 20 April 1994 the Government invited the Court to hold that, as submitted in their memorial, there had been no violation of Article 10 (art. 10) of the Convention.

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[*] Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 298 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

25. The applicant maintained that his conviction and sentence for having aided and abetted the dissemination of racist remarks violated his right to freedom of expression within the meaning of Article 10 (art. 10) of the Convention, which reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

26. The Government contested this contention whereas the Commission upheld it.

27. It is common ground that the measures giving rise to the applicant's case constituted an interference with his right to freedom of expression.

It is moreover undisputed that this interference was "prescribed by law", the applicant's conviction being based on Articles 266 (b) and 23 (1) of the Penal Code. In this context, the Government pointed out that the former provision had been enacted in order to comply with the UN Convention. The Government's argument, as the Court understands it, is that, whilst Article 10 (art. 10) of the Convention is applicable, the Court, in applying paragraph 2 (art. 10-2), should consider that the relevant provisions of the Penal Code are to be interpreted and applied in an extensive manner, in accordance with the rationale of the UN Convention (see paragraph 21 above). In other words, Article 10 (art. 10) should not be interpreted in such a way as to limit, derogate from or destroy the right to protection against racial discrimination under the UN Convention.

Finally it is uncontested that the interference pursued a legitimate aim, namely the "protection of the reputation or rights of others".

The only point in dispute is whether the measures were "necessary in a democratic society".

28. The applicant and the Commission were of the view that, notwithstanding Denmark's obligations as a Party to the UN Convention (see paragraph 21 above), a fair balance had to be struck between the

"protection of the reputation or rights of others" and the applicant's right to impart information. According to the applicant, such a balance was envisaged in a clause contained in Article 4 of the UN Convention to the effect that "due regard" should be had to "the principles in the Universal Declaration of Human Rights and the rights ... in Article 5 of [the UN] Convention". The clause had been introduced at the drafting stage because of concern among a number of States that the requirement in Article 4 (a) that "[States Parties] shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred" was too sweeping and could give rise to difficulties with regard to other human rights, in particular the right to freedom of opinion and expression. In the applicant's further submission, this explained why the Committee of Ministers of the Council of Europe, when urging member States to ratify the UN Convention, had proposed that they add an interpretative statement to their instrument of ratification, which would, inter alia, stress that respect was also due for the rights laid down in the European Convention (Resolution (68) 30 adopted by the Ministers' Deputies on 31 October 1968).

The applicant and the Commission emphasised that, taken in the context of the broadcast as a whole, the offending remarks had the effect of ridiculing their authors rather than promoting their racist views. The overall impression of the programme was that it sought to draw public attention to a matter of great public concern, namely racism and xenophobia. The applicant had deliberately included the offensive statements in the programme, not with the intention of disseminating racist opinions, but in order to counter them through exposure. The applicant pointed out that he tried to show, analyse and explain to his viewers a new phenomenon in Denmark at the time, that of violent racism practised by inarticulate and socially disadvantaged youths. Joined by the Commission, he considered that the broadcast could not have had any significant detrimental effects on the "reputation or rights of others". The interests in protecting the latter were therefore outweighed by those of protecting the applicant's freedom of expression.

In addition the applicant alleged that had the 1991 Media Liability Act been in force at the relevant time he would not have faced prosecution since under the Act it is in principle only the author of a punishable statement who may be liable. This undermined the Government's argument that his conviction was required by the UN Convention and "necessary" within the meaning of Article 10 (art. 10).

29. The Government contended that the applicant had edited the Greenjackets item in a sensationalist rather than informative manner and that its news or information value was minimal. Television was a powerful medium and a majority of Danes normally viewed the news programme in which the item was broadcast. Yet the applicant, knowing that they would

incur criminal liability, had encouraged the Greenjackets to make racist statements and had failed to counter these statements in the programme. It was too subtle to assume that viewers would not take the remarks at their face value. No weight could be attached to the fact that the programme had given rise to only a few complaints, since, due to lack of information and insufficient knowledge of the Danish language and even fear of reprisals by violent racists, victims of the insulting comments were likely to be dissuaded from complaining. The applicant had thus failed to fulfil the "duties and responsibilities" incumbent on him as a television journalist. The fine imposed upon him was at the lower end of the scale of sanctions applicable to Article 266 (b) offences and was therefore not likely to deter any journalist from contributing to public discussion on racism and xenophobia; it only had the effect of a public reminder that racist expressions are to be taken seriously and cannot be tolerated.

The Government moreover disputed that the matter would have been dealt with differently had the 1991 Media Liability Act been in force at the material time. The rule that only the author of a punishable statement may incur liability was subject to exceptions (see paragraph 20 above); how the applicant's case would have been considered under the 1991 Act was purely a matter of speculation.

The Government stressed that at all three levels the Danish courts, which were in principle better placed than the European Court to evaluate the effects of the programme, had carried out a careful balancing exercise of all the interests involved. The review effected by those courts had been similar to that carried out under Article 10 (art. 10); their decisions fell within the margin of appreciation to be left to the national authorities and corresponded to a pressing social need.

30. The Court would emphasise at the outset that it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations. It may be true, as has been suggested by the applicant, that as a result of recent events the awareness of the dangers of racial discrimination is sharper today than it was a decade ago, at the material time. Nevertheless, the issue was already then of general importance, as is illustrated for instance by the fact that the UN Convention dates from 1965. Consequently, the object and purpose pursued by the UN Convention are of great weight in determining whether the applicant's conviction, which - as the Government have stressed - was based on a provision enacted in order to ensure Denmark's compliance with the UN Convention, was "necessary" within the meaning of Article 10 para. 2 (art. 10-2).

In the second place, Denmark's obligations under Article 10 (art. 10) must be interpreted, to the extent possible, so as to be reconcilable with its obligations under the UN Convention. In this respect it is not for the Court to interpret the "due regard" clause in Article 4 of the UN Convention,

which is open to various constructions. The Court is however of the opinion that its interpretation of Article 10 (art. 10) of the European Convention in the present case is compatible with Denmark's obligations under the UN Convention.

31. A significant feature of the present case is that the applicant did not make the objectionable statements himself but assisted in their dissemination in his capacity of television journalist responsible for a news programme of Danmarks Radio (see paragraphs 9 to 11 above). In assessing whether his conviction and sentence were "necessary", the Court will therefore have regard to the principles established in its case-law relating to the role of the press (as summarised in for instance the Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59).

The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance (ibid.). Whilst the press must not overstep the bounds set, inter alia, in the interest of "the protection of the reputation or rights of others", it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (ibid.). Although formulated primarily with regard to the print media, these principles doubtless apply also to the audiovisual media.

In considering the "duties and responsibilities" of a journalist, the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media (see Purcell and Others v. Ireland, Commission's admissibility decision of 16 April 1991, application no. 15404/89, Decisions and Reports (DR) 70, p. 262). The audiovisual media have means of conveying through images meanings which the print media are not able to impart.

At the same time, the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the Court recalls that Article 10 (art. 10) protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see the Oberschlick v. Austria judgment of 23 May 1991, Series A no. 204, p. 25, para. 57).

The Court will look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are relevant and sufficient and whether the means

employed were proportionate to the legitimate aim pursued (see the above-mentioned Observer and Guardian judgment, pp. 29-30, para. 59). In doing so the Court has to satisfy itself that the national authorities did apply standards which were in conformity with the principles embodied in Article 10 (art. 10) and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see, for instance, the Schwabe v. Austria judgment of 28 August 1992, Series A no. 242-B, pp. 32-33, para. 29).

The Court's assessment will have regard to the manner in which the Greenjackets feature was prepared, its contents, the context in which it was broadcast and the purpose of the programme. Bearing in mind the obligations on States under the UN Convention and other international instruments to take effective measures to eliminate all forms of racial discrimination and to prevent and combat racist doctrines and practices (see paragraph 21 above), an important factor in the Court's evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas.

32. The national courts laid considerable emphasis on the fact that the applicant had himself taken the initiative of preparing the Greenjackets feature and that he not only knew in advance that racist statements were likely to be made during the interview but also had encouraged such statements. He had edited the programme in such a way as to include the offensive assertions. Without his involvement, the remarks would not have been disseminated to a wide circle of people and would thus not have been punishable (see paragraphs 14 and 18 above).

The Court is satisfied that these were relevant reasons for the purposes of paragraph 2 of Article 10 (art. 10-2).

33. On the other hand, as to the contents of the Greenjackets item, it should be noted that the TV presenter's introduction started by a reference to recent public discussion and press comments on racism in Denmark, thus inviting the viewer to see the programme in that context. He went on to announce that the object of the programme was to address aspects of the problem, by identifying certain racist individuals and by portraying their mentality and social background. There is no reason to doubt that the ensuing interviews fulfilled that aim. Taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought - by means of an interview - to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern.

The Supreme Court held that the news or information value of the feature was not such as to justify the dissemination of the offensive remarks (see paragraph 18 above). However, in view of the principles stated in paragraph

31 above, the Court sees no cause to question the Sunday News Magazine staff members' own appreciation of the news or information value of the impugned item, which formed the basis for their decisions to produce and broadcast it.

34. Furthermore, it must be borne in mind that the item was broadcast as part of a serious Danish news programme and was intended for a well-informed audience (see paragraph 9 above).

The Court is not convinced by the argument, also stressed by the national courts (see paragraphs 14 and 18 above), that the Greenjackets item was presented without any attempt to counterbalance the extremist views expressed. Both the TV presenter's introduction and the applicant's conduct during the interviews clearly dissociated him from the persons interviewed, for example by describing them as members of "a group of extremist youths" who supported the Ku Klux Klan and by referring to the criminal records of some of them. The applicant also rebutted some of the racist statements for instance by recalling that there were black people who had important jobs. It should finally not be forgotten that, taken as a whole, the filmed portrait surely conveyed the meaning that the racist statements were part of a generally anti-social attitude of the Greenjackets.

Admittedly, the item did not explicitly recall the immorality, dangers and unlawfulness of the promotion of racial hatred and of ideas of superiority of one race. However, in view of the above-mentioned counterbalancing elements and the natural limitations on spelling out such elements in a short item within a longer programme as well as the journalist's discretion as to the form of expression used, the Court does not consider the absence of such precautionary reminders to be relevant.

35. News reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog" (see, for instance, the above-mentioned Observer and Guardian judgment, pp. 29-30, para. 59). The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. In this regard the Court does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted.

There can be no doubt that the remarks in respect of which the Greenjackets were convicted (see paragraph 14 above) were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10 (art. 10) (see, for instance, the Commission's admissibility decisions in Glimmerveen and Hagenbeek v. the Netherlands, applications nos. 8348/78 and 8406/78, DR 18, p. 187; and Künen v. Germany, application no. 12194/86, DR 56, p. 205). However, even having regard to

the manner in which the applicant prepared the Greenjackets item (see paragraph 32 above), it has not been shown that, considered as a whole, the feature was such as to justify also his conviction of, and punishment for, a criminal offence under the Penal Code.

36. It is moreover undisputed that the purpose of the applicant in compiling the broadcast in question was not racist. Although he relied on this in the domestic proceedings, it does not appear from the reasoning in the relevant judgments that they took such a factor into account (see paragraphs 14, 17 and 18 above).

37. Having regard to the foregoing, the reasons adduced in support of the applicant's conviction and sentence were not sufficient to establish convincingly that the interference thereby occasioned with the enjoyment of his right to freedom of expression was "necessary in a democratic society"; in particular the means employed were disproportionate to the aim of protecting "the reputation or rights of others". Accordingly the measures gave rise to a breach of Article 10 (art. 10) of the Convention.

II. APPLICATION OF ARTICLE 50 (art. 50)

38. Mr Jersild sought just satisfaction under Article 50 (art. 50) of the Convention, according to which:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

39. The Government accepted parts of his claim. The Commission offered no comments.

A. Pecuniary damage

40. The applicant claimed 1,000 kroner in respect of the fine imposed upon him, to be reimbursed by him to Danmarks Radio which had provisionally paid the fine for him.

41. The Government did not object and the Court finds that the amount should be awarded.

B. Non-pecuniary damage

42. The applicant requested 20,000 kroner in compensation for non-pecuniary damage. He maintained that his professional reputation had been prejudiced and that he had felt distress as a result of his conviction.

43. The Court observes that the applicant still works with the Sunday News Magazine at Danmarks Radio and that his employer has supported him throughout the proceedings, inter alia by paying the fine (see paragraphs 9 and 40 above) and legal fees (see paragraph 44 below). It agrees with the Government that the finding of a violation of Article 10 (art. 10) constitutes in itself adequate just satisfaction in this respect.

C. Costs and expenses

44. The applicant claimed in respect of costs and expenses:

(a) 45,000 kroner for work done in the domestic proceedings by his lawyer, Mr J. Stockholm;

(b) by way of legal fees incurred in the Strasbourg proceedings, 13,126.80 kroner for Mrs Johannessen, 6,900 pounds sterling for Mr Boyle and 50,000 kroner (exclusive 25% value-added tax) for Mr Trier;

(c) 20,169.20 kroner to cover costs of translation, interpretation and an expert opinion;

(d) 25,080 kroner, 965.40 pounds and 4,075 French francs in travel and subsistence expenses incurred in connection with the hearings before the Commission and Court, as well as miscellaneous expenses.

Parts of the above costs and expenses had been provisionally disbursed by Danmarks Radio.

45. The Government did not object to the above claims. The Court considers that the applicant is entitled to recover the sums in their entirety. They should be increased by any value-added taxes that may be chargeable.

FOR THESE REASONS, THE COURT

1. Holds by twelve votes to seven that there has been a violation of Article 10 (art. 10) of the Convention;

2. Holds by seventeen votes to two that Denmark is to pay the applicant, within three months, 1,000 (one thousand) Danish kroner in compensation for pecuniary damage; and, for costs and expenses, the sums resulting from the calculations to be made in accordance with paragraph 45 of the judgment;

3. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 September 1994.

Rolv RYSSDAL
President

Herbert PETZOLD
Acting Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint dissenting opinion of Mr Ryssdal, Mr Bernhardt, Mr Spielmann and Mr Loizou;

(b) joint dissenting opinion of Mr Gölcüklü, Mr Russo and Mr Valticos;

(c) supplementary joint dissenting opinion of Mr Gölcüklü and Mr Valticos.

R. R.
H. P.

JOINT DISSENTING OPINION OF JUDGES RYSSDAL, BERNHARDT, SPIELMANN AND LOIZOU

1. This is the first time that the Court has been concerned with a case of dissemination of racist remarks which deny to a large group of persons the quality of "human beings". In earlier decisions the Court has - in our view, rightly - underlined the great importance of the freedom of the press and the media in general for a democratic society, but it has never had to consider a situation in which "the reputation or rights of others" (Article 10 para. 2) (art. 10-2) were endangered to such an extent as here.

2. We agree with the majority (paragraph 35 of the judgment) that the Greenjackets themselves "did not enjoy the protection of Article 10 (art. 10)". The same must be true of journalists who disseminate such remarks with supporting comments or with their approval. This can clearly not be said of the applicant. Therefore it is admittedly difficult to strike the right balance between the freedom of the press and the protection of others. But the majority attributes much more weight to the freedom of the journalist than to the protection of those who have to suffer from racist hatred.

3. Neither the written text of the interview (paragraph 11 of the judgment) nor the video film we have seen makes it clear that the remarks of the Greenjackets are intolerable in a society based on respect for human rights. The applicant has cut the entire interview down to a few minutes, probably with the consequence or even the intention of retaining the most crude remarks. That being so, it was absolutely necessary to add at least a clear statement of disapproval. The majority of the Court sees such disapproval in the context of the interview, but this is an interpretation of cryptic remarks. Nobody can exclude that certain parts of the public found in the television spot support for their racist prejudices.

And what must be the feelings of those whose human dignity has been attacked, or even denied, by the Greenjackets? Can they get the impression that seen in context the television broadcast contributes to their protection? A journalist’s good intentions are not enough in such a situation, especially in a case in which he has himself provoked the racist statements.

4. The International Convention on the Elimination of All Forms of Racial Discrimination probably does not require the punishment of journalists responsible for a television spot of this kind. On the other hand, it supports the opinion that the media too can be obliged to take a clear stand in the area of racial discrimination and hatred.

5. The threat of racial discrimination and persecution is certainly serious in our society, and the Court has rightly emphasised the vital importance of combating racial discrimination in all its forms and manifestations (paragraph 30 of the judgment). The Danish courts fully recognised that protection of persons whose human dignity is attacked has to be balanced against the right to freedom of expression. They carefully considered the

responsibility of the applicant, and the reasons for their conclusions were relevant. The protection of racial minorities cannot have less weight than the right to impart information, and in the concrete circumstances of the present case it is in our opinion not for this Court to substitute its own balancing of the conflicting interests for that of the Danish Supreme Court. We are convinced that the Danish courts acted inside the margin of appreciation which must be left to the Contracting States in this sensitive area. Accordingly, the findings of the Danish courts cannot be considered as giving rise to a violation of Article 10 (art. 10) of the Convention.

JOINT DISSENTING OPINION OF JUDGES GÖLCÜKLÜ, RUSSO AND VALTICOS

(Translation)

We cannot share the opinion of the majority of the Court in the Jersild case.

There are indeed two major principles at issue in this case, one being that of freedom of expression, embodied in Article 10 (art. 10) of the Convention, the other the prohibition on defending racial hatred, which is obviously one of the restrictions authorised by paragraph 2 of Article 10 (art. 10-2) and, moreover, is the subject of basic human rights documents adopted by the General Assembly of the United Nations, in particular the 1965 Convention on the Elimination of All Forms of Racial Discrimination. That Convention manifestly cannot be ignored when the European Convention is being implemented. It is, moreover, binding on Denmark. It must also guide the European Court of Human Rights in its decisions, in particular as regards the scope it confers on the terms of the European Convention and on the exceptions which the Convention lays down in general terms.

In the Jersild case the statements made and willingly reproduced in the relevant broadcast on Danish television, without any significant reaction on the part of the commentator, did indeed amount to incitement to contempt not only of foreigners in general but more particularly of black people, described as belonging to an inferior, subhuman race ("the niggers ... are not human beings ... Just take a picture of a gorilla ... and then look at a nigger, it’s the same body structure ... A nigger is not a human being, it’s an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called.").

While appreciating that some judges attach particular importance to freedom of expression, the more so as their countries have largely been deprived of it in quite recent times, we cannot accept that this freedom should extend to encouraging racial hatred, contempt for races other than the one to which we belong, and defending violence against those who belong to the races in question. It has been sought to defend the broadcast on the ground that it would provoke a healthy reaction of rejection among the viewers. That is to display an optimism, which to say the least, is belied by experience. Large numbers of young people today, and even of the population at large, finding themselves overwhelmed by the difficulties of life, unemployment and poverty, are only too willing to seek scapegoats who are held up to them without any real word of caution; for - and this is an important point - the journalist responsible for the broadcast in question made no real attempt to challenge the points of view he was presenting,

which was necessary if their impact was to be counterbalanced, at least for the viewers.

That being so, we consider that by taking criminal measures - which were, moreover, moderate ones - the Danish judicial institutions in no way infringed Article 10 (art. 10) of the Convention.

SUPPLEMENTARY JOINT DISSENTING OPINION OF JUDGES GÖLCÜKLÜ AND VALTICOS

(Translation)

We have voted against point 2 of the operative provisions of the judgment because we are so firmly convinced that the applicant was wrong not to react against the defence of racism that we consider it wholly unjustified to award him any compensation whatever.

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

THIRD SECTION

CASE OF JERUSALEM v. AUSTRIA

(Application no. 26958/95)

JUDGMENT

STRASBOURG

27 February 2001

FINAL

27/05/2001

In the case of Jerusalem v. Austria,

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

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 3 October 2000 and 30 January 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 26958/95) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mrs Susanne Jerusalem ("the applicant"), on 2 March 1995.

2. The applicant was represented by Mr T. Prader, a lawyer practising in Vienna (Austria).

3. The applicant alleged that an injunction prohibiting her from repeating certain statements she had made in the course of a debate in the Vienna Municipal Council violated her right to freedom of expression. Furthermore, she alleges that the court proceedings leading to the injunction had been unfair.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 27 June 2000 the Chamber declared the application partly admissible [*Note by the Registry.* The Court's decision is obtainable from the Registry].

7. The Austrian Government ("the Government"), but not the applicant, filed observations on the merits (Rule 59 § 1).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 3 October 2000 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*
Mr H. WINKLER, Head of the International Law Department at the Federal Ministry of Foreign Affairs, *Agent*,
Mrs B. OHMS, Federal Chancellery, *Adviser*,
Mr G. LUKASSER, Federal Ministry of Justice, *Adviser*;

(b) *for the applicant*
Mr D. ENNÖCKL, *Counsel*.

The Court heard addresses by Mr Ennöckl and Mr Winkler.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is an Austrian citizen, residing in Vienna. At the relevant time she was a member of the Vienna Municipal Council (*Gemeinderat*), which also acts as the Regional Parliament (*Landtag*).

10. On 11 June 1992, in the course of a session of the Vienna Municipal Council, the applicant, in her function as member of the Municipal Council, gave a speech. The debate related to the granting of subsidies by the municipality to an association which assists parents whose children had become involved in sects. In this context the applicant made the following statement:

> "Like everyone else, I know that today a sect no longer means a small group that breaks away from a big church ..., but a psycho-sect.
>
> These psycho-sects also exist in Vienna. They have common features. One aspect they have in common is their totalitarian character. Moreover, in their ideology, they show fascist tendencies and often have hierarchical structures. In general, a person who gets involved with such a sect loses his identity and submits to the group ..."

After having commented on the activities of an association she considered a sect, the applicant continued as follows:

> "...the sect IPM [*Institut zur Förderung der Psychologischen Menschenkenntnis* – Institute for a Better Understanding of Human Psychology], which has not long been in existence in Austria but which has existed for several years in Switzerland, where it is called the VPM [*Verein zur Förderung der Psychologischen Menschenkenntnis* –

> Association for a Better Understanding of Human Psychology] has had a certain influence on the drugs policy of the Austrian People's Party."

11. The applicant then stated that the Austrian People's Party had issued a publication on drugs policy in cooperation with the IPM, and had organised information activities involving public discussions together with the IPM. The applicant then requested a resolution by the Municipal Council that, before granting subsidies to an association, the question whether that association was a sect should be examined.

12. The debate in the Municipal Council then turned to the drugs policy and the applicant, in a further speech, criticised the cooperation between the Austrian People's Party and the IPM, and made further statements on the nature and activities of the IPM.

13. On 27 October 1992 the IPM, an association established under Austrian law, and the VPM, an association established under Swiss law, filed a civil-law action under Article 1330 of the Austrian Civil Code against the applicant with the Vienna Regional Court for Civil Matters (*Landesgericht für Zivilrechtssachen*). The associations requested the court to issue an injunction against the applicant prohibiting her from repeating the statement that the IPM was a sect, ordering her to retract this statement and directing the publication of the applicant's retraction in several Austrian newspapers.

14. On 2 February 1993 the applicant commented on the action. She submitted that the term "sect" used by her was a value judgment and not a statement of fact. It had been used in the context of a political debate. If the court, however, was of the opinion that the term "sect" was a statement of fact, she was willing to prove that this statement was true, and proposed documentary evidence and the hearing of witnesses to confirm that the plaintiffs were sects. As documentary evidence, the applicant proposed a decision by a German court and seven articles from newspapers and periodicals on the internal structure and activities of the plaintiffs. She proposed that four witnesses be heard. She also requested that the court obtain an expert report.

15. On 16 February 1993 the IPM and the VPM altered their injunction claim to include the following statement made by the applicant on 11 June 1992:

> "One aspect they have in common is their totalitarian character. Moreover, in their ideology, they show fascist tendencies and often have hierarchical structures. In general, a person who gets involved with such a sect loses his identity and submits to the group ..."

16. On 18 February 1993 the applicant confirmed that she had received the plaintiffs' amended claim. She submitted a transcript of the session of the Vienna Municipal Council of 11 June 1992, and argued that the modification of the action merely referred to a general explanation of the

term “psycho-sect” and had no direct relation to the plaintiffs. She further referred to her previous statements and the evidence proposed therein.

17. On 22 February 1993 a hearing took place before the Regional Court. The court accepted several documents submitted by the parties, closed the taking of evidence and rejected all requests for the taking of other evidence as irrelevant because the documents submitted had clarified the issues sufficiently.

18. On 8 April 1993 the Regional Court granted the injunction. It ordered the applicant not to repeat her statements that the IPM and the VPM were sects of a totalitarian character. Furthermore, the court ordered the applicant to retract these statements, the retraction to be published in several newspapers. The Regional Court found that, contrary to the applicant’s opinion, her statements were not value judgments, but statements of fact. Having regard to the statutes of the associations and other evidence before it, the Regional Court considered that the applicant’s statements had proved to be untrue. The applicant had disseminated unfounded assumptions as proven fact and had therefore acted negligently. As the damage to the plaintiff associations’ earnings and livelihood was manifest, the Court granted the requested injunction under Article 1330 § 2 of the Civil Code.

19. On 12 July 1993 the applicant appealed. She submitted that the Regional Court had failed to take the evidence requested by her. She contended in particular that the real activities of the plaintiffs and their (totalitarian) methods could not be seen from their statutes. In particular, the internal organisational structure (hierarchical structure), their conduct against critics (exhibiting a totalitarian character and an ideology with fascist features) and the effect on the personality of the persons concerned (loss of identity and submission to the group) should have been examined. Only a report by an expert using sociological and psychological methods, or interviews with the persons affected, could have clarified these issues. In any event, the applicant’s statements were value judgments made in the context of a political debate and not statements of fact. The injunction therefore violated her right to freedom of expression under Article 10 of the Convention.

20. On 16 November 1993 the Vienna Court of Appeal (*Oberlandesgericht*) upheld the Regional Court’s decision in so far as it concerned the prohibition on repetition, but quashed the order for a retraction and its publication.

21. It confirmed the Regional Court’s view that the applicant’s allegations were statements of fact. Contrary to the opinion of the Regional Court, the Court of Appeal considered that the applicant’s allegations amounted to an insult and fell not only within the scope of the second but also within the scope of the first paragraph of Article 1330 of the Civil Code. In that case, the applicant had to prove the truth of her allegations.

22. With regard to the applicant's complaint that the Regional Court had refused to take the evidence she had proposed in order to prove that the plaintiffs were sects, the Court of Appeal found that such evidence was irrelevant to the proceedings. According to the Court of Appeal's legal point of view, the applicant's statements had to be seen as a whole. Thus, the use of the term "sect" was not decisive, but the allegation of fascist tendencies was of primary importance. This latter statement amounted to an insult going beyond justified criticism. Since the applicant had not offered any evidence with regard to this definition of a psycho-sect, but only with regard to the question whether the plaintiffs were sects, she had failed to prove its truth, as required by Article 1330 § 1 of the Civil Code. The Court of Appeal also found that the request for a retraction of the statement and its publication in several newspapers had to be dismissed because the plaintiffs had failed to specify the addressees of the retraction, even though the applicant's statements had been reported in the newspapers.

23. On 18 August 1994 the Supreme Court (*Oberster Gerichtshof*) rejected as inadmissible the applicant's further appeal on points of law (*Revision*). It confirmed, however, that the statements such as "fascist tendencies" or "totalitarian character" were statements of fact which the applicant had failed to prove. Referring to its previous case-law, it stated that disparagement by means of untrue statements, even though it was made in the course of a political debate, went beyond acceptable political criticism and could not be justified by a weighing of interests or by the right to freedom of expression.

II. RELEVANT DOMESTIC LAW

24. Article 1330 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) provides as follows:

> "(1) Everyone who has suffered material damage or loss of profit because of an insult may claim compensation.
>
> (2) The same applies if anyone disseminates statements of fact which jeopardise another person's credit, income or livelihood and if the untruth of the statement was known or must have been known to him. In such a case the public retraction of the statement may also be requested ..."

25. Members of the Vienna Municipal Council enjoy a limited parliamentary immunity. They are exempt from legal proceedings for anything said by them in the course of debates in the Municipal Council in so far as the Municipal Council sits as the Parliament of a *Land* (Articles 57, 58 and 96 of the Federal Constitution). However, this privilege does not extend to sessions of the Municipal Council sitting as the local council. The reason is that Vienna, under the Austrian Constitution, has a dual function,

being at the same time a *Land* and a local council (Article 108 of the Federal Constitution).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

26. The applicant alleged a breach of Article 10 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ..."

27. The applicant contests the necessity of the interference with her right to freedom of expression. The incriminated statements had been made in the course of a session of the Vienna Municipal Council and concerned a political issue, namely the granting of public subsidies to associations and, in particular, an association of parents whose children had become involved with sects. In this context the applicant had pointed out that sects were gaining influence in politics and had cited the plaintiff associations as examples because of their cooperation with the Austrian People's Party. The applicant had not been involved in a direct dispute with the VPM (*Verein zur Förderung der Psychologischen Menschenkenntnis* – Association for a Better Understanding of Human Psychology) or the IPM (*Institut zur Förderung der Psychologischen Menschenkenntnis* – Institute for a Better Understanding of Human Psychology). Rather, her statements were a critical comment on the drug policy of another political party, and could not be understood as an attack on the plaintiffs' reputation. In any event, the IPM itself had repeatedly made public statements on AIDS prevention as well as on drug policy, and the applicant was therefore entitled to comment on that. Finally, the applicant submitted that the statements at issue were value judgments. This opinion was not shared by the Austrian courts, which qualified them as statements of fact, the truth of which had to be proved. Nevertheless, she had offered evidence to prove their truth, but the Austrian courts had refused it. Thus, it was not her fault that she had not succeeded in proving the truth of her statements.

28. The Government accept that the injunction interfered with the applicant's right to freedom of expression. However, in their view, the

measure at issue was justified under paragraph 2 of Article 10 as it was "prescribed by law", namely Article 1330 of the Civil Code, and pursued the legitimate aim of protecting the reputation and rights of others. Moreover, it was necessary in a democratic society in the interests of that aim. In this respect the Government submit that the limits of acceptable criticism are wider in respect of a politician than in respect of a private individual. In the present case, however, the applicant had not attacked a politician but had raised serious accusations against private bodies, whose political function, if any, was merely a consultative one. In her capacity as member of the Municipal Council, the applicant had attacked the associations in circumstances which prevented them from defending themselves in the same way, at the same place and before the same audience. Moreover, the interference was not disproportionate since the impugned judicial proceedings were not instituted *ex officio* by the State but by private organisations, and the proceedings were not criminal in nature but civil.

29. The Government submit further that the Austrian courts had correctly qualified the applicant's remarks as statements of fact. Thus, the applicant had the opportunity to prove the truth of her statements, which she failed to do.

30. The Court notes that it was common ground between the parties that the injunction constituted an interference with the applicant's right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention. Furthermore, there was no dispute that the interference was prescribed by law and pursued a legitimate aim, namely the protection of the reputation or rights of others, within the meaning of Article 10 § 2. The Court endorses this assessment.

31. The dispute in the case relates to the question whether the interference was "necessary in a democratic society".

32. According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for individual self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

33. The test of "necessity in a democratic society" requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify

it are relevant and sufficient (see The Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 38, § 62). In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

34. The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (ibid.).

35. In examining the particular circumstances of the case, the Court will take the following elements into account: the position of the applicant, the position of the associations which instituted the injunction proceedings and their activities, and the subject matter of the debate before the Vienna Municipal Council.

36. As regards the applicant's position, the Court observes that she was an elected politician sitting as a member of the Vienna Municipal Council. As such, the applicant enjoyed limited parliamentary immunity (see paragraph 25 above). However, the session of the Municipal Council during which the applicant made her speech was one of the local council and not the *Land* Parliament. In the latter instance, any statement made by the applicant would have been protected by parliamentary immunity and an action for an injunction would have been impossible. In this respect the Court recalls that while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court (see *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, pp. 22-23, § 42).

37. As regards the position of the IPM and the VPM, the applicant's opponents in the injunction proceedings, the Government submitted that the associations were private bodies and could not, for the purposes of Article 10, be compared with politicians.

38. The Court recalls that the limits of acceptable criticism are wider with regard to politicians acting in their public capacity than in relation to private individuals, as the former inevitably and knowingly lay themselves open to close scrutiny of word and deed by both journalists and the public at large. Politicians must display a greater degree of tolerance, especially when they themselves make public statements that are susceptible to criticism.

However, private individuals or associations lay themselves open to scrutiny when they enter the arena of public debate. In the case of *Nilsen and Johnsen*, cited above, § 52, the Court found that Mr Bratholm, a government expert involved in a dispute with Mr Nilsen and Mr Johnsen, could not, on account of that position, be compared to a politician who had to display a greater degree of tolerance. However, the Court found that Mr Bratholm's participation in a public debate was a relevant factor.

39. In the present case the Court observes that the IPM and the VPM were associations active in a field of public concern, namely drug policy. They participated in public discussions on this matter and, as the Government conceded, cooperated with a political party. Since the associations were active in this manner in the public domain, they ought to have shown a higher degree of tolerance to criticism when opponents considered their aims as well as to the means employed in that debate.

40. As regards the impugned statements of the applicant, the Court observes that they were made in the course of a political debate within the Vienna Municipal Council. It is not decisive that this debate occurred before the Vienna Municipal Council sitting as the local council and not as the *Land* Parliament. Irrespective of whether the applicant's statements were covered by parliamentary immunity, the Court finds that they were made in a forum which was at least comparable to Parliament as concerns the public interest in protecting the participants' freedom of public expression. In a democracy, Parliament or such comparable bodies are the essential fora for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein.

41. The debate in the Municipal Council related to the granting of public subsidies to associations and the applicant commented on one particular item on the agenda, namely the granting of subsidies to an association which assisted parents whose children had become involved in sects (*der Selbsthilfegruppen von Sektenopfern)*. The purpose of the applicant's speech was to emphasise the necessity for such assistance by describing the dangers of groups which, with a connotation quite distinct from that attaching to the words in past religious controversies, were commonly referred to as sects. In this context – in which the IPM and the VPM were not mentioned – she explained the term "sect" and expressed the opinion that one aspect which these sects have in common is their totalitarian character. Her further elaboration of the point was fully in line with general definitions of totalitarianism. It was only later in her speech that the applicant criticised connections between the Austrian People's Party and the IPM and the VPM.

42. In the present case, the Austrian courts qualified the applicant's statements as statements of fact. Accordingly, the applicant was obliged to prove their truth in order to avoid an injunction. In this respect the Court recalls that in the cases of *Lingens v. Austria* (judgment of 8 July 1986, Series A no. 103, p. 28, § 46), and *Oberschlick v. Austria (no. 1)* (judgment

of 23 May 1991, Series A no. 204, pp. 27-28, § 63), the Court has distinguished between statements of fact and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10.

43. However, the Court further recalls that, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (see *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 236, § 47, and *Oberschlick v. Austria (no. 2)*, judgment of 1 July 1997, *Reports* 1997-IV, p. 1276, § 33).

44. The Court finds that, contrary to the view of the Austrian Courts, the impugned statements in the present case, reflecting as they did fair comment on matters of public interest by an elected member of the Municipal Council, are to be regarded as value judgments rather than statements of fact (see *Lingens*, cited above, p. 28, § 46, and *Wabl v. Austria*, no. 24773/94, § 36, 21 March 2000, unreported).

45. The question remains whether there existed a sufficient factual basis for such value judgments. In this regard, the Court notes that the applicant offered documentary evidence, especially articles from newspapers and magazines, on the internal structure and the activities of the plaintiffs, as well as a German court judgment on this matter. In the Court's view, such material may have been relevant to show a prima facie case that the value judgment expressed by the applicant was fair comment. Apart from that documentary evidence, which was accepted by the Regional Court, the applicant also proposed the evidence of four witnesses and suggested that an expert opinion be sought. Nevertheless, the Regional Court refused to take this evidence because, as the Court of Appeal explained, it merely related to the term "sect" and not to that term as explained by the applicant in her speech, namely a body having a totalitarian character, showing fascist tendencies and having hierarchical structures with a resultant adverse impact on the psychological situation of its members or followers. Such evidence was therefore deemed irrelevant. No comment was made as to its availability.

However, the Court considers that the distinction drawn between the term "sect" and "psycho-sect showing totalitarian features" was artificial and disregarded the true nature of the debate in which the applicant was involved. It is struck by the inconsistent approach of the domestic courts on the one hand requiring proof of a statement and on the other hand refusing to consider all available evidence.

46. The Court finds that, in requiring the applicant to prove the truth of her statements, while at the same time depriving her of an effective opportunity to adduce evidence to support her statements and thereby show that they constituted fair comment, the Austrian courts overstepped their margin of appreciation and that the injunction granted against the applicant amounted to a disproportionate interference with her freedom of expression.

47. Accordingly there has been a breach of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

48. Article 6 § 1, so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

49. The applicant also complains under Article 6 of the Convention that the Austrian courts refused to take the evidence proposed by her, in particular to hear witnesses on whether the associations were sects.

50. This is contested by the Government, who argue that the Austrian courts correctly dismissed the applicant's request.

51. Having regard to its above considerations under Article 10 of the Convention, the Court does not find it necessary to examine the applicant's complaint under Article 6 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

53. Under the head of non-pecuniary damage the applicant claims 200,000 Austrian schillings (ATS). The Government did not comment on the claim.

54. The Court does not exclude that the applicant may have sustained non-pecuniary prejudice as a result of the breach of Article 10, on account of the anxiety and uncertainty occasioned by the injunction proceedings. It considers, however, that in the circumstances of the case the finding of a violation in itself constitutes sufficient just satisfaction (see *Oberschlick (no. 1)*, cited above, p. 29, § 69, and *News Verlags GmbH & CoKG v. Austria*, no. 31457/96, § 66, ECHR 2000-I).

B. Costs and expenses

55. The applicant claimed ATS 101,531.40 as costs and expenses incurred in the domestic proceedings and ATS 178,906.20 for the Convention proceedings. She further claimed ATS 11,594.70 for the travel expenses of her counsel participating at the hearing before the Court.

56. The Government did not comment on these claims.

57. The Court recalls that, according to its case-law, it has to consider whether the costs and expenses were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for instance, Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 80, ECHR 1999-III). The Court considers that these conditions are met as regards the costs and expenses incurred in the domestic proceedings and, consequently, awards the sum of ATS 101,531.40.

As to the costs of the Convention proceedings, the Court finds the claim excessive. In this respect the Court notes that for costs and expenses related to the hearing alone the applicant claims ATS 113,837.10. Therefore the Court, having regard to sums granted in comparable cases (for example, *Labita v. Italy* [GC], no. 26772/95, § 210, ECHR 2000-IV), and making an assessment on an equitable basis, awards the applicant ATS 110,000 for costs and expenses incurred in the Convention proceedings.

C. Default interest

58. According to the information available to the Court, the statutory rate of interest applicable in Austria at the date of adoption of the present judgment is 4% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;

2. *Holds* that it is not necessary to examine separately whether there has been a violation of Article 6 of the Convention;

3. *Holds* that the finding of a violation in itself constitutes sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:

(i) ATS 101,531.40 (one hundred and one thousand five hundred and thirty-one Austrian schillings forty groschen) for costs and expenses incurred in the domestic proceedings, and

(ii) ATS 110,000 (one hundred and ten thousand Austrian schillings) for costs and expenses incurred in the proceedings before the Convention organs;

(b) that simple interest at an annual rate of 4 % shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 February 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FORMER THIRD SECTION

CASE OF KRONE VERLAG GMBH & CO. KG v. AUSTRIA

(Application no. 34315/96)

JUDGMENT

STRASBOURG

26 February 2002

FINAL

26/05/2002

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Krone Verlag GmbH & Co. Kg v. Austria,

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

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Registrar*

Having deliberated in private on 15 May 2001 and 30 January 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 34315/96) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a limited partnership registered under Austrian law, Krone Verlag GmbH & Co. KG ("the applicant"), on 29 November 1996.

2. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicant company alleged that an injunction ordering it to refrain in the future from publishing the picture of a politician, together with allegations about his sources of revenue, like that which it had already published in its newspaper, violated its right to freedom of expression, contrary to Article 10 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 15 May 2001 the Chamber declared the application admissible.

7. On 1 November 2001 the Court effected a change in the composition of its Sections, but the present case remained with the former Chamber of Section III which had declared the application admissible.

8. Neither the applicant company nor the Government filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant company is the publisher of a newspaper (*Kronenzeitung*) with its registered office in Vienna.

10. On 3, 4, 7, 8 and 15 March, as well as on 3 and 16 May and 29 June 1995, the applicant company published, in its Carinthian regional edition (*Lokalausgabe)*, articles on the financial situation of a certain Mr Posch who, at that time, was employed as a teacher and, at the same time, was a member of the Austrian National Assembly (*Nationalrat*) and the European Parliament. The articles commented on these professional tasks and, in harsh terms, alleged that he received three salaries unlawfully as, according to Austrian law, he was not entitled to a teacher's salary during his membership of the European Parliament. He was, *inter alia*, referred to as someone unjustly enriching himself. These articles were accompanied by photographs of Mr Posch.

11. On 18 August 1995 Mr Posch applied for an injunction under Section 78 of the Copyright Act (*Urheberrechtsgesetz*) to the Klagenfurt Regional Court against the applicant company. He requested that the applicant company be ordered to refrain from publishing his picture in connection with statements describing him as somebody who received his salaries unlawfully and who benefited from unlawful privileges. Furthermore, he requested an order for the publication of the judgment in the applicant company's newspaper, indicating the grant of damages and the injunction (*einstweilige Verfügung*).

12. On 21 September 1995 the applicant company filed a statement of defence (*Klagebeantwortung*) in which it argued, *inter alia*, that the publication of the impugned articles had been justified under Article 10 of the Convention.

13. On 10 October 1995 the Klagenfurt Regional Court granted an interim injunction. It found the measure justified because the plaintiff's interest in prohibiting the publication of his photograph outweighed the applicant company's interest in the publication of the illustrated articles, in

particular as the publication of the pictures *per se* had no special information value (*Nachrichtenwert*).

14. On 4 January 1996 the Klagenfurt Regional Court granted the permanent injunction prohibiting the applicant company from publishing the plaintiff's picture in connection with the above mentioned or similar articles. It dismissed the remainder of the action. The court found that Section 78 of the Copyright Act prohibited publishing a person's picture if the publication violated that person's legitimate interests. When considering such interests, account had to be taken of whether the person concerned was known to the public, because the publication of the photographs of unknown persons made it possible to identify them later. The court found that Mr Posch's face was not generally known, despite his membership of the National Assembly. Therefore, his legitimate interests had been infringed by creating the possibility of identifying him. The applicant company was of course entitled to report on the plaintiff's activities and financial situation, but there was no legitimate interest in publishing his picture as it had, *per se*, no information value. Furthermore, it was irrelevant for this specific question whether the content of the articles was true or false.

15. On 8 February 1996 the applicant company appealed. It argued that the court had erred when it found that the plaintiff's interests outweighed the applicant company's interests, as the public in Carinthia, who had elected Mr Posch, were interested in his sources of revenue. Therefore the court should have also taken evidence – as had been offered by the applicant company – in order to prove the truth of the articles. Furthermore, the plaintiff was known to the public as he was Carinthian and had participated in several events during the election campaign there. Thus it was incorrect that Mr Posch's face was unknown.

16. On 9 July 1996 the Graz Court of Appeal dismissed the appeal. It found that the publication of the pictures together with the articles had been unnecessary. In any case, the information value of the pictures could not outweigh Mr Posch's interests. It also confirmed the legal opinion of the Regional Court that, for the purposes of Section 78 of the Copyright Act, it was irrelevant whether or not the publication contained true information.

17. On 15 October 1996 the Supreme Court declared inadmissible the applicant company's extraordinary appeal on points of law (*außerordentlicher Revisionsrekurs*). It confirmed the findings of the Court of Appeal, observed that the publication of the plaintiff's pictures had no additional information value, and therefore concluded that it had been unnecessary. On 4 November 1996 this decision was served upon counsel for the applicant company.

II. RELEVANT DOMESTIC LAW

18. Section 78 of the Copyright Act, in so far as relevant, reads as follows:

> "(1) Images of persons shall neither be exhibited publicly, nor in any way made accessible to the public, where injury would be caused to the legitimate interests of the persons concerned or, in the event that they have died without having authorised or ordered publication, those of a close relative."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

19. The applicant company complains under Article 10 of the Convention that the injunction prohibiting it from publishing photos of Mr Posch, in connection with certain statements about his sources of revenue, violated its right to freedom of expression.

20. The relevant part of Article 10 of the Convention reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority....
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others...."

A. Whether there was an interference

21. The Court notes that it was common ground between the parties that the injunction issued by the Austrian courts constituted an interference with the applicant company's freedom of expression, as guaranteed by Article 10 § 1 of the Convention.

B. Whether the interference was justified

22. An interference contravenes Article 10 of the Convention unless it is "prescribed by law", pursues one or more of the legitimate aims referred to in paragraph 2 of Article 10 and is "necessary in a democratic society" for achieving such an aim or aims.

1. "Prescribed by law"

23. The applicant company submitted that the interference was not prescribed by law because Section 78 of the Copyright Act left a very wide margin of interpretation to the domestic courts, in particular as regards the term "justified interests" of the person in the picture.

24. The Government for their part asserted that section 78 of the Copyright Act formed the legal basis for the injunctions.

25. The Court finds that the impugned measure had a legal basis in Austrian law, namely Section 78 of the Copyright Act. The Court is not persuaded by the applicant company's argument that this provision is too vague to make the interference unforeseeable. A similar argument has been rejected by the Court in the case of *News Verlags GmbH & Co.KG v. Austria*, (no. 31457/96, ECHR 2000-I, § 43) and the Court sees no reason to reach a different conclusion in the present case. Accordingly, the Court is satisfied that the interference was "prescribed by law".

2. Legitimate aim

26. The applicant company submits that the interference at issue did not pursue a legitimate aim as required by paragraph 2 of Article 10.

27. In the Government's view, there existed a legitimate aim, namely the protection of the reputation and rights of others.

28. The Court agrees with the Government and finds that the measure at issue pursued a legitimate aim, namely the protection of the rights and the reputation of others, i.e. of Mr Posch. The applicant company does not submit any arguments in support of its allegation that this was not the case. The interference complained of, thus, had an aim that was legitimate under paragraph 2 of Article 10.

3. "Necessary in a democratic society"

29. The applicant company submits that the injunction was not necessary in a democratic society. The public has an interest in being informed about politicians and their conduct and, in particular, about politicians like Mr Posch who was not just a local politician of limited importance but a member of the Austrian Parliament, as well as a member of the European Parliament. The report did not concern issues relating to that politician's private sphere but a matter which was directly connected to his public functions, as the article criticised the fact that he received at the same time salaries from different functions and sources. Informing the public of such issues is an essential task of the media and, in this context, a politician should accept that his picture be published.

30. In the applicant company's view, there is no material difference between the present application and the aforementioned case of News VerlagsGmbH & Co.KG v. Austria as the essential argument of the

domestic courts for issuing the injunctions was the same, namely that in their view there was no additional informative or news value in publishing the picture of the person concerned. This was not the test which should be applied under Article 10 when deciding on an injunction. The domestic courts should rather examine whether or not the arguments raised in the accompanying text were true or not.

31. The Government submit that the Austrian courts which granted the impugned injunction have struck a fair balance between the public's right to be informed about its elected representatives and their emoluments and the protection of the reputation of a politician. They argue further that pictorial reporting should essentially be judged by other standards than verbal reporting in view of the dangerous effects a picture may have on a person's security. There was no urgent need to publish a picture of Mr Posch while the tendency of the applicant company's style of reporting was to disparage Mr Posch in the eyes of the public. The bold print of the head lines and the placing of the article on the front page were sufficient to attract the readers' attention. The picture had no additional informative or news value. Moreover, the injunction was a proportionate measure as the applicant company was not generally prevented from publishing photographs of Mr Posch, but only prohibited from doing so in a closely circumscribed context.

32. In the Government's view the present case had to be distinguished from the News Verlags GmbH & Co. KG v. Austria judgment (no. 31457/96, ECHR 2000-I) on important factual differences. In the latter case, the Court attached particular importance to the fact that the person whose picture had been published was suspected of criminal offences directed against the foundations of a democratic society and the picture in that case had been published in the context of reporting on court proceedings. Both elements were absent in the present application.

33. The Court recalls its well-established case-law that the adjective "necessary", within the meaning of Article 10 § 2 implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protection by Article 10.

34. In exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned court decisions in isolation; it must look at them in the light of the case as a whole, including the materials for which reproach is made against the applicant company and the context in which they were published. The Court must determine whether the interference at issue was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the courts to justify it are "relevant and sufficient" (see,

for instance, Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30, § 59 and, recently, *Arslan v. Turkey*, no. 23462/94, § 44, 8.7.99).

35. The Court recalls further that there is little scope for restrictions on political speech or questions of public interest (see e.g. *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 46, ECHR 1999-VIII). The limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance. A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of the open discussion of political issues (e.g. Oberschlick v. Austria judgment of 23 May 1991, Series A no. 204, p. 26, § 59).

36. In the present case, the applicant company criticised Mr Posch, a politician. The subject matter of the published articles concerned his financial situation and the accusation that not all of his income had been earned lawfully. This is without doubt a matter of public concern which does not fall wholly within his private sphere. The reasons relied on by the Austrian courts for issuing an injunction prohibiting the applicant company from publishing the picture of Mr Posch were essentially that they did not consider Mr Posch a person known to the public and that the publication of his picture in connection with the reporting of his financial situation would make it possible to identify him, which infringed his interests. The applicant company had no legitimate interest in publishing the picture as it had no information value *per se* and it was irrelevant whether the facts alleged in the accompanying article were true or not.

37. Even accepting that the reasons adduced by the Austrian courts were "relevant", the Court finds that they were not "sufficient". The Austrian courts failed to take into account the essential function the press fulfils in a democratic society and its duty to impart information and ideas on all matters of public interest (*Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III). Moreover, it is of little importance whether a certain person (or his or her picture) is actually known to the public. What counts is whether this person has entered the public arena. This is the case of a politician on account of his public functions (Oberschlick v. Austria judgment (No. 2) of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, § 29), a person participating in a public debate (*Nilsen and Johnsen v. Norway* [GC], no 23118/93, ECHR 1999-VIII, § 52), an association which is active in a field of public concern, on which it enters into public discussions (*Jerusalem v. Austria*, no. 26958/95, §39, 27.2.2001), or a person who is suspected of having committed offences of a political nature which attract the attention of the public (*News Verlags*

GmbH & Co. KG v. Austria, loc. cit., § 54). In view of Mr Posch's position as a politician there is no doubt that he had entered the public arena and had to bear the consequences thereof. Thus, there is no valid reason why the applicant company should be prevented from publishing his picture. In this respect the Court attaches particular importance to the fact that the published photographs did not disclose any details of his private life (see *Tammer v. Estonia*, no. 41205/98, § 68, 6.2.2001). Moreover, the Court has noted itself that on the Austrian Parliament's internet site the curriculum vitae and picture of Mr Posch, who is still a member of the Austrian Parliament (national council), can be seen.

38. The Government also argue that the injunction was a proportionate measure as the applicant company was not generally prevented from publishing photographs of Mr Posch, but was only prohibited from doing so in a closely circumscribed context. However, even within the scope delimited by the terms of the injunction the measure must correspond to a pressing social need. For the above reasons, the Court finds that this is not the case.

39. It follows from these considerations that the interference with the applicant company's right to freedom of expression was not "necessary in a democratic society". Accordingly, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

41. The applicant company sought 59,419.02 Austrian schillings [ATS] (4,318.16 euros [EUR]) in respect of pecuniary damage, that is to say reimbursement of the opposing parties' costs for court fees and legal representation, which the applicant company was ordered to pay by the Austrian courts.

42. In addition the applicant company claimed 100.000 EUR in non-pecuniary damages. It submitted that, as a consequence of the injunction, it would be prevented in the future from publishing a picture of Mr Posch when reporting on his financial situation which would result in a loss for the newspaper's circulation. If, however, the applicant company would

disregard the injunction and publish a picture of Mr Posch, heavy fines might be imposed in enforcement proceedings.

43. The Government did not comment on the applicant company's claim for pecuniary damage but objected to an award for non-pecuniary damage. In their view, the applicant company failed to show a sufficiently strong link of causality between the violation found and the claim raised, and merely speculated about possible developments in the future.

44. As to pecuniary damages, the Court observes that payment by the applicant of the sums in question was a direct consequence of its conviction, which the Court has found to be in breach of Article 10 of the Convention. The Court considers the claim justified and, consequently, awards the full amount, namely 4,318.16 EUR.

45. As to non-pecuniary damages, the Court will leave open whether a corporate applicant may claim non-pecuniary damages of this kind (see *mutatis mutandis* the Immobiliare Saffi v. Italy judgment of 28 July 1999, § 79, ECHR 1999-V) as, in the circumstances of the case, the finding of a violation in itself provides sufficient satisfaction as regards any non-pecuniary damages the applicant company might have sustained.

B. Costs and expenses

46. For costs and expenses incurred by its legal representation in the domestic proceedings, the applicant company claimed 78,224.54 ATS (5,684.80 EUR). Further, the applicant company, which has not been represented by counsel in the Convention proceedings, claimed 10,000 ATS (726.73 EUR) for expenses incurred in the Convention proceedings. It submitted that the case had been prepared and pursued by its employees, which caused internal costs of at least the amount claimed.

47. The Government did not comment on these claims.

48. The Court finds that the sums claimed by the applicant company appear reasonable and awards the full amount, namely 6,411.53 EUR.

C. Default interest

49. According to the information available to the Court, the statutory rate of interest applicable in Austria at the date of adoption of the present judgment is 4% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;

2. *Holds* that the finding of a violation in itself constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
      (i) 4,318.16 EUR (four thousand three hundred and eighteen euros and sixteen cents) in respect of pecuniary damage;
      (ii) 6,411.53 EUR (six thousand four hundred and eleven euros and fifty three cents) in respect of costs and expenses;
   (b) that simple interest at an annual rate of 4% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 February 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

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

COURT (CHAMBER)

CASE OF LEANDER v. SWEDEN

(Application no. 9248/81)

JUDGMENT

STRASBOURG

26 March 1987

In the Leander case[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. L.-E. PETTITI,
Sir Vincent EVANS,
Mr. C. RUSSO,
Mr. R. BERNHARDT,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 30 and 31 May and 28 August 1986 and on 25 February 1987,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 July 1985, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. The case originated in an application (no. 9248/81) against the Kingdom of Sweden lodged with the Commission on 2 November 1980 under Article 25 (art. 25) by a Swedish citizen, Mr. Torsten Leander.

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Sweden recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision from the Court as to whether the facts of the case disclosed violations by the respondent State of its obligations under Articles 8, 10 and 13 (art. 8, art. 10, art. 13) of the Convention.

3. In response to the inquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the

[*] Note by the Registrar: The case is numbered 10/1985/96/144. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and originating applications (to the Commission) referred to the Court since its creation.

proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

4. The Chamber of seven judges to be constituted included, as ex officio members, Mr. G. Lagergren, the elected judge of Swedish nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 2 October 1985, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. J. Cremona, Mr. G. Wiarda, Mr. L.-E. Pettiti, Sir Vincent Evans and Mr. R. Bernhardt (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). Mr. J. Gersing, substitute judge, subsequently replaced Mr. Wiarda, whose term of office as judge had expired before the hearing, and at a later stage Mr. F. Gölcüklü and Mr. C. Russo, substitute judges, replaced Mr. Gersing and Mr. Cremona, who were prevented from taking part in the consideration of the case (Rules 2 § 3, 22 § 1 and 24 § 1).

5. Mr. Ryssdal assumed the office of President of the Chamber (Rule 21 § 5). He ascertained, through the Registrar, the views of the Agent of the Swedish Government ("the Government"), the Delegate of the Commission and the lawyer for the applicant regarding the need for a written procedure (Rule 37 § 1). On 12 December 1985, he directed that the lawyer and, should he so decide, the Agent should each have until 4 February 1986 to file a memorial and that the Delegate should be entitled to reply in writing within two months from the date of the transmission to him by the Registrar of whichever of the aforesaid documents should last be filed.

The applicant’s memorial was received at the registry on 3 February. By letter the same day, the Agent of the Government stated that the Government did not intend to file any memorial. On 21 March, the Secretary to the Commission informed the Registrar that the Delegate would present his observations at the hearing.

6. On 3 April 1986, after consulting, through the Registrar, the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant, the President directed that the oral proceedings should open on 26 May 1986 (Rule 38).

On 28 April, the Commission communicated to the Registrar a number of documents whose production he had requested on the instructions of the President. On 12 May, certain additional documents furnished by the applicant were received at the registry.

7. The hearing was held in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately before it opened, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mr. H. CORELL, Ambassador,
Under-Secretary for Legal and Consular Affairs, Ministry for Foreign Affairs, *Agent*,

Mr. K. BERGENSTRAND, Assistant Under-Secretary,
Ministry of Justice,
Mr. S. HÖGLUND, Head of Division,
National Police Board, *Advisers*;

- for the Commission
Mr. H. SCHERMERS, *Delegate*;

- for the applicant
Mr. D. TÖLLBORG, *Counsel*,
Mr. J. LAESTADIUS, *Adviser*.

8. The Court heard addresses by Mr. Corell for the Government, by Mr. Schermers for the Commission and by Mr. Töllborg for the applicant, as well as their replies to questions put by the Court and several judges.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

9. The applicant, Mr. Torsten Leander, is a Swedish citizen born in 1951 and a carpenter by profession.

10. On 20 August 1979, he started to work as a temporary replacement in a post of museum technician (vikarierande museitekniker) at the Naval Museum at Karlskrona in the south of Sweden. The museum is adjacent to the Karlskrona Naval Base which is a restricted military security zone.

The applicant maintained before the Court that the intention was that he should work for ten months in this post, while its ordinary holder was on leave. He alleged that on 3 September he was told to leave his work pending the outcome of a personnel control which had to be carried out on him in accordance with the Personnel Control Ordinance 1969 (personal-kontrollkungörelsen 1969:446 - see paragraphs 18-34 below). According to the applicant, this control had been requested on 9 August 1979.

The Government submitted that the applicant was employed only from 20 August to 31 August 1979, as evidenced by a notice to this effect, issued on 27 August 1979 by the Director of the Museum. They further contended that in employing Mr. Leander the Director had committed two mistakes. Firstly, it was not in accordance with the procedure prescribed in the Ordinance and the relevant regulations issued thereunder to employ a person before a personnel control had been undertaken and, secondly, the post had not been properly declared vacant.

11. The necessary steps were taken on 30 August 1979. The post was opened for application until 28 September 1979. Mr. Leander did not apply.

12. It appears that on 25 September the Director informed him that the outcome of the personnel control had been unfavourable and that he could therefore not be employed at the Museum.

13. Following the advice of the Security Chief of the Naval Base, the applicant wrote to the Commander-in-Chief of the Navy (chefen för marinen) requesting to be informed of the reasons why he could not be employed at the Naval Museum.

In his reply of 3 October 1979, the Commander-in-Chief of the Navy stated, inter alia:

> "The Museum possesses several storage rooms and historical objects within the area for the security of which the Chief of the Naval Base (örlogsbaschefen) is responsible. According to the information received by the Commander-in-Chief of the Navy, the person holding the post in question must have freedom to circulate within areas subject to special restrictions regarding access. The rules on access to these areas must therefore also be applied to the personnel employed at the Museum.
>
> It is for these reasons that the Chief of the Naval Base requested a personnel control.
>
> The control carried out has provided such grounds for the Commander-in-Chief's assessment of you from a security point of view that the decision has been taken not to accept you.
>
> However, if your duties at the Naval Museum will not necessitate that you have access to the naval installations at the Naval Base, the Commander-in-Chief sees no reason to oppose your employment. The decision whether or not to employ you is taken in a procedure distinct from the present one."

14. On 22 October 1979, the applicant complained to the Government and requested that the assessment of the Commander-in-Chief of the Navy be cancelled and that he be declared acceptable for the temporary employment at the Naval Museum, irrespective of the possibility of being reinstated in that employment. He pointed out in particular that he had left a permanent position in Dalarna, in the North of Sweden, on being told that he was accepted for employment at the Naval Museum and that a negative outcome of the personnel control could mean social misery, especially considering that he had a wife and child to support. In his original complaint, and also in a letter of 4 December 1979, Mr. Leander further requested that he be given information about the reasons for his not being accepted at the Naval Museum.

The Government requested the opinion of the Supreme Commander of the Armed Forces (överbefälhavaren), who in turn consulted the Commander-in-Chief of the Navy.

The Commander-in-Chief of the Navy explained in a letter of 7 November 1979 that he had received the result of the personnel control from the Supreme Commander on 17 September 1979 together with the following proposal:

"Accepted in accordance with the assessment of the [Commander-in-Chief of the Navy], on condition that L. does not, through access to the Museum's premises or through his work, obtain insight into secret activities."

The Commander-in-Chief of the Navy added that, according to his information, the Director of the Museum required the person employed in the post in question to have free access to, and freedom to circulate in, the Naval Base and that accordingly, on 21 September 1979, he had taken the decision not to accept the applicant.

In his reply to the Government, the Supreme Commander of the Armed Forces stated, inter alia:

"However, the employment of Mr. Leander during this time, 15 August - 1 September 1979, did not involve any access to the Naval Base. The Commander-in-Chief of the Navy has said that he does not oppose such employment. The Director of the Naval Museum has, however, affirmed the requirement that Mr. Leander should have access to the Naval Base.

In view of the above and the fact that, if Mr. Leander was given access to the Naval Base, he would have access to secret installations and information, the Commander-in-Chief of the Navy decided not to accept the applicant.

When dealing with the present case, the Commander-in-Chief of the Navy has entirely followed existing regulations concerning the assessment of personal qualifications from a security point of view.

...

Like the Commander-in-Chief of the Navy, the Supreme Commander of the Armed Forces considers that Mr. Leander may properly be employed by the Naval Museum provided that the holder of the appointment does not require access to the Naval Base."

The opinion of the Supreme Commander of the Armed Forces was accompanied by a secret annex, containing the information on Mr. Leander released by the National Police Board (rikspolisstyrelsen). This annex was never communicated to the applicant and has not been included in the material submitted to the Court.

15. In a letter of 5 February 1980, the applicant raised new grievances before the Government. These concerned the decision of the National Police Board not to exercise its powers under section 13 of the Personnel Control Ordinance to communicate to him the information released on him (see paragraph 31 below). The applicant requested that the Government should, before taking a decision on his request of 22 October 1979, give him the right to be apprised of and to comment upon the information thus released by the Board.

On this matter, the Government sought the opinion of the Board. In its reply of 22 February 1980, the Board proposed that the applicant's complaints be dismissed. It added:

"The entering of information in the register of the Board's Security Department is based mainly on a 1973 Royal Decree which is secret. Before information is entered, the question of registration is subject to assessment, at several levels, by civil servants under responsibility to verify compliance with the above-mentioned rules in relation to each item of information. In the event of doubt, the question of registration is decided upon by the Chief of the Security Department.

Information from the register is handed out in accordance with section 9 of the Personnel Control Ordinance after decision by the National Police Board in plenary meeting. At least three of the six members of the Board who are appointed amongst parliamentarians should be present when decisions are taken in matters of personnel control. In the case of the applicant, all six members were present.

...

Under section 13 of the Personnel Control Ordinance, the person whom the information concerns ought to be given the opportunity to submit observations on the matter if special reasons give cause for this. However, the National Police Board did not see any cause to apply this provision in the case of the applicant as no special reasons were found, and also as the registering had been effected in accordance with the secret Royal Decree and disclosure of the information would have revealed part of the contents of that Decree."

Mr. Leander replied to this opinion in a letter of 11 March 1980 to the Government, in which he argued, inter alia, that the Board should have communicated to him, at least orally and subject to a duty of confidentiality, the information kept on him.

16. By decision of 14 May 1980, the Government rejected the whole of the applicant's complaint. In its operative parts, the decision read:

"The question whether or not a person is suitable for certain employment can only be examined by the Government in the context of a complaint about the appointment to a post. Leander has lodged no appeal with the Government in respect of appointment. His request that the Government should declare him acceptable for the provisional employment concerned cannot therefore be examined.

In the present case, there are no such special circumstances as are mentioned in section 13 of the Personnel Control Ordinance which would give Leander the right to be acquainted with the information about him released by the National Police Board to the Supreme Commander of the Armed Forces.

The remainder of Leander's petition is a request to be given an extract from, or information about the contents of, a police register.

The Government reject [this] request ...

The Government do not examine Leander's request for a revised assessment of his person and take no measure in regard to any other part of his petition."

17. The applicant maintained before the Court that he still did not know the content of the secret information recorded on him.

Regarding his personal background, he furnished the following details to the Commission and the Court. At the relevant time, he had not belonged to any political party since 1976. Earlier he had been a member of the Swedish Communist Party. He had also been a member of an association publishing a radical review - Fib/Kulturfront. During his military service, in 1971-72, he had been active in the soldiers' union and a representative at the soldiers' union conference in 1972 which, according to him, had been infiltrated by the security police. His only criminal conviction stems from his time in military service and consisted of a fine of 10 Swedish Crowns for having been late for a military parade. He had also been active in the Swedish Building Workers' Association and he had travelled a couple of times in Eastern Europe.

The applicant asserted however that, according to unanimous statements by responsible officials, none of the above-mentioned circumstances should have been the cause for the unfavourable outcome of the personnel control.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Prohibition of registration of opinion

18. According to Chapter 2, section 3, of the Swedish Instrument of Government (regeringsformen, which forms the main constituent of the Swedish Constitution and is hereafter referred to as "the Constitution"), "no entry regarding a citizen in a public register may without his consent be founded exclusively on his political opinion".

B. Secret police-register

19. The legal basis of the register kept by the National Police Board's Security Department ("the secret police-register") is to be found in the Personnel Control Ordinance, which was enacted by the Government under their regulatory powers and which was originally published in the Swedish Official Journal (svensk författningssamling, 1969:446). Section 2 of the Ordinance (as amended by Ordinance 1972:505) provides:

> "For the special police service responsible for the prevention and detection of offences against national security, etc., the Security Department within the National Police Board shall keep a police-register. In this register, the National Police Board may enter information necessary for the special police service.
>
> In the police-register referred to in the first paragraph, no entry is allowed merely for the reason that a person, by belonging to an organisation or by other means, has expressed a political opinion. Further provisions concerning the application of this rule shall be laid down by the Government."

20. In consequence, the following instructions, published on 22 September 1972, were given to the National Police Board by the Government:

> "In this country, there exist organisations and groups engaging in political activities which involve the use or the possible use of force or threats of compulsion as means to achieve their political aims.
>
> Some organisations have adopted a programme in which it is said that the organisation shall endeavour to change the social system by violence. It can be assumed, however, that a large part of the membership of such organisations will never take part in the realisation of the goals in the programme. The mere fact of being a member of such an organisation does not therefore constitute a reason for the Security Police to make an entry about a person in its register. An entry may be made, however, if a member or a supporter of such an organisation has acted in a way which justifies the suspicion that he may be prepared to participate in activities which endanger national security or which are aimed at, and may contribute towards, overthrowing the democratic system by force or affecting the status of Sweden as an independent State.
>
> There also exist organisations and groups which may engage in, or may have engaged in, political subversion in Sweden or in other States, while using force, threats or compulsion as means for such subversion. Information about members or supporters of such organisations or groups shall be entered in the register of the Security Police.
>
> Further instructions concerning the application of section 2 of the Personnel Control Ordinance shall be issued by the Government following proposals from the National Police Board. If, in the special police service, circumstances appear which may call for amendments to the instructions issued by the Government the National Police Board should submit proposals for such amendments."

21. Further instructions, this time secret, were issued by the Government on 27 April 1973 and again on 3 December 1981.

22. In addition to the circumstances provided for in the Personnel Control Ordinance (see paragraph 24 below), information from the secret police-register appears also to be released by the National Police Board in certain cases of public prosecution and in matters relating to applications for Swedish citizenship.

C. Personnel control

23. In addition to the above-mentioned provisions regarding the secret police-register, the Personnel Control Ordinance contains provisions as to, inter alia, the posts which are to be security classified, the procedure for handing out information and the use of the information released. The main relevant provisions are summarised below.

24. According to section 1, personnel control means the obtaining of information from police registers in respect of persons holding or being considered for appointment to posts of importance for national security.

25. Section 3 (as amended by Ordinance 1976:110) enumerates certain authorities, including the Supreme Commander of the Armed Forces, entitled to request a personnel control.

26. Section 4 specifies that a personnel control may only be carried out with regard to certain posts of importance for national security. The posts concerned are divided into two security classes (skyddsklasser), depending upon whether or not they are of vital importance for national security. The decision to classify a post in Security Class 1 is taken by the Government, whereas the right to classify a post in Security Class 2 is normally delegated to the authority in question.

27. According to section 6, requests for release of information for the purposes of a personnel control are to be made to the National Police Board and the request shall be made only with regard to the person whom it is intended to appoint to the post.

28. Sections 8 and 9 deal with what information may be handed out to the appointing authority.

If the post in question falls within Security Class 1, the National Police Board may, under section 8, release all information on the person concerned contained in the secret police-register or in any other police register. If the post comes within Security Class 2, the Board may, by virtue of section 9 (as amended by Ordinance 1972:505), only supply a certain specific kind of information on the person concerned, namely

> "1. his conviction for, or his being suspected of having committed, crimes mentioned in paragraph 1 of the Act of 21 March 1952 (no. 98) laying down special provisions on investigation measures in certain criminal cases (lag med särskilda bestämmelser om tvångsmedel i vissa brottmål) or mentioned in Chapter 13, paragraphs 7 or 8, of the Penal Code" - mainly crimes against public peace, national security or the Government - "or his conviction for, or his being suspected of, an attempt, conspiracy or incitement to commit such crimes;
>
> 2. his conviction for, or his being suspected of having committed, such other acts as constitute crimes against the security of the State, or which are intended and liable to bring about the violent overthrow of the democratic government or to affect the country's position as an independent State; or his conviction for, or his being suspected of, an attempt or conspiracy to commit such crimes;
>
> 3. his being suspected, on the basis of his activities or otherwise, of being ready to participate in such acts as are mentioned in sub-paragraphs 1 and 2."

29. Section 11 provides that, when deciding whether or not to make information from the register available, the National Police Board shall be composed of the National Police Commissioner (rikspolischefen), the Head of the Security Police and those members of the Board who have been appointed by the Government; there are six such lay members - usually

Members or former Members of Parliament from different political parties, including the Opposition - and at least three of them must be present when the decision is taken.

Information may be released only if all the participating members of the Board agree on the decision. Where one or more of the lay members of the Board oppose release of certain information, the National Police Commissioner may refer the matter to the Government for decision if he considers that the information should be made available. Such reference to the Government shall also be made if one of the lay members so requests.

30. When a request for a personnel control is received by the National Police Board, the practice is the following. The Security Department draws up a memorandum on the information contained in the relevant registers and presents this orally to the Board, which, after deliberation, decides whether the information should be handed out in whole or in part. In taking this decision, it considers among other things the nature of the post in question, the degree of reliability of the information and how old the entries are. When a file contains only a few entries, this is a factor which may militate against disclosure. There are no written instructions on disclosure apart from the provisions of the Ordinance and the Instructions of the Government.

31. At the relevant time, section 13 prescribed that before information was released by the National Police Board in cases relating to appointment to posts classified in Security Class 1, the person concerned should be given an opportunity of presenting his observations in writing or orally, unless there were special reasons to the contrary. In cases of appointment to posts classified in Security Class 2, the above notification procedure was to be applied only if required on account of special circumstances. However, in no case concerning a Security Class 2 post does the Board ever seem to have found any special circumstances to be present and, accordingly, such notification was never made - in spite of the fact that various important authorities, including the Chancellor of Justice and the Parliamentary Ombudsman, called upon to comment on the legislative proposal which was to become the Ordinance had recommended the making of at least some form of notification.

This provision was amended as from 1 October 1983 (Ordinance 1983:764). At present, before information is released in cases of appointment to posts in all Security Classes, the person concerned must be given the opportunity of presenting his observations in writing or orally. This rule does not, however, apply if the person would thereby come to know information classified as secret by virtue of any provision in the Secrecy Act 1980, except for section 17 in Chapter 7 of the Act (see paragraph 41 below), or if the requesting authority, in cases not concerned with appointment to official posts, has been exempted by the Government

from the requirement of informing the person concerned of the personnel control (see paragraph 33 below).

32. At the time of the proceedings in Mr. Leander's case, the National Police Board was, under section 14, prohibited from adding any comments to the information released to the requesting authority.

33. Section 19 provided that before an authority initiated a personnel control, it had to inform the person concerned thereof - with one exception not relevant in the present case.

34. Section 20 prescribed that it was the requesting authority that should independently assess the importance of the information released from the police register(s), having regard to the nature of the activities connected with the post in question, the authority's own knowledge of the person concerned and other circumstances.

D. Safeguards

1. Minister of Justice

35. Over the years, the Minister of Justice has been actively engaged in the supervision of the security police and the personnel control. He has made a number of investigations of varying depth. The investigations made by the Minister of Justice do not result in any reports. However, the Government stated that the deliberations between the Minister and the National Police Board have led to amendments of both the public and the secret instructions.

2. Chancellor of Justice

36. The Office of the Chancellor of Justice has a long tradition and is now established in Chapter 11, section 6, of the Constitution. His functions and powers are set out in the 1975 Act on Supervision by the Chancellor of Justice (lag 1975:1339 om justitiekanslerns tillsyn) and in the Government's Instruction to the Chancellor (förordning 1975:1345 med instruktion för justitiekanslern).

The duties of the Chancellor of Justice, as laid down by Parliament (riksdag), include supervising the public authorities and their employees in order to ensure that their powers are exercised in accordance with the law and the applicable regulations. In this capacity, he often receives and examines complaints from individuals. He also has to act on the Government's behalf in order to safeguard the rights of the State and has to assist the Government with advice and investigations in legal matters.

The appointment as Chancellor of Justice is made by the Government and continues until retirement age. According to Chapter 11, section 6, of the Constitution, the Chancellor is subordinate to the Government.

However, section 7 of the same Chapter provides: "No public authority," - including the Government - "nor the Parliament, nor the decision-making body of a municipality may determine how an administrative authority" - including the Chancellor of Justice - "shall make its decision in a particular case concerning the exercise of public authority against a private subject or against a municipality, or concerning the application of law."

The Chancellor of Justice has the right to attend all deliberations held by courts and administrative authorities, although without expressing his opinion. He is also entitled to have access to all files or other documents kept by the authorities.

All public authorities as well as their employees must provide the Chancellor of Justice with such information and reports as he may request (see also paragraph 41 below).

In his supervisory capacity, he may institute criminal proceedings against public servants or he may report them with a view to disciplinary proceedings.

The Chancellor may, in agreement with the Parliamentary Ombudsman, transfer to him cases involving individual complaints, and vice versa. Thus, identical complaints will in practice be considered by either the Chancellor or the Ombudsman, but not by both.

37. The National Police Board, being a public authority, and its activities, including personnel control, fall under the Chancellor of Justice's supervision.

The Chancellor of Justice visits the Board and its Security Department regularly, generally once a year. In addition, visits take place if special reasons so warrant. A complaint from an individual may constitute such a special reason. His visits are always recorded and the minutes are drafted in such a way that they may be made public. If secret material has to be recorded, the secret passages in the minutes will not be made public. The Government have submitted a copy of the minutes of an inspection visit of 6 December 1983, from which it appears that the Chancellor of Justice together with two officials of the Chancellery inspected the premises of the Security Department and discussed, inter alia, questions concerning personnel control. Nothing emerged from the visit which called for special mention.

The Chancellor of Justice has no power to alter a decision by the Board or the Security Department, nor can he interfere with their decision-making in general, although he is free to make statements about actions that he deems to be contrary to law or inappropriate.

Since opinions expressed by the Chancellor in relation to an inspection of the personnel control procedure are not legally binding, it might perhaps be doubted whether they fall within the sphere where the Chancellor is guaranteed independence by virtue of Chapter 11, section 7, of the Constitution (see paragraph 36 above). In view of Swedish legal tradition, it

is however inconceivable that the Government would endeavour to use their powers under Chapter 11, section 6, of the Constitution so as to give the Chancellor instructions as to, for example, the opinion he should give in a matter concerning the application of the Personnel Control Ordinance, or generally to prohibit him from monitoring the activities of the National Police Board; no such instructions exist and none has ever been given.

3. Parliamentary Ombudsman

38. The functions and powers of the Parliamentary Ombudsmen, an institution that dates back to 1809, are laid down in particular in Chapter 12, section 6, of the Constitution, and in the Act of Instruction to the Parliamentary Ombudsmen (lag 1975:1057 med instruktion för justitieombudsmännen).

The four holders of the office of Parliamentary Ombudsman are elected by Parliament. Their main task is to supervise the application, within the public administration, of laws and other regulations.

It is the particular duty of an Ombudsman to ensure that courts of law and administrative authorities observe the provisions of the Constitution regarding objectivity and impartiality and that the fundamental rights and freedoms of citizens are not encroached upon in the processes of public administration.

If, while performing his supervisory duties, an Ombudsman should find cause to raise the question of amending legislation or of any other measure the State should take, he may present a statement on the subject to the Parliament or the Government.

An Ombudsman exercises supervision either on complaint from individuals or by carrying out inspections and other investigations he deems necessary.

The examination of a matter is concluded by a report in which the Ombudsman states his opinion on whether the measure contravenes the law or is inappropriate in any other respect. The Ombudsman may also make pronouncements aimed at promoting uniform and proper application of the law.

The Ombudsman's reports are considered to be expressions of his personal opinion. Whether or not his statements will have any practical effects depends on his ability to convince the decision-maker or authority in question. Those concerned often, but by no means always, abide by the Ombudsman's opinion (see Gustaf Petrén/Hans Ragnemalm, Sveriges Grundlagar, Stockholm 1980, p. 327).

An Ombudsman may institute a criminal prosecution or disciplinary proceedings against an official who has committed an offence by departing from the obligations incumbent upon him in his official duties.

An Ombudsman may be present at the deliberations of a court or an administrative authority and shall have access to the minutes and other

documents of any such court or authority. Any court, any administrative authority and any civil servant in central or local government must provide the Ombudsman with such information and reports as he may request. In the performance of his duties, the Ombudsman may request the assistance of any public prosecutor.

39. It follows from the foregoing that the National Police Board and its activities come under the supervision of the Parliamentary Ombudsmen.

According to information submitted by the registrar of the Parliamentary Ombudsmen, the procedure in cases of individual complaint is the following. When the complaint is lodged, the Ombudsman responsible contacts the Board or the requesting authority (see paragraph 25 above). He will then be furnished with oral information on the circumstances of the case and be afforded the opportunity to study the relevant documents and files. This information is not entered on any record kept by the Ombudsman, as that would entail problems as to how to preserve the secret character of the information. The Ombudsman arrives at his opinion on the basis of the inquiry described above and of the results of any other investigations undertaken. His report is always drawn up in writing and made accessible to the public. It does not therefore set out any secret information.

Since 1969 there have been at least eight individual complaints relating to the personnel control system. Four were complaints of a general nature by notorious complainants. After having investigated the factual circumstances underlying the other four complaints, the Ombudsman closed the file in two of them only after having expressed specific criticism in respect of certain issues (reports of 20 February 1984 in case 684-1983 and of 15 February 1985 in case 2316-1984). The criticism expressed by the Ombudsman in the report of 20 February 1984 has, according to a recent judgment of the Labour Court (no. 28 of 12 March 1986), led the Supreme Commander of the Armed Forces to change a previous practice regarding the application of section 19 of the Ordinance.

4. Parliamentary Committee on Justice (riksdagens justitieutskott)

40. The Parliamentary Standing Committee on Justice consists of fifteen Members of Parliament nominated on a proportional basis. Since 1971, it has considered the appropriations for the security branch of the police and, almost every year, scrutinised the expenses of the security police, its organisation and activities. A great interest has, according to the Government, been shown in matters concerning the Personnel Control Ordinance and its application and in the question of assessing the influence of the lay members of the National Police Board on the activities of the security police. The Committee normally informs itself by holding hearings with spokesmen of the Board and its Security Department and by regular visits. Such visits took place in the spring of 1977, the autumn of 1979 and

the spring of 1983. In the spring of 1980, special discussions took place between the Committee and the parliamentarians on the Board. In the spring of 1981, the Committee asked for, and received, a special report. In the spring of 1982, the Committee held a hearing with the National Police Commissioner and the Head of the Security Department.

According to the Government, the Principal Secretary to the Committee has confirmed that the members of the Committee, during their visits, have full access to the registers and that they have also examined the register kept at the Security Department. The members have also discussed various matters concerning the keeping of the register with the officials responsible for making the entries and putting data before the Board when a personnel control is carried out.

5. Principle of free access to public documents

41. Under section 2 of Chapter 2 of the Freedom of the Press Act (tryckfrihetsförordningen), which is part of the Swedish Constitution, everyone is entitled to have access to a public document unless, within defined areas, such access is limited by law.

At the relevant time, the main provisions concerning these limitations were found in the Act on Restrictions on the Right of Access to Public Documents (lag om inskränkningar i rätten att utbekomma allmänna handlingar 1937:249, "the 1937 Act"), which was in force until 1 January 1981.

Under section 11 of the 1937 Act (as amended), "details of information entered on such registers as are mentioned in the Act on the General Criminal Register (lag om allmänt kriminalregister 1963:197) or in the Police Register Act (lag om polisregister m.m. 1965:94) may not be handed out in any other cases or manner than those provided for in those Acts". According to section 3 of the Police Register Act (as amended by Act 1977:1032, in force until 1 March 1985):

> "Extracts from or information on the contents of police registers shall be given upon request from
>
> 1. the Chancellor of Justice, the Parliamentary Ombudsmen, the National Police Board, the Central Immigration Authority, County Administrative Boards, county administrative courts, Chiefs of Police or public prosecutors;
>
> 2. other authorities, if and to the extent that the Government, for certain types of cases or in a specific case, have given the necessary authorisation;
>
> 3. an individual, if he needs the extract in order to secure his rights in a foreign country, in order to enter a foreign country or in order to take up residence or domicile or to work there, or in order to have decided questions of employment or contracts related to activities concerned with health-care or with matters of importance from a national security point of view, and the Government by way of special ordinance have authorised that extracts or information be given for such purposes, or, in other cases, if

the individual can prove that he depends on obtaining information from the register in order to secure his rights, and the Government authorise such information to be given to him."

As of 1 January 1981, the 1937 Act was replaced by the Secrecy Act 1980 (sekretesslagen, 1980:100) and similar regulations are now to be found in Chapter 7, section 17, of this Act.

No evidence has been adduced of any special ordinance allowing individuals in the applicant's situation to obtain extracts from the police registers.

42. A decision by an authority other than the Parliament or the Government to refuse access to a document is subject to appeal to the courts (Chapter 2, section 15, of the Freedom of the Press Act).

In several recent cases decided by the Supreme Administrative Court, individuals have been refused access to information contained in the secret police-register as they had not obtained or sought the previous authorisation by the Government required by the above-cited section 3 of the Police Register Act (Yearbook of the Supreme Administrative Court - 1981: Ab 100 and Ab 282 and 1982: Ab 85).

This is consistent with the events in the present case, in that the Government declared themselves competent to examine Mr. Leander's request to be acquainted with the information about him released by the National Police Board (see paragraph 16 above).

However, no appeal - either to the Government or to the administrative courts - against a decision of the Board to release information to the requesting authority seems to be available to the individual concerned, since he is not considered to be a party to the release procedure before the Board (see the Supreme Administrative Court's decision of 20 June 1984 in case 1509-1984).

43. Even if a certain document is secret, the Government always have a certain discretionary power to release it, and a person who is a party to judicial or administrative proceedings in which the document is of relevance may still be allowed access to it. The basic provisions in this respect were, until 30 December 1980, contained in section 38 of the 1937 Act (as amended by Act 1974:567), which stated:

"Whenever it is found necessary in order to secure public or individual rights, the Government may, without being subject to the restrictions otherwise laid down in this Act, provide for the release of documents.

If a document which may not be released to everybody can be presumed to be of importance as evidence in a trial or police investigation in a criminal matter, the court which handles the case or which is competent to decide questions relating to the police investigation may order that the document should be released to it or to the officer in charge of the police investigation. The foregoing does not however concern documents referred to in sections 1-4, 31 and 33. If the contents of a document are such that the person who has drawn it up may not, according to Chapter 36, section 5 (2), (3) or (4), of the Code of Judicial Procedure, be heard as a witness in regard

thereto, the document may not be presented in the judicial proceedings or in the course of the police investigation; neither, unless warranted by special circumstances, may the document be presented in the judicial proceedings or in the course of the police investigation if a professional secret would thereby be disclosed."

As from 1 January 1981, corresponding provisions are to be found in Chapter 14, sections 5 and 8, of the Secrecy Act 1980.

6. Damages

44. The civil liability of the State is dealt with in Chapter 3 of the Civil Liability Act 1972 (skadeståndslagen 1972:207).

According to section 2, acts of public authorities may give rise to an entitlement to compensation in the event of fault or negligence.

However, under section 7, an action for damages will not lie in respect of decisions taken by Parliament, the Government, the Supreme Court, the Supreme Administrative Court or the National Social Security Court. Furthermore, with regard to decisions of lower authorities, such as the National Police Board, section 4 of the Act provides that such an action will not lie to the extent that the person concerned could have avoided losses by exhausting available remedies.

PROCEEDINGS BEFORE THE COMMISSION

45. In his application (no. 9248/81) lodged with the Commission on 2 November 1980, Mr. Leander alleged violations of Articles 6, 8, 10 and 13 (art. 6, art. 8, art. 10, art. 13) of the Convention. He complained that he had been prevented from obtaining a permanent employment and dismissed from a provisional employment on account of certain secret information which allegedly made him a security risk; this was an attack on his reputation and he ought to have had an opportunity to defend himself before a tribunal.

46. On 10 October 1983, the Commission declared inadmissible the complaint under Article 6 (art. 6) but declared admissible the complaints under Articles 8, 10 and 13 (art. 8, art. 10, art. 13).

In its report of 17 May 1985 (Article 31) (art. 31), the Commission expressed the opinion that there had been no breach of Article 8 (art. 8) (unanimously), that no separate issue arose under Article 10 (art. 10) with respect to freedom to express opinions or freedom to receive information (unanimously) and that the case did not disclose any breach of Article 13 (art. 13) (seven votes to five).

The full text of the Commission’s opinion and of the dissenting opinion contained in the report is reproduced as an annex to the present judgment.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

47. The applicant claimed that the personnel control procedure, as applied in his case, gave rise to a breach of Article 8 (art. 8), which reads:

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

He contended that nothing in his personal or political background (see paragraph 17 above) could be regarded as of such a nature as to make it necessary in a democratic society to register him in the Security Department's register, to classify him as a "security risk" and accordingly to exclude him from the employment in question. He argued in addition that the Personnel Control Ordinance could not be considered as a "law" for the purposes of paragraph 2 of Article 8 (art. 8-2).

He did not, however, challenge the need for a personnel control system. Neither did he call in question the Government's power, within the limits set by Articles 8 and 10 (art. 8, art. 10) of the Convention, to bar sympathizers of certain extreme political ideologies from security-sensitive positions and to file information on such persons in the register kept by the Security Department of the National Police Board.

A. Whether there was any interference with an Article 8 (art. 8) right

48. It is uncontested that the secret police-register contained information relating to Mr. Leander's private life.

Both the storing and the release of such information, which were coupled with a refusal to allow Mr. Leander an opportunity to refute it, amounted to an interference with his right to respect for private life as guaranteed by Article 8 § 1 (art. 8-1).

B. Whether the interference was justified

1. Legitimate aim

49. The aim of the Swedish personnel control system is clearly a legitimate one for the purposes of Article 8 (art. 8), namely the protection of national security.

The main issues of contention were whether the interference was "in accordance with the law" and "necessary in a democratic society".

2. "In accordance with the law"

(a) General principles

50. The expression "in accordance with the law" in paragraph 2 of Article 8 (art. 8-2) requires, to begin with, that the interference must have some basis in domestic law. Compliance with domestic law, however, does not suffice: the law in question must be accessible to the individual concerned and its consequences for him must also be foreseeable (see, mutatis mutandis, the Malone judgment of 2 August 1984, Series A no. 82, pp. 31-32, § 66).

51. However, the requirement of foreseeability in the special context of secret controls of staff in sectors affecting national security cannot be the same as in many other fields. Thus, it cannot mean that an individual should be enabled to foresee precisely what checks will be made in his regard by the Swedish special police service in its efforts to protect national security. Nevertheless, in a system applicable to citizens generally, as under the Personnel Control Ordinance, the law has to be sufficiently clear in its terms to give them an adequate indication as to the circumstances in which and the conditions on which the public authorities are empowered to resort to this kind of secret and potentially dangerous interference with private life (ibid., p. 32, § 67).

In assessing whether the criterion of foreseeability is satisfied, account may be taken also of instructions or administrative practices which do not have the status of substantive law, in so far as those concerned are made sufficiently aware of their contents (see the Silver and Others judgment of 25 March 1983, Series A no. 61, pp. 33-34, §§ 88-89).

In addition, where the implementation of the law consists of secret measures, not open to scrutiny by the individuals concerned or by the public at large, the law itself, as opposed to the accompanying administrative practice, must indicate the scope of any discretion conferred on the competent authority with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see the above-mentioned Malone judgment, Series A no. 82, pp. 32-33, § 68).

(b) Application in the present case of the foregoing principles

52. The interference had a valid basis in domestic law, namely the Personnel Control Ordinance. However, the applicant claimed that the provisions governing the keeping of the secret police-register, that is primarily section 2 of the Ordinance, lacked the required accessibility and foreseeability.

Both the Government and the Commission disagreed with this contention.

53. The Ordinance itself, which was published in the Swedish Official Journal, doubtless meets the requirement of accessibility. The main question is thus whether domestic law laid down, with sufficient precision, the conditions under which the National Police Board was empowered to store and release information under the personnel control system.

54. The first paragraph of section 2 of the Ordinance does confer a wide discretion on the National Police Board as to what information may be entered in the register (see paragraph 19 above). The scope of this discretion is however limited by law in important respects through the second paragraph, which corresponds to the prohibition already contained in the Constitution (see paragraph 18 above), in that "no entry is allowed merely for the reason that a person, by belonging to an organisation or by other means, has expressed a political opinion". In addition, the Board's discretion in this connection is circumscribed by instructions issued by the Government (see paragraphs 20-21 above). However, of these only one is public and hence sufficiently accessible to be taken into account, namely the Instruction of 22 September 1972 (see paragraph 20 above).

The entering of information on the secret police-register is also subject to the requirements that the information be necessary for the special police service and be intended to serve the purpose of preventing or detecting "offences against national security, etc." (first paragraph of section 2 of the Ordinance - see paragraph 19 above)

55. Furthermore, the Ordinance contains explicit and detailed provisions as to what information may be handed out, the authorities to which information may be communicated, the circumstances in which such communication may take place and the procedure to be followed by the National Police Board when taking decisions to release information (see paragraphs 25-29 above).

56. Having regard to the foregoing, the Court finds that Swedish law gives citizens an adequate indication as to the scope and the manner of exercise of the discretion conferred on the responsible authorities to collect, record and release information under the personnel control system.

57. The interference in the present case with Mr. Leander's private life was therefore "in accordance with the law", within the meaning of Article 8 (art. 8).

3. "Necessary in a democratic society in the interests of national security"

58. The notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see, inter alia, the Gillow judgment of 24 November 1986, Series A no. 109, p. 22, § 55).

59. However, the Court recognises that the national authorities enjoy a margin of appreciation, the scope of which will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved. In the instant case, the interest of the respondent State in protecting its national security must be balanced against the seriousness of the interference with the applicant's right to respect for his private life.

There can be no doubt as to the necessity, for the purpose of protecting national security, for the Contracting States to have laws granting the competent domestic authorities power, firstly, to collect and store in registers not accessible to the public information on persons and, secondly, to use this information when assessing the suitability of candidates for employment in posts of importance for national security.

Admittedly, the contested interference adversely affected Mr. Leander's legitimate interests through the consequences it had on his possibilities of access to certain sensitive posts within the public service. On the other hand, the right of access to public service is not as such enshrined in the Convention (see, inter alia, the Kosiek judgment of 28 August 1986, Series A no. 105, p. 20, §§ 34-35), and, apart from those consequences, the interference did not constitute an obstacle to his leading a private life of his own choosing.

In these circumstances, the Court accepts that the margin of appreciation available to the respondent State in assessing the pressing social need in the present case, and in particular in choosing the means for achieving the legitimate aim of protecting national security, was a wide one.

60. Nevertheless, in view of the risk that a system of secret surveillance for the protection of national security poses of undermining or even destroying democracy on the ground of defending it, the Court must be satisfied that there exist adequate and effective guarantees against abuse (see the Klass and Others judgment of 6 September 1978, Series A no. 28, pp. 23-24, §§ 49-50).

61. The applicant maintained that such guarantees were not provided to him under the Swedish personnel control system, notably because he was refused any possibility of challenging the correctness of the information concerning him.

62. The Government invoked twelve different safeguards, which, in their opinion, provided adequate protection when taken together:

(i) the existence of personnel control as such is made public through the Personnel Control Ordinance;

(ii) there is a division of sensitive posts into different security classes (see paragraph 26 above);

(iii) only relevant information may be collected and released (see paragraphs 18-20, 28 and 30 above);

(iv) a request for information may be made only with regard to the person whom it is intended to appoint (see paragraph 27 above);

(v) parliamentarians are members of the National Police Board (see paragraph 29 above);

(vi) information may be communicated to the person in question; the Government did, however, concede that no such communication had ever been made, at least under the provisions in force before 1 October 1983 (see paragraph 31 above);

(vii) the decision whether or not to appoint the person in question rests with the requesting authority and not with the National Police Board (see paragraph 34 above);

(viii) an appeal against this decision can be lodged with the Government (see paragraph 16 above);

(ix) the supervision effected by the Minister of Justice (see paragraph 35 above);

(x) the supervision effected by the Chancellor of Justice (see paragraphs 36-37 above);

(xi) the supervision effected by the Parliamentary Ombudsman (see paragraphs 38-39 above);

(xii) the supervision effected by the Parliamentary Committee on Justice (see paragraph 40 above).

63. The Court first points out that some of these safeguards are irrelevant in the present case, since, for example, there was never any appealable appointment decision (see paragraphs 11 and 16 above).

64. The Personnel Control Ordinance contains a number of provisions designed to reduce the effects of the personnel control procedure to an unavoidable minimum (see notably paragraphs 54-55 and nos. (ii)-(iv) in paragraph 62 above). Furthermore, the use of the information on the secret police-register in areas outside personnel control is limited, as a matter of practice, to cases of public prosecution and cases concerning the obtaining of Swedish citizenship (see paragraph 22 above).

The supervision of the proper implementation of the system is, leaving aside the controls exercised by the Government themselves, entrusted both to Parliament and to independent institutions (see paragraphs 35-40 above).

65. The Court attaches particular importance to the presence of parliamentarians on the National Police Board and to the supervision effected by the Chancellor of Justice and the Parliamentary Ombudsman as well as the Parliamentary Committee on Justice (see paragraph 62 above, nos. (v), (x), (xi) and (xii)).

The parliamentary members of the Board, who include members of the Opposition (see paragraph 29 above), participate in all decisions regarding whether or not information should be released to the requesting authority. In particular, each of them is vested with a right of veto, the exercise of which automatically prevents the Board from releasing the information. In such a case, a decision to release can be taken only by the Government themselves and then only if the matter has been referred to them by the National Police Commissioner or at the request of one of the parliamentarians (see paragraph 29 above). This direct and regular control over the most important aspect of the register - the release of information - provides a major safeguard against abuse.

In addition, a scrutiny is effected by the Parliamentary Committee on Justice (see paragraph 40 above).

The supervision carried out by the Parliamentary Ombudsman constitutes a further significant guarantee against abuse, especially in cases where individuals feel that their rights and freedoms have been encroached upon (see paragraphs 38-39 above).

As far as the Chancellor of Justice is concerned, it may be that in some matters he is the highest legal adviser of the Government. However, it is the Swedish Parliament which has given him his mandate to supervise, amongst other things, the functioning of the personnel control system. In doing so, he acts in much the same way as the Ombudsman and is, at least in practice, independent of the Government (see paragraphs 36-37 above).

66. The fact that the information released to the military authorities was not communicated to Mr. Leander cannot by itself warrant the conclusion that the interference was not "necessary in a democratic society in the interests of national security", as it is the very absence of such communication which, at least partly, ensures the efficacy of the personnel control procedure (see, mutatis mutandis, the above-mentioned Klass and Others judgment, Series A no. 28, p. 27, § 58).

The Court notes, however, that various authorities consulted before the issue of the Ordinance of 1969, including the Chancellor of Justice and the Parliamentary Ombudsman, considered it desirable that the rule of communication to the person concerned, as contained in section 13 of the Ordinance, should be effectively applied in so far as it did not jeopardise the purpose of the control (see paragraph 31 above).

67. The Court, like the Commission, thus reaches the conclusion that the safeguards contained in the Swedish personnel control system meet the requirements of paragraph 2 of Article 8 (art. 8-2). Having regard to the wide margin of appreciation available to it, the respondent State was entitled to consider that in the present case the interests of national security prevailed over the individual interests of the applicant (see paragraph 59 above). The interference to which Mr. Leander was subjected cannot

therefore be said to have been disproportionate to the legitimate aim pursued.

4. Conclusion

68. Accordingly, there has been no breach of Article 8 (art. 8).

II. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

69. The applicant further maintained that the same facts as constituted the alleged violation of Article 8 (art. 8) also gave rise to a breach of Article 10 (art. 10), which reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

70. The Commission found that the applicant's claims did not raise any separate issues under Article 10 (art. 10) in so far as either freedom to express opinions or freedom to receive information was concerned. The Government agreed with this conclusion.

A. Freedom to express opinions

71. The right of recruitment to the public service is not in itself recognised by the Convention, but it does not follow that in other respects civil servants, including probationary civil servants, fall outside the scope of the Convention and notably of the protection afforded by Article 10 (art. 10) (see the Glasenapp and the Kosiek judgments of 28 August 1986, Series A no. 104, p. 26, §§ 49-50, and Series A no. 105, p. 20, §§ 35-36).

72. It has first to be determined whether or not the personnel control procedure to which the applicant was subjected amounted to an interference with the exercise of freedom of expression - in the form, for example, of a "formality, condition, restriction or penalty" - or whether the disputed measures lay within the sphere of the right of access to the public service. In order to answer this question, the scope of the measures must be determined by putting them in the context of the facts of the case and the relevant legislation (ibid.).

It appears clearly from the provisions of the Ordinance that its purpose is to ensure that persons holding posts of importance for national security have the necessary personal qualifications (see paragraph 24 above). This being so, access to the public service lies at the heart of the issue submitted to the Court: in declaring that the applicant could not be accepted for reasons of national security for appointment to the post in question, the Supreme Commander of the Armed Forces and the Commander-in-Chief of the Navy took into account the relevant information merely in order to satisfy themselves as to whether or not Mr. Leander possessed one of the necessary personal qualifications for this post.

73. Accordingly, there has been no interference with Mr. Leander's freedom to express opinions, as protected by Article 10 (art. 10).

B. Freedom to receive information

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

75. There has thus been no interference with Mr. Leander's freedom to receive information, as protected by Article 10 (art. 10).

III. ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

76. The applicant finally alleged a breach of Article 13 (art. 13), which reads:

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

Firstly, he complained of the fact that neither he nor his lawyer had been given the right to receive and to comment upon the complete material on which the appointing authority based its decision (see paragraph 62, no. (vi), above). He also objected that he had not had any right to appeal to an independent authority with power to render a binding decision in regard to the correctness and release of information kept on him (see paragraph 42 above).

Both the Government and the Commission disagreed with these contentions.

77. For the interpretation of Article 13 (art. 13), the following general principles are of relevance:

(a) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (see, inter alia, the above-mentioned Silver and 0thers judgment, Series A no. 61, p. 42, § 113);

(b) the authority referred to in Article 13 (art. 13) need not be a judicial authority but, if it is not, the powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective (ibid.);

(c) although no single remedy may itself entirely satisfy the requirements of Article 13 (art. 13), the aggregate of remedies provided for under domestic law may do so (ibid.);

(d) Article 13 (art. 13) does not guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or equivalent domestic norms (see the James and Others judgment of 21 February 1986, Series A no. 98, p. 47, § 85).

78. The Court has held that Article 8 (art. 8) did not in the circumstances require the communication to Mr. Leander of the information on him released by the National Police Board (see paragraph 66 above). The Convention is to be read as a whole and therefore, as the Commission recalled in its report, any interpretation of Article 13 (art. 13) must be in harmony with the logic of the Convention. Consequently, the Court, consistently with its conclusion concerning Article 8 (art. 8), holds that the lack of communication of this information does not, of itself and in the circumstances of the case, entail a breach of Article 13 (art. 13) (see, mutatis mutandis, the above-mentioned Klass and Others judgment, Series A no. 28, pp. 30-31, § 68).

For the purposes of the present proceedings, an "effective remedy" under Article 13 (art. 13) must mean a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in any system of secret checks on candidates for employment in posts of importance from a national security point of view. It therefore remains to examine the various remedies available to the applicant under Swedish law in order to see whether they were "effective" in this limited sense (ibid., p. 31, § 69).

79. There can be no doubt that the applicant's complaints have raised arguable claims under the Convention at least in so far as Article 8 (art. 8) is concerned and that, accordingly, he was entitled to an effective remedy in order to enforce his rights under that Article as they were protected under Swedish law (see the above-mentioned James and Others judgment, Series A no. 98, p. 47, § 84, and also the Lithgow and Others judgment of 8 July 1986, Series A no. 102, p. 74, § 205).

The Court has found the Swedish personnel control system as such to be compatible with Article 8 (art. 8). In such a situation, the requirements of Article 13 (art. 13) will be satisfied if there exists domestic machinery

whereby, subject to the inherent limitations of the context, the individual can secure compliance with the relevant laws (see the above-mentioned James and Others judgment, Series A no. 98, p. 48, § 86).

80. The Government argued that Swedish law offered sufficient remedies for the purposes of Article 13 (art. 13), namely

(i) a formal application for the post, and, if unsuccessful, an appeal to the Government;

(ii) a request to the National Police Board for access to the secret police-register on the basis of the Freedom of the Press Act, and, if refused, an appeal to the administrative courts;

(iii) a complaint to the Chancellor of Justice;

(iv) a complaint to the Parliamentary Ombudsman.

The majority of the Commission found that these four remedies, taken in the aggregate, met the requirements of Article 13 (art. 13), although none of them did so taken alone.

81. The Court notes first that both the Chancellor of Justice and the Parliamentary Ombudsman have the competence to receive individual complaints and that they have the duty to investigate such complaints in order to ensure that the relevant laws have been properly applied by the National Police Board (see paragraphs 36 and 38 above). In the performance of these duties, both officials have access to all the information contained in the secret police-register (see paragraph 41 above). Several decisions from the Parliamentary Ombudsman evidence that these powers are also used in relation to complaints regarding the operation of the personnel control system (see paragraph 39 above). Furthermore, both officials must, in the present context, be considered independent of the Government. This is quite clear in respect of the Parliamentary Ombudsman. As far as the Chancellor of Justice is concerned, he may likewise be regarded as being, at least in practice, independent of the Government when performing his supervisory functions in relation to the working of the personnel control system (see paragraph 37 above).

82. The main weakness in the control afforded by the Ombudsman and the Chancellor of Justice is that both officials, apart from their competence to institute criminal and disciplinary proceedings (see paragraphs 36-38 above), lack the power to render a legally binding decision. On this point, the Court, however, recalls the necessarily limited effectiveness that can be required of any remedy available to the individual concerned in a system of secret security checks. The opinions of the Parliamentary Ombudsman and the Chancellor of Justice command by tradition great respect in Swedish society and in practice are usually followed (see paragraphs 37-38 above). It is also material - although this does not constitute a remedy that the individual can exercise of his own accord - that a special feature of the Swedish personnel control system is the substantial parliamentary supervision to which it is subject, in particular through the parliamentarians

on the National Police Board who consider each case where release of information is requested (see paragraph 29 above).

83. To these remedies, which were never exercised by Mr. Leander, must be added the remedy to which he actually had recourse when he complained, in a letter of 5 February 1980 to the Government, that the National Police Board, contrary to the provisions of section 13 of the Personnel Control Ordinance, had omitted to invite him to comment, in writing or orally, on the information contained in the register (see paragraph 15 above). The Government requested the opinion of the Board in this connection; whereupon Mr. Leander was given the opportunity to reply, which he did in a letter of 11 March 1980. In its decision of 14 May 1980, which covered also Mr. Leander's complaints of 22 October and 4 December 1979, the Government, that is the entire Cabinet, dismissed Mr. Leander's various complaints (see paragraphs 14 and 16 above).

The Court recalls that the authority referred to in Article 13 (art. 13) need not necessarily be a judicial authority in the strict sense, but that the powers and procedural guarantees an authority possesses are relevant in determining whether the remedy is effective. There can be no question about the power of the Government to deliver a decision binding on the Board (see paragraph 77 above).

84. It should also be borne in mind that for the purposes of the present proceedings, an effective remedy under Article 13 (art. 13) must mean a remedy that is as effective as can be, having regard to the restricted scope for recourse inherent in any system of secret surveillance for the protection of national security (see paragraphs 78-79 above).

Even if, taken on its own, the complaint to the Government were not considered sufficient to ensure compliance with Article 13 (art. 13), the Court finds that the aggregate of the remedies set out above (see paragraphs 81-83) satisfies the conditions of Article 13 (art. 13) in the particular circumstances of the instant case (see, mutatis mutandis, the above-mentioned Klass and Others judgment, Series A no. 28, p. 32, § 72).

Accordingly, the Court concludes that there was no violation of Article 13 (art. 13).

FOR THESE REASONS, THE COURT

1. Holds unanimously that there has been no breach of Article 8, or Article 10 (art. 8, art. 10);

2. Holds by four votes to three that there has been no breach of Article 13 (art. 13).

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 26 March 1987.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the following separate opinions are annexed to the present judgment:

- partly dissenting opinion of Mr. Ryssdal;

- partly dissenting opinion of Mr. Pettiti and Mr. Russo.

R. R.
M.-A. E.

PARTLY DISSENTING OPINION OF JUDGE RYSSDAL

1. I subscribe to the finding that no breach of Article 8 or Article 10 (art. 8, art. 10) has been established.

2. As the Court has held that Article 8 (art. 8) did not in the circumstances require the communication to the applicant of the relevant information on him released to the military authorities, I also concur that the lack of communication of this information cannot entail a breach of Article 13 (art. 13). In that respect, Article 13 (art. 13) must be interpreted and applied so as not to nullify the conclusion already reached under Article 8 (art. 8).

3. However, by virtue of Article 13 (art. 13), the applicant should have had available to him "an effective remedy before a national authority"; and I do not agree with the majority of the Court "that the aggregate of the remedies" set out in paragraphs 81 to 83 of the judgment "satisfies the conditions of Article 13 (art. 13) in the particular circumstances of the instant case".

4. It is convenient first to identify the alleged breach of the Convention in respect of which Mr. Leander was entitled to an effective domestic remedy by virtue of Article 13 (art. 13). His basic grievance under Article 8 (art. 8) is described in the judgment (at paragraph 47) as being "that nothing in his personal or political background ... could be regarded as of such a nature as to make it necessary in a democratic society to register him in the Security Department’s register, to classify him as a ‘security risk’ and accordingly to exclude him from the employment in question".

5. I concur with the Court that "for the purposes of the present proceedings, an effective remedy under Article 13 (art. 13) must mean a remedy that is as effective as can be, having regard to the restricted scope for recourse inherent in any system of secret surveillance for the protection of national security" (see paragraph 84 of the judgment).

On the other hand, precisely because the inherent secrecy of the control system renders the citizens’ right to respect for private life especially vulnerable, it is essential that any complaint alleging violation of that right should be examined by a "national authority" which is completely independent of the executive and invested with effective powers of investigation. The "national authority" should thus have both the competence in law and the capability in practice to inquire closely into the operation of the personnel control system, and in particular to verify that no mistake has been made as to the scope and manner of exercise of the discretionary power conferred on the police and the National Police Board to collect, store and release information. Such an independent power of inquiry is all the more necessary as some of the Government’s instructions regarding the storing of information in the police register are themselves

secret, a fact which, to my mind, of itself constitutes a considerable source of concern.

In so far as the "national authority" ascertains that a mistake has been made, the citizen affected should also, by virtue of Article 13, (art. 13) have the possibility - if need be by bringing separate proceedings before the courts - either of contesting the validity of the outcome of the secret personnel control, that is the decision not to employ him (or her), or of obtaining compensation or some other form of relief.

6. The majority of the Court (at paragraph 83 of the judgment) include in the aggregate of relevant remedies Mr. Leander's complaint to the Government that the National Police Board had, contrary to the provisions of the Personnel Control Ordinance, omitted to invite him to comment on the information contained in the register, which complaint was rejected by the Government in their decision of 14 May 1980. In my opinion, this avenue of recourse is not capable of being decisive for the purposes of Article 13 (art. 13), whether taken on its own or in conjunction with the other remedies relied on by the majority of the Court, namely complaint to the Parliamentary Ombudsman and the Chancellor of Justice. This is because, leaving aside the question of independence, it did not address Mr. Leander's basic grievance under the Convention. Even if the requirement of secrecy did not permit Mr. Leander himself to be given the opportunity of commenting on the adverse material kept on him in the register, Article 13 (art. 13) guaranteed him a right of access to a "national authority" having competence to examine whether his Convention grievance was justified or not.

Consequently, of the aggregate of relevant remedies, there remains for consideration the possibility of applying either to the Parliamentary Ombudsman or to the Chancellor of Justice.

7. The Parliamentary Ombudsman and the Chancellor of Justice exercise a general supervision over the activities of the executive branch of government; they do not have specific responsibility for inquiry into the operation of the personnel control system. I recognise that, by tradition in Sweden, the opinions of the Parliamentary Ombudsman and the Chancellor of Justice command great respect. However, the Parliamentary Ombudsman and the Chancellor of Justice have no power to render legally binding decisions; and it is not clearly established that, if in the opinion of the Ombudsman or the Chancellor a mistake has been made, the individual affected would have available to him an effective means to contest the validity of the employment decision or to obtain some other form of relief.

8. I consequently conclude that there has been a breach of Article 13 (art. 13).

PARTIALLY DISSENTING OPINION OF JUDGES PETTITI AND RUSSO

(Translation)

We voted with the majority in finding that there has been no breach of Articles 8 and 10 (art. 8, art. 10) but we hold that there has been a breach of Article 13 (art. 13).

We consider that a complaint to the Chancellor of Justice would have resulted only in an opinion being given and was not an effective remedy; the same is true of the Ombudsman. These two remedies taken together, then, do not satisfy the requirements of Article 13 (art. 13).

Individuals are not regarded as being parties to the release procedure before the Board (see the Supreme Administrative Court's decision of 20 June 1984). No appeal lies to the Government or to the administrative courts against the Board's decision as such to supply information to the requesting authority, nor was Mr. Leander involved in criminal proceedings such as would have entitled him to require the document to be released.

In the case specifically of registers which, being secret, make it impossible for a citizen to avail himself of the laws and regulations entitling him to have access to administrative documents, it is all the more necessary that there should be an effective remedy before an independent authority, even if that authority is not a judicial body.

The doctrine of act of State may be invoked by the Government improperly. The police authorities may even have committed a flagrantly unlawful act (voie de fait).

It should also be noted that the Swedish Ombudsman's decisions are effective only in relation to civil servants and not as regards the applicant concerned.

Furthermore, even when combined, ineffective remedies cannot amount to an effective remedy where, as in the instant case, their respective shortcomings do not cancel each other out but are cumulative.

The six members of the Commission who held in their dissenting opinion that there had been a breach of Article 13 (art. 13), rightly commented on the lack of any effective remedy. In our view, it is not essential to make it a mandatory requirement that the authority responsible for hearing appeals should be able to award damages, but it is absolutely essential that an independent authority should be able to determine the merits of an entry in the register and even whether there has been a straightforward clerical error or mistake of identity - in which case the national-security argument would fall to the ground.

Consideration also needs to be given to the dangers of electronic links between the police registers and other States' registers or Interpol's register. The individual must have a right of appeal against an entry resulting from a

fundamental mistake, even if the source of the information is kept secret and is known only to the independent authority that has jurisdiction to determine the applicant's appeal.

A supervisory system such as is provided by the Supreme Administrative Courts (in Belgium, France and Italy) ought to afford an effective remedy, which is lacking at present in our view.

The State cannot be sole judge in its own cause in this sensitive area of human-rights protection.

We consequently hold that there has been a breach of Article 13 (art. 13).

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

CASE OF LEHIDEUX AND ISORNI v. FRANCE

(55/1997/839/1045)

JUDGMENT

STRASBOURG

23 September 1998

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SUMMARY[1]

Judgment delivered by a Grand Chamber

France – conviction for "public defence of war crimes or the crimes of collaboration" following appearance in a national daily newspaper of an advertisement presenting in a positive light certain acts of Philippe Pétain (section 24(3) of the Freedom of the Press Act of 29 July 1881)

I. ARTICLE 10 OF THE CONVENTION

A. Application of Article 17

In order to take into account all circumstances of case, Court began by considering question of compliance with Article 10, whose requirements it assessed, however, in light of Article 17.

B. Compliance with Article 10

Conviction in issue: interference with applicants' exercise of their right to freedom of expression – prescribed by law – pursued several legitimate aims, namely protection of reputation or rights of others and prevention of disorder or crime.

So-called "double game" theory: not Court's task to settle this point, which was part of an ongoing debate among historians about events in question (Montoire) and their interpretation – question did not belong to category of clearly established historical facts, such as the Holocaust, whose negation or revision would be removed from protection of Article 10 by Article 17 – it did not appear that applicants had attempted to deny or revise what they themselves had referred to as "Nazi atrocities and persecutions" or "German omnipotence and barbarism" – only names which appeared at foot of text in issue were those of two associations legally constituted with the object of promoting rehabilitation of Philippe Pétain.

Paris Court of Appeal: had not taken sides in controversy over so-called "double game" theory but had noted "the absence … of any criticism of … artfully concealed facts", namely signing of so-called Act relating to aliens of Jewish race, or any attempt "to distance [the] authors from them".

Applicants had not so much praised a policy as a man, and had done so for a purpose whose pertinence and legitimacy had been recognised by Court of Appeal, namely securing revision of Philippe Pétain's conviction – omissions for which authors of text were criticised concerned events directly linked with the Holocaust – passivity of prosecuting authorities – events referred to in publication had taken place forty years before – publication corresponded directly to object of associations which had produced it – seriousness of a criminal conviction for publicly defending crimes of collaboration, regard being had to existence of civil remedies – not appropriate to apply Article 17.

Conclusion: violation (fifteen votes to six).

1. This summary by the registry does not bind the Court.

II. ARTICLE 50 OF THE CONVENTION

Pecuniary damage: sufficiently made good by finding of violation.
Costs and expenses: reimbursed on equitable basis.

Conclusion: respondent State to pay applicants specified sum for costs and expenses (unanimously).

COURT'S CASE-LAW REFERRED TO

25.3.1985, Barthold v. Germany; 20.11.1989, markt intern Verlag GmbH and Klaus Beermann v. Germany; 29.10.1992, Open Door and Dublin Well Woman v. Ireland; 24.2.1994, Casado Coca v. Spain; 23.6.1994, Jacubowski v. Germany; 23.9.1994, Jersild v. Denmark; 24.11.1994, Kemmache v. France (no. 3); 26.9.1995, Vogt v. Germany; 24.2.1997, De Haes and Gijsels v. Belgium; 25.11.1997, Zana v. Turkey; 30.1.1998, United Communist Party of Turkey and Others v. Turkey; 25.5.1998, Socialist Party and Others v. Turkey

In the case of Lehideux and Isorni v. France[1],

The European Court of Human Rights, sitting, in accordance with Rule 51 of Rules of Court A[2], as a Grand Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr F. GÖLCÜKLÜ,
Mr L.-E. PETTITI,
Mr C. RUSSO,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,
Sir John FREELAND,
Mr A.B. BAKA,
Mr G. MIFSUD BONNICI,
Mr B. REPIK,
Mr P. JAMBREK,
Mr P. KŪRIS,
Mr J. CASADEVALL,
Mr P. VAN DIJK,
Mr T. PANTIRU,
Mr V. BUTKEVYCH,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 24 April and 24 August 1998,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

1. The case is numbered 55/1997/839/1045. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 28 May 1997 and by the French Government ("the Government") on 8 August 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 24662/94) against the French Republic lodged with the Commission under Article 25 by two French nationals, Mr Marie-François Lehideux and Mr Jacques Isorni, on 13 May 1994.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46); the Government's application referred to Article 48. The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention.

2. The second applicant died on 8 May 1995. On 24 June 1996 the Commission decided that his widow, Mrs Yvonne Isorni, had standing to continue the proceedings on her late husband's behalf.

3. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

4. The Chamber to be constituted included *ex officio* Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 3 July 1997, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr R. Macdonald, Mr A. Spielmann, Mr I. Foighel, Mr A.N. Loizou, Mr J.M. Morenilla, Mr T. Pantiru and Mr V. Butkevych (Article 43 *in fine* of the Convention and Rule 21 § 5).

5. On 22 October 1997 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51). The Grand Chamber to be constituted included *ex officio* Mr Ryssdal, President of the Court, and Mr Bernhardt, the Vice-President, together with the other members and the four substitutes of the original Chamber, the latter being Mr B. Walsh, Mr P. Jambrek, Mr F. Gölcüklü and Mr R. Pekkanen (Rule 51 § 2 (a) and (b)). On 25 October 1997 the President, in the presence of the Registrar,

drew by lot the names of the seven additional judges needed to complete the Grand Chamber, namely Mr C. Russo, Mrs E. Palm, Sir John Freeland, Mr A.B. Baka, Mr B. Repik, Mr J. Casadevall and Mr P. van Dijk (Rule 51 § 2 (c)). Subsequently Mr J. De Meyer, Mr G. Mifsud Bonnici and Mr P. Kūris, substitute judges, replaced Mr Ryssdal and Mr Walsh, who had died, and Mr Macdonald, who was unable to take part in the further consideration of the case, and Mr Bernhardt took Mr Ryssdal's place as President of the Grand Chamber (Rules 21 § 6, 22 § 1, 24 § 1 and 51 § 6).

6. As President of the Grand Chamber, Mr Ryssdal, acting through the Registrar, had consulted the Agent of the Government, the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicants' and the Government's memorials on 23 and 27 February 1998 respectively.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 April 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr M. PERRIN DE BRICHAMBAUT, Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mrs M. DUBROCARD, *magistrat*, on secondment to the Legal
Affairs Department, Ministry of Foreign Affairs,
Mr A. BUCHET, *magistrat*, Head of the Human Rights Office,
European and International Affairs Service,
Ministry of Justice,
Mrs C. ETIENNE, *magistrat*, on secondment to the
Criminal Justice and Individual Freedoms Office,
Criminal Cases and Pardons Department,
Ministry of Justice, *Counsel*;

(b) *for the Commission*
Mr B. CONFORTI, *Delegate*;

(c) *for the applicants*
Mr B. PREVOST, of the Paris Bar,
Mr J. EBSTEIN-LANGEVIN, former member of the Paris Bar, *Counsel*.

The Court heard addresses by Mr Conforti, Mr Ebstein-Langevin, Mr Prevost and Mr Perrin de Brichambaut.

8. On 23 June 1998 the Court was informed that Mr Lehideux had died on 21 June.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. Mr Lehideux, the first applicant, who was born in 1904 and died on 21 June 1998 (see paragraph 8 above), was formerly an administrator and later a director of several companies – including Renault France – and lived in Paris. From September 1940 to April 1942 he was Minister for Industrial Production in the Government of Marshal Pétain and, from 1959 to 1964, a member of the Economic and Social Committee. He was the President of the Association for the Defence of the Memory of Marshal Pétain.

The second applicant, Mr Isorni, who was born in 1911 and died on 8 May 1995 (see paragraph 2 above), was formerly a lawyer practising in Paris. As First Secretary of the Conference of Pupil Advocates of the Paris Bar, he was officially appointed to assist the President of the Bar Association in defending Marshal Pétain at his trial before the High Court of Justice. On 15 August 1945 the High Court of Justice sentenced Philippe Pétain to death and forfeiture of his civic rights for collusion with Germany with a view to furthering the designs of the enemy.

A. The publication in issue

10. On 13 July 1984 the daily newspaper *Le Monde* published a one-page advertisement bearing the title "People of France, you have short memories" in large print, beneath which appeared in small italics, "Philippe Pétain, 17 June 1941". The text ended with an invitation to readers to write to the Association for the Defence of the Memory of Marshal Pétain and the National Pétain-Verdun Association.

11. The text, which was divided into several sections each beginning with the words "People of France, you have short memories if you have forgotten…" in large capitals, recapitulated, in a series of assertions, the main stages of Philippe Pétain's life as a public figure from 1916 to 1945, presenting his actions, first as a soldier and later as French Head of State, in a positive light.

In respect of the 1940–45 period, the text contained the following passage:

> **"PEOPLE OF FRANCE, YOU HAVE SHORT MEMORIES**
>
> **– IF YOU HAVE FORGOTTEN...**
>
> – That in 1940 the civil and military authorities had led France to disaster. Those responsible begged him to come to its assistance. By his call to the nation of 17 June 1940 *he secured an armistice* and prevented the enemy from camping on the shores of

the Mediterranean, *thereby saving the Allies*. Power was then legally conferred on him by the Parliamentary Assemblies, in which the Popular Front had a majority. The grateful French people rightly saw him as their saviour. There were 'forty million Pétainists' (Henri Amouroux).

How many no longer remember this and how many have disavowed it?

– That in the thick of difficulties which no French Head of State had ever known, Nazi atrocities and persecutions, he protected them against German omnipotence and barbarism, thus ensuring that two million prisoners of war were saved.

– That he provided daily bread, re-established social justice, defended private schools and protected a pillaged economy.

– That, through his supremely skilful policy, he managed to send a personal representative to London on the very same day that he went to Montoire, thereby allowing France, in defeat, to maintain its position between the contradictory demands of the Germans and the Allies and, through his secret agreements with America, to prepare and contribute to its liberation, for which he had formed the army of Africa.

– That he preserved for France virtually every part of what people then still dared to call the French Empire.

– That he was threatened by Hitler and Ribbentrop for resisting their will, and that on 20 August 1944 German troops carried him off to Germany.

PEOPLE OF FRANCE, YOU HAVE SHORT MEMORIES

– IF YOU HAVE FORGOTTEN...

– That, while he was a prisoner of the enemy, Philippe Pétain was prosecuted on the orders of Charles de Gaulle for betraying his country, whereas he had done all he could to save it.

– IF YOU HAVE FORGOTTEN...

– That, having escaped from Germany, he returned to France, however great the personal risk to himself, to defend himself against that monstrous accusation and to try to protect, by his presence, those who had obeyed his orders.

PEOPLE OF FRANCE, YOU HAVE SHORT MEMORIES

– IF YOU HAVE FORGOTTEN...

– That the prosecution, with the collusion of persons in the highest authority, used a forgery, as in the Dreyfus case, to secure his conviction and that at ninety years of age he was condemned, in haste, to death..."

B. The criminal proceedings against the applicants

1. The complaint which led to the prosecution

12. On 10 October 1984 the National Association of Former Members of the Resistance filed a criminal complaint, together with an application to join the proceedings as a civil party, against a Mr L., the publication manager of *Le Monde*, for publicly defending the crimes of collaboration with the enemy, and against Mr Lehideux as President of the Association for the Defence of the Memory of Marshal Pétain, Mr Isorni as the author of the text complained of and a Mr M., as President of the National Pétain-Verdun Association, for aiding and abetting a public defence of the crimes of collaboration with the enemy.

The civil party argued that the text was an apologia which contravened the criminal law since it tended to justify the policy of Marshal Pétain, who had been found guilty by the High Court of Justice on 15 August 1945 (see paragraph 9 above).

13. The applicants denied that their advertisement constituted a public defence of the crimes of collaboration with the enemy, but acknowledged that the spirit of the text was consistent with their aim of having the judgment of the High Court of Justice overturned and rehabilitating Marshal Pétain.

14. On 29 May 1985 the public prosecutor filed his final submissions recommending that the charges be dropped on the ground that the offence had not been made out.

He considered that "the political and historical light" in which the applicants had portrayed Philippe Pétain's policy during the period 1940 to 1944 was "radically different from the approach adopted by the High Court of Justice": "far from glorifying the policy of collaboration, the defendants ... [gave] credit to Marshal Pétain – the fact that their historical perception [might] appear incorrect, misguided or partisan being of little consequence – for his endeavours and actions to protect France and its people and his contribution to the country's liberation...". He added that, although their aim had been to enhance Philippe Pétain's image and praise his conduct during the Second World War, this positive assessment could be construed as a public defence of his actions "only by arbitrarily separating the image thus embellished from its supporting text and its link with the purely extrinsic information which, for the most part, was contained in the documents on the High Court's file". He concluded that "it might appear strange to commit for trial before the Criminal Court the authors and producers of a text which glorifies an individual, not for the crimes of which he was convicted, but for the beneficial actions which he is deemed to have performed for the good of France, its people and, secretly, the Allies".

15. The investigating judge did not follow the public prosecutor's submissions. In an order of 4 June 1985, he committed Mr L., the applicants and Mr M. for trial before the Criminal Court on charges, against the first defendant as principal and the others as accomplices, of making a public defence of the crimes of collaboration with the enemy, defined in section 24(3) of the Freedom of the Press Act of 29 July 1881.

The investigating judge observed: "a public defence means a speech or text which tends to defend or vindicate a doctrine or an action". He noted that the applicants had presented Marshal Pétain's policy during the period 1940 to 1944 in a favourable light, crediting him with endeavours and actions to protect France and its people, whereas the same events had been the subject of lengthy, detailed reasoning in the judgment of the High Court of Justice convicting Marshal Pétain. He therefore considered that the part of the published text referring to the 1940–45 period incorporated, developed and glorified the grounds of defence submitted by Pétain at his trial before the High Court of Justice and therefore amounted to a "justification of the actions and policies of Marshal Pétain, convicted under Articles 75 and 87 of the Criminal Code" then in force.

2. The Paris Criminal Court's judgment of 27 June 1986

16. On 27 June 1986 the Paris Criminal Court, the proceedings before which had been joined by the Resistance Action Committee and the National Federation of Deported and Interned Members of the Resistance and Patriots, as civil parties, acquitted the defendants and ruled that it lacked jurisdiction to deal with the civil parties' application.

The court stated that its task was "not to take sides in the historical controversy which, for more than forty years, has pitted the Resistance associations against Philippe Pétain's supporters", but to determine whether the offence had been made out in the instant case. In that connection, the court specified that, "according to the civil parties' and the public prosecutor's own submissions, the defendants [were] being prosecuted for their opinions..." and that "no restrictions [could] be imposed on freedom of expression other than those derived from statute, strictly interpreted...".

The court held that only the part of the text referring to the 1940–45 period could be construed as a public defence of the crimes of collaboration with the enemy. It noted that this part of the text was clearly a eulogy of Philippe Pétain, an appeal in his defence designed to create a shift in public opinion favourable to the reopening of his case. It considered, however, that the offence had not been made out, for the following reasons: the text contained "no attempt to justify collaboration with Nazi Germany", but stated that Marshal Pétain's aim had been to "facilitate the Allies' victory";

Marshal Pétain's collaboration with Nazi Germany was neither acknowledged nor presented in a favourable light; the fact that the judgment of the High Court of Justice constituted *res judicata* did not in any way prevent the defenders of Marshal Pétain's memory from criticising it; the text was part of a campaign in which the second applicant had been engaged since 1945 to have the judgment of the High Court of Justice overturned, an objective which was "perfectly legal".

The court emphasised, "for the avoidance of any doubt", that its judgment "should not be deemed to favour one of the arguments put forward in the historical controversy".

17. The National Association of Former Members of the Resistance and the Resistance Action Committee appealed.

3. The Paris Court of Appeal's judgment of 8 July 1987

18. In a judgment of 8 July 1987 the Paris Court of Appeal held, firstly, that the combined effect of Article 2 § 5 of the Code of Criminal Procedure and the Freedom of the Press Act of 29 July 1881 was that the civil parties did not have standing to trigger a public prosecution and, secondly, that the prosecutor's submissions on their complaint did not satisfy the formal requirements laid down on pain of nullity in the same Act. The court therefore declared the prosecution and subsequent proceedings null and void.

19. The National Association of Former Members of the Resistance and the Resistance Action Committee appealed on points of law against the above judgment.

4. The Court of Cassation's judgment of 20 December 1988

20. In a judgment of 20 December 1988 the Court of Cassation (Criminal Division) held that the Paris Court of Appeal had erred in law. Accordingly, it quashed the judgment of 8 July 1987 in its entirety and remitted the case to the same Court of Appeal with a differently constituted bench.

5. The Paris Court of Appeal's judgment of 26 January 1990

21. On 26 January 1990 the Paris Court of Appeal declared the two civil party applications admissible, set aside the acquittals and awarded the civil parties damages of one franc. It also ordered the publication of excerpts from the judgment in *Le Monde*.

In its judgment it held that the three constituent elements of the offence of making a public defence of the crimes of collaboration had been made out.

It found, firstly, that the public element had been made out owing to the fact that the text in question had been published in *Le Monde*.

It went on to say that the text contained an "apologia" for the crimes of collaboration, and that the mental element had been made out, for the following reasons:

> "The glorification of Pétain by the authors of this manifesto is conveyed by the celebration of what they seek to portray as great deeds; thus, equal prominence is given, for example, to the victory at Verdun and the defeat at Abd-el-Krim, attributed to Pétain like the securing of the armistice in 1940 and 'his policy', described as 'supremely skilful': 'He managed to send a personal representative to London on the very same day that he went to Montoire, thereby allowing France, in defeat, to maintain its position between the contradictory demands of the Germans and the Allies and, through his secret agreements with America, to prepare and contribute to its liberation, for which he had formed the army of Africa'. Praise of the Montoire policy is thus magnified by reference to its supposed results. This is indeed an unreserved eulogy of a policy which is none other than that of collaboration. The significance of the meeting between Pétain and Hitler at Montoire on 24 October 1940 to which the authors of the advertisement refer were specified as follows in a radio broadcast by Pétain of 30 October 1940:
>
> 'It is in honour and in order to maintain French unity, a ten-centuries-old unity, within the framework of constructive action for a *new European order* that I today embark upon the path of *collaboration.*'
>
> The order referred to here was none other than the Hitlerian order based on racism defined in *Mein Kampf*, to which Pétain had just officially subscribed in advance by signing, on 3 October 1940, the so-called Act relating to aliens of Jewish race, who were later to be interned in camps set up in France for that purpose, in order to facilitate their conveyance to the Nazi concentration camps which were their intended destination.
>
> Through the absence from the text of any criticism of these artfully concealed facts or even any attempt to distance its authors from them, this manifesto does indeed, therefore, implicitly but necessarily, contain an apologia for the crimes of collaboration committed, sometimes with the active participation and sometimes with the tacit consent of the Vichy Government, that is of Pétain and his zealots, in the very 'atrocities' and 'Nazi persecutions' to which the text refers.
>
> The court is forced to the above conclusion without taking sides in the historical controversy between those who think that Pétain was really playing a double game supposedly beneficial to the French and those who place reliance only on Pétain's avowed policies and publicly announced official decisions, regardless of the excuses that he was able to put forward or that his supporters now seek to cloak him in. Accordingly, this court finds that the advertisement in issue did contain the apologetic element of the offence charged.
>
> In addition, for the offence to be made out, the mental element must be established.

> The accused, headed by Jacques Isorni, the author of the manifesto, are seeking revision of the judgment given by the High Court of Justice on 14 August 1945, which sentenced Pétain to death, forfeiture of his civic rights and confiscation of his possessions for collusion with Germany, a power at war with France, with a view to furthering the enemy's designs, this conduct constituting offences defined by and punishable under Articles 75 and 87 of the Criminal Code.
>
> The accused, with the exception of [Mr L.], all claim responsibility for the text in issue and maintain that their object in publishing it was to create a shift in public opinion which, in their view, would increase support for a decision to reopen the case.
>
> This goal, pursued unremittingly by Jacques Isorni in particular, Pétain's former defence counsel before the High Court, who seeks to have a new judicial decision substituted for the High Court's judgment, is considered by that lawyer to be a sacred duty of the defence. However legitimate on his part and the part of those who expressed their support for his action their intention to have the case reopened may have been, it did not justify the use of unlawful means to further that aim, since they knew that by putting forward an unqualified and unrestricted eulogy of the policy of collaboration they were *ipso facto* justifying the crimes committed in furtherance of that policy, and therefore cannot have acted in good faith."

6. The Court of Cassation's judgment of 16 November 1993

22. The applicants, Mr M. and Mr L. appealed on points of law against the above judgment. In their statement of the grounds of appeal they relied on Article 10 of the Convention and complained that they had been convicted for their opinions. Their aim had been to defend what they considered to be just in the action of a convicted person, without glorifying war crimes or the crimes of collaboration of which he had been convicted in the judgment which they were seeking to have overturned. They asserted that the Court of Appeal had found them guilty of making an "implicit apologia", constituted more by what they had not said than by the content of the text itself, holding that the manifesto in issue "implicitly but necessarily" contained an apologia for the crimes of collaboration and convicting them for what they had not written and the criticisms they had not made, despite the fact that they had referred in their text to Nazi atrocities and barbarism.

23. On 16 November 1993 the Criminal Division of the Court of Cassation dismissed the appeals on the following grounds:

> "Having regard [to the] findings [of the Court of Appeal] the Court of Cassation, whose task is to determine whether the text prosecuted under section 24(3) of the Act of 29 July 1881 constitutes a public defence of the crimes contemplated in that Act, is satisfied from its examination of the article in question that the passage referred to by the Court of Appeal falls within the contemplation of the aforementioned Act. In presenting as praiseworthy a person convicted of collusion with the enemy, the text glorified his crime and, in so doing, publicly defended it. The mental element of the offence can be inferred from the deliberate nature of the acts on account of which the defendants were charged.

In delivering that judgment, the Court of Appeal did not exceed its powers. Nor did it infringe the right to freedom of expression protected by Article 10, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms, since the exercise of that right may, under paragraph 2 of that Article, be subject to certain restrictions prescribed by law, where these are necessary, as in the instant case, in the interests of national security, territorial integrity or public safety."

II. RELEVANT DOMESTIC LAW

A. The Freedom of the Press Act of 29 July 1881

24. In 1984 section 23 of the Freedom of the Press Act of 29 July 1881 read as follows:

"Where a crime or major offence is committed, anyone who, by uttering speeches, cries or threats in a public place or assembly, or by means of a written or printed text, drawing, engraving, painting, emblem, image, or any other written, spoken or pictorial item sold or distributed, offered for sale or exhibited in a public place or assembly, or by means of a placard or notice exhibited in a place where it can be seen by the public, has directly and successfully incited another or others to commit the said crime or major offence shall be punished as an accomplice thereto."

25. At the same time, section 24 provided that "anyone who, by one of the means set out in section 23, has made a public defence of ... the crimes of collaboration with the enemy" was to be liable to one to five years' imprisonment and a fine of from three hundred to three hundred thousand francs.

26. The French courts have gradually clarified the conditions for the application of the provisions making public defence of a crime a criminal offence.

The Court of Cassation has ruled that public defence of the crimes defined in section 24(3) of the Act of 29 July 1881 is a separate offence from unsuccessful incitement to commit one of the crimes listed in sub-sections 1 and 2 of the same section and that the constituent elements of each of those offences must not be confused (*Crim.* 11 July 1972, *Bull. crim.* no. 236).

As early as 1912 the Criminal Division of the Court of Cassation held that public defence of a criminal amounted to public defence of his crime (*Crim.* 22 August 1912, *Bull. crim.* no. 46). That case-law was upheld by a decision to the effect that the glorification of a person on the basis of facts constituting one of the crimes or major offences listed in section 24(3) of the 1881 Act constituted the crime of public defence defined in and punishable under that Act (*Crim.* 24 October 1967, *Bull. crim.* no. 263).

Publication of a text which is likely to incite any reader to judge favourably the German National Socialist Party leaders convicted of war crimes by the Nuremberg International Tribunal and constitutes an attempt to justify their crimes in part is a public defence of war crimes (*Crim.* 14 January 1971, *Bull. crim.* no. 14).

A public defence of the crime of theft is made out where an article is published which, far from merely relating a criminal theft, presents it as a praiseworthy exploit and expresses the hope that the perpetrator will escape all punishment (*Crim.* 2 November 1978, *Bull. crim.* no. 294).

The offence is made out where an apologia is presented in indirect form (Paris, 25 February 1959, D. 1959. 552).

Lastly, it is the Court of Cassation's task to determine whether a text prosecuted under section 24(3) of the Act of 29 July 1881 partakes of the nature of a public defence of crime as defined therein (*Crim.* 11 July 1972, *Bull. crim.* no. 236).

27. Law no. 90-615 of 13 July 1990 ("the *loi Gayssot*") added to the Freedom of the Press Act a section 24 *bis* making liable to one year's imprisonment and a fine of 300,000 French francs, or one of those penalties only, those who "deny the existence of one or more crimes against humanity as defined in Article 6 of the Statute of the International Military Tribunal annexed to the London agreement of 8 August 1945 which have been committed either by the members of an organisation declared criminal pursuant to Article 9 of the Statute or by a person found guilty of such crimes by a French or international court".

Section 48-2 of the Freedom of the Press Act, also inserted by the *loi Gayssot*, provides: "Any association which has been lawfully registered for at least five years at the relevant time, and whose objects, according to its articles of association, include the defence of the moral interests and honour of the French Resistance or deportees, may exercise the rights conferred on civil parties in connection with public defence of war crimes, crimes against humanity or the crimes of collaboration with the enemy and in connection with the offence defined in section 24 *bis*."

B. The Criminal Code

28. Articles 75 and 87 of the Criminal Code, applied by the High Court of Justice in its judgment of 15 August 1945 convicting Marshal Pétain, provided at that time:

Article 75

"Any French citizen who colludes with a foreign power with a view to inciting it to engage in hostilities against France, or provides it with the necessary means, either by facilitating the penetration of foreign forces into French territory, or by undermining the loyalty of the army, navy or air force, or in any other manner, shall be guilty of treason and sentenced to death."

Article 87

"Any attempt to overthrow or change the government ..., or to incite citizens or inhabitants to take up arms against the imperial authority shall be punishable by deportation to a military fortress."

PROCEEDINGS BEFORE THE COMMISSION

29. Mr Lehideux and Mr Isorni applied to the Commission on 13 May 1994, complaining of a breach of Articles 6, 10 and, in substance, 7 of the Convention. In support of their application they produced a large number of documents, which included copies of several memoranda obtained from British official records describing contacts which took place in October and December 1940 between the then British government, led by Winston Churchill, and Louis Rougier, an emissary of Philippe Pétain.

30. On 24 June 1996 the Commission declared the Article 10 complaint admissible and declared the remainder of the application (no. 24662/94) inadmissible. In its report of 8 April 1997 (Article 31), it expressed the opinion that there had been a violation of Article 10 (twenty-three votes to eight). The full text of the Commission's opinion and of the six separate opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

31. In their memorial the Government asked the Court to dismiss the application lodged by Mr Lehideux and Mr Isorni, firstly as being incompatible with the provisions of the Convention pursuant to Article 17, and in the alternative because there had been no violation of Article 10.

32. The applicants asked the Court to hold that there had been a breach of Article 10 and to award them just satisfaction.

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

33. The applicants alleged that their conviction for "public defence of war crimes or the crimes of collaboration" had breached Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

34. The Government asked the Court to dismiss the application, pursuant to Article 17 of the Convention, on the ground of incompatibility with the provisions of the Convention. At the very least, in their submission, paragraph 2 of Article 10 should be applied in the light of the obligations arising from Article 17.

A. Application of Article 17

35. The Government considered that the publication in issue infringed the very spirit of the Convention and the essential values of democracy. The application of Mr Lehideux and Mr Isorni was accordingly barred by Article 17, which provides:

> "Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

The justification given by the applicants for publishing the text in issue – that they sought to overturn Philippe Pétain's conviction – was unacceptable, as were their assertions about their text being a contribution to the historical debate. The text presented certain historical events in a manifestly erroneous manner, sometimes by lending them a significance they did not have, as in the way they had presented the Montoire meeting, and sometimes by ignoring events which were essential for an understanding of the relevant period of history, namely collaboration between the Vichy regime and Nazi Germany.

36. Before the Commission the applicants submitted that Article 17 could not be invoked against them, emphasising that a distinction should be drawn between the basis for the conviction of Philippe Pétain, the former Articles 75 and 87 of the Criminal Code, and the basis of their own conviction, the Press Act. They further emphasised that their text had by no means expressed approval of Nazi barbarism and its persecutions.

37. In its decision on the admissibility of the application (see paragraph 30 above), the Commission expressed the opinion that Article 17 could not prevent the applicants from relying on Article 10. It considered that the advertisement which had given rise to the applicants' conviction did not contain any terms of racial hatred or other statements calculated to destroy or restrict the rights and freedoms guaranteed by the Convention. As the Paris Court of Appeal had recognised in its judgment of 26 January 1990, the applicants' object had been to secure revision of Philippe Pétain's trial. Furthermore, it could not be deduced from the text that the applicants' expression of their ideas constituted an "activity" within the meaning of Article 17.

38. The Court will rule on the application of Article 17 in the light of all the circumstances of the case. It will accordingly begin by considering the question of compliance with Article 10, whose requirements it will however assess in the light of Article 17 (see, *mutatis mutandis*, the United Communist Party of Turkey and Others v. Turkey judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, p. 18, § 32).

B. Compliance with Article 10

39. The conviction in issue incontestably amounted to "interference" with the applicants' exercise of their right to freedom of expression. Those appearing before the Court agreed that it was "prescribed by law" and pursued several of the legitimate aims set forth in Article 10 § 2, namely protection of the reputation or rights of others and the prevention of disorder or crime.

The Court agrees. It must now, therefore, determine whether the interference was "necessary in a democratic society" for the achievement of those aims.

1. Arguments of the participants

(a) The applicants

40. The applicants argued that the text in issue reflected a historical opinion and imparted information about a subject of general interest. Their conviction had been intended to impose a "politically correct" version of history.

The text was a contribution to the historical controversy about the period 1940–44. Although there might be disagreement about its content, history was a field in which differences of opinion were desirable. The text had been based on exact historical facts, not misrepresented or incomplete facts as the Government had maintained. With particular regard to the omissions criticised by the Government, the applicants explained that their text had been intended only to promote the campaign for Philippe Pétain's retrial, without setting out to raise any other issues. In any event, since they had not distorted real historical events, they could not be assimilated or compared, in their action and their writings, to negationists or revisionists. Moreover, the courts that had dealt with their case had not all been convinced of their guilt.

In short, the applicants had not contested either Nazi atrocities and barbarism or the Holocaust. They had not endorsed a policy. They had merely said: "Perhaps something else took place", something other than what people thought, namely that, on account of his incomparable past record as a military leader, the man who had been the head of the French State could only have desired victory by the Allies.

(b) The Government

41. The Government submitted that, as regards in the first place the aim of the text in issue, the applicants were trying to justify the text after the event, claiming that it had been written with a view to applying for revision of Philippe Pétain's trial. That argument was inadmissible, because Mr Lehideux and Mr Isorni had not been convicted by the Paris Court of Appeal on account of their real or supposed aim in publishing the text but on account of the text itself. The Court of Appeal had said very clearly, in its judgment of 26 January 1990, that whatever the applicants' intention might have been in publishing the text, that intention did not justify them in eulogising the policy of collaboration.

That being said, neither the constitution of the Association for the Defence of the Memory of Marshal Pétain nor the text in issue referred at any point, in one way or another, to securing a retrial for Philippe Pétain.

42. The Government further asserted that there was no doubt that if the French authorities had been able to consider that the text published by the applicants in the 13 July 1984 issue of *Le Monde* was merely a contribution to a historical debate, its authors would never have been convicted. However, the publication of a text which was supposed to be a contribution to a public debate of a historical nature obliged its authors to observe a number of constraints and rules, taking into account facts deemed to be common knowledge at the time of writing. That had not been done in the present case, because neither the presentation of the text in issue nor its content satisfied the minimum requirements of objectivity.

In the first place, the text had appeared in the form of an advertisement. The repetition of certain phrases, and even the presentation, in terms of the typeface chosen, had been used to attract the reader's attention. A more serious criticism was that the content of the text itself, as was noted in the judgment convicting the applicants, constituted an unreserved eulogy of the policy conducted by the Vichy government, led by Philippe Pétain, although that policy had been one of collaboration by the State with the National Socialist regime. The applicants had gone about composing that eulogy in two different ways. Firstly, they had attempted to justify Philippe Pétain's decisions by trying to give them a different meaning; secondly, they had purely and simply omitted to mention historical facts which were a matter of common knowledge, and were inescapable and essential for any objective account of the policy concerned.

The Montoire episode illustrated the first method used by the applicants. They had tried to justify this argument by talk of a double-game policy supposedly followed at that time by the head of the Vichy government. At the time when the text was published, this theory had been refuted by all historians who had made a special study of the period.

As to the second method, it consisted in omission. Omitting to mention the racial legislation enacted in October 1940 was a perfect example. By omitting in particular to make any reference in a publication glorifying Philippe Pétain to what was – in the words of the American historian Robert Paxton – "the blackest mark on the whole Vichy experience", namely its active anti-Semitism, the applicants had deliberately chosen to remain silent about the most scandalous acts of the Vichy government, which were recognised as real historical events and had also objectively served the interests of the National Socialist regime.

In other words, although Mr Lehideux and Mr Isorni were not negationists, in order to glorify Philippe Pétain's record during the Second World War they had been impelled to deny, by deliberately omitting to mention it, the existence of his policy of collaboration with the Third Reich. Such a denial was unacceptable to all those who had paid the price of that policy with their lives or the lives of their relatives, either because they had been marked out as its victims or because they had chosen to fight against it.

43. In order to assess the necessity of interference with the applicants' freedom of expression, the national authorities, in the Government's submission, had had a wider margin of appreciation, for two reasons. Firstly, the text in issue had been published in the form of an advertisement. Secondly, it had referred to a particularly grim page of the history of France. This had still been a very painful part of the collective memory at the time of the applicants' conviction, and remained so, given the difficulty in France of determining who was responsible, whether isolated individuals or entire institutions, for the policy of collaboration with the National Socialist regime.

Irrespective of its content, the text dealt with a very specific field – the history of a State. That field, by its very nature, was impossible to define objectively in European terms, so that there could be no uniform conception of the requirements arising from Article 10. Quite obviously, the countries of Europe could not have a uniform conception of the requirements relating to "protection of the rights of others" in connection with the effects of a publication in a national daily newspaper on the role played by Philippe Pétain during the Second World War.

At all events, the penalty eventually imposed had been purely symbolic, since Mr Lehideux and Mr Isorni had been ordered to pay all in all to each of the two associations which had joined the proceedings as civil parties the sum of one franc in damages and to pay for publication in *Le Monde* of the judgment against them.

(c) The Commission

44. The Commission considered that a number of factors took the present case outside the scope of commercial or advertising material. Apart from the fact that the prosecution had been based on the Freedom of the Press Act, the article had concerned a politician and historical events, and had invited the reader to write to two associations in order to bring about a shift in public opinion favourable to revision of Philippe Pétain's trial.

Consequently, although the text was presented in the form of a separate advertisement and contained repeated phrases calculated to arrest the reader's attention, its content and purpose did not bring it within the competitive or commercial domains, or even into that of professional advertising within the meaning of the Court's case-law (see the Barthold v. Germany judgment of 25 March 1985, Series A no. 90; the markt intern Verlag GmbH and Klaus Beermann v. Germany judgment of 20 November 1989, Series A no. 165; the Casado Coca v. Spain judgment of 24 February 1994, Series A no. 285-A; and the Jacubowski v. Germany judgment of 23 June 1994, Series A no. 291-A).

45. According to the Commission, the correctness or incorrectness of the facts presented by the applicants – which it was not in any way its task to verify – had not been the basis on which they were convicted. The Court of Appeal had criticised the applicants more for their non-exhaustive presentation of facts relating to a specific period of history than for distorting or denying established historical events.

The applicants had expressed themselves on behalf of two associations which had been legally constituted in France and whose object was, precisely, to have Marshal Pétain's case reopened; they could not therefore be denied the right to pursue this object through the press or any other medium of communication. Moreover, the applicants had not failed to mention in the text and distance themselves from "Nazi atrocities and persecutions".

Lastly, the Commission emphasised the importance, in a democratic society, of historical debate about a public figure in respect of whom, as was the case with Philippe Pétain, different opinions had been and might be expressed. For these reasons, the Commission expressed the opinion that there had been a violation of Article 10.

2. The Court's assessment

46. The Court notes that, according to the Government, the eulogy the applicants were guilty of was produced by two different methods: the authors of the publication in issue had sometimes tried to justify Philippe Pétain's decisions by endeavouring to give them a different meaning and at other times had purely and simply omitted to mention historical facts which were a matter of common knowledge, and were inescapable and essential for any objective account of the policy concerned.

47. The first technique had been used in the passage concerning Philippe Pétain's policy at Montoire. By describing this policy in the text as "supremely skilful", the applicants had lent credence to the so-called "double game" theory, even though they knew that by 1984 all historians, both French and non-French, refuted that theory.

The Court considers that it is not its task to settle this point, which is part of an ongoing debate among historians about the events in question and their interpretation. As such, it does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17. In the present case, it does not appear that the applicants attempted to deny or revise what they themselves referred to in their publication as "Nazi atrocities and persecutions" or "German omnipotence and barbarism". In describing Philippe Pétain's policy as "supremely skilful", the authors of the text were rather supporting one of the conflicting theories in the debate about the role of the head of the Vichy government, the so-called "double game" theory.

48. Moreover, the Court notes that the applicants did not act in their personal capacities, as the only names which appeared at the foot of the text in issue were those of the Association for the Defence of the Memory of Marshal Pétain and the National Pétain-Verdun Association, to which readers were invited to write. Since these associations were legally constituted and sought to promote the rehabilitation of Philippe Pétain, it was scarcely surprising to find them supporting, in a publication which they had paid for, one of the rival historical theories, the one which was most favourable to the man whose memory they sought to defend. Besides, readers were given a clear indication of how matters stood by the inclusion of the associations' names at the foot of the page and by the word "Advertisement" which appeared at the top of the page.

In any event, the Paris Court of Appeal noted that the applicants' aim, in publishing the text in issue, had been "to create a shift in public opinion which, in their view, would increase support for a decision to reopen the case". It went on to say: "However legitimate … their intention to have the case reopened may have been, it did not justify the use of unlawful means to further that aim…" (see paragraph 21 above).

49. The Court notes that in its judgment of 26 January 1990 the Paris Court of Appeal ruled "without taking sides in the historical controversy between those who think that Pétain was really playing a double game supposedly beneficial to the French and those who place reliance only on Pétain's avowed policies and publicly announced official decisions, regardless of the excuses that he was able to put forward or that his supporters now seek to cloak him in" (see paragraph 21 above).

In support of the conviction the Paris Court of Appeal, in reasoning later upheld by the Court of Cassation, placed rather more emphasis on the second method criticised by the Government, namely the omission of essential historical facts, which, it found, had constituted the apologia in

issue. Thus, after noting "an unreserved eulogy of [the Montoire] policy, which [was] none other than that of collaboration" the Court of Appeal held that "by putting forward an unqualified and unrestricted eulogy of the policy of collaboration [the applicants] were *ipso facto* justifying the crimes committed in furtherance of that policy". At another point in its judgment it held: "this manifesto does indeed, therefore, implicitly but necessarily, contain an apologia for the crimes of collaboration"; that apologia resulted from "the absence from the text of any criticism of these artfully concealed facts or even any attempt to distance its authors from them", the facts concerned being the support Pétain gave to "the Hitlerian order based on racism" by signing on 3 October 1940 the so-called Act relating to aliens of Jewish race (see paragraph 21 above).

50. The Court does not have to express an opinion on the constituent elements of the offence under French law of publicly defending the crimes of collaboration. Moreover, it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (see, among many other authorities, the Kemmache v. France (no. 3) judgment of 24 November 1994, Series A no. 296-C, p. 87, § 37). The Court's role is limited to verifying whether the interference which resulted from the applicants' conviction of that offence can be regarded as "necessary in a democratic society".

51. The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicants and the context in which they made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see, among many other authorities, the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, pp. 2547–48, § 51).

The Court must accordingly first examine the content of the remarks in issue and then determine whether it justified the applicants' conviction, having regard to the fact that the State could have used means other than a criminal penalty (see, *mutatis mutandis*, the Socialist Party and Others v. Turkey judgment of 25 May 1998, *Reports* 1998-III, p. 1256, § 44).

52. With regard, firstly, to the content of the publication, the Court notes its unilateral character. Since the text presented Philippe Pétain in an entirely favourable light and did not mention any of the offences he had been accused of, and for which he had been sentenced to death by the High Court of Justice, it could without any doubt be regarded as polemical. In that connection, however, the Court reiterates that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (see the De Haes and Gijsels v. Belgium judgment of 24 February 1997, *Reports* 1997-I, p. 236, § 48).

The Court notes that the Paris Court of Appeal's judgment convicting the applicants was mainly based on the fact that the authors of the text had not distanced themselves from or criticised certain aspects of Philippe Pétain's conduct, and especially the fact that they had put nothing in the text about other events, particularly the signing "on 3 October 1940, [of] the so-called Act relating to aliens of Jewish race, who were later to be interned in camps set up in France for that purpose, in order to facilitate their conveyance to the Nazi concentration camps which were their intended destination". The Court must accordingly consider whether these criticisms could justify the interference complained of.

53. There is no doubt that, like any other remark directed against the Convention's underlying values (see, *mutatis mutandis*, the Jersild v. Denmark judgment of 23 September 1994, Series A no. 298, p. 25, § 35), the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10. In the present case, however, the applicants explicitly stated their disapproval of "Nazi atrocities and persecutions" and of "German omnipotence and barbarism". Thus they were not so much praising a policy as a man, and doing so for a purpose – namely securing revision of Philippe Pétain's conviction – whose pertinence and legitimacy at least, if not the means employed to achieve it, were recognised by the Court of Appeal.

54. As to the omissions for which the authors of the text were criticised, the Court does not intend to rule on them in the abstract. These were not omissions about facts of no consequence but about events directly linked with the Holocaust. Admittedly, the authors of the text did refer to "Nazi barbarism", but without indicating that Philippe Pétain had knowingly contributed to it, particularly through his responsibility for the persecution and deportation to the death camps of tens of thousands of Jews in France. The gravity of these facts, which constitute crimes against

humanity, increases the gravity of any attempt to draw a veil over them. Although it is morally reprehensible, however, the fact that the text made no mention of them must be assessed in the light of a number of other circumstances of the case.

55. These include the fact that, as the Government observed, "this page of the history of France remains very painful in the collective memory, given the difficulties the country experienced in determining who was responsible, whether isolated individuals or entire institutions, for the policy of collaboration with Nazi Germany".

In that connection it should be pointed out, however, that it was for the prosecution, whose role it is to represent all the sensibilities which make up the general interest and to assess the rights of others, to put that case during the domestic proceedings. But the prosecuting authorities first decided not to proceed with the case against the applicants in the Criminal Court (see paragraph 14 above), then refrained from appealing against the acquittal pronounced by that court (see paragraphs 16 and 17 above) and from appealing to the Court of Cassation against the Paris Court of Appeal's judgment of 8 July 1987 (see paragraphs 18 and 19 above).

The Court further notes that the events referred to in the publication in issue had occurred more than forty years before. Even though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. That forms part of the efforts that every country must make to debate its own history openly and dispassionately. The Court reiterates in that connection that, subject to paragraph 2 of Article 10, freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, among many other authorities, the Open Door and Dublin Well Woman v. Ireland judgment of 29 October 1992, Series A no. 246-A, p. 30, § 71, and the Vogt v. Germany judgment of 26 September 1995, Series A no. 323, p. 25, § 52).

56. Furthermore, the publication in issue corresponds directly to the object of the associations which produced it, the Association for the Defence of the Memory of Marshal Pétain and the National Pétain-Verdun Association. These associations are legally constituted and no proceedings have been brought against them, either before or after 1984, for pursuing their objects.

57. Lastly, the Court notes the seriousness of a criminal conviction for publicly defending the crimes of collaboration, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies.

58. In short, the Court considers the applicants' criminal conviction disproportionate and, as such, unnecessary in a democratic society. There has therefore been a breach of Article 10.

Having reached that conclusion, the Court considers that it is not appropriate to apply Article 17.

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

59. Under Article 50 of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage and costs and expenses

60. The applicants claimed one franc as symbolic compensation for non-pecuniary damage. In respect of the costs and expenses incurred as a result of the proceedings before the Convention institutions, they claimed 165,000 French francs (FRF), that is FRF 90,000 for lawyers' fees and FRF 75,000 for research and documentation, journeys to London, reproduction costs and postal charges, journeys to Strasbourg and "various services".

61. The Delegate of the Commission submitted that the finding of a violation of Article 10 would constitute sufficient compensation for non-pecuniary damage.

62. The Government also considered that, if the Court were to find a violation, the non-pecuniary damage would be sufficiently made good by that finding. As to costs and expenses, they left the matter to the Court's discretion.

63. The Court considers that the non-pecuniary damage suffered by the applicants is sufficiently made good by the finding of a breach of Article 10. It assesses costs and expenses, on an equitable basis, at FRF 100,000.

B. Default interest

64. According to the information available to the Court, the statutory rate of interest in France at the date of adoption of the present judgment is 3.36% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by fifteen votes to six that there has been a breach of Article 10 of the Convention;

2. *Holds* unanimously that the finding of a breach in itself constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicants;

3. *Holds* unanimously
   (a) that the respondent State is to pay the applicants, within three months, 100,000 (one hundred thousand) French francs for costs and expenses;
   (b) that simple interest at an annual rate of 3.36% shall be payable on this sum from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 September 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to this judgment:
(a) concurring opinion of Mr De Meyer;
(b) concurring opinion of Mr Jambrek;
(c) joint dissenting opinion of Mr Foighel, Mr Loizou and Sir John Freeland;
(d) dissenting opinion of Mr Morenilla;
(e) dissenting opinion of Mr Casadevall.

Initialled: R. B.
Initialled: H. P.

CONCURRING OPINION OF JUDGE DE MEYER

(*Translation*)

Freedom of expression implies just as much the right to present a public figure in a favourable light as the right to present him in an unfavourable light. Similarly, it implies just as much the right to disapprove of a judicial decision concerning him as the right to approve of it.

In particular, those who wish to serve the memory of such a figure and promote his rehabilitation cannot be forbidden to express themselves freely and in public to that effect.

It is natural that those who wish to impart ideas of this kind should direct attention to the merits of the person concerned or what they consider to be his merits. They cannot be required to mention in addition his errors and faults, whether real or supposed, or some of them.

What “pressing social need” could make things different where Pétain is concerned?

That is enough for me to be able to find in this case a manifest infringement of the freedom of expression.

CONCURRING OPINION OF JUDGE JAMBREK

1. I agreed with the majority that the applicants' criminal conviction was disproportionate and, as such, unnecessary in a democratic society, and that there had therefore been a breach of their right to freedom of expression, as protected by Article 10 of the Convention. In particular, I agreed that conviction of public defence of war crimes pursued the legitimate aims of the protection of the reputation or rights of others and the prevention of disorder or crime set forth in the second paragraph of Article 10 of the Convention.

The Court assessed requirements for compliance with Article 10 in the light of Article 17, and the latter in the light of all the circumstances of the case (paragraph 38 of the judgment). Having reached the conclusion of a breach of Article 10, the Court considered that it was not appropriate to apply Article 17 (paragraph 58 of the judgment).

Article 17 may, as the Court noted, "remove the protection of Article 10" from certain expressive acts, such as, for example, any attempt to deny or revise in a publication "Nazi atrocities and persecutions" or "German omnipotence and barbarism" (paragraph 47 of the judgment) or even the Holocaust would represent.

The events in question and their interpretation in the Court's view do not belong to the category of established historical facts whose negation or revision would in itself aim at the destruction of certain rights and freedoms set forth in the Convention or at their limitation to a greater extent than is provided for in the Convention; they rather represent a part of an ongoing debate among historians.

2. In order that Article 17 may be applied, the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others (see the United Communist Party of Turkey and Others v. Turkey judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, p. 16, § 23).

Therefore, the requirements of Article 17 are strictly scrutinised, and rightly so.

The Court, in its case-law on Article 10, has always affirmed that freedom of expression is one of the essential foundations of democratic society and should be interpreted broadly where the actions of journalists or members of parliament or political or historical debate are concerned. Even in the case of controversial views, the principle must be respected. The best protection for democracies against the resurgence of the racist, anti-Semitic and subversive doctrines which originated in the totalitarian regimes of national-socialist or communist persuasion remains the possibility of

engaging in a free critique which reveals the real dangers and the ways to forestall them. Democracies, unlike dictatorships, can cope with the sharpest controversies and promote what should be the democratic ideal resulting from the European Convention on Human Rights.

3. On the other hand, the requirements of Article 17 also reflect concern for the defence of democratic society and its institutions.

The European Convention was drafted as a response to the experience of world-wide, and especially European, totalitarian regimes prior to and during the Second World War. One of its tasks was, according to Rolv Ryssdal, to "sound the alarm at their resurgence" (Rolv Ryssdal, "The Expanding Role of the European Court of Human Rights", in Asbjorn Eide and Jan Helgesen (eds.), *The Future of Human Rights Protection in a Changing World*, Oslo, Norwegian University Press, 1991). It could be assumed that this original aim also corresponds to the more recent dangers to the European principles of democracy and the rule of law.

The Court recognised quite early in its jurisprudence that both the historical context in which the Convention was concluded and new developments require "a just balance between the protection of the general interest of the community and the respect due to fundamental human rights, while attaching particular importance to the latter" (judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A no. 6, p. 32, § 5). Ten years later it similarly held that "some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention", referring also to the Preamble to the Convention statement that "Fundamental Freedoms … are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which [the Contracting States] depend" (in the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 28, § 59).

It is also noteworthy that the Court within the same context gave credence to the principle of a "democracy capable of defending itself" (*wehrhafte Demokratie*). In this connection the Court took into account "Germany's experience under the Weimar Republic and during the bitter period that followed the collapse of that regime up to the adoption of the Basic Law in 1949. Germany wished to avoid a repetition of those experiences by founding its new State on the idea that it should be a 'democracy capable of defending itself'" (in the Vogt v. Germany judgment of 26 September 1995, Series A no. 323, p. 28, § 59).

4. In conclusion, while I would firmly agree that the requirements of Article 17 of the Convention should be applied with strict scrutiny, the spirit in which that Article was drafted should be respected, and its relevance upheld.

JOINT DISSENTING OPINION OF JUDGES FOIGHEL, LOIZOU AND Sir John FREELAND

1. We agree that the conviction and sentencing of the applicants in this case amounted to an interference with their right to freedom of expression as guaranteed by Article 10 of the Convention and that the restriction which this interference represented is to be regarded as having been "prescribed by law" in the sense of paragraph 2 of that Article and as having pursued a legitimate aim under that paragraph. Where we differ from the majority is in the assessment of whether the interference is to be treated as "necessary in a democratic society".

2. As to that question, it should first be noted that the text in question was published as a full-page advertisement, paid for by the applicants' associations, in the edition of *Le Monde* for 13 July 1984. The text contained a series of slogans, in capital letters and bold type (People of France, you have short memories if you have forgotten…), interspersed with short passages in laudatory terms purporting to summarise episodes in the career of Philippe Pétain. It was clearly intended to drum up support for the applicants' associations and, no doubt to that end, concluded with an invitation to readers to write to those associations. Nowhere, however, did it say anything about the reopening of the case of Philippe Pétain, which has been claimed by the applicants to have been the purpose of the advertisement. Nor can it be regarded as in any valid sense a contribution to genuine historical debate, given its wholly one-sided and promotional character.

3. Secondly, it perhaps needs to be said that it is not for the Court to decide whether the conviction of the applicants of apology for serious offences of collaboration was or was not justified as a matter of French law. That conviction proceeded from the judgment of the Paris Court of Appeal of 26 January 1990, in which the text of the advertisement was carefully analysed, and was upheld by the Court of Cassation in its judgment of 16 November 1993. The relevant question for our Court is whether the Convention test of necessity in a democratic society is satisfied in the case of this outcome in the domestic courts.

4. As is clear from the Court's case-law, the adjective "necessary", as part of the test of necessity in a democratic society, is to be understood as implying a "pressing social need" and it is in the first place for the national authorities to determine whether the interference in issue corresponds to such a need, for which they enjoy a greater or lesser margin of appreciation. In cases involving the right to freedom of expression the Court has generally been particularly restrictive in its approach to the margin of

appreciation, although it has been prepared to accept a wider margin in relation to issues likely to offend personal convictions in the religious or moral domain. That latter category, based as it is on the principle that the margin of appreciation is wider where the aim pursued cannot be objectively defined on the European scale, is in our view not to be regarded as confined to those particular issues. It may include an issue such as that in question in the present case, where the aim pursued arose out of historical circumstances peculiar to France and where the French authorities were uniquely well placed, by virtue of their direct and continuous contact with the vital forces of their country, to assess the consequences for the protection of the rights of other groups, such as the associations of former Resistance fighters and of deportees who were civil parties to the domestic proceedings, and more generally for the process of healing the wounds and divisions in French society resulting from the events of the 1940s. We would particularly underline that Article 10 § 2 of the Convention refers not only to the protection of the rights of others but also to the duties and responsibilities which accompany the exercise of the freedom of expression; and we consider it entirely justifiable – indeed, only natural – that in circumstances such as those of the present case full and sympathetic account should be taken of the extent of offensiveness of the publication to the sensitivities of groups of victims affected by it.

5. Are the French authorities, then, to be regarded as having exceeded their margin of appreciation by virtue of the facts that the legislature has (as part of a law which was primarily concerned to establish an amnesty for serious offences of collaboration) criminalised acts of apology for such offences and that the courts have determined the publication of an advertisement in the terms in question to constitute such an act and imposed the penalties which they did? It has (unsurprisingly) not been argued before the Court that the criminalisation of acts of apology for serious offences of collaboration in itself went beyond the margin of appreciation. As regards the content of the advertisement, the applicants have, in order to distance Philippe Pétain from personal responsibility for the darker side of what was done in France during the Vichy era and as part of the vindication of his actions during the period, pointed to the references in the text to “Nazi atrocities and persecutions” and its claim that he afforded protection to the French people from “German omnipotence and barbarism”. Yet, as the Paris Court of Appeal observed in its judgment of 26 January 1990, the text said

nothing at all about the notorious racist, and in particular anti-Jewish, activities undertaken by the Pétain regime itself[1], beginning with the Act relating to aliens of Jewish race which was signed by him on 3 October 1940.

6. The distortion inherent in this contrasting silence about one of the most unsavoury features of the Pétain regime is capable of being understood as amounting to implicit support for what was done. Even if such a distortion is, however, insufficient, because too indirect or remote, to constitute an "activity or … act aimed at the destruction of any of the rights and freedoms set forth" in the Convention, within the meaning of its Article 17, so as to disable the applicants from relying on Article 10, the principle which underlies Article 17 is a factor which can properly be taken into account in the assessment of the exercise of the margin of appreciation and the existence of necessity. That principle is one of firm discouragement of the promotion of values hostile to those embodied in the Convention. Having regard to the conclusions reached in the judgment of the Paris Court of Appeal of 26 January 1990 as to the effect to be given to the wording of the advertisement, and having regard to the concern which the French authorities, with their particular familiarity with the historical background and current context, could legitimately have to demonstrate that racism and, in particular, anti-Semitism, are not to be condoned, we consider that the margin of appreciation should not be treated as having been exceeded and that the test of necessity in a democratic society has been satisfied in this case.

7. On the question of proportionality, we would note only that the penalty imposed by the Paris Court of Appeal was limited to the requirement of a symbolic payment of one franc to the civil parties and the ordering of publication of excerpts from that Court's judgment in *Le Monde*.

8. We would add that our conclusion on the question of necessity in a democratic society is confined to the circumstances of the present case and should of course not be understood as suggesting in any way that it is permissible to restrict genuine debate about controversial historical figures. Such debate about the role of Philippe Pétain has been, and no doubt will continue to be, engaged in vigorously in France.

9. For the reasons indicated above, we voted against the finding of a violation of Article 10 of the Convention in this case.

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1. "Undoubtedly, the ugliest side of Vichy's abortive moral revolution was its vicious racism, and in particular its own special brand of anti-Semitism. Recent research has established beyond question that, far from being a Nazi imposition, Vichy's anti-Semitism was entirely home-grown and in certain respects even exceeded German requirements" (*Twentieth Century France: Politics and Society* 1898–1991 by James F. McMillan, pp. 138–39. See also *Vichy France and the Jews* by Michael R. Marrus and Robert O. Paxton, particularly pp. 365–72).

DISSENTING OPINION OF JUDGE MORENILLA

(*Translation*)

1. I regret that I am unable to agree with the finding of a violation of Article 10 of the Convention, in the very special circumstances of the present case. In my opinion, the national courts were in a better position than our Court to rule on any criminal consequences of publication of the advertisement in question and, accordingly, to assess the necessity of ordering the applicants, for publicly defending the crimes of collaboration with the enemy (section 24 of the Freedom of the Press Act of 29 July 1881), to pay the civil parties the sum of one franc in damages and to have the judgment published at their expense. European supervision consists, as our Court has said repeatedly since its Handyside v. the United Kingdom judgment of 7 December 1976, in reviewing under Article 10 "the decisions [the national courts] delivered in the exercise of their power of appreciation" (Series A no. 24, p. 23, § 50).

2. As the President of the Commission, Mr Trechsel, observed in his dissenting opinion, referring to our *Sunday Times* v. the United Kingdom (no. 1) judgment of 26 April 1979 (Series A no. 30, p. 36, § 59), the margin of appreciation of the Contracting States is wider where the aim pursued cannot be objectively defined on a European scale. In the present case, assessment of how a country's history should be presented and of the effect of a publication on the feelings of the population in an important sector of society, with a view to determining the necessity in a democratic society of imposing a restriction like the one in issue, is a matter for the judicial authorities of that country, who are "called upon to interpret and apply the laws in force" (see the Handyside judgment previously cited, p. 22, § 48).

3. On the other hand, I agree with the rest of the opinion of the majority, in particular their view that the applicants' conviction for aiding and abetting a public defence of the crimes of collaboration with the enemy amounted to interference with their right to impart information or ideas, notwithstanding the rather symbolic nature of the penalty. I nevertheless abstain, for the reasons set out above, from making a personal assessment of the text of the advertisement, which was signed by two associations legally constituted under domestic law, or of its effect on contemporary European society, more than half a century after the historical events it referred to.

DISSENTING OPINION OF JUDGE CASADEVALL

(*Translation*)

1. With the minority, bearing in mind the presentation of the facts and the content of the text in issue, I consider that there has been no breach of Article 10 of the Convention in the present case. The interference was prescribed by domestic law, pursued a legitimate aim and was, in my opinion, necessary for the purposes of paragraph 2 of Article 10.

2. That second paragraph provides that exercise of the freedom of expression – a right which carries with it duties and responsibilities – may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law, as measures necessary for the protection of certain legally protected interests.

3. The possibility of prescribing interference, and the State's margin of appreciation, which is wider in certain fields[1], lead me to consider that the national courts were best placed to assess the facts and the social consequences of publication of the text in issue, since, as the Government emphasised in their memorial, "…those circumstances refer to past events and to France's debate with its own history". With regard to the severity which should be shown, I do not accept the idea, put forward by the majority in paragraph 55 of the judgment, that the need for severity diminishes with the passage of time ("… forty years on …").

4. Quite clearly, the text does not take the form of an article of substance, making a serious historical analysis, but of an advertisement (whose insertion in *Le Monde* was paid for) with passages in large, bold type, expressly urging readers to write to the two associations named at the foot of the page – the usual practice where advertisements are concerned.

5. It cannot be maintained that this text was likely to contribute to any debate of general interest for the French people and their history. In the recent case of Hertel v. Switzerland (judgment of 25 August 1998, *Reports* 1998-VI) the issue was different: the applicant in that case had been subjected to censorship for publishing in a specialist magazine, distributed mainly to subscribers, an article in which he had put forward a technical and scientific argument – whether this was correct or incorrect being of no consequence – relating to an environmental and public-health question.

1. "In assessing this question, the Court recalls that the domestic margin of appreciation is not identical as regards each of the aims listed in Article 10 § 2" (Worm v. Austria judgment of 29 August 1997, *Reports of Judgments and Decisions* 1997-V, p. 1551, § 49).

6. It is not for me to judge the text of the advertisement, still less to make a historical analysis of the content, for which I would not be qualified. However, the Government pointed out in their observations that it contained manifest errors, falsehoods and above all omissions which had made it possible to paint a portrait scarcely compatible with, and indeed even contrary to, the historical reality. These are facts which were considered and assessed by the French courts before they convicted the applicants.

7. In the Zana v. Turkey case (judgment of 25 November 1997, *Reports* 1997-VII) the Court analysed what the applicant had said during a press interview. It observed: "Those words could be interpreted in several ways but, at all events, they are both contradictory and ambiguous…" (see paragraph 58) and "That statement cannot, however, be looked at in isolation. It had a special significance in the circumstances of the case, as the applicant must have realised" (see paragraph 59). It concluded that the punishment imposed on the applicant could reasonably be regarded as answering a pressing social need and that the reasons adduced by the national authorities were relevant and sufficient (see paragraph 61) having regard to the margin of appreciation which national authorities had "… in such a case …" (see paragraph 62). That case concerned a public defence of an act punishable as a serious crime under national law. A similar analysis was required, in my opinion, in the present case. In any event, the applicants were ordered only to pay the civil parties the symbolic sum of one franc and to have the judgment published at their expense.

8. It should also be noted, as Mr Geus pointed out (report of the Commission, p. 2918), that there was a manifest contradiction between the content of the advertisement and the aim allegedly pursued by its authors.

9. Lastly, I share the concerns expressed by the President of the Commission, Mr Trechsel, in his dissenting opinion, regarding the very disturbing favourable conjuncture which apparently obtains at present for certain extreme-right ideas in Europe.

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

FOURTH SECTION

CASE OF LEŠNÍK v. SLOVAKIA

(Application no. 35640/97)

JUDGMENT

STRASBOURG

11 March 2003

FINAL

11/06/2003

In the case of Lešník v. Slovakia,

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

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 17 December 2002 and 4 February 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 35640/97) against the Slovak Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovakian national, Mr Alexej Lešník ("the applicant"), on 10 March 1997.

2. The applicant, who had been granted legal aid, was represented by Mr J. Hrubala, a lawyer practising in Banská Bystrica. The Slovakian Government ("the Government") were represented by their Agent, Mr P. Vršanský.

3. The applicant alleged, in particular, that his right to freedom of expression had been violated as a result of his conviction for statements in respect of a public prosecutor.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section.

7. By a decision of 8 January 2002 the Chamber declared the application partly admissible.

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1940 and lives in Košice. He is a businessman.

10. On 2 December 1991 the applicant requested the Košice City Prosecutor's Office to bring criminal proceedings against H., a businessman from the Czech Republic whom he suspected of having committed fraud. The request was examined by various authorities but no criminal proceedings were brought.

11. On 4 December 1992 the applicant complained to the police that two unknown men had left a message at the entrance to his flat saying that they would break his hands if he did not "abstain from writing". On 13 April 1993 the applicant complained to the police that a shot had been fired through a window in his flat. He claimed that he was being harassed because he had written articles about several former members of the Communist Party. Subsequently the applicant was informed that the police could not identify the perpetrators.

12. On 5 April 1993 the applicant complained to the head of the Košice Telecommunications Authority that, following a change of the central switchboard, telephone conversations at his agency were frequently interrupted. The applicant stated that there was a noise on the telephone prior to the interruption of a call which was similar to that which had formerly occurred when telephone calls were tapped by the communist secret police. He requested that the fault be remedied.

13. On 10 June 1993 a police investigator brought criminal proceedings against the applicant on the ground that he was suspected of having stolen goods from H. The decision was based on a written communication by the district prosecutor in Semily (Czech Republic).

14. On 1 November 1993 the applicant asked the Košice Regional Prosecutor to discontinue the criminal proceedings against him. In his letter the applicant complained, without providing further details, that the police investigator dealing with his case had obtained information on him by

unlawfully tapping his telephone. He requested that criminal proceedings be brought against a person or persons unknown for illegal telephone tapping.

15. On 6 December 1993 the applicant addressed a letter to P., the Košice I district prosecutor. The letter contained, *inter alia*, the following statements:

> "Since you have not succeeded, comrade prosecutor, in attaining your aims in one area, you continue energetically, in accordance with the practice of the [former] State Security agents, to fabricate another case [against the applicant] as you have learned to do under the so-called infallible socialist law. On this occasion I can assure you, however, that I have not bowed to the high representatives of the former political system and, in particular, the [former] State Security agents who paid at least as much attention to my person as you do now. I do not intend today to let myself be intimidated, especially not by individuals such as yourself, a person with a dubious past, not to speak of [your] other qualities ...
>
> It is not only my earlier experience of managing a detective agency which makes it difficult for me to associate you with objectivity, professionalism and respect for the law. I would therefore like to remind you on this occasion that you are also bound by the law despite the fact that you probably consider yourself ... to be an almighty lord of the Tatra [Mountains] and the Váh [River] and, as such, beyond anyone's reach as you are, for the time being, under the protective hand of comrade [M.]. Abuse of the law may have very unpleasant consequences for you. For the time being, I will only mention some of the abuses which do not call for any comments."

16. In the letter the applicant further stated that the addressee was responsible for the dismissal of his criminal complaint against H. and the institution of criminal proceedings against him in 1993, and that he had unlawfully ordered the tapping of his telephone.

17. P. submitted the letter to his hierarchical superior, the Košice Regional Prosecutor. In a letter of 17 March 1994 the latter informed the applicant that it had not been established that P. had given an order to tap his telephone or that he had otherwise acted unlawfully.

18. In the meantime, on 7 March 1994, the applicant complained to the General Prosecutor that P. had committed an offence in that he had misused his authority. The letter read, *inter alia*, as follows:

> "[P.] accepted the request of [H.'s lawyer] ... that no criminal proceedings would be brought against [H.] in Slovakia notwithstanding that sufficient evidence existed to do so ... Of course, money paid by [H.] with a view to covering up his fraudulent activity also played a role in the matter. It would therefore be worth examining in this context whether [an offence of bribery was not committed] ...
>
> Following a ... threat ... by ... an investigator from the Košice I Investigation Office in the context of the case of [H.] ... I went to the aforesaid office on 10 June 1993. After I had rejected an 'agreement' which was proposed to me, [the investigator], a former State Security agent, accused me of having stolen [goods from H.] in 1991. Thus [P.] has been unwilling to bring proceedings against [H.] since 1991, and has arranged, through a police investigator who can easily be blackmailed, for proceedings to be brought against me in revenge for the justified complaints I had lodged against him. [P.] did so contrary to [the relevant provisions of the Code of Criminal

Procedure] because so far ... there is no evidence before [the relevant authorities] from which to conclude with sufficient certainty that I stole anything from [H.] Subsequently I realised that my telephone, which was also used by my detective agency, had been tapped contrary to Article 88 of the Code of Criminal Procedure."

19. On a petition by P., the General Prosecutor's Office agreed that criminal proceedings be brought against the applicant for insulting a public prosecutor. The case was transferred to a public prosecutor in Liptovský Mikuláš. On 2 June 1994 the applicant was charged with insulting a public official in his letters of 6 December 1993 and 7 March 1994 mentioned above.

20. In a letter of 5 September 1994 addressed to the Košice Regional Prosecutor's Office, the applicant expressed the view that the purpose of the harassment to which he was subjected in 1992 and 1993 had been to make him withdraw his criminal complaint against H. He requested that an investigation be opened.

21. In September 1994 the newspaper *Necenzurované noviny* published an article by a third person describing the applicant's case in detail. It was entitled "How the Red Plague operates in Eastern Slovakia" and contained quotations from the applicant's letters. The relevant parts read as follows:

"... It is on this basis that the district prosecutor's office in Liptovský Mikuláš started a prosecution against [the applicant] on 2 June 1994. In order to give the reader an idea of what is possible in [Slovakia], I will quote the text which, according to public prosecutor [L.], constitutes a criminal offence.

In his message of 7 March 1994 addressed to the General Prosecutor in Bratislava, [the applicant] stated in respect of [public prosecutor P.] that in the criminal case of [H.] he had deliberately acted wrongly so that 'he could satisfy his friend [M.] from Košice, the former President of the Košice City Court whom the City Committee of the Communist Party of Slovakia had identified as a key official and who is now [H.]'s lawyer, that no criminal proceedings would be brought against [H.] in Slovakia notwithstanding that sufficient evidence existed to do so ... Of course, money paid by [H.] with a view to covering up his fraudulent activity also played a role in the matter. It would therefore be worth examining in this context whether the facts do not fall under Articles 161 and 162 of the Criminal Code [which govern the offence of bribery]'.

In the same document [the applicant] stated: 'Subsequently I realised that my telephone, which was also used by my detective agency, had been tapped contrary to Article 88 of the Code of Criminal Procedure.'

In a letter dated 6 December 1993 and addressed to public prosecutor [P.], [the applicant] stated among other things: 'Since you have not succeeded, comrade prosecutor, in attaining your aims in one area, you continue energetically, in accordance with the practice of the [former] State Security agents, to fabricate another case as you have learned to do under the so-called infallible socialist law. On this occasion I can assure you, however, that I have not bowed to the high representatives of the former political system and, in particular, the [former] State Security agents who paid at least as much attention to my person as you do now. I do not intend today

to let myself be intimidated, especially not by individuals such as yourself, a person with a dubious past, not to speak of [your] other qualities ...'

In the same letter [the applicant] went on: 'It is not only my earlier experience of managing a detective agency which makes it difficult for me to associate you with objectivity, professionalism and respect for the law. I would therefore like to remind you on this occasion that you are also bound by the law despite the fact that you probably consider yourself to be an almighty lord of the Tatra [Mountains] and the Váh [River] and, as such, beyond anyone's reach since you are, for the time being, under the protective hand of comrade [M.]. Abuse of the law may have very unpleasant consequences for you. For the time being, I will only mention some of the abuses which do not call for any comments.'

Thus, on the basis of these statements, prosecutor [L.], on the instructions of [the General Prosecutor], started a prosecution against [the applicant]. Every decent person must be astonished to learn of such stupid behaviour."

22. On 7 November 1994 the applicant stated before the prosecutor in Liptovský Mikuláš that he had intended to criticise P. for his wrongful actions but not to insult him. He further informed the public prosecutor dealing with the case that he had not written any newspaper article on the issue, but had merely provided the author with the relevant documents.

23. On 8 November 1994 the Košice Regional Prosecutor submitted a document to the district prosecutor's office in Liptovský Mikuláš indicating, with reference to the relevant register, that the Košice I district prosecutor had not ordered the tapping of the applicant's telephone between 1992 and 1994.

24. On 23 November 1994 the Liptovský Mikuláš district prosecutor indicted the applicant before the Liptovský Mikuláš District Court on the charge of insulting a public official. On 25 November 1994 the Liptovský Mikuláš District Court transferred the case to the Košice I District Court for reasons of jurisdiction. As the public prosecutor affected by the applicant's statements was responsible for the same district, the Košice Regional Court, on 9 March 1995, transferred the case to the Trebišov District Court.

25. On 25 April 1995 the Trebišov District Court issued a penal order in which it convicted the applicant of attacking a public official, on the ground that, in his letters of 6 December 1993 and 7 March 1994, he had insulted a public prosecutor. The court sentenced the applicant to four months' imprisonment suspended for a probationary period of one year.

26. The applicant appealed against the order. The case was assigned to another judge. On 25 June 1996 the Trebišov District Court convicted the applicant under Article 156 § 3 of the Criminal Code of insulting a public official and sentenced him to four months' imprisonment suspended for a probationary period of one year. The judgment stated, in particular, that in his letters the applicant had alleged that the public prosecutor had deliberately acted improperly as regards the applicant's request of 1991 for criminal proceedings to be brought against H.; that the public prosecutor

had done so at the request of the lawyer representing H.; and that H. had paid a sum of money for this purpose. The District Court also noted that the applicant had accused P. of having been unwilling to uphold his criminal complaint, of having ordered criminal proceedings to be brought against him and of having his telephone illegally tapped.

27. The judgment further stated that the applicant had not shown that the public prosecutor in question had failed to act in accordance with the law. The court therefore concluded that the applicant's statements were defamatory and grossly offensive.

28. The District Court did not accept the applicant's defence that the sole purpose of his letters had been to have his request for criminal proceedings to be brought against H. dealt with appropriately. The court noted that, besides the two letters in question, the applicant had sent a considerable number of other complaints concerning the same issue which, however, had contained no defamatory or offensive remarks. Both the Košice Regional Prosecutor's Office and the General Prosecutor's Office had dealt with the applicant's complaints and had dismissed them as being unsubstantiated.

29. The applicant appealed, both personally and through his lawyer. He alleged that the purpose of his remarks had been to prevent further delays in the proceedings concerning his criminal complaint of 1991, and not to offend P. He further claimed that the statements in question were not offensive and did not constitute an offence.

30. On 24 September 1996 the Košice Regional Court dismissed the appeal after hearing evidence from the applicant and asking him to substantiate his allegations.

31. The Regional Court found that in the statements made in his letters of 6 December 1993 and 7 March 1994 the applicant had grossly insulted a public prosecutor without justification. In particular, it stated that the applicant had failed to substantiate his allegation that H. had paid a sum of money in order to prevent criminal proceedings being brought against him and reiterated that the General Prosecutor's Office had not established that P. had acted unlawfully in this or any other respect.

32. The Regional Court further considered defamatory and grossly offensive the applicant's statements that the public prosecutor had acted in accordance with the practice of the former State Security agents, had a dubious past, not to speak of his other qualities, and possibly considered himself to be an almighty lord of the Tatra Mountains and the Váh River who was "beyond anyone's reach".

33. In the Regional Court's view, the applicant had failed to show that he had a justified reason to make such statements. The court did not accept the applicant's argument that he had doubts about the past and qualities of the public prosecutor because the latter had studied socialist law, had failed

to take appropriate action on the applicant's criminal complaint of 1991, and initiated criminal proceedings against him.

34. In its judgment the Regional Court pointed out that the applicant had not been hindered in seeking redress before the appropriate authorities for the actions of P. which he considered inappropriate or unlawful. It held, however, that by making defamatory and offensive remarks the applicant had committed an attack against a public official within the meaning of Article 156 § 3 of the Criminal Code. The Regional Court upheld the sentence which the District Court had imposed on the applicant.

35. On 28 October 1996 the Košice IV District Office revoked the trading licence under which the applicant had been authorised, *inter alia*, to run a detective agency, on the ground that he had been convicted of an offence. On 12 December 1996 the Košice Regional Office dismissed the applicant's appeal against this decision.

36. On 4 June 1997 the Košice Regional Court quashed the administrative decisions concerning the revocation of the applicant's trading licence and remitted the case to the Košice Regional Office. In its judgment the Regional Court noted that both administrative authorities, deciding at lower instances, had failed to establish any relevant legal grounds for their decisions.

37. On 18 November 1997 the Trebišov District Court issued a decision noting that the applicant had not committed any offence during the probationary period and stating that he was to be considered as not having been convicted.

38. As from 1 January 1998 the relevant law was amended in that persons wishing to run private security agencies were required to obtain the approval of the police headquarters. The applicant did not ask for such approval and returned his trading licence of 7 January 1993, under which he had been allowed to run a detective agency, to the Košice IV District Office on 3 June 1998. In the meantime, on 18 February 1998, he registered with the relevant authorities as running a different business. He attached a certificate indicating that his criminal record was clean and received a new trading licence on 6 April 1998.

II. RELEVANT DOMESTIC LAW

39. Article 156 § 3 of the Criminal Code provides that a person who utters grossly offensive or defamatory remarks in respect of a public official relating to that official's exercise of his or her powers shall be punished by up to one year's imprisonment or a fine.

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

40. The applicant complained that his right to freedom of expression had been breached in that he had been convicted for having criticised the actions of a public prosecutor which he considered unlawful. He alleged a violation of Article 10 of the Convention, the relevant parts of which provide:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ... or for maintaining the authority and impartiality of the judiciary."

A. Existence of an interference

41. It was common ground that the applicant's conviction for insulting a public official and the suspended prison sentence imposed on him constituted an interference with his freedom of expression guaranteed by paragraph 1 of Article 10. The Court sees no reason to hold otherwise.

B. Justification of the interference

42. This interference would contravene Article 10 of the Convention unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in paragraph 2 of Article 10 and was "necessary in a democratic society" for achieving such aim or aims.

1. "Prescribed by law"

43. The applicant contended that the Criminal Code and the Code of Criminal Procedure had been enacted in 1961 and that, despite several amendments, their respective provisions were intended to harass citizens. For this reason, his conviction could not be regarded as lawful.

44. The Government maintained that the interference had been in accordance with Article 156 § 3 of the Criminal Code as in force at the relevant time. They considered irrelevant, when determining whether or not it was "prescribed by law", the date and circumstances of its enactment.

45. The Court notes that the interference in question had a legal basis, namely Article 156 § 3 of the Criminal Code, and is satisfied that the

application of the legal provisions contained therein to the applicant's case did not go beyond what could be reasonably foreseen in the circumstances. Accordingly, the interference was prescribed by law within the meaning of Article 10 § 2 of the Convention. As to the applicant's argument concerning the nature of the criminal law in Slovakia, it relates, in substance, to the question whether the interference resulting from the application of the relevant law in the present case was "necessary in a democratic society", which the Court will address below.

2. Legitimate aim

46. The applicant maintained that the interference in question had not pursued any legitimate aim as its main purpose had been to justify the failure by the public prosecutor concerned to proceed with the applicant's criminal complaint against another person.

47. In the Government's view, the interference pursued the legitimate aim of protecting the reputation and rights of the public prosecutor concerned and also the aim of protecting the authority and impartiality of the judiciary.

48. The Court notes that the criminal proceedings instituted against the applicant on account of his critical statements in respect of P. pursued the legitimate aim of protecting the latter's reputation and rights with a view to permitting him to exercise his duties as a public prosecutor without undue disturbance.

3. "Necessary in a democratic society"

(a) Arguments before the Court

49. The applicant submitted that the interference had not been necessary in a democratic society. He pointed out, in particular, that his statements were value judgments which were not susceptible of proof; that their aim had not been to offend the public official concerned but to criticise the latter's actions which he considered unlawful; and that he had neither published his letters nor disseminated them to a wider audience. Lastly, the applicant argued that the interference had been disproportionate as a prison sentence had been imposed on him and his trading licence had been revoked following his conviction.

50. The Government contended that in his letters the applicant had alleged that the public prosecutor had misused his authority and acted unlawfully. However, those allegations, which had not been made in the context of a debate on matters of public interest, had turned out to be unsubstantiated. The interference complained of had therefore been justified by a pressing social need, namely to protect a public official against insults capable of affecting his rights and reputation. Lastly, the Government maintained that the reasons

relied on by the domestic courts were relevant and sufficient, and that the interference had been proportionate to the legitimate aim pursued.

(b) The Court's assessment

(i) The relevant principles

51. According to the Court's case-law (see the recapitulation in *Janowski v. Poland* [GC], no. 25716/94, §§ 30 and 33, ECHR 1999-I, and *Nikula v. Finland*, no. 31611/96, §§ 44 and 48, ECHR 2002-II, with further references), the adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

52. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

53. The limits of acceptable criticism in respect of civil servants exercising their powers may admittedly in some circumstances be wider than in relation to private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions. Moreover, civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty.

(ii) Application of the aforementioned principles to the instant case

54. Public prosecutors are civil servants whose task it is to contribute to the proper administration of justice. In this respect they form part of the judicial machinery in the broader sense of this term. It is in the general interest that they, like judicial officers, should enjoy public confidence. It

may therefore be necessary for the State to protect them from accusations that are unfounded.

55. There is no doubt that in a democratic society individuals are entitled to comment on and criticise the administration of justice and the officials involved in it. However, such criticism must not overstep certain limits. The Court has held that the national authorities are in principle better placed to ensure, within the margin of appreciation reserved to them, a fair balance between the various interests at stake in similar cases.

56. In the present case the interference with the applicant's freedom of expression resulted from the domestic courts' finding that his statements in two letters of 6 December 1993 and 7 March 1994 had grossly insulted a public prosecutor without justification. The Court's task is to examine whether a fair balance was struck between the competing rights and interests: the applicant's right to freedom of expression on the one hand and the public prosecutor's right to have his personal rights protected on the other hand. In particular, when assessing the necessity of the impugned measure, the Court must determine whether or not the domestic courts overstepped their margin of appreciation when convicting the applicant.

57. While the applicant's statements in respect of the professional and personal qualities of the public prosecutor concerned could be considered as value judgments which are not susceptible of proof, the Court notes that the above-mentioned letters also contained accusations of unlawful and abusive conduct by the latter. Thus the applicant alleged, in particular, that the public prosecutor had unlawfully refused to uphold his criminal complaint, had abused his powers and had in that context been involved in bribery and unlawful tapping of the applicant's telephone. Those allegations are, in the Court's view, statements of fact which the domestic courts rightly requested the applicant to support by relevant evidence.

58. However, the domestic courts found, after examining all the available evidence, that the applicant's above statements of fact were unsubstantiated. There is no information before the Court which would indicate that this finding was contrary to the facts of the case or otherwise arbitrary. The courts dealing with the case duly examined the circumstances in which the insulting statements were made and whether they could be justified, for example by the conduct of the public prosecutor in question. The Court is satisfied that the reasons given by the domestic courts in respect of the applicant's statements accusing P. of misconduct and breaches of the law are sufficient and relevant.

59. Those accusations were of a serious nature and were made repeatedly. They were capable of insulting the public prosecutor, of affecting him in the performance of his duties and also, in the case of the letter sent to the General Prosecutor's Office, of damaging his reputation.

60. Admittedly, the applicant's statements were aimed at seeking redress before the relevant authorities for the actions of P. which he considered

wrong or unlawful. In this connection the Court notes, however, that the applicant was not prevented from using appropriate means to seek such redress (see paragraphs 28 and 34 above, and also *Tammer v. Estonia*, no. 41205/98, § 67, ECHR 2001-I, with further reference).

61. Since the relevant parts of the letters were also published in a newspaper, it is conceivable that they opened a possibility of a public debate. In this context the Court must take into consideration that the newspaper article in question was written by a third person and that the domestic courts did not rely on that article when convicting the applicant. However, the harm caused to the public prosecutor concerned by the statements of fact, which the applicant could not prove to have been true, must have been aggravated to a certain extent by the publication of the letters, to which the applicant had after all contributed by providing the author with the relevant documents (see paragraph 22 above).

62. As to the applicant's argument that the interference in question was disproportionate in that, in particular, his trading licence was withdrawn following his conviction, the Court notes that on 4 June 1997 the Košice Regional Court quashed the relevant administrative decisions as having no legal grounds. Furthermore, in its decision of 8 January 2002 on the admissibility of the present application the Court dismissed the applicant's complaint under Article 8 of the Convention in this respect, noting that the applicant had not shown that he had suffered any damage as a result of the decisions to revoke his trading licence and that, in any event, it had been open to him to claim compensation in this respect under the State Liability Act of 1969.

63. Although the sanction imposed on the applicant – four months' imprisonment suspended for a probationary period of one year – is not insignificant in itself, the Court notes that it is situated at the lower end of the applicable scale.

64. In view of the above considerations and bearing in mind that a certain margin of appreciation is left to the national authorities in such matters, the Court finds that the interference complained of was not disproportionate to the legitimate aim pursued and can be regarded as "necessary" within the meaning of Article 10 § 2 of the Convention.

65. There has consequently been no breach of Article 10 of the Convention.

FOR THESE REASONS, THE COURT

Holds by five votes to two that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 11 March 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Sir Nicolas Bratza and Mr Maruste is annexed to this judgment.

N.B.
M.O'B.

JOINT DISSENTING OPINION OF JUDGES Sir NICOLAS BRATZA AND MARUSTE

We are unable to share the view of the majority of the Chamber that the applicant's rights under Article 10 of the Convention were not violated in the present case. In our view, the prosecution of the applicant and the imposition on him of a suspended sentence of imprisonment for insulting a public prosecutor, P., was neither a response to a pressing social need nor proportionate to any legitimate aim pursued.

Like the majority of the Chamber, we accept that the impugned statements were of a serious nature, accusing P., as they did, of an abuse of his powers as a prosecutor and going as far as to impute to P. the acceptance of a bribe. We accept, too, the finding of the domestic courts that the accusations had not been proved by the applicant to be true and that they were insulting of P.

However, unlike the majority of the Chamber, we attach central, if not decisive, importance to the fact that the impugned statements which were the subject of the prosecution were not made to the media or otherwise published by the applicant to the outside world but were contained in two letters, the first addressed personally to P. himself and the second to the General Prosecutor, in his capacity as P.'s ultimate hierarchical superior.

The Court has in several cases observed (see, in particular, *Janowski v. Poland* [GC], no. 25716/94, ECHR 1999-I, and *Nikula v. Finland*, no. 31611/96, ECHR 2002-II) that it may be necessary to protect public servants, including prosecutors, from offensive, abusive and defamatory attacks which are calculated to affect them in the performance of their duties and to damage public confidence in them and the office they hold. However, these cases have all concerned written or verbal attacks made in public and not, as in the present case, those made in private correspondence to the public servant concerned, where the same considerations do not appear to us to apply. Not only are the limits of acceptable criticism of a public servant wider than in relation to private individuals, but public servants must be prepared to tolerate such criticism, where it is personally addressed to them in private correspondence, even where such criticism is expressed in abusive, strong or intemperate terms and even where it consists of serious and unfounded allegations. Where as here the allegations are contained in a personal letter addressed to the public servant in question, it is only in the most exceptional circumstances that resort to criminal proceedings can be justified in terms of Article 10 of the Convention. We can find no such special circumstances in the present case.

The same is true of the statements contained in the letter to the General Prosecutor. As the hierarchical superior of P., the General Prosecutor was in our view the appropriate authority to receive complaints about the manner in which P. had carried out his public functions and in particular to investigate, as the applicant had requested him to do, whether the offence of bribery had been committed. Private citizens must remain in principle free to make complaints against public officials to their hierarchical superiors without the risk of facing prosecution for defamation or insult, even where such complaints amount to allegations of a criminal offence and even where such allegations prove on examination to be groundless.

It is true that in the present case the contents of the two letters reached the public domain when they were substantially reproduced in an article written by a third person relating details of the applicant's case. It is true, too, that the applicant admitted that he had provided the author of the article with the relevant documents. However, this is in our view of no significance in the particular circumstances of the present case. The charge of insulting P. was lodged against the applicant in June 1994, prior to the publication of the article, and related exclusively to the applicant's letters of 6 December 1993 and 7 March 1994. Moreover, at no stage during the criminal proceedings against the applicant in the district or regional court was any reliance placed on the fact that the allegations had been given wider publicity through the article nor was any reference made to the publication of the allegations in the judgments of either court, the applicant's conviction and the sentence imposed on him being based solely on the two letters which he had written.

In our view, there was in these circumstances an unjustified interference with the applicant's freedom of expression.

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

COURT (PLENARY)

CASE OF LINGENS v. AUSTRIA

(Application no. 9815/82)

JUDGMENT

STRASBOURG

8 July 1986

In the Lingens case[*],

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. W. GANSHOF VAN DER MEERSCH,
Mr. J. CREMONA,
Mr. G. WIARDA,
Mr. Thór VILHJÁLMSSON,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. J. GERSING,
Mr. A. SPIELMANN,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 27 November 1985 and 23-24 June 1986,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The present case was referred to the Court, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), on 13 December 1984 by the European Commission of Human Rights ("the Commission") and, subsequently, on 28

[*] Note by the Registrar: The case is numbered 12/1984/84/131. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

January 1985, by the Federal Government of the Republic of Austria ("the Government"). The case originated in an application (no. 9815/82) against Austria lodged with the Commission on 19 April 1982 under Article 25 (art. 25) by Mr. Peter Michael Lingens, an Austrian national.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Republic of Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46), and the Government's application referred to Article 48 (art. 48). They sought a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10).

2. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Mr. Lingens stated that he wished to take part in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 para. 3 (b)). On 23 January 1985, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mrs. D. Bindschedler-Robert, Mr. G. Lagergren, Sir Vincent Evans, Mr. R. Bernhardt and Mr. J. Gersing (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr. Wiarda assumed the office of President of the Chamber (Rule 21 para. 5). After consulting, through the Deputy Registrar, the Agent of the Government, the Commission's Delegate and Mr. Lingens' lawyer, he

- decided, on 11 February 1985, that there was no call at that stage for memorials to be filed (Rule 37 para. 1);

- directed, on 4 July, that the oral proceedings should open on 25 November 1985 (Rule 38).

On 30 January, the President had granted the applicant's lawyer leave to use the German language during the proceedings (Rule 27 para. 3).

5. On 4 May 1985, the International Press Institute (IPI), through Interights, sought leave to submit written observations under Rule 37 para. 2. On 6 July, the President agreed, subject to certain conditions.

After an extension of the time-limit originally granted, these observations were received at the Court's registry on 1 October 1985.

6. On 25 September 1985, the Chamber had decided under Rule 50 to relinquish jurisdiction forthwith in favour of the plenary Court.

In a letter received at the registry on 13 November the applicant submitted his claims under Article 50 (art. 50) of the Convention.

7. The hearings, presided over by Mr. Ryssdal who had become President of the Court on 30 May 1985, were held in public at the Human Rights Building, Strasbourg, on 25 November 1985. Immediately before they opened, the Court had held a preparatory meeting.

There appeared before the Court:
- for the Government
Mr. H. TÜRK, Legal Adviser,
Ministry of Foreign Affairs, Agent,
Mr. W. OKRESEK, Federal Chancellery,
Mr. G. FELSENSTEIN, Ministry of Justice, *Advisers*;
- for the Commission
Mr. H.G. SCHERMERS, *Delegate*;
- for the applicant
Mr. W. MASSER, Rechtsanwalt, *Counsel*,
Mr. P.M. LINGENS, *Applicant*.

The Court heard addresses by Mr. Türk and Mr. Okresek for the Government, by Mr. Schermers for the Commission and by Mr. Masser for the applicant and Mr. Lingens himself, as well as their replies to its questions.

On 6 December 1985 and 17 March 1986, Mr. Masser, complying with a request by the President, filed with the registry several documents giving further particulars of the applicant's claims for just satisfaction. The Government replied on 18 March 1986.

AS TO THE FACTS

8. Mr. Lingens, an Austrian journalist born in 1931, resides in Vienna and is editor of the magazine Profil.

I. THE APPLICANT'S ARTICLES AND THEIR BACKGROUND

9. On 9 October 1975, four days after the Austrian general elections, in the course of a television interview, Mr. Simon Wiesenthal, President of the Jewish Documentation Centre, accused Mr. Friedrich Peter, the President of the Austrian Liberal Party (Freiheitliche Partei Österreichs) of having served in the first SS infantry brigade during the Second World War. This unit had on several occasions massacred civilians behind the German lines in Russia. Mr. Peter did not deny that he was a member of the unit, but stated that he was never involved in the atrocities it committed. Mr. Wiesenthal then said that he had not alleged anything of the sort.

10. The following day, Mr. Bruno Kreisky, the retiring Chancellor and President of the Austrian Socialist Party (Sozialistische Partei Österreichs), was questioned on television about these accusations.

Immediately before the television interview, he had met Mr. Peter at the Federal Chancellery. Their meeting was one of the normal consultations between heads of parties with a view to forming a new government; it had

aroused great public interest because before the elections on 5 October the possibility of a Kreisky-Peter coalition government had been canvassed.

At the interview, Mr. Kreisky excluded the possibility of such a coalition because his party had won an absolute majority. However, he vigorously supported Mr. Peter and referred to Mr. Wiesenthal's organisation and activities as a "political mafia" and "mafia methods". Similar remarks were reported the next day in a Vienna daily newspaper to which he had given an interview.

11. At this juncture, the applicant published two articles in the Vienna magazine Profil.

12. The first was published on 14 October 1975 under the heading "The Peter Case" ("Der Fall Peter"). It related the above events and in particular the activities of the first SS infantry brigade; it also drew attention to Mr. Peter's role in criminal proceedings instituted in Graz (and later abandoned) against persons who had fought in that brigade. It drew the conclusion that although Mr. Peter was admittedly entitled to the benefit of the presumption of innocence, his past nevertheless rendered him unacceptable as a politician in Austria. The applicant went on to criticise the attitude of Mr. Kreisky whom he accused of protecting Mr. Peter and other former members of the SS for political reasons. With regard to Mr. Kreisky's criticisms of Mr. Wiesenthal, he wrote "had they been made by someone else this would probably have been described as the basest opportunism" ("Bei einem anderen würde man es wahrscheinlich übelsten Opportunismus nennen"), but added that in the circumstances the position was more complex because Mr. Kreisky believed what he was saying.

13. The second article, published on 21 October 1975, was entitled "Reconciliation with the Nazis, but how?" ("Versöhnung mit den Nazis - aber wie?"). It covered several pages and was divided into an introduction and six sections: "'Still' or 'Already'", "We are all innocent", "Was it necessary to shoot defenceless people?", "Why is it still a question for discussion?", "Helbich and Peter" and "Politically ignorant".

14. In the introduction Mr. Lingens recalled the facts and stressed the influence of Mr. Kreisky's remarks on public opinion. He criticised him not only for supporting Mr. Peter, but also for his accommodating attitude towards former Nazis who had recently taken part in Austrian politics.

15. Under the heading "'Still' or 'Already'" the applicant conceded that one could not object to such attitudes on grounds of "Realpolitik". According to him "the time has passed when for electoral reasons one had to take account not only of Nazis but also of their victims ... the former have outlived the latter ...". Nevertheless Austria, which had produced Hitler and Eichmann and so many other war criminals, had not succeeded in coming to terms with its past; it had simply ignored it. This policy risked delivering the country into the hands of a future fascist movement.

With regard to the then Chancellor, he added: "In truth Mr. Kreisky's behaviour cannot be criticised on rational grounds but only on irrational grounds: it is immoral, undignified" ("In Wahrheit kann man das, was Kreisky tut, auf rationale Weise nicht widerlegen. Nur irrational: es ist unmoralisch. Würdelos"). It was, moreover, unnecessary because Austrians could reconcile themselves with the past without seeking the favours of the former Nazis, minimising the problem of concentration camps or maligning Mr. Wiesenthal by exploiting anti-Semitism.

What was surprising was not that one "still" spoke about these things thirty years later but, on the contrary, that so many people were "already" able to close their eyes to the existence of this mountain of corpses.

Finally, Mr. Lingens criticised the lack of tact with which Mr. Kreisky treated the victims of the Nazis.

16. The second section commented on the attitude of Austrian society in general with regard to Nazi crimes and former Nazis. In the author's opinion, by sheltering behind the philosophic alternative between collective guilt and collective innocence the Austrians had avoided facing up to a real, discernible and assessable guilt.

After a long disquisition on various types of responsibility, he stressed that at the time it had in fact been possible to choose between good and evil and gave examples of persons who had refused to collaborate. He concluded that "if Bruno Kreisky had used his personal reputation, in the way he used it to protect Mr. Peter, to reveal this other and better Austria, he would have given this country - thirty years afterwards - what it most needed to come to terms with its past: a greater confidence in itself".

17. The third and fourth sections (which together amounted to a third of the article) also dealt with the need to overcome the consciousness of collective guilt and envisage the determination of real guilt.

Under the title "Was it necessary to shoot defenceless people?", Mr. Lingens drew a distinction between the special units and the regular forces in the armies of the Third Reich; he pointed out that no one was forcibly enlisted in the former: one had to volunteer.

In the following section he stressed the difference between individuals guilty of criminal offences and persons who, morally speaking, had to be regarded as accomplices; he maintained that if Austria had tried its Nazis earlier, more quickly and more thoroughly, it would have been able to view its past more calmly without complexes and with more confidence. He then set out the reasons why that had not been possible and defended Mr. Wiesenthal from the charge of belonging to a "mafia". Finally, he considered the possibility of showing clemency after so many years and concluded: "It belongs to every society to show mercy but not to maintain an unhealthy relationship with the law by acquitting obvious murderers and concealing, dissembling or denying manifest guilt."

18. The fifth section of Mr. Lingens' article compared the Peter case with another affair of a more economic nature relating to Mr. Helbich, one of the leaders of the Austrian People's Party (Österreichische Volkspartei), and compared Mr. Kreisky's different reaction in each case. The author argued that the circumstances of the first case made Mr. Peter unfit to be a member of parliament, a politician and a member of the government, and added: "This is a minimum requirement of political ethics" ("ein Mindesterfordernis des politischen Anstandes"). The "monstrosity" ("Ungeheuerlichkeit") was not, in his opinion, the fact that Mr. Wiesenthal had raised the matter, but that Mr. Kreisky wished to hush it up.

19. The article ended with a section criticising the political parties in general owing to the presence of former Nazis among their leaders. The applicant considered that Mr. Peter ought to resign, not to admit his guilt but to prove that he possessed a quality unknown to Mr. Kreisky, namely tact.

II. PRIVATE PROSECUTIONS BROUGHT BY MR. KREISKY

20. On 29 October and 12 November 1975, the then Chancellor brought two private prosecutions against Mr. Lingens. He considered that certain passages in the articles summarised above were defamatory and relied on Article 111 of the Austrian Criminal Code, which reads:

> "1. Anyone who in such a way that it may be perceived by a third person accuses another of possessing a contemptible character or attitude or of behaviour contrary to honour or morality and of such a nature as to make him contemptible or otherwise lower him in public esteem shall be liable to imprisonment not exceeding six months or a fine.
>
> 2. Anyone who commits this offence in a printed document, by broadcasting or otherwise in such a way as to make the defamation accessible to a broad section of the public shall be liable to imprisonment not exceeding one year or a fine.
>
> 3. The person making the statement shall not be punished if it is proved to be true. As regards the offence defined in paragraph 1, he shall also not be liable if circumstances are established which gave him sufficient reason to assume that the statement was true."

Under Article 112, "evidence of the truth and of good faith shall not be admissible unless the person making the statement pleads the correctness of the statement or his good faith ...".

A. First set of proceedings

1. Decision of the Vienna Regional Court

21. On 26 March 1979, the Vienna Regional Court found Mr. Lingens guilty of defamation (üble Nachrede - Article 111 para. 2) for having used

the expressions "the basest opportunism", "immoral" and "undignified". However, it held that certain other expressions were not defamatory in their context ("minimum requirement of political ethics", "monstrosity"). It fined him 20,000 Schillings, considering as mitigating circumstances the fact that the accused intended to voice political criticism of politicians on political questions and that the latter were expected to show greater tolerance of defamation than other individuals. In view of the defendant's good faith it awarded Mr. Kreisky no damages but, on his application, ordered the confiscation of the articles complained of and the publication of the judgment.

22. In its decision, which contained a lengthy statement of reasons, the Regional Court first examined the objectively defamatory character of each of the passages complained of. It held that the expressions "basest opportunism", "immoral" and "undignified" were defamatory and were directly or indirectly aimed at Mr. Kreisky personally, whereas the words "minimum requirement of political ethics" and "monstrosity" did not go beyond the accepted limits of political criticism.

According to Mr. Lingens, the first three expressions were value-judgments and therefore as such not contrary to Article 111 of the Criminal Code. However, the Regional Court considered that the unfavourable conclusions drawn with regard to the then Chancellor's behaviour fell within the scope of that provision. Nor could the defendant rely on his right to freedom of expression, since the relevant provisions of the Constitution and Article 10 (art. 10) of the Convention authorised limitations of this right: a balance had to be struck between this right and the right to respect for private life and reputation. In the instant case the applicant had gone beyond the permissible limits.

23. As regards Mr. Kreisky's use of a private prosecution, the Regional Court pointed out that he had been criticised not in his capacity as Federal Chancellor but as a leading member of his party and a politician. Article 117 para. 2 of the Criminal Code therefore did not apply in the instant case : it made defamation of an office-holder punishable, but solely by means of a public prosecution commenced with the consent of the person concerned, who could not bring a private prosecution unless the prosecuting authorities refused to act.

24. The Regional Court then considered the question of proving truth (preuve de la vérité) (see paragraph 20 above). It held that as the applicant had not provided evidence to justify the expression "basest opportunism", that was sufficient to lead to his conviction.

With regard to the words "immoral" and "undignified", the accused had used them in relation to Mr. Kreisky's attitude consisting in minimising Nazi atrocities, referring to Mr. Wiesenthal's activities as being of a mafia-type and insinuating that the latter had collaborated with the Gestapo. On this last point the Regional Court admitted evidence produced by Mr.

Lingens in the form of a court decision finding a journalist guilty of defamation for having made a similar allegation.

In so far as Mr. Kreisky had spoken of "mafia methods" and "mafia", the Regional Court pointed out that these expressions normally referred to an organised form of criminal behaviour but were sometimes used in a different sense. Even if one did not accept the argument put forward by the private prosecutor, his conception of the "mafia" was a possible one and deserved to be examined. It was not for the prosecutor to prove the truth of his allegations but for Mr. Lingens to prove the truth of his. Mr. Wiesenthal himself had conceded that in order to attain his various aims he relied on an organisation with numerous ramifications. Moreover, the then Chancellor's statements (see paragraph 10 above) must be seen in the context of a political struggle between political opponents, each of them using such weapons as were at his disposal. Seen from this angle they did not reflect an absence of morality or dignity but constituted a possible defence and were in no way unusual in the bitter tussles of politics.

In truth, Mr. Kreisky's attitude towards Nazi victims and Nazi collaborators was far from clear and unambiguous; it appeared in a form which allowed different conclusions. It was therefore logically impossible for the defendant to establish that the only possible interpretation of this attitude was the one he put on it.

2. Appeal to the Vienna Court of Appeal

25. Mr. Kreisky and Mr. Lingens both appealed against the judgment to the Vienna Court of Appeal. On 30 November 1979, the Court of Appeal set the judgment aside without examining the merits, on the ground that the Regional Court had failed to go sufficiently into the question whether the then Chancellor was entitled to bring a private prosecution in spite of the provisions of Article 117 of the Criminal Code (see paragraph 23 above).

B. Second set of proceedings

1. Decision of the Vienna Regional Court

26. The Vienna Regional Court, to which the Court of Appeal had returned the case, gave judgment on 1 April 1981.

After examining the circumstances surrounding the statements by the then Chancellor, it came to the conclusion that he had been criticised not in his official capacity but as head of a party and as a private individual who felt himself under an obligation to protect a third person. It followed therefore that he was entitled to bring a private prosecution.

As regards the legal definition of the acts imputed to Mr. Lingens, the Regional Court confirmed its judgment of 26 March 1979.

With regard to the defence of justification, it again noted that the accused had not produced any evidence to prove the truth of the expression "the basest opportunism". As regards the expressions "immoral" and "undignified", the evidence he had produced related solely to the allegations of collaboration with the Nazis made against Mr. Wiesenthal. These, however, were not relevant because Mr. Kreisky had made them after the publication of the articles in question.

In so far as these expressions were directed at other behaviour and attitudes of the Chancellor, the Regional Court maintained its previous findings unchanged. It considered that Mr. Lingens' criticisms went far beyond the question of Mr. Kreisky's attacks on Mr. Wiesenthal. The fact that the former had been able to prosecute the applicant but could not himself be prosecuted for defamation by Mr. Wiesenthal was due to the existing legislation on parliamentary immunity. The obligation to prove the truth of his statements was also based on the law and it was not for the courts but for the legislature to make this proof less difficult. Nor was the Regional Court responsible for the lack of tolerance and the litigious tendencies of certain politicians.

It therefore passed the same sentence as in the original judgment (see paragraph 21 above).

2. Appeal to the Vienna Court of Appeal

27. Both sides again appealed to the Vienna Court of Appeal, which gave judgment on 29 October 1981; it reduced the fine imposed on the applicant to 15,000 Schillings but confirmed the Regional Court's judgment in all other respects.

28. Mr. Kreisky disputed the statement that different criteria applied to private life and to political life. He argued that politicians and private individuals should receive the same treatment as regards the protection of their reputation.

The Court of Appeal, however, pointed out that Article 111 of the Criminal Code applied solely to the esteem enjoyed by a person in his social setting. In the case of politicians, this was public opinion. Yet experience showed that frequent use of insults in political discussion (often under cover of parliamentary immunity) had given the impression that statements in this field could not be judged by the same criteria as those relating to private life. Politicians should therefore show greater tolerance. As a general rule, criticisms uttered in political controversy did not affect a person's reputation unless they touched on his private life. That did not apply in the instant case to the expressions "minimum requirement of political ethics" and "monstrosity". Mr. Kreisky's appeal was therefore dismissed.

29. The Court of Appeal then turned to Mr. Lingens' grounds of appeal and first of all examined the evidence taken at first instance, in order to decide in what capacity Mr. Kreisky had been subjected to his criticism. It

too found that he was criticised in his capacity both as a party leader and as a private individual.

The expression "the basest opportunism" meant that the person referred to was acting for a specific purpose with complete disregard of moral considerations and this in itself constituted an attack on Mr. Kreisky's reputation. The use of the words "had they been made by someone else" (see paragraph 12 above) could not be understood as a withdrawal of the criticism. As the defendant had not succeeded in proving the truth of it, the court of first instance had been right to find him guilty of an offence.

According to the applicant, the expressions "immoral" and "undignified" were his personal judgment of conduct which was not disputed, a judgment made in exercise of his freedom of expression, guaranteed by Article 10 (art. 10) of the Convention. The Court of Appeal did not accept this argument; it pointed out that Austrian law did not confer upon the individual an unlimited right to formulate value-judgments and that Article 10 (art. 10) authorised limitations laid down by law for the protection, inter alia, of the reputation of others. Furthermore, the task of the press was to impart information, the interpretation of which had to be left primarily to the reader. If a journalist himself expressed an opinion, it should remain within the limits set by the criminal law to ensure the protection of reputations. This, however, was not the position in the instant case. The burden was on Mr. Lingens to establish the truth of his statements; he could not separate his unfavourable value-judgment from the facts on which it was based. Since Mr. Kreisky was personally convinced that Mr. Wiesenthal used "mafia methods", he could not be accused of having acted immorally or in an undignified manner.

30. The appeal judgment was published in Profil on 22 February 1982, as required by the accessory penalty imposed on Mr. Lingens and his publisher.

PROCEEDINGS BEFORE THE COMMISSION

31. In his application of 19 April 1982 to the Commission (no. 9815/82), Mr. Lingens complained of his conviction for defamation through the press (Article 111 para. 2 of the Criminal Code).

32. The Commission declared the application admissible on 5 October 1983. In its report of 11 October 1984 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a breach of Article 10 (art. 10). The full text of the Commission's opinion is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS MADE TO THE COURT

33. At the hearing on 25 November 1985, the Government requested the Court "to hold that the provisions of Article 10 (art. 10) of the European Convention on Human Rights were not violated in the instant case", and the applicant asked for a decision in his favour.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

34. Under Article 10 (art. 10) of the Convention,

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Mr. Lingens claimed that the impugned court decisions infringed his freedom of expression to a degree incompatible with the fundamental principles of a democratic society.

This was also the conclusion reached by the Commission. In the Government's submission, on the other hand, the disputed penalty was necessary in order to protect Mr. Kreisky's reputation.

35. It was not disputed that there was "interference by public authority" with the exercise of the applicant's freedom of expression. This resulted from the applicant's conviction for defamation by the Vienna Regional Court on 1 April 1981, which conviction was upheld by the Vienna Court of Appeal on 29 October 1981 (see paragraphs 26 and 27 above).

Such interference contravenes the Convention if it does not satisfy the requirements of paragraph 2 of Article 10 (art. 10-2). It therefore falls to be determined whether the interference was "prescribed by law", had an aim or aims that is or are legitimate under Article 10 para. 2 (art. 10-2) and was "necessary in a democratic society" for the aforesaid aim or aims (see, as the most recent authority, the Barthold judgment of 25 March 1985, Series A no. 90, p. 21, para. 43).

36. As regards the first two points, the Court agrees with the Commission and the Government that the conviction in question was indisputably based on Article 111 of the Austrian Criminal Code (see paragraph 21 above); it was moreover designed to protect "the reputation or rights of others" and there is no reason to suppose that it had any other purpose (see Article 18 of the Convention) (art. 18). The conviction was accordingly "prescribed by law" and had a legitimate aim under Article 10 para. 2 (art. 10-2) of the Convention.

37. In their respective submissions the Commission, the Government and the applicant concentrated on the question whether the interference was "necessary in a democratic society" for achieving the above-mentioned aim.

The applicant invoked his role as a political journalist in a pluralist society; as such he considered that he had a duty to express his views on Mr. Kreisky's condemnations of Mr. Wiesenthal (see paragraph 10 above). He also considered - as did the Commission - that a politician who was himself accustomed to attacking his opponents had to expect fiercer criticism than other people.

The Government submitted that freedom of expression could not prevent national courts from exercising their discretion and taking decisions necessary in their judgment to ensure that political debate did not degenerate into personal insult. It was claimed that some of the expressions used by Mr. Lingens (see paragraphs 12 and 15 above) overstepped the limits. Furthermore, the applicant had been able to make his views known to the public without any prior censorship; the penalty subsequently imposed on him was therefore not disproportionate to the legitimate aim pursued.

Moreover, the Government asserted that in the instant case there was a conflict between two rights secured in the Convention - freedom of expression (Article 10) (art. 10) and the right to respect for private life (Article 8) (art. 8). The fairly broad interpretation the Commission had adopted of the first of these rights did not, it was said, make sufficient allowance for the need to safeguard the second right.

38. On this latter point the Court notes that the words held against Mr. Lingens related to certain public condemnations of Mr. Wiesenthal by Mr. Kreisky (see paragraph 10 above) and to the latter's attitude as a politician towards National Socialism and former Nazis (see paragraph 14 above). There is accordingly no need in this instance to read Article 10 (art. 10) in the light of Article 8 (art. 8).

39. The adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a "pressing social need" (see the above-mentioned Barthold judgment, Series A no. 90, pp. 24-25, para. 55). The Contracting States have a certain margin of appreciation in assessing whether such a need exists (ibid.), but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (see the Sunday Times judgment

of 26 April 1979, Series A no. 30, p. 36, para. 59). The Court is therefore empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10) (ibid.).

40. In exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned court decisions in isolation; it must look at them in the light of the case as a whole, including the articles held against the applicant and the context in which they were written (see, mutatis mutandis, the Handyside judgment of 7 December 1976, Series A no. 24, p. 23, para. 50). The Court must determine whether the interference at issue was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the Austrian courts to justify it are "relevant and sufficient" (see the above-mentioned Barthold judgment, Series A no. 90, p. 25, para. 55).

41. In this connection, the Court has to recall that freedom of expression, as secured in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see the above-mentioned Handyside judgment, Series A no. 24, p. 23, para. 49).

These principles are of particular importance as far as the press is concerned. Whilst the press must not overstep the bounds set, inter alia, for the "protection of the reputation of others", it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them (see, mutatis mutandis, the above-mentioned Sunday Times judgment, Series A no. 30, p. 40, para. 65). In this connection, the Court cannot accept the opinion, expressed in the judgment of the Vienna Court of Appeal, to the effect that the task of the press was to impart information, the interpretation of which had to be left primarily to the reader (see paragraph 29 above).

42. Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.

The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10

para. 2 (art. 10-2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.

43. The applicant was convicted because he had used certain expressions ("basest opportunism", "immoral" and "undignified") apropos of Mr. Kreisky, who was Federal Chancellor at the time, in two articles published in the Viennese magazine Profil on 14 and 21 October 1975 (see paragraphs 12-19 above). The articles dealt with political issues of public interest in Austria which had given rise to many heated discussions concerning the attitude of Austrians in general - and the Chancellor in particular - to National Socialism and to the participation of former Nazis in the governance of the country. The content and tone of the articles were on the whole fairly balanced but the use of the aforementioned expressions in particular appeared likely to harm Mr. Kreisky's reputation.

However, since the case concerned Mr. Kreisky in his capacity as a politician, regard must be had to the background against which these articles were written. They had appeared shortly after the general election of October 1975. Many Austrians had thought beforehand that Mr. Kreisky's party would lose its absolute majority and, in order to be able to govern, would have to form a coalition with Mr. Peter's party. When, after the elections, Mr. Wiesenthal made a number of revelations about Mr. Peter's Nazi past, the Chancellor defended Mr. Peter and attacked his detractor, whose activities he described as "mafia methods"; hence Mr. Lingens' sharp reaction (see paragraphs 9 and 10 above).

The impugned expressions are therefore to be seen against the background of a post-election political controversy; as the Vienna Regional Court noted in its judgment of 26 March 1979 (see paragraph 24 above), in this struggle each used the weapons at his disposal; and these were in no way unusual in the hard-fought tussles of politics.

In assessing, from the point of view of the Convention, the penalty imposed on the applicant and the reasons for which the domestic courts imposed it, these circumstances must not be overlooked.

44. On final appeal the Vienna Court of Appeal sentenced Mr. Lingens to a fine; it also ordered confiscation of the relevant issues of Profil and publication of the judgment (see paragraphs 21, 26, 27 and 30 above).

As the Government pointed out, the disputed articles had at the time already been widely disseminated, so that although the penalty imposed on the author did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future; the Delegate of the Commission rightly pointed this out. In the context of political debate such a sentence would be likely to deter journalists from

contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog (see, mutatis mutandis, the above-mentioned Barthold judgment, Series A no. 90, p. 26, para. 58).

45. The Austrian courts applied themselves first to determining whether the passages held against Mr. Lingens were objectively defamatory; they ruled that some of the expressions used were indeed defamatory - "the basest opportunism", "immoral" and "undignified" (see paragraph 21 above).

The defendant had submitted that the observations in question were value-judgments made by him in the exercise of his freedom of expression (see paragraphs 22 and 29 above). The Court, like the Commission, shares this view. The applicant's criticisms were in fact directed against the attitude adopted by Mr. Kreisky, who was Federal Chancellor at the time. What was at issue was not his right to disseminate information but his freedom of opinion and his right to impart ideas; the restrictions authorised in paragraph 2 of Article 10 (art. 10-2) nevertheless remained applicable.

46. The relevant courts then sought to determine whether the defendant had established the truth of his statements; this was in pursuance of Article 111 para. 3 of the Criminal Code (see paragraph 20 above). They held in substance that there were different ways of assessing Mr. Kreisky's behaviour and that it could not logically be proved that one interpretation was right to the exclusion of all others; they consequently found the applicant guilty of defamation (see paragraphs 24, 26 and 29 above).

In the Court's view, a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof. The Court notes in this connection that the facts on which Mr. Lingens founded his value-judgment were undisputed, as was also his good faith (see paragraph 21 above).

Under paragraph 3 of Article 111 of the Criminal Code, read in conjunction with paragraph 2, journalists in a case such as this cannot escape conviction for the matters specified in paragraph 1 unless they can prove the truth of their statements (see paragraph 20 above).

As regards value-judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (art. 10) of the Convention.

The Vienna Regional Court held that the burden of proof was a consequence of the law and that it was not for the courts but for the legislature to make it less onerous (judgment of 1 April 1981; see paragraph 26 above). In this context the Court points out that it does not have to specify which national authority is responsible for any breach of the Convention; the sole issue is the State's international responsibility (see,

inter alia, the Zimmermann and Steiner judgment of 13 July 1983, Series A no. 66, p. 13, para. 32).

47. From the various foregoing considerations it appears that the interference with Mr. Lingens' exercise of the freedom of expression was not "necessary in a democratic society ... for the protection of the reputation ... of others"; it was disproportionate to the legitimate aim pursued. There was accordingly a breach of Article 10 (art. 10) of the Convention.

II. THE APPLICATION OF ARTICLE 50 (art. 50)

48. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

49. In a letter received at the registry on 18 November 1985 the applicant sought just satisfaction in pecuniary form. At the hearings on 25 November the Government, while disputing that there had been a breach, agreed to certain items of the claim but sought further particulars in respect of others. Mr. Lingens provided these on 6 December 1985 and 17 March 1986, and the Government commented on them on 18 March. The Commission submitted its comments on 22 April 1986.

The question is accordingly ready for decision (Rule 53 para. 1 of the Rules of Court).

50. The applicant claimed firstly repayment of the 15,000 Schillings fine and of the 30,600 Schillings costs awarded against him by the Vienna Court of Appeal (see paragraph 27 above). He is indeed entitled to recover these sums by reason of their direct link with the decision the Court has held to be contrary to the freedom of expression (see, mutatis mutandis, the Minelli judgment of 25 March 1983, Series A no. 62, p. 21, para. 47). The Government moreover did not dispute this.

51. With regard to the expenditure incurred as a result of the accessory penalty of having to publish the judgment in the magazine Profil (see paragraph 30 above, taken together with paragraph 21), the applicant claimed 40,860 Schillings on the basis of the scale in force at the time.

The Government contended that this amount included, firstly, a loss of profit and, secondly, actual financial outlay; they claimed that only the latter should be taken into account for the purposes of Article 50 (art. 50).

The Court cannot speculate on the amount of profit Mr. Lingens might have derived from any paying advertisements that might hypothetically have been put in the magazine in place of the judgment of 29 October 1981. But it does not rule out that the applicant may thereby have suffered some

loss of opportunity which must be taken into account. There are also the costs indisputably incurred for reproducing the judgment in question.

The foregoing items cannot be calculated exactly. Assessing them in their entirety on an equitable basis, the Court awards Mr. Lingens compensation of 25,000 Schillings under this head.

52. The applicant further claimed 54,938.60 Schillings for costs and expenses incurred for his defence in the Regional Court and the Vienna Court of Appeal. This claim deserves consideration, as the proceedings concerned were designed to prevent or redress the breach found by the Court (see the above-mentioned Minelli judgment, Series A no. 62, p. 20, para. 45). Furthermore, the amount sought appears reasonable and should accordingly be awarded to the applicant.

53. As to the costs and expenses incurred in the proceedings before the Convention institutions, Mr. Lingens - who did not have legal aid in this connection - initially put them at 197,033.20 Schillings. The Government challenged both the amount, which they considered excessive, and the method of calculation. Subsequently counsel for the applicant submitted a fee note for 189,305.60 Schillings.

The Court reiterates that in this context it is not bound by the domestic scales or criteria relied on by the Government and the applicant in support of their respective submissions, but enjoys a discretion which it exercises in the light of what it considers equitable (see, inter alia, the Eckle judgment of 21 June 1983, Series A no. 65, p. 15, para. 35). In the instant case it was not disputed that the costs were both actually and necessarily incurred; the only matter in issue is whether they were reasonable as to quantum. The Court shares the Government’s reservations in this respect, and considers it appropriate to award the applicant 130,000 Schillings in respect of the costs in question.

54. Lastly, Mr. Lingens claimed 29,000 Schillings in respect of his travel and subsistence expenses for the hearings before the Commission and subsequently the Court.

Applicants may appear in person before the Commission (Rule 26 para. 3 of the Rules of Procedure), and this was what happened in the present case. Although they do not have the standing of parties before the Court, they are nonetheless entitled under Rules 30 and 33 para. 3 (d) of the Rules of Court to take part in the proceedings on certain conditions. Furthermore, their presence in the court-room is an undoubted asset: it can enable the Court to ascertain on the spot their view on issues affecting them (Rules 39 and 44 of the Rules of Court - see the König judgment of 10 March 1980, Series A no. 36, p. 19, para. 26). Nor does the sum claimed by Mr. Lingens under this head appear unreasonable.

55. The amounts awarded to Mr. Lingens under Article 50 (art. 50) of the Convention total 284,538.60 Schillings.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a breach of Article 10 (art. 10) of the Convention;

2. Holds that the Republic of Austria is to pay to the applicant 284,538.60 Schillings (two hundred and eighty-four thousand five hundred and thirty-eight Schillings sixty Groschen) as "just satisfaction".

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 8 July 1986.

Rolv RYSSDAL
President

For the Registrar
Jonathan L. SHARPE
Head of Division in the registry of the Court

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the separate opinion of Mr. Thór Vilhjálmsson is annexed to the present judgment.

R.R.
J.L.S.

CONCURRING OPINION OF JUDGE THÓR VILHJÁLMSSON

In this case, I have with certain hesitation joined my colleagues in finding a violation of Article 10 (art. 10) of the Convention. I have the following comment to make on the reasons set out in the judgment.

In the first sub-paragraph of paragraph 29, it is stated that the Vienna Court of Appeal found that Mr. Lingens had criticised Mr. Kreisky in his capacity both as a party leader and as a private individual (my underlining). Keeping this in mind, I find it difficult to agree with the last part of paragraph 38 of the judgment. I agree, though, with the other judges that it is Article 10 (art. 10) of the Convention that has to be interpreted and applied in the present case. This is to be done by taking the right to respect for private life, stated in Article 8 (art. 8), as one of the factors relevant to the question whether or not in this case the freedom of expression was subjected to restrictions and penalties that were necessary in a democratic society for the protection of the reputation of others. The text of paragraphs that follow paragraph 38 shows that this is in fact taken into account when the Court weighs the relevant considerations. As already stated, I agree with the conclusion stated in paragraph 47 and the operative provisions of the judgment.

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

COURT (CHAMBER)

CASE OF MÜLLER AND OTHERS v. SWITZERLAND

(Application no. 10737/84)

JUDGMENT

STRASBOURG

24 May 1988

In the case of Müller and Others[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. J. CREMONA,
Mrs. D. BINDSCHEDLER-ROBERT,
Sir Vincent EVANS,
Mr. R. BERNHARDT,
Mr. A. SPIELMANN,
Mr. J. DE MEYER,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 27 January and 27 and 28 April 1988,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Swiss Confederation ("the Government") on 12 December 1986 and 25 February 1987 respectively, within the three-month period laid down in Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 10737/84) against Switzerland lodged with the Commission under Article 25 (art. 25) by nine Swiss citizens - Mr. Josef Felix Müller, Mr. Charles Descloux, Mr. Michel Gremaud, Mr. Paul Jacquat, Mr. Jean Pythoud, Mrs. Geneviève Renevey, Mr. Michel Ritter, Mr. Jacques Sidler and Mr. Walter Tschopp - and a Canadian national, Mr. Christophe von Imhoff, on 22 July 1983.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). Both sought a

[*] Note by the Registrar: The case is numbered 25/1986/123/174. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

decision from the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings pending before the Court and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Mrs. D. Bindschedler-Robert, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 3 February 1987, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr. J. Cremona, Mr. J. Pinheiro Farinha, Sir Vincent Evans, Mr. R. Bernhardt and Mr. A. Spielmann (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). Subsequently, Mr. Pinheiro Farinha, who was unable to attend, was replaced by Mr. J. De Meyer, substitute judge (Rules 22 § 1 and 24 § 1).

4. Mr. Ryssdal, who had assumed the office of President of the Chamber (Rule 21 § 5), consulted - through the Deputy Registrar - the Agent of the Government, the Delegate of the Commission and the lawyer for the applicants on the need for a written procedure (Rule 37 § 1). In accordance with the orders made in consequence, the registry received:

(a) the applicants' memorial, written in German by leave of the President (Rule 27 § 3), on 1 June 1987;

(b) the Government's memorial, on 30 July.

In a letter of 12 October, the Secretary to the Commission informed the Registrar that the Delegate would make his submissions at the hearing.

5. Having consulted - through the Deputy Registrar - the Agent of the Government, the Delegate of the Commission and the lawyer for the applicants, the President directed on 23 October 1987 that the oral proceedings should commence on 25 January 1988 (Rule 38).

6. On 30 November, the Court decided to inspect the impugned paintings by Josef Felix Müller, as the Government had suggested (Rule 40 § 1). They were duly shown, in camera, in the presence of those appearing before the Court, on 25 January 1988, before the hearing began.

In the meantime, on 2 and 4 December 1987, the Registrar had received a number of documents which the President had instructed him to obtain from the Commission. Between 11 January and 8 April 1988, the Government and the applicants furnished several other documents.

7. The hearing was held in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mr. O. JACOT-GUILLARMOD, Head

of the Department of International Affairs, Federal Department of Justice, *Agent*,
Mr. P. ZAPPELLI, Cantonal Judge, Canton of Fribourg,
Mr. B. MÜNGER, Federal Department of Justice, *Counsel*;
- for the Commission
Mr. H. VANDENBERGHE, *Delegate*;
- for the applicants
Mr. P. RECHSTEINER, avocat, *Counsel*.

The Court heard addresses by Mr. Jacot-Guillarmod for the Government, by Mr. Vandenberghe for the Commission and by Mr. Rechsteiner for the applicants, as well as their replies to its questions.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The first applicant, Josef Felix Müller, a painter born in 1955, lives in St. Gall. The other nine applicants are:

(a) Charles Descloux, art critic, born in 1939 and living in Fribourg;

(b) Michel Gremaud, art teacher, born in 1944 and living at Guin, Garmiswil;

(c) Christophe von Imhoff, picture restorer, born in 1939 and living at Belfaux;

(d) Paul Jacquat, bank clerk, born in 1940 and living at Belfaux;

(e) Jean Pythoud, architect, born in 1925 and living in Fribourg;

(f) Geneviève Renevey, community worker, born in 1946 and living at Villars-sur-Glâne;

(g) Michel Ritter, artist, born in 1949 and living at Montagny-la-Ville;

(h) Jacques Sidler, photographer, born in 1946 and living at Vuisternens-en-Ogoz;

(i) Walter Tschopp, assistant lecturer, born in 1950 and living in Fribourg.

9. Josef Felix Müller has exhibited on his own and with other artists on many occasions, particularly since 1981, both in private galleries and in museums, in Switzerland and elsewhere.

With the assistance of the Federal Office of Culture, he took part in the Sydney Biennial in Australia in 1984, as Switzerland’s representative. He has been awarded several prizes and has sold works to museums such as the Kunsthalle in Zürich.

10. In 1981, the nine last-mentioned applicants mounted an exhibition of contemporary art in Fribourg at the former Grand Seminary, a building due to be demolished. The exhibition, entitled "Fri-Art 81", was held as part of the celebrations of the 500th anniversary of the Canton of Fribourg's entry into the Swiss Confederation. The organisers invited several artists to take part, each of whom was allowed to invite another artist of his own choosing. The artists were meant to make free use of the space allocated to them. Their works, which they created on the spot from early August 1981 onwards, were to have been removed when the exhibition ended on 18 October 1981.

11. In the space of three nights Josef Felix Müller, who had been invited by one of the other artists, produced three large paintings (measuring 3.11m x 2.24m, 2.97m x 1.98m and 3.74m x 2.20m) entitled "Drei Nächte, drei Bilder" ("Three Nights, Three Pictures"). They were on show when the exhibition began on 21 August 1981. The exhibition had been advertised in the press and on posters and was open to all, without any charge being made for admission. The catalogue, specially printed for the preview, contained a photographic reproduction of the paintings.

12. On 4 September 1981, the day of the official opening, the principal public prosecutor of the Canton of Fribourg reported to the investigating judge that the paintings in question appeared to come within the provisions of Article 204 of the Criminal Code, which prohibited obscene publications and required that they be destroyed (see paragraph 20 below). The prosecutor thought that one of the three pictures also infringed freedom of religious belief and worship within the meaning of Article 261 of the Criminal Code.

According to the Government, the prosecutor had acted on an information laid by a man whose daughter, a minor, had reacted violently to the paintings on show; some days earlier another visitor to the exhibition had apparently thrown down one of the paintings, trampled on it and crumpled it.

13. Accompanied by his clerk and some police officers, the investigating judge went to the exhibition on 4 September and had the disputed pictures removed and seized; ten days later, he issued an attachment order. On 30 September 1981, the Indictment Chamber dismissed an appeal against that decision.

After questioning the ten applicants on 10, 15 and 17 September and 6 November 1981, the investigating judge committed them for trial to the Sarine District Criminal Court.

14. On 24 February 1982, the court sentenced each of them to a fine of 300 Swiss francs (SF) for publishing obscene material (Article 204 § 1 of the Criminal Code) - the convictions to be deleted from the criminal records after one year - but acquitted them on the charge of infringing freedom of religious belief and worship (Article 261). It also ordered that the

confiscated paintings should be deposited in the Art and History Museum of the Canton of Fribourg for safekeeping. At the hearing on 24 February, it had heard evidence from Mr. Jean-Christophe Ammann, the curator of the Kunsthalle in Basle, as to Josef Felix Müller's artistic qualities.

In its judgment, the court pointed out first of all that "the law [did] not define obscenity for the purposes of Article 204 CC [Criminal Code] and the concept [had] to be clarified by means of interpretation, having regard to the intent and purpose of the enactment as well as to its place in the legislation and in the overall legal system". After referring to the Federal Court's case-law on the subject, it said among other things:

> "In the instant case, although Mr. Müller's three works are not sexually arousing to a person of ordinary sensitivity, they are undoubtedly repugnant at the very least. The overall impression is of persons giving free rein to licentiousness and even perversion. The subjects - sodomy, fellatio, bestiality, the erect penis - are obviously morally offensive to the vast majority of the population. Although allowance has to be made for changes in the moral climate, even for the worse, what we have here would revolutionise it. Comment on the confiscated works is superfluous; their vulgarity is plain to see and needs no elaborating upon.
>
> ...
>
> Nor can a person of ordinary sensitivity be expected to go behind what is actually depicted and make a second assessment of the picture independently of what he can actually see. To do that he would have to be accompanied to exhibitions by a procession of sexologists, psychologists, art theorists or ethnologists in order to have explained to him that what he saw was in reality what he wrongly thought he saw.
>
> Lastly, the comparisons with the works of Michelangelo and J. Bosch are specious. Apart from the fact that they contain no depictions of the kind in Müller's paintings, no valid comparison can be made with history-of-art or cultural collections in which sexuality has a place ..., but without lapsing into crudity. Even with an artistic aim, crude sexuality is not worthy of protection ... . Nor are comparisons with civilisations foreign to western civilisation valid."

On the question whether to order the destruction of the pictures under paragraph 3 of Article 204 (see paragraph 20 below), the court said:

> "Not without misgivings, the court will not order the destruction of the three works.
>
> The artistic merit of the three works exhibited in Fribourg is admittedly less obvious than is supposed by the witness Ammann, who nevertheless said that the paintings Müller exhibited in Basle were more 'demanding'. The court would not disagree. Müller is undoubtedly an artist of some accomplishment, particularly in the matter of composition and in the use of colour, even though the works seized in Fribourg appear rather scamped.
>
> Nonetheless, the court, deferring to the art critic's opinion while not sharing it, and concurring with the relevant findings of the Federal Court in the Rey judgment (ATF 89 IV 136 et seq.), takes the view that in order to withhold the three paintings from the general public - to 'destroy' them - it is sufficient to place them in a museum, whose curator will be required to make them available only to a few serious specialists

> capable of taking an exclusively artistic or cultural interest in them as opposed to a prurient interest. The Art and History Museum of the Canton of Fribourg meets the requirements for preventing any further breach of Article 204 of the Criminal Code. The three confiscated paintings will be deposited there."

15. All the applicants appealed on points of law on 24 February 1982; in particular, they challenged the trial court's interpretation as regards the obscenity of the relevant paintings. For example, it was argued by Josef Felix Müller (in pleadings of 16 March 1982) that something which was obscene sought directly to arouse sexual passion, and that this had to be its purpose, with the essential aim of pandering to man's lowest instincts or else for pecuniary gain. This, it was alleged, was never the case "where artistic or scientific endeavour [was] the primary consideration".

16. The Fribourg Cantonal Court, sitting as a court of cassation, dismissed the appeals on 26 April 1982.

Referring to the Federal Court's case-law, it acknowledged that "in the recent past, and still today, the public's general views on morality and social mores, which vary at different times and in different places, have changed in a way which enables things to be seen more objectively and naturally". The trial court had to take account of this change, but that did not mean that it had to show complete permissiveness, which would leave no scope for the application of Article 204 of the Criminal Code.

As for works of art, they did not in themselves have any privileged status. At most they might escape destruction despite their obscenity. Their creators nonetheless fell within the thrust of Article 204, "since that statutory provision as a whole [was] designed to protect public morals, even in the sphere of the fine arts". That being so, the court could dispense with deciding the question whether the pictures complained of were the outcome of "artistic ideas, though even then, intention [was] one thing and realisation of it another".

Like the trial court, the appellate court found that Josef Felix Müller's paintings aroused "repugnance and disgust":

> "These are not works which, in treating a particular subject or scene, allude to sexual activity more or less discreetly. They place it in the foreground, depicting it not in the embrace of man and woman but in vulgar images of sodomy, fellatio between males, bestiality, erect penises and masturbation. Sexual activity is the main, not to say sole, ingredient of all three paintings, and neither the appellants' explanations nor the witness Mr. Ammann's learned-seeming but wholly unpersuasive remarks can alter that fact. To go into detail, however distasteful it may be, one of the paintings contains no fewer than eight erect members. All the persons depicted are entirely naked and one of them is engaging simultaneously in various sexual practices with two other males and an animal. He is kneeling down and not only sodomising the animal but holding its erect penis in another animal's mouth. At the same time he is having the lower part of his back - his buttocks, even - fondled by another male, whose erect penis a third male is holding towards the first male's mouth. The animal being sodomised has its tongue extended towards the buttocks of a fourth male, whose penis is likewise erect. Even the animals' tongues (especially in the smallest painting)

are more suggestive, in shape and aspect, of erect male organs than of tongues. Sexual activity is crudely and vulgarly portrayed for its own sake and not as a consequence of any idea informing the work. Lastly, it should be pointed out that the paintings are large ..., with the result that their crudeness and vulgarity are all the more offensive.

The court is likewise unconvinced by the appellants' contention that the paintings are symbolical. What counts is their face value, their effect on the observer, not some abstraction utterly unconnected with the visible image or which glosses over it. Furthermore, the important thing is not the artist's meaning or purported meaning but the objective effect of the image on the observer ... .

Not much of the argument in the appeal was directed to the issues of intention or of awareness of obscenity, nor indeed could it have been. In particular, an author is aware of a publication's obscenity when he knows it deals with sexual matters and that any written or pictorial allusion to such matters is likely, in the light of generally accepted views, grossly to offend the average reader's or observer's natural sense of decency and propriety. That was plainly so here, as the evidence at the trial confirmed. ... Indeed, several of the defendants admitted that the paintings had shocked them. It should be noted that even someone insensible to obscenity is capable of realising that it may disturb others. As the trial court pointed out, the defendants at the very least acted recklessly.

Lastly, it is immaterial that similar works have allegedly been exhibited elsewhere; the three paintings in issue do not on that account cease to be obscene, as the trial court rightly held them to be ..."

17. On 18 June 1982, the applicants lodged an application for a declaration of nullity (Nichtigkeitsbeschwerde) with the Federal Court. They sought to have the judgment of 26 April set aside and the case remitted with a view to their acquittal and the return of the confiscated paintings or, in the alternative, merely the return of the paintings.

In their submission, the Fribourg Cantonal Court had wrongly interpreted Article 204 of the Criminal Code; in particular, it had taken no account of the scope of the freedom of artistic expression, guaranteed inter alia in Article 10 (art. 10) of the Convention. Mr. Ammann, one of the most distinguished experts on modern art, had confirmed that these were works of note. Similar pictures by Josef Felix Müller, moreover, had been exhibited in Basle in February 1982 and it had not occurred to anyone to regard them as being obscene.

As to the "publication" of obscene items, which was prohibited under Article 204 of the Criminal Code, this was a relative concept. It should be possible to show in an exhibition pictures which, if they were displayed in the market-place, would fall foul of Article 204; people interested in the arts ought to have an opportunity to acquaint themselves with all the trends in contemporary art. Visitors to an exhibition of contemporary art like "Fri-Art 81" should expect to be faced with modern works that might be incomprehensible. If they did not like the paintings in issue, they were free to look away from them and pass them by; there was no need for the protection of the criminal law. It was not for the court to undertake indirect

censorship of the arts. On a strict construction of Article 204 - that is, one which, having regard to the fundamental right to freedom of artistic expression, left it to art-lovers to decide for themselves what they wanted to see -, the applicants should be acquitted.

Confiscation of the disputed paintings, they submitted, could only be ordered if they represented a danger to public order such that returning them could not be justified - and that was a matter the court of cassation had not considered. Since the pictures had been openly on display for ten days without giving rise to any protests, it was difficult to see how such a danger was made out. Josef Felix Müller would certainly not show his paintings in Fribourg in the near future. On the other hand, they could be shown without any difficulty elsewhere, as was proved by his exhibition in Basle in February 1982. It was consequently out of all proportion to deprive him of them.

18. The Criminal Cassation Division of the Federal Court dismissed the appeal on 26 January 1983 for the following reasons:

> "The decided cases show that for the purposes of Article 204 of the Criminal Code, any item is obscene which offends, in a manner that is difficult to accept, the sense of sexual propriety; the effect of the obscenity may be to arouse a normal person sexually or to disgust or repel him. ... The test of obscenity to be applied by the court is whether the overall impression of the item or work causes moral offence to a person of ordinary sensitivity ...
>
> The paintings in issue show an orgy of unnatural sexual practices (sodomy, bestiality, petting), which is crudely depicted in large format; they are liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity. The artistic licence relied on by the appellant cannot in any way alter that conclusion in the instant case.
>
> The content and scope of constitutional freedoms are determined on the basis of the federal law currently in force. This applies inter alia to freedom of the press, freedom of opinion and artistic freedom; under Article 113 [of the Federal Constitution], the Federal Court is bound by federal enactments ... In the field of artistic creation [it] has held that works of art per se do not enjoy any special status ... A work of art is not obscene, however, if the artist contrives to present subjects of a sexual nature in an artistic form such that their offensiveness is toned down and ceases to predominate ... In reaching its decision, the criminal court does not have to view the work through an art critic's spectacles (which would often ill become it) but must decide whether the work is liable to offend the unsuspecting visitor.
>
> Expert opinion as to the artistic merit of the work in issue is therefore irrelevant at this stage, though it might be relevant to the decision as to what action to take in order to prevent fresh offences (destruction or seizure of the item; Art. 204 § 3 CC ...).

The Cantonal Court duly scrutinised the paintings for a predominantly aesthetic element. Having regard in particular to the number of sexual features in each of the three (one of them, for instance, contains eight erect members), it decided that the emphasis was on sexuality in its offensive forms and that this was the predominant, not to say sole, ingredient of the

items in dispute. The Cassation Division of the Federal Court agrees. The overall impression created by Müller's paintings is such as to be morally offensive to a person of normal sensitivity. The Cantonal Court's finding that they were obscene was accordingly not in breach of federal law.

The appellants maintained that the publication element of the offences was lacking. They are wrong.

The obscene paintings were on display in an exhibition open to the public which had been advertised on posters and in the press. There was no condition of admission to 'Fri-Art 81', such as an age-limit. The paintings in dispute were thus made accessible to an indeterminate number of people, which is the criterion of publicity for the purposes of Article 204 CC ..."

Finally, the Criminal Cassation Division of the Federal Court declared the alternative application for return of the paintings to be inadmissible as it had not first been made before the cantonal courts.

19. On 20 January 1988, the Sarine District Criminal Court granted an application made by Josef Felix Müller on 29 June 1987 and ordered the return of the paintings.

On the basis that it had been requested in effect to reconsider the confiscation order it had made in 1982, the court held that it had to decide whether the order could stand "almost eight years later". Hence, the reasons for its decision were as follows:

> "In Swiss law, confiscation is a preventive measure in rem. This is already clear from the legislative text, which classifies Article 58 under the heading 'other measures' - the heading in the margin for Articles 57-62 CC - and not under the subsidiary penalties prescribed in Articles 51-56 CC ...
>
> The confiscation of items or assets may admittedly constitute a serious interference with property rights. It must be proportionate and a more lenient order may thus be justified where it achieves the desired aim. Confiscation remains however the rule. It should be departed from only where a more lenient order achieves the desired aim ... In this case, when the confiscation order was made in 1982, the statutory provision (Article 204 § 3 CC) would normally have required the destruction of the paintings. Giving a reasoned decision, the court preferred a more lenient measure which achieved the aim of security, whilst complying with the principle of proportionality ... . The measure itself should remain in force only as long as the statutory requirements are satisfied ... .
>
> It is true that the Code makes no provision for an order under Article 58 to be subsequently discharged or varied. The legislature probably did not address itself to this question at the time, whereas provision was made whereby other measures, which were admittedly much more serious because they restricted personal liberty, could be re-examined by a court of its own motion (Articles 42-44 CC). It does not follow that discharge or variation is completely illegal. The Federal Court has, moreover, held that a measure should not remain in force where the circumstances justifying it cease to obtain ... .
>
> Accordingly, the view must be taken that an order confiscating a work of art may subsequently be discharged or varied, either because the confiscated item is no longer

dangerous and a measure is no longer required, or because the necessary degree of security may be achieved by another more lenient measure (judgment of the Basle-Urban Court of Appeal of 19 August 1980, in the Fahrner case).

Judgments concerning freedom of expression and its scope often refer to Article 10 §§ 1 and 2 (art. 10-1, art. 10-2) [of the Convention].

In this area, the decisions of the Convention authorities have a direct influence on the Swiss legal system, by way of strengthening individual liberties and judicial safeguards ...

In this case, where the applicant has availed himself of the possibility of applying for the return of his paintings, the court must consider whether the grounds on which it made the confiscation order in the first place, which restricted J.F. Müller's freedom of expression, are still valid.

While the restriction was necessary in a democratic society in 1982 and was justified by the need to safeguard and protect morality and the rights of others, the court considers, admittedly with some hesitation, that the order may now be discharged. It should be noted that the confiscation measure was not absolute but merely of indeterminate duration, which left room to apply for a reconsideration.

It appears to the court that the preventive measure has now fulfilled its function, namely to ensure that such paintings are not exhibited in public again without any precautions. Those convicted have themselves admitted that the paintings could shock people. Once the order has achieved its aim, there is no reason why it should continue in force.

Accordingly, the artist is entitled to have his works returned to him.

It is not necessary to attach any obligations to this decision. If J.F. Müller decided to exhibit the three paintings again elsewhere, he knows that he would be running the risk of further action by the courts under Article 204 of the Criminal Code.

Finally, it appears that by exhibiting three provocative paintings in a former seminary in 1982, J.F. Müller deliberately intended to draw attention to himself and the organisers. Since then he has become known for more 'demanding' works, to use the terms of the art critic who gave evidence in 1982. Having achieved a certain repute, he may find it unnecessary to shock by resorting to vulgarity. In any event, there is no reason to believe that he will use the three paintings in future to offend other people's moral sensibilities.

..."

Josef Felix Müller recovered his paintings in March 1988.

II. RELEVANT DOMESTIC LAW

20. Article 204 of the Swiss Criminal Code provides:

"1. Anyone who makes or has in his possession any writings, pictures, films or other items which are obscene with a view to trading in them, distributing them or

displaying them in public, or who, for the above purposes, imports, transports or exports such items or puts them into circulation in any way, or who openly or secretly deals in them or publicly distributes or displays them or by way of trade supplies them for hire, or who announces or makes known in any way, with a view to facilitating such prohibited circulation or trade, that anyone is engaged in any of the aforesaid punishable activities, or who announces or makes known how or through whom such items may be directly or indirectly procured, shall be imprisoned or fined.

2. Anyone supplying or displaying such items to a person under the age of 18 shall be imprisoned or fined.

3. The court shall order the destruction of the items."

The Federal Court has consistently held that any works or items which offend, in a manner that is difficult to accept, the sense of sexual propriety, are obscene; the effect may be to arouse a normal person sexually or to disgust or repel him (Judgments of the Swiss Federal Court (ATF), vol. 83 (1957), part VI, pp. 19-25; vol. 86 (1960), part IV, pp. 19-25; vol. 87 (1961), part IV, pp. 73-85); making such items available to an indeterminate number of people amounts to "publication" of them.

21. The Federal Court held in 1963 that, for the purposes of paragraph 3 of Article 204, if an obscene object was of undoubted cultural interest, it was sufficient to withhold it from the general public in order to "destroy" it.

In its judgment of 10 May 1963 in the case of Rey v. Attorney-General of Valais (ATF vol. 89 (1963), part IV, pp. 133-140), it held inter alia "that, in making destruction mandatory, the legislature had in contemplation only the commonest case, publication of entirely pornographic items". As "destruction is a measure as opposed to a punishment", "it must not go beyond what is necessary to achieve the desired aim", that is to say "the protection of public morality". The court went on to state:

"In other words, ‘destruction’, as prescribed by Article 204 § 3 of the Criminal Code, must protect public morality but go no further than that requirement warrants.

In the commonest case, that of pornographic publications devoid of artistic, literary or scientific merit, the destruction will be physical and irreversible, not just because of the lack of any cultural value, but also because, in general, this is the only adequate way of ultimately protecting the public from the danger of the confiscated items ... .

It is quite a different matter when one is dealing, as in the present case, with an irreplaceable or virtually irreplaceable work of art. There is then a clash of two opposing interests, both of them important in terms of the civilisation to which Switzerland belongs: the moral and the cultural interest. In such a case, the legislature and the courts must find a way of reconciling the two. This court has thus held, in applying Article 204, that it must always be borne in mind that artistic creativity is itself subject to certain constraints of public morality, but that there must nonetheless be artistic freedom ... .

It is, accordingly, a matter for the courts to consider in each case in view of all the circumstances, whether physical destruction is essential or whether a more lenient

measure suffices. The mandatory requirement of Article 204 § 3 will, therefore, be complied with where the courts order that an obscene item devoid of any cultural value is to be physically destroyed, and, in respect of an item of undoubted cultural interest, where effective steps are taken to withhold it from the general public and to make it available only to a limited number of serious specialists ... .

If such precautions are taken, Article 204 of the Criminal Code will not be applicable to items which are inherently obscene but of genuine cultural interest. A distinction must also be drawn between such items and pure pornography. The cultural interest of an item admittedly does not prevent it from being obscene. But it does require the courts to determine with particular care what steps must be taken to prevent general access to the item, while making it available to a well-defined number of serious connoisseurs; this will comply with the requirements of Article 204 § 3 of the Criminal Code, which, as has been shown, makes destruction mandatory but only as a measure whose effects must be in proportion to the intended aim ... ."

This particular case concerned seven ivory reliefs and thirty prints of antique Japanese art; the court held that the requirement to "destroy" them was met by placing them in a museum.

22. Previous to the Sarine District Criminal Court's decision of 20 January 1988 (see paragraph 19 above), the Basle-Urban Court of Appeal had already discharged a confiscation order made pursuant to the Criminal Code. In a judgment of 29 August 1980, to which the District Court referred, the Court of Appeal granted an application to restore to the heirs of the painter Kurt Fahrner a painting confiscated in 1960, after he had been convicted of an infringement of freedom of religious belief and worship (Article 261 of the Criminal Code).

The Court of Appeal held inter alia that as confiscation "always interferes with the property rights of the person concerned, a degree of restraint is called for and, in accordance with the principle of proportionality, such a measure must go no further than is essential to maintain security". The court added (translation from the German):

"This principle applies, in particular, where (on account of its distinctiveness) the item subject to confiscation is hard or impossible to replace. Therefore the principle applies more strictly to a work of art (e.g. a painting) than to a weapon used to commit an offence ... . Finally, having regard to its preventive character, the measure should remain in force only for as long as the legal requirements are satisfied ... ."

Accordingly, the view had to be taken that "an order confiscating a work of art may subsequently be discharged or varied, either because the confiscated item is no longer dangerous and the measure no longer required, or because the necessary degree of security may be achieved by another more lenient measure".

In that particular case, the reasoning of the Court of Appeal was as follows:

"To apply present-day criteria, both parties agree with the court that the public's ideas of obscenity, immorality, indecency, blasphemy, etc. have changed considerably in the last twenty years and have become distinctly more liberal. Although the confiscated painting is undoubtedly liable to offend a great many people's religious

sensibilities even today, there is no reason to fear that, by exhibiting it in a private or suitable public place, one would be endangering religious harmony, public safety, morals or public order within the meaning of Article 58 of the Criminal Code ...

Whether there is a danger thus depends primarily on where the item to be confiscated is liable to end up ... . In this case, the exhibition of the painting in a museum would at present clearly be unobjectionable in the context of Article 58 of the Criminal Code. However, even if the picture were to be returned unconditionally, the likelihood of misuse must be regarded as minimal because Fahrner, who deliberately set out, by means of a provocative exhibition, to draw attention to himself as a painter and to his ideas and works, has since died. There is no reason to believe that the applicants have any intention of using the picture to offend other people's religious sensibilities. At any rate, the picture would not lend itself to such a purpose (Article 261 of the Criminal Code) sufficiently to permit the 1960 confiscation order to stand ... . Any danger of that kind arising from the picture is no longer serious enough to justify action under Article 58 of the Criminal Code. Nor is there any reason to hand this picture over to a scientific collection, i.e. a museum, in order to protect the public and morality. The confiscation order should be discharged and the picture unconditionally returned to the applicants, whose main application is thus granted."

PROCEEDINGS BEFORE THE COMMISSION

23. The applicants applied to the Commission on 22 July 1983 (application no. 10737/84). Relying on Article 10 (art. 10) of the Convention, they complained of their criminal conviction and sentence to a fine (hereinafter referred to as the "conviction") and of the confiscation of the pictures in dispute.

24. The Commission declared the application admissible on 6 December 1985.

In its report of 8 October 1986 (made under Article 31) (art. 31), it took the view that there had been a breach of Article 10 (art. 10) in respect of the confiscation of the paintings (by eleven votes to three) but not in respect of the conviction (unanimously). The text of the Commission's opinion and the separate opinion contained in the report is reproduced as an annex to this judgment.

FINAL SUBMISSIONS TO THE COURT

25. At the hearing on 25 January 1988, the Government reiterated the final submissions in their memorial, asking the Court to

"hold that there has been no violation of Article 10 (art. 10) of the Convention in this case, either in relation to the applicants' conviction and sentence to a fine or as regards the confiscation of the first applicant's paintings".

AS TO THE LAW

26. The applicants complained that their conviction and the confiscation of the paintings in issue violated Article 10 (art. 10) of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Government rejected this contention. The Commission too rejected it with regard to the first of the measures complained of but accepted it with regard to the second.

27. The applicants indisputably exercised their right to freedom of expression - the first applicant by painting and then exhibiting the works in question, and the nine others by giving him the opportunity to show them in public at the "Fri-Art 81" exhibition they had mounted.

Admittedly, Article 10 (art. 10) does not specify that freedom of artistic expression, in issue here, comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression. As those appearing before the Court all acknowledged, it includes freedom of artistic expression - notably within freedom to receive and impart information and ideas - which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Confirmation, if any were needed, that this interpretation is correct, is provided by the second sentence of paragraph 1 of Article 10 (art. 10-1), which refers to "broadcasting, television or cinema enterprises", media whose activities extend to the field of art. Confirmation that the concept of freedom of expression is such as to include artistic expression is also to be found in Article 19 § 2 of the International Covenant on Civil and Political Rights, which specifically includes within the right of freedom of expression information and ideas "in the form of art".

28. The applicants clearly suffered "interference by public authority" with the exercise of their freedom of expression - firstly, by reason of their conviction by the Sarine District Criminal Court on 24 February 1982, which was confirmed by the Fribourg Cantonal Court on 26 April 1982 and then by the Federal Court on 26 January 1983 (see paragraphs 14, 16 and 18

above), and secondly on account of the confiscation of the paintings, which was ordered at the same time but subsequently lifted (see paragraph 19 above).

Such measures, which constitute "penalties" or "restrictions", are not contrary to the Convention solely by virtue of the fact that they interfere with freedom of expression, as the exercise of this right may be curtailed under the conditions provided for in paragraph 2 (art. 10-2). Consequently, the two measures complained of did not infringe Article 10 (art. 10) if they were "prescribed by law", had one or more of the legitimate aims under paragraph 2 of that Article (art. 10-2) and were "necessary in a democratic society" for achieving the aim or aims concerned.

Like the Commission, the Court will look in turn at the applicants' conviction and at the confiscation of the pictures from this point of view.

I. THE APPLICANTS' CONVICTION

1. "Prescribed by law"

29. In the applicants' view, the terms of Article 204 § 1 of the Swiss Criminal Code, in particular the word "obscene", were too vague to enable the individual to regulate his conduct and consequently neither the artist nor the organisers of the exhibition could foresee that they would be committing an offence. This view was not shared by the Government and the Commission.

According to the Court's case-law, "foreseeability" is one of the requirements inherent in the phrase "prescribed by law" in Article 10 § 2 (art. 10-2) of the Convention. A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see the Olsson judgment of 24 March 1988, Series A no. 130, p. 30, § 61 (a)). The Court has, however, already emphasised the impossibility of attaining absolute precision in the framing of laws, particularly in fields in which the situation changes according to the prevailing views of society (see the Barthold judgment of 25 March 1985, Series A no. 90, p. 22, § 47). The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague (see, for example, the Olsson judgment previously cited, ibid.). Criminal-law provisions on obscenity fall within this category.

In the present instance, it is also relevant to note that there were a number of consistent decisions by the Federal Court on the "publication" of "obscene" items (see paragraph 20 above). These decisions, which were accessible because they had been published and which were followed by the

lower courts, supplemented the letter of Article 204 § 1 of the Criminal Code. The applicants' conviction was therefore "prescribed by law" within the meaning of Article 10 § 2 (art. 10-2) of the Convention.

2. The legitimacy of the aim pursued

30. The Government contended that the aim of the interference complained of was to protect morals and the rights of others. On the latter point, they relied above all on the reaction of a man and his daughter who visited the "Fri-Art 81" exhibition (see paragraph 12 above).

The Court accepts that Article 204 of the Swiss Criminal Code is designed to protect public morals, and there is no reason to suppose that in applying it in the instant case the Swiss courts had any other objectives that would have been incompatible with the Convention. Moreover, as the Commission pointed out, there is a natural link between protection of morals and protection of the rights of others.

The applicants' conviction consequently had a legitimate aim under Article 10 § 2 (art. 10-2).

3. "Necessary in a democratic society"

31. The submissions of those appearing before the Court focused on the question whether the disputed interference was "necessary in a democratic society" for achieving the aforementioned aim.

In the applicants' view, freedom of artistic expression was of such fundamental importance that banning a work or convicting the artist of an offence struck at the very essence of the right guaranteed in Article 10 (art. 10) and had damaging consequences for a democratic society. No doubt the impugned paintings reflected a conception of sexuality that was at odds with the currently prevailing social morality, but, the applicants argued, their symbolical meaning had to be considered, since these were works of art. Freedom of artistic expression would become devoid of substance if paintings like those of Josef Felix Müller could not be shown to people interested in the arts as part of an exhibition of experimental contemporary art.

In the Government's submission, on the other hand, the interference was necessary, having regard in particular to the subject-matter of the paintings and to the particular circumstances in which they were exhibited.

For similar reasons and irrespective of any assessment of artistic or symbolical merit, the Commission considered that the Swiss courts could reasonably hold that the paintings were obscene and were entitled to find the applicants guilty of an offence under Article 204 of the Criminal Code.

32. The Court has consistently held that in Article 10 § 2 (art. 10-2) the adjective "necessary" implies the existence of a "pressing social need" (see, as the most recent authority, the Lingens judgment of 8 July 1986, Series A

no. 103, p. 25, § 39). The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but this goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (ibid.). The Court is therefore empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10) (ibid.).

In exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned court decisions in isolation; it must look at them in the light of the case as a whole, including the paintings in question and the context in which they were exhibited. The Court must determine whether the interference at issue was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the Swiss courts to justify it are "relevant and sufficient" (see the same judgment, p. 26, § 40).

33. In this connection, the Court must reiterate that freedom of expression, as secured in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society, indeed one of the basic conditions for its progress and for the self-fulfilment of the individual. Subject to paragraph 2 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see the Handyside judgment of 7 December 1976, Series A no. 24, p. 23, § 49). Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression.

34. Artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10 (art. 10-2). Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, "duties and responsibilities"; their scope will depend on his situation and the means he uses (see, mutatis mutandis, the Handyside judgment previously cited, p. 23, § 49). In considering whether the penalty was "necessary in a democratic society", the Court cannot overlook this aspect of the matter.

35. The applicants' conviction on the basis of Article 204 of the Swiss Criminal Code was intended to protect morals. Today, as at the time of the Handyside judgment (previously cited, p. 22, § 48), it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals. The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their

countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.

36. In the instant case, it must be emphasised that - as the Swiss courts found both at the cantonal level at first instance and on appeal and at the federal level - the paintings in question depict in a crude manner sexual relations, particularly between men and animals (see paragraphs 14, 16 and 18 above). They were painted on the spot - in accordance with the aims of the exhibition, which was meant to be spontaneous - and the general public had free access to them, as the organisers had not imposed any admission charge or any age-limit. Indeed, the paintings were displayed in an exhibition which was unrestrictedly open to - and sought to attract - the public at large.

The Court recognises, as did the Swiss courts, that conceptions of sexual morality have changed in recent years. Nevertheless, having inspected the original paintings, the Court does not find unreasonable the view taken by the Swiss courts that those paintings, with their emphasis on sexuality in some of its crudest forms, were "liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity" (see paragraph 18 above). In the circumstances, having regard to the margin of appreciation left to them under Article 10 § 2 (art. 10-2), the Swiss courts were entitled to consider it "necessary" for the protection of morals to impose a fine on the applicants for publishing obscene material.

The applicants claimed that the exhibition of the pictures had not given rise to any public outcry and indeed that the press on the whole was on their side. It may also be true that Josef Felix Müller has been able to exhibit works in a similar vein in other parts of Switzerland and abroad, both before and after the "Fri-Art 81" exhibition (see paragraph 9 above). It does not, however, follow that the applicants' conviction in Fribourg did not, in all the circumstances of the case, respond to a genuine social need, as was affirmed in substance by all three of the Swiss courts which dealt with the case.

37. In conclusion, the disputed measure did not infringe Article 10 (art. 10) of the Convention.

II. THE CONFISCATION OF THE PAINTINGS

1. "Prescribed by law"

38. In the applicants' submission, the confiscation of the paintings was not "prescribed by law" for it was contrary to the clear and unambiguous terms of Article 204 § 3 of the Swiss Criminal Code, which lays down that items held to be obscene must be destroyed.

The Government and the Commission rightly referred to the development of Swiss case-law with regard to this provision, beginning with the Federal Court's judgment of 10 May 1963 in the Rey case; since then, where an obscene item is of cultural interest and difficult or impossible to replace, such as a painting, it has been sufficient, in order to satisfy the requirements of Article 204 § 3 of the Criminal Code, to take whatever measures the court considers essential to withhold it from the general public (see paragraph 21 above). In 1982, confiscation was the measure envisaged under the relevant case-law and was as a rule employed for this purpose. Accessible to the public and followed by the lower courts, this case-law has alleviated the harshness of Article 204 § 3. The impugned measure was consequently "prescribed by law" within the meaning of Article 10 § 2 (art. 10-2) of the Convention.

2. The legitimacy of the aim pursued

39. The confiscation of the paintings - the persons appearing before the Court were in agreement on this point - was designed to protect public morals by preventing any repetition of the offence with which the applicants were charged. It accordingly had a legitimate aim under Article 10 § 2 (art. 10-2).

3. "Necessary in a democratic society"

40. Here again, those appearing before the Court concentrated their submissions on the "necessity" of the interference.

The applicants considered the confiscation to be disproportionate in relation to the aim pursued. In their view, the relevant courts could have chosen a less Draconian measure or, in the interests of protecting human rights, could have decided to take no action at all. They claimed that by confiscating the paintings the Fribourg authorities in reality imposed their view of morals on the country as a whole and that this was unacceptable, contradictory and contrary to the Convention, having regard to the well-known diversity of opinions on the subject.

The Government rejected these contentions. In declining to take the drastic measure of destroying the paintings, the Swiss courts took the minimum action necessary. The discharge of the confiscation order on 20 January 1988, which the first applicant could have applied for earlier, clearly showed that the confiscation had not offended the proportionality principle; indeed, it represented an application of it.

The Commission considered the confiscation of the paintings to be disproportionate to the legitimate aim pursued. In its view, the judicial authorities had no power to weigh the conflicting interests involved and order measures less severe than confiscation for an indefinite period.

41. It is clear that notwithstanding the apparently rigid terms of paragraph 3 of Article 204 of the Criminal Code, the case-law of the Federal Court allowed a court which had found certain items to be obscene to order their confiscation as an alternative to destruction. In the present case, it is the former measure which has to be considered under Article 10 § 2 (art. 10-2) of the Convention.

42. A principle of law which is common to the Contracting States allows confiscation of "items whose use has been lawfully adjudged illicit and dangerous to the general interest" (see, mutatis mutandis, the Handyside judgment previously cited, Series A no. 24, p. 30, § 63). In the instant case, the purpose was to protect the public from any repetition of the offence.

43. The applicants' conviction responded to a genuine social need under Article 10 § 2 (art. 10-2) of the Convention (see paragraph 36 above). The same reasons which justified that measure also apply in the view of the Court to the confiscation order made at the same time.

Undoubtedly, as the applicants and the Commission rightly emphasised, a special problem arises where, as in the instant case, the item confiscated is an original painting: on account of the measure taken, the artist can no longer make use of his work in whatever way he might wish. Thus Josef Felix Müller lost, in particular, the opportunity of showing his paintings in places where the demands made by the protection of morals are considered to be less strict than in Fribourg.

It must be pointed out, however, that under case-law going back to the Fahrner case in 1980 and which was subsequently applied in the instant case (see paragraphs 19 and 22 above), it is open to the owner of a confiscated work to apply to the relevant cantonal court to have the confiscation order discharged or varied if the item in question no longer presents any danger or if some other, more lenient, measure would suffice to protect the interests of public morals. In its decision of 20 January 1988, the Sarine District Criminal Court stated that the original confiscation "was not absolute but merely of indeterminate duration, which left room to apply for a reconsideration" (see paragraph 19 above). It granted Mr. Müller's application because "the preventive measure [had] fulfilled its function, namely to ensure that such paintings [were] not exhibited in public again without any precautions" (ibid.).

Admittedly, the first applicant was deprived of his works for nearly eight years, but there was nothing to prevent him from applying earlier to have them returned; the relevant case-law of the Basle Court of Appeal was public and accessible, and, what is more, the Agent of the Government himself drew his attention to it during the Commission's hearing on 6 December 1985; there is no evidence before the Court to show that such an application would have failed.

That being so, and having regard to their margin of appreciation, the Swiss courts were entitled to hold that confiscation of the paintings in issue was "necessary" for the protection of morals.

44. In conclusion, the disputed measure did not infringe Article 10 (art. 10) of the Convention.

FOR THESE REASONS, THE COURT

1. Holds by six votes to one that the applicants' conviction did not infringe Article 10 (art. 10) of the Convention;

2. Holds by five votes to two that the confiscation of the paintings did not infringe Article 10 (art. 10) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 May 1988.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr. Spielmann;

(b) partly concurring and partly dissenting opinion of Mr. De Meyer.

R.R.
M.-A.E.

DISSENTING OPINION OF JUDGE SPIELMANN

(Translation)

1. In his separate opinion, Mr. H. Danelius of the Commission stated inter alia as follows:

> "In my view, the Commission should have asked whether, taken together, the two measures" [fine and confiscation] "constituted a violation of his right to freedom of expression as protected by Article 10 (art. 10) of the Convention, and my reply would have been that they did."

2. I can only agree with this approach to the question, just as I endorse Mr. Danelius completely when he states:

> "I believe Mr. Müller's fine and the fines imposed on the other applicants for exhibiting the three paintings at Fribourg are a more complex matter since the question arises whether there is any real need, in modern society, to punish such expression of artistic creativity, even though some may find them offensive or even disgusting."

3. However, I do not agree with the following conclusion reached by Mr. Danelius:

> "In the end, though, I voted with the rest of the Commission on this matter, wishing to conform to European Court case-law, particularly Handyside. There the Court pointed out that 'it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals' and that the requirements of morals vary 'from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject'. The Court added that 'by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements'."

4. In purely logical terms I find it very difficult to regard the fines imposed as coming within the requirements of Article 10 (art. 10) of the Convention and, on the other hand, to agree with the Commission that the confiscation of the paintings did not comply with the requirements of that Article (art. 10).

5. I believe the two matters are indistinguishable. Either there has been a violation of the Convention both in respect of the fines and the confiscation, or there has been no violation at all.

6. My view is that there has been a violation of Article 10 (art. 10) of the Convention. I will explain this view without drawing any distinction between the fines imposed and the confiscation ordered.

7. A. Prescribed by law

I agree entirely with the finding of the majority of the Court that the convictions and confiscation order were prescribed by law.

8. B. Legitimate nature of the aim

I have no reason to doubt that these decisions had a legitimate aim under Article 10 § 2 (art. 10-2) of the Convention.

9. C. "Necessary in a democratic society"

The majority of the Court recognises "that conceptions of sexual morality have changed in recent years. Nevertheless, having inspected the original paintings, the Court does not find unreasonable the view taken by the Swiss courts that those paintings, with their emphasis on sexuality in some of its crudest forms, were 'liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity'." Furthermore, this was "an exhibition which was unrestrictedly open to - and sought to attract - the public at large." In the circumstances, having regard to the margin of appreciation left to them under Article 10 § 2 (art. 10-2), [the Swiss courts] were entitled to consider it 'necessary' for the protection of morals to impose a fine on the applicants for publishing obscene material."

As regards the confiscation of the disputed paintings, the majority of the Court also considers that "having regard to the margin of appreciation, the Swiss courts were entitled to hold that confiscation of the paintings in issue was 'necessary' for the protection of morals".

10. I cannot agree with this opinion for the following reasons.

(a) Relativity of the notion of "obscenity"

There are numerous examples in the press, literature and painting which should teach us to be more prudent in this field. Freedom of expression is the rule and interferences by the State, properly justified, must remain the exception.

For example, in 1857, Flaubert was prosecuted for his last novel "Madame Bovary".

In the same year, on 20 August 1857 to be precise, Charles Baudelaire and his publishers were summoned before the same Regional Criminal Court of the Seine. The subject-matter of the proceedings: "Les Fleurs du Mal".

In the context of this case, it is not inappropriate to recall this trial (see appendix).

In my opinion, the Contracting States should take greater account of the notion of the relativity of values in the field of the expression of ideas.

If, of necessity, we may regard State authorities as being in principle in a better position than the international court to give an opinion on the exact content of the requirements of Article 10 (art. 10) of the Convention, it remains unacceptable in a Europe composed of States that the State in question should leave such an assessment to a canton or a municipal authority.

If this were to be the case, it would clearly be impossible for an international court to find any violation of Article 10 (art. 10) as the second paragraph of that Article would always apply (art. 10-2).

(b) "Margin of appreciation" of national authorities

It is not necessary to repeat the Court's case-law in this regard.

I believe however that there are limits to this concept.

Otherwise, many of the guarantees laid down in the Convention might be in danger of remaining a dead letter, at least in practice.

Moreover, can it not be argued that all exaggeration is liable in the short or medium term to lose its significance?

As will be stated below, I do not believe that the notion of "the margin of appreciation" justified the decisions taken by the Swiss authorities as these measures were in no respect necessary in a democratic society.

(c) The criterion of "necessity"

In concluding that the decisions taken were in no respect necessary in a democratic society, I would rely on the following two arguments:

1. Although convicting the applicants in criminal proceedings, the Swiss authorities did not order the destruction of the disputed paintings, despite a formal provision in their criminal code.

2. Although they ordered the confiscation of the disputed paintings, the authorities agreed in 1988 to restore these items.

In other words, can it seriously be argued that what was "necessary" in 1987 is no longer so in 1988, or, what is certainly no longer "necessary" in 1988, was necessary in 1982?

I do not understand this reasoning.

11. In these circumstances, I conclude that there was a violation of Article 10 (art. 10) of the Convention both as regards the fines imposed and the confiscated - albeit returned - pictures.

APPENDIX

The "Baudelaire" case : "Les Fleurs du Mal"

On 20 August 1857, the 6th Criminal Chamber of the Seine Regional Court delivered the following judgment:

> "The Regional Court,
>
> Whereas Baudelaire, Poulet-Malassis and de Broisse have offended against public morality, imposes a fine of 300 Francs on Baudelaire and 100 Francs each on Poulet-Malassis and de Broisse;
>
> Orders the destruction of documents nos. 20, 30, 39, 80, 81 and 87 in the book of documents ..."

This conviction followed the formal address by the public prosecutor's representative, who cited inter alia the following verses in support of the prosecution case :

> "Je sucerai, pour noyer ma rancoeur, Le népenthès et la bonne ciguë Aux bouts charmants de cette gorge aiguë Qui n'a jamais emprisonné de coeur ..."

and also:

"Moi, j'ai la lèvre humide et je sais la science De perdre au fond d'un lit l'antique conscience. Je sèche tous les pleurs sur mes seins triomphants Et fais rire les vieux du rire des enfants. Je remplace, pour qui me voit nue et sans voiles, La lune, le soleil, le ciel et les étoiles !"

After these quotations, the public prosecutor's representative stated as follows:

"Gentlemen, ..., I say to you: take a stand by your judgment in this case against these growing, unmistakable tendencies, against this unhealthy fever which seeks to paint everything, to write everything and to say everything, as though the crime of offending public morality had been abolished and that morality no longer existed.

Paganism had its shameful manifestations which may be found in the ruins of the destroyed cities of Pompeii and Herculanum. However, in the temple and in public places, its statues have a chaste nudity. Its artists follow the cult of plastic beauty; they make harmonious shapes out of the human body and do not depict it as being debased or throbbing in the stranglehold of debauchery; they respected community life.

In our society immersed in Christianity, show at least the same respect."

Baudelaire's defence lawyer, Maître Gustave Chaix d'Est-Ange, stated as follows:

"...

After the title "Les Fleurs du Mal" comes the epigraph: all the author's thinking is there, the entire spirit of the book; it is in a way a second title, more explicit than the first, explaining, commenting and elaborating upon it:

'On dit qu'il faut couler les exécrables choses Dans le puits de l'oubli et au sépulchre encloses, Et que par les escrits le mal résuscité Infectera les moeurs de la postérité; Mais le vice n'a point pour mère la science, Et la vertu n'est pas mère de l'ignorance.'"

(Th. Agrippa d'Aubigné, les Tragiques, livre II)

Maître Gustave Chaix d'Est-Ange went on to state:

"The intimate thoughts of the author are even more clearly expressed in the first poem which he dedicates to the reader as a warning:

'La sottise, l'erreur, le péché, la lésine, Occupent nos esprits et travaillent nos corps. Et nous alimentons nos aimables remords, Comme les mendiants nourrissent leur vermine.

Nos péchés sont têtus, nos repentirs sont lâches; Nous nous faisons payer grassement nos aveux; Et nous rentrons gaîment dans le chemin bourbeux, Croyant par de vils pleurs laver toutes nos taches.

C'est le Diable qui tient les fils qui nous remuent! Aux objets répugnants nous trouvons des appas. Chaque jour vers l'Enfer nous descendons d'un pas, Sans horreur, à travers des ténèbres qui puent.'"

Baudelaire's lawyer added:

> "Gentlemen, change this into prose, delete the rhyme and the caesura, grasp the substance of this powerful and vivid language and the underlying intentions; and tell me if we have ever heard this language being delivered from the Christrian pulpit, from the lips of some fiery preacher; tell me if the same thoughts would not be found, perhaps sometimes even the same expressions, in the homilies of some strict and unsophisticated father of the Church".

On 31 May 1949, at the request of the Société des gens de lettres, the Paris Court of Cassation in a decision on the merits, quashed the above-mentioned judgment of the Seine Regional Court on the following grounds:

> "Whereas the prohibited poems do not contain any obscene or even rude term and do not exceed the licence which the artist is permitted ...
>
> Whereas accordingly, the crime of offending public morality is not established ...
>
> ...
>
> Quashes the judgment of 20 August 1857, restores the good name of Baudelaire, Poulet-Malassis and de Broisse ..."

When Baudelaire's good name was thus restored, he had already been dead more than 80 years.

In legal terms, this was quite simply a miscarriage of justice.

(Source: "Le procès des Fleurs du Mal" - 'Le journal des procès' no. 85, 1986 - Bruxelles, Ed. Justice et Société)

SEPARATE OPINION, PARTLY CONCURRING AND PARTLY DISSENTING, OF JUDGE DE MEYER

(Translation)

I.

Art, or what claims to be art, certainly falls within the sphere of freedom of expression.

There is no need at all to try to see it was a vehicle for communicating information or ideas[1]: it may be that but it is doubtful whether it is necessarily so.

Whilst the right to freedom of expression "shall include" or "includes" the freedom to "seek", to "receive" and to "impart" "information" and "ideas"[2], it may also include other things. The external manifestation of the human personality may take very different forms which cannot all be made to fit into the categories mentioned above.

II.

It is only with some hesitation that I have come to the view that the courts of the defendant State did not infringe the applicants' right to freedom of expression by imposing on them the fines at issue in this case.

That I was finally able to form this view owed much to the fact that the paintings in question were exhibited in rather special circumstances[3]. This factor made it possible for the Swiss courts properly to determine, without going beyond the limits of their discretionary power, that to impose these fines was "necessary in a democratic society".

It might have been otherwise if these paintings had been exhibited in other circumstances.

III.

The particular nature of the circumstances of their exhibition in Fribourg in 1981 leads me, moreover, to believe that it has not been shown that in this case it was necessary to confiscate the paintings.

---

[1] See paragraph 27 of the judgment.

[2] See Article 10 (art. 10) of the European Convention on Human Rights, Article 19 of the International Covenant on Civil and Political Rights and Article 19 of the Universal Declaration of Human Rights.

[3] See the first sub-paragraph of paragraph 36 of the judgment.

Rather it seems to me that such confiscation went beyond what could be considered necessary and that the fines were sufficient on their own.

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

FIRST SECTION

CASE OF McVICAR v. THE UNITED KINGDOM

(Application no. 46311/99)

JUDGMENT

STRASBOURG

7 May 2002

FINAL

07/08/2002

In the case of McVicar v. the United Kingdom,

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

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Sir Nicolas BRATZA,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mr V. ZAGREBELSKI, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 18 April 2002,

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

PROCEDURE

1. The case originated in an application (no. 46311/99) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr John Roger McVicar ("the applicant"), on 18 December 1998.

2. The applicant was represented before the Court by Mr D. Price, a lawyer practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr H. Llewellyn, of the Foreign and Commonwealth Office.

3. The applicant alleged that the inability of a defendant to a libel action to claim legal aid constituted a violation of Articles 6 § 1 and 10 of the Convention. He submitted also that the exclusion of witness evidence at his trial, the burden of proof which he faced in pleading a defence of justification, the order for costs made against him and the injunction restricting future publication violated Article 10 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 10 May 2001, the Court declared the application partly admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry].

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1). Within that Section, the Chamber that would consider

the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Court having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a British national, born in 1940 and living in London.

9. The applicant, who has a sociology degree, is a journalist and broadcaster. He has written for many national newspapers and magazines and has made a number of appearances on radio and television.

In September 1995 an article was published in *Spiked* magazine in which the applicant suggested that the athlete Linford Christie used banned performance-enhancing drugs. The article stated, *inter alia*:

> "On the basis of circumstantial evidence many believe, but cannot prove that Christie has been taking performance-enhancing drugs ... If he has been outwitting the testers for years, it is extremely unlikely that Christie will be caught in the few months left before his likely retirement from competitive sprinting. Nevertheless, there is no bloody hypodermic needle, and no direct evidence that points the finger at Christie. ...
>
> Certainly the ten days between injuring himself in Gothenburg and winning in Zurich would have allowed Christie to recover from a slight hamstring injury and, without fear of a random test, put in seven days intensive training, boosted by banned drugs, and perhaps human growth hormone, that would give him the explosiveness and power to run 10.03 seconds into a headwind. We don't know. ...
>
> Christie exhibits a number of other possible effects of these performance-enhancing drugs. His remarkable physique, in regard to both its bulk and definition, is consistent with the use of anabolic steroids. ... Similar considerations apply to speed (*sic*) with which he put on weight. In the early part of his career, he was a beanpole sprinter but between 1986 and 1988 he put on 13 kg in bodyweight to come in at the 70 kg powerhouse that he has stayed at since. Steroids have other side-effects ... Three of the commonest are grandiosity, fixated delusions and a persecution complex. Linford genuinely seems to think that running a hundred metres faster than anyone else is rather more than an exciting, even unique spectacle, but some kind of monumental contribution to human culture. ...
>
> Human growth hormone ... costs £1,200 for a week's supply. Miboerone is a steroid that is even more expensive ... Christie is rich. He also shows most of the physical, behavioural and psychological features of an athlete that regularly uses steroids. This conclusion is reinforced generally by the performances that he continues to turn in at

> an age when psychologically he should be in decline and specifically by his uncanny quick recovery from his injury at Gothenburg. ...
>
> Aside from all the non-testing criteria that provide circumstantial evidence to suggest that Christie may be a regular user, the final clinching one is Christie's own character and attitude to competition. He is a win-at-all-cost athlete and his determination to succeed may lead people to believe that he would not deprive himself of an advantage enjoyed by some of his rivals, thereby denying himself his only chance of fame and fortune."

10. In December 1995 Mr Christie commenced an action in the High Court for defamation against the applicant, the magazine's editor and the publishing company. The editor and publishing company were represented by a solicitor-advocate specialising in defamation and media litigation, Mr David Price. Mr Price had advised the publishing company prior to publication about the legality of the article in question. A separate action was launched by Mr Christie against the printers and various distributors of the magazine.

11. During the greater part of the proceedings the applicant represented himself because he could not afford to pay legal fees and because, under Schedule 2, Part II, of the Legal Aid Act 1988, legal aid was not available for defamation actions. His defence was that the allegations made in the article were true in substance and in fact.

In a newspaper article among the papers submitted by the applicant to the Court, it was reported that the applicant had, in June 1996, successfully defended himself in criminal proceedings concerning a charge of assaulting a neighbour.

12. On 28 June 1996 there was a directions hearing at which Mr Price (on behalf of the editor and publishing company), the applicant and counsel for Mr Christie made representations. An order was made requiring, *inter alia*, that the plaintiff and the defendants should exchange statements of witnesses of fact by 2 October 1996, and could each call four expert witnesses (a physiologist, a pharmacologist, a psychologist and an athletics coach), but only if the substance of each expert's evidence was disclosed in a report to be exchanged by 30 October 1996. These time-limits were subsequently extended by consent to some time in December 1996 and April 1997 respectively.

13. The applicant wished to rely on the evidence of an athlete, Geoffrey Walusimbi, who had allegedly told the applicant that Mr Christie had introduced him to performance-enhancing drugs. In respect of Mr Walusimbi the applicant served the following document dated 19 December 1996, which purported to be a statement of the nature of the evidence intended to be adduced under the Rules of the Supreme Court (RSC), Order 38, Rule 2A(5) (see below):

> "The second defendant has issued a subpoena on Mr Geoffrey Walusimbi ... He intends to adduce evidence from him concerning:

(a) his masked appearance on the *Panorama* [television] programme 'Drug Olympics' ... in which he admitted taking performance-enhancing drugs;

(b) his training relationship with Linford Christie;

(c) his trips abroad with Linford Christie to various Sports Clinics, in particular one in Florida, 'First Medical';

(d) his knowledge of Linford Christie's own use of performance-enhancing drugs."

14. One of the expert witnesses whom the applicant wished to call was an osteopath called Terry Moule. Mr Moule had been involved in sports medicine for over twenty years and had treated Mr Christie. He allegedly told the applicant that as a result of his experience he was able to tell by the look and feel of an athlete's body whether that athlete had taken performance-enhancing drugs, and that he was certain that Mr Christie had been a regular user. However, because of his previous association with Mr Christie, Mr Moule did not wish to give a statement. The applicant did not, therefore, serve any form of report in respect of Mr Moule's expert evidence as required by the order for directions. Instead, in April 1997, he served the following document, which he mistakenly believed to be acceptable under the RSC, Order 38, Rule 2A(5) in place of an expert's report:

"Terry Moule is a professional physiotherapist and went to the 1992 Barcelona Olympic Games as team physiotherapist for the athletics squad. He is conversant with the effects of steroids on the body and talks about 'steroid feel' and the particular look of a body that has been built up using anabolic-androgenic steroids. He is an expert on how the body responds to these drugs when supplemented by power lifting. He understands the effects of ageing on the performance of 'fast-twitch' muscle. He has massaged the Plaintiff in the early part of his career.

A subpoena has been taken out for Terry Moule."

15. The trial was listed to start on 15 June 1998. By this time, the applicant was the sole defendant in the proceedings because the editor had been killed in a traffic accident in September 1996 and the publishing company had become insolvent. On 30 April 1998 the applicant instructed Mr Price, who had had no involvement in the case since the death of the editor, to represent him as his solicitor-advocate. Mr Price had previously given advice to the editor and the publishing company both prior to, and following, publication of the article and had drafted a defence to Mr Christie's action on the limited information then available.

16. Mr Christie applied to prevent Mr Price from acting on the grounds that he had previously been responsible for the decision to publish the article concerned, having given legal advice to the editor, and that the legality of that decision was itself now at issue. As a result, Mr Christie argued that Mr Price had a conflict of interest. Mr Christie's application was granted by the trial judge, Mr Justice Popplewell, in the High Court on

8 June 1998, but his decision was reversed by the Court of Appeal three days later. The applicant was represented by Mr Price at both hearings.

17. About a week before the trial Mr Christie's solicitors indicated that they intended to make an application to the trial judge seeking to prevent the applicant from calling a number of witnesses, including Mr Moule and Mr Walusimbi. Mr Price had, since being instructed by the applicant, made efforts to secure full statements from those witnesses. Following the indication received from Mr Christie's solicitors, Mr Moule agreed to make a signed statement, in which he described, *inter alia*, the effects of steroids and the high level of usage amongst athletes, and stated that "it would be almost impossible to succeed at the highest levels in the 100 metre [event] without the use of banned performance-enhancing drugs". This statement was served on Mr Christie's solicitors at 3 p.m. on Friday 12 June 1998, one working hour before the trial was due to commence.

18. On 15 and 16 June 1998 Mr Justice Popplewell heard preliminary submissions from Mr Price on behalf of the applicant and counsel for Mr Christie as to the admissibility of the evidence of the witnesses concerned. On 15 June 1998, in relation to the admissibility of the expert evidence of Mr Moule and a Professor Beckett on behalf of the applicant, he ruled as follows:

> "The rules [on disclosure of evidence] are designed to avoid an ambush. ... They are not to beat inefficient litigants. There is provision for the Judge in exercise of his duty to give leave for evidence to be called. Mr Price at the forefront of his argument says the obligation was on the Plaintiff to ensure that the Plaintiff was not taken by surprise. That is a misunderstanding of the rules of the Court. The rules provide that if the party wants to call an expert he should provide the substance of the expert's report. Mr Price contends that Mr Moule's expert statement leads to one conclusion; having observed the Plaintiff and massaged his body, everybody should understand what Mr Moule was going to say. I think there is another way of reading the evidence. The Plaintiff might have concluded that it was useless evidence. This is compounded by the fact that Mr Moule's statement deals with the ability to observe the effect of anabolic steroids but nowhere does he say that about the Plaintiff. The nearest he gets is at paragraph 8 where he says that at least 70% of athletes use steroids systematically. That statement adds nothing to the defence as pleaded.
>
> There is no obligation on a party to draw the attention of the other party to the defect in its witness statements. At trial the admissibility of statements is often dealt with. There is criticism of the Plaintiff on this point but it is false. The obligation is on the party to make sure that it complies with Orders. It has not been suggested that the Defendant was unable to obtain written statements. The fact that he has statements suggests quite the contrary. The Defendant was a litigant in person but Mr Price acted for a period of time and Mr McVicar is not inexperienced. He has very much in mind what is involved. It may be said that Mr Price did not have full conduct but he has had since 30 April 1998. A review would have revealed that the statements did not comply with the Orders made. ... That I have discretion is clear. The exercise of that discretion is to ensure a fair disposal. ..."

The judge continued that he had to balance the prejudice that would be suffered by the applicant if the evidence were excluded against that which would be suffered by Mr Christie if Mr Moule's testimony were admitted. It would be unfair to allow Mr Moule to give evidence at trial without giving Mr Christie time to call counter-evidence, but to order an adjournment for this purpose would itself be prejudicial to Mr Christie because the applicant did not have sufficient means to provide an indemnity for the extra costs which would be incurred as a result. The judge concluded: "If there is more prejudice to the Defendant than the Plaintiff he is the person who is responsible. The fault lies with him. I will not allow Mr Moule's evidence." He also refused the applicant leave to adduce that part of Professor Beckett's evidence which dealt with the efficacy of drug testing and the ease with which the ban on drug taking could be evaded on the basis that these issues were not pleaded by the applicant and an amendment to the pleading should not be allowed.

19. On 16 June 1998 the judge refused to grant the applicant's request for leave to admit Mr Walusimbi's evidence, on the ground that it would be unfair to Mr Christie to be faced with wide allegations about his drug taking, the details of which he would not know until Mr Walusimbi took the stand.

20. The applicant appealed against these rulings to the Court of Appeal. He was again represented by Mr Price at the appeal hearing, which took place on 18 June 1998. Lord Justice May, delivering the judgment of the court, commented, as had the trial judge, that the interests of the applicant were "identical" to those of his previous co-defendants, the editor and the publishing company. He went on:

> "I deal with Mr Moule's statement first. The gist statement served in April 1997 relating to Mr Moule contained very little detail of the substance of the evidence that he might give. It refers only to Mr Moule's experience and qualifications as a physiotherapist and then says baldly that he massaged the plaintiff during the early part of his career. The witness statement now served gives a more detailed account of his experience and names some of the sportspeople, including the plaintiff, whom he has treated. It refers to the benefit and effect of anabolic steroids for athletes, particularly in the 100 metres event. It states that in Mr Moule's experience a large proportion of professional athletes use steroids. It says that from his experience Mr Moule is generally able to tell by looking whether an athlete is taking steroids and that he can also tell this if he manipulates their muscles. ...
>
> Mr Price accepts that the gist statement did not put forward any affirmative version of what Mr Moule might say, but he submits that it could be inferred that Mr Moule would give the evidence that the look and feel of the plaintiff's body indicates use of banned drugs. I do not accept this submission. This gist statement is not even inferentially a statement of the evidence intended to be adduced such as is referred to in Order 38, Rule 2A(5). ...
>
> Matters which Mr Price would have us infer are intended to be said by Mr Moule are neither pleaded nor the subject of any previously served witness statement or

expert's report and I see no reason why the plaintiff should have anticipated the sudden arrival of this material at the very last moment.

Mr Price says that there is a strong public interest in allowing all relevant and probative evidence to be adduced lest there may be a verdict which is contrary to the truth. ... The judge took this important submission into account and so do I. The fact is that there are competing public interests, one of which is that parties to litigation should not turn up at the very last moment with unheralded evidence which puts another party at a disadvantage, and another of which is that the general administration of justice demands, for reasons which have been articulated frequently by this court, that fixed trial dates should not be abandoned at the last moment other than in quite exceptional circumstances. ...

It seems to me that the case for exercising the judge's discretion in relation to Mr Moule as he did is clear and overwhelming. Mr Moule's evidence was not heralded in the gist statement. The statement was served at the latest possible moment before the start of the trial. Without an adjournment of the trial (which the judge rightly regarded as out of the question and which would in any event have prejudiced the plaintiff) the plaintiff would be prejudiced by not being able properly to deal with the evidence. Any prejudice to the defendant was his own fault.

The judge had to make a balancing judgment, which in my view he did upon proper and unassailable principles. Accordingly, I would not disturb the judge's finding in relation to Mr Moule's evidence."

In relation to Mr Walusimbi's evidence, he said:

"A gist statement was served in relation to Mr Walusimbi and referred to what he had said in a *Panorama* programme. A transcript of the programme was provided on discovery. The [applicant] now wants to call Mr Walusimbi to say that the use of performance-enhancing drugs by athletes is widespread and that there are means of evading tests. Before the judge, he wanted to call Mr Walusimbi to give first-hand evidence that the plaintiff had taken drugs. This was neither pleaded nor included in the *Panorama* material. The judge rightly excluded it and there is no application for leave to appeal against that part of the decision. The judge held that the general evidence added little or nothing to the issue of widespread drug taking. I agree, not least since I would permit Professor Beckett's evidence to be adduced and this deals with the same topic. Further general evidence about widespread drug use by athletes does not go to establish that the plaintiff has taken drugs or that he is reasonably suspected of having done so. This again was very late evidence tendered in breach of court orders and the rules, and I consider that the judge exercised his discretion correctly to exclude it."

21. The main trial commenced on the same day, 18 June 1998. The applicant represented himself as his funds were exhausted. On 3 July 1998 the jury found, by a majority of ten to two, that the article complained of bore the meaning that

"Mr Christie is a cheat who regularly used banned performance-enhancing drugs to improve his success in athletic competition."

It found also that the applicant had not proved that the article as so interpreted was substantially true.

Although Mr Christie did not seek damages, the applicant was ordered to pay the costs of the action and was made subject to an injunction

> "... restraining the [applicant] whether by himself, his servants, agents or otherwise howsoever from further publishing or causing the publication of the allegation (express or by implication) that the plaintiff is a cheat who has regularly used performance-enhancing drugs to improve his success in athletic competition or any words to the same or similar effect ..."

22. Following the verdict, the distributors and printers involved in the separate action reached a settlement with Mr Christie which required the payment of damages to him (see paragraph 10 above).

II. RELEVANT LAW AND PRACTICE

A. The United Kingdom

1. Defamation

23. Under English law the object of a libel action is to vindicate the plaintiff's reputation and to make reparation for the injury done by the wrongful publication of defamatory statements concerning him or her. A defence of justification applies where the defamatory statement is substantially true. The burden is on the defendant to prove the truth of the statement on the balance of probabilities.

2. Legal aid

24. Throughout the relevant time, the allocation of civil legal aid in the United Kingdom was governed by the Legal Aid Act 1988. Under Schedule 2, Part II, paragraph 1, of that Act, "proceedings wholly or partly in respect of defamation" were excepted from the scope of the civil legal-aid scheme.

3. Exchange of witness statements

25. At the relevant time, civil procedure before the High Court was governed by the Rules of the Supreme Court (RSC). Under RSC Order 38, Rule 2A:

> "(1) The powers of the Court under this rule shall be exercised for the purpose of disposing fairly and expeditiously of the cause or matter before it, and saving costs ...
>
> (2) At the summons for directions in an action commenced by writ the Court shall direct every party to serve on the other parties, within fourteen weeks (or such other period as the Court may specify) of the hearing of the summons and on such terms as the Court may specify, written statements of the oral evidence which the party intends to adduce on any issues of fact to be decided at the trial. ...

...

(4) Statements served under this rule shall –

(a) be dated and, except for good reason (which should be specified by letter accompanying the statement), be signed by the intended witness and shall include a statement by him that the contents are true to the best of his knowledge and belief;

...

(5) Where a party is unable to obtain a written statement from an intended witness in accordance with paragraph (4)(a), the Court may direct the party wishing to adduce that witness's evidence to provide the other party with the name of the witness and (unless the Court otherwise orders) a statement of the nature of the evidence intended to be adduced. ...

...

(7) Subject to paragraph (9), where the party serving the statement does call such a witness at the trial –

...

(b) the party may not without the consent of the other parties or the leave of the Court adduce evidence from that witness the substance of which is not included in the statement served ...

(10) Where a party fails to comply with a direction for the exchange of witness statements he shall not be entitled to adduce evidence to which the direction related without the leave of the Court. ..."

Statements served under Rule 2A(5) are commonly referred to as "gist" statements.

4. Expert reports

26. According to the RSC, Order 38, Rule 37:

"(1) ... in respect of expert oral evidence, then, unless the Court considers that there are special reasons for not doing so, it shall direct that the substance of the evidence be disclosed in the form of a written report or reports to such other parties and within such period as the court may specify."

As in Rule 2A(10) in respect of witness statements (see above), the court may, pursuant to a general power set out at RSC, Order 3, Rule 5, grant leave to allow expert evidence to be adduced late when the order for directions has not been complied with by either party.

B. The United States of America

27. In New York Times *v. Sullivan* ((1964) 376 US 254), the Supreme Court of the United States ruled that a State could not, under the First and

Fourteenth Amendments to the United States Constitution, award damages to a public official for defamatory falsehood relating to his official conduct unless he proved "actual malice". This was shown where the statement concerned had been made with knowledge of its falsity or with reckless disregard as to whether it was true or false. In delivering the judgment of the court, Mr Justice Brennan commented:

> "Allowance of the defence of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defence as an adequate safeguard have recognised the difficulties of adducing legal proof that the alleged libel was true in all its factual particulars. ... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone'."

COMPLAINTS

28. The applicant contended that the unavailability of legal aid in defamation proceedings violated his right to effective access to a court under Article 6 § 1 of the Convention. He drew attention to, *inter alia*, the complexity of the law and procedure in connection with defamation actions, the fact that the evidence of Mr Moule and Mr Walusimbi had been excluded and the burden of proof imposed upon him to prove the truth of the allegations in mounting his defence before the High Court.

29. He contended further that the unavailability of legal aid, exclusion of witness evidence and burden of proof which he faced, together with the order that he pay Mr Christie's costs and the injunction prohibiting repetition of the allegations, violated his right to freedom of expression under Article 10 of the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

30. The applicant complained that the unavailability of legal aid in defamation proceedings violated his right to effective access to a court under Article 6 § 1 of the Convention.

The relevant part of Article 6 § 1 provides:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

A. The parties' submissions

1. The applicant

31. The applicant stated that he had been denied effective access to a court by reason of the unavailability of legal aid for the purpose of defending the defamation action brought against him by Mr Christie. He argued that the relevant provisions of the Legal Aid Act 1988 ("the 1988 Act") were arbitrary in that they barred those involved in defamation proceedings from legal aid whatever the justice and facts of the particular case. He asserted that such a blanket refusal could not constitute a legitimate prioritisation of legal-aid resources by the government.

32. In particular, the applicant submitted that the exclusion of defamation proceedings from legal aid under the 1988 Act was inconsistent with the importance attached to such proceedings under English law and procedure. He highlighted the fact that defamation is one of the few types of civil proceedings which can generally only be heard in the High Court before a judge and jury. The applicant asserted that the action in which he had been involved was one of many defamation cases raising issues of public importance and that, given also the comparative wealth of his opponent, he should have been granted legal aid so as to allow him to present his case on a level playing field.

33. The applicant pointed to a number of similarities between his position and that of the applicant in *Airey v. Ireland* (judgment of 9 October 1979, Series A no. 32). First, the law and procedure applicable to his case were complex. Second, he was faced with a significant burden of proof which would require witness evidence, including by way of detailed cross-examination, if it was to be met. Third, the proceedings were conducted in a "highly charged emotional environment" and, in his case, had been subject to extensive media coverage. He indicated that both his reputation as a journalist and his finances were at stake in the proceedings, with the result that he could not present his defence to the court with the required degree of objectivity.

34. The applicant distinguished his case from the European Commission of Human Rights' ("the Commission") previous decisions in *Winer v. the United Kingdom* (no. 10871/84, 10 July 1986, Decisions and Reports (DR) 48, p. 154); *Munro v. the United Kingdom* (no. 10594/83, 14 July 1987, DR 52, p. 158); *Steel and Morris v. the United Kingdom* (no. 21325/93, 5 May 1993, unreported); and *Stewart-Brady v. the United Kingdom* (no. 27436/95, 2 July 1997, unreported). He argued that each of those

decisions was based upon its individual facts and that, in contrast to the present case, the applicants had been unable to show prejudice as a result of their failure to secure legal aid. As an indication of the prejudice which he had suffered, the applicant referred to the exclusion of the evidence of two of his best witnesses as a consequence of his misunderstanding of the requirements laid down for valid service of evidence. He cited also technical deficiencies in the drafting of his defence pleadings which led in part to the exclusion of Mr Moule's evidence and restricted the applicant's ability to cross-examine Mr Christie and his witnesses at trial. He alleged further prejudice as a result of his ignorance about how to force disclosure of Mr Christie's drug-testing records and how he might seek to have certain evidence given by Mr Christie's witnesses excluded from the trial on the basis that it had not been anticipated.

35. The applicant drew attention to the limited assistance which he had received from Mr Price in the proceedings as a whole (see paragraphs 11, 15 and 21 above). He highlighted the fact that Mr Price had not spoken to any witnesses while acting for the editor and publishing company and had given them no advice as to how they should seek to substantiate the allegations made in the article. Nor had he been instructed when it came to compliance with the directions made in June 1996 (see paragraph 12 above). Once he had instructed Mr Price in April 1998, the applicant indicated that it was not feasible for the errors which had been made to be remedied bearing in mind the amount of work which had to be done, in particular as a result of Mr Christie's pre-trial strategy (see paragraphs 16-21 above).

2. The Government

36. The Government contended that there had been no denial of effective access to a court in this case.

37. They drew attention to *Winer, Munro, Steel and Morris* and *Stewart-Brady*, cited above, in which the Commission had found that the non-availability of legal aid for defamation proceedings did not involve any violation of Article 6 § 1. They explained these decisions by reference to three factors. Firstly, the absence of an express provision relating to civil proceedings, equivalent to the Article 6 § 3 (c) right to legal assistance in criminal proceedings, which implied that the obligation to provide legal aid under Article 6 § 1 must be restricted. Secondly, the fact that the Convention left States a free choice as to the means to be used in ensuring a right of effective access to a court. Such means may comprise, for example, simplification of rules of procedure rather than provision of legal aid. Thirdly, the legitimacy, given limited resources, of operating systems of civil legal aid which restrict eligibility so long as such restrictions were not arbitrary.

As shown in *Steel and Morris*, this analysis was not affected by a litigant's status as defendant. Indeed, the Government maintained that it

would be improper to favour defamation defendants over plaintiffs for the purposes of determining entitlement to legal aid.

38. The Government drew attention to the fact that, prior to being instructed by the applicant, Mr Price had represented the publishing company and the editor in the same action, with the result that he had been fully informed of the facts and issues of the case at all material times. He had then acted for the applicant for a period of over six weeks up to commencement of the trial. In particular, he had appeared at the hearings on the admissibility of the evidence of Mr Moule and Mr Walusimbi. They said that it was clear from the judgments of Mr Justice Popplewell and the Court of Appeal that, if the applicant had disclosed that evidence in proper form some weeks before commencement of the trial, rather than at the last minute, the balance in favour of admitting the evidence may have been very different.

39. The Government argued that the applicant was a successful professional journalist and was thus in a position to formulate and express arguments effectively and should have been well capable of comprehending the law and rules of procedure with which he was faced even in the absence of legal advice.

40. In all the circumstances, the Government argued that the applicant's position could not be compared with that of the applicant in *Airey*, cited above.

41. The Government argued also that the allocation to the applicant under domestic law of the burden of proving that the allegations were substantially true was not arbitrary. It was fair to place the burden of proof on the person who positively asserted a particular state of affairs, rather than the person who denied that a state of affairs existed, given the difficulties which arose where proof of a negative was required. Journalists must act responsibly in checking their sources and ensure that allegations which they made had an objective basis before publishing them.

42. The Government pointed out that the existence of a legal burden of proof was not unique to English law of defamation, but was almost invariably a feature of every civil legal action. The fact that, in the present case, that burden rested upon the applicant as defendant did not, they said, indicate that he must be provided with legal aid.

43. As to complexity, the Government submitted that the rules governing the service of expert and other evidence (see paragraphs 25-26 above) were straightforward and designed to promote, in a proportionate manner, an objective which was both legitimate and easy to understand, namely to allow each party to have fair notice of the case which they would face at trial. Indeed, in this case the High Court had, on an occasion when the applicant was present, made a clear and specific order as to the procedure to be followed (see paragraph 12 above).

44. The Government commented that the law of defamation was not complex in the context of the applicant's case as the only real issue before the court had been whether the allegations made were substantially true.

45. They argued that the fact that defamation proceedings were heard before a High Court judge and jury neither founded nor strengthened an argument that Article 6 § 1 required the applicant to be granted legal aid. The trial judge had a responsibility to ensure that the hearing was conducted fairly, and that each party had a proper opportunity to put their case effectively for consideration by the jury. His decision to exclude certain of the applicant's evidence did not amount to a denial of such an opportunity, but rather resulted from the applicant's failure to avail himself of it. Indeed, the exercise of discretion so as to exclude the evidence of Mr Moule and Mr Walusimbi, while allowing other of the applicant's evidence which had equally been served in violation of the requirements of the rules, represented a fair balance between the rights of each party and reduced delay in the proceedings as a whole.

B. The Court's assessment

46. The Court recalls that the right of access to a court constitutes an element which is inherent in the right to a fair trial under Article 6 § 1 of the Convention (see, among other authorities, *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, p. 18, § 36).

47. It recalls further that, despite the absence of a clause similar to Article 6 § 3 (c) of the Convention in the context of civil litigation, Article 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to a court, either because legal representation is rendered compulsory, or by reason of the complexity of the procedure or of the case (see *Airey*, cited above, pp. 14-16, § 26).

48. However, as the *Airey* case itself made clear (pp. 12-16, §§ 24 and 26), Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants a right of effective access to a court. The question whether or not that Article requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case and, in particular, upon whether the individual would be able to present his case properly and satisfactorily without the assistance of a lawyer.

49. In *Airey*, the Court highlighted a number of circumstances which cumulatively led to a finding that Mrs Airey had been denied an effective right of access to a court by the State's refusal of legal aid. Firstly, the proceedings, which concerned an application for a decree of judicial separation from the applicant's husband, were commenced by petition and conducted in the High Court, where the procedure was complex. Secondly, litigation of the kind at issue, in addition to involving complicated points of

law, necessitated proof of adultery, unnatural practices or cruelty, which might have required the tendering of expert evidence or the calling and examining of witnesses. Thirdly, marital disputes often entailed an emotional involvement that was scarcely compatible with the degree of objectivity required by advocacy in court. The Court drew attention also to the fact that the applicant was from a humble background, had gone to work as a shop assistant at a young age before marrying and having four children, and had been unemployed for much of her life.

In all the circumstances, the Court considered it most improbable that Mrs Airey could effectively present her own case. It considered further that this view was corroborated by the fact that, in each of the 255 judicial separation proceedings initiated in Ireland between January 1972 and December 1978, the petitioner had been represented by a lawyer.

50. Turning to the present case, the Court considers that the relevant question is not whether the applicant had access to a court as such, since he was defendant in the proceedings. Rather, the applicant's complaints relate to the fairness of libel proceedings generally and his right under Article 6 § 1 of the Convention to present an effective defence. However, the principles which apply to his complaint are identical to those which applied in *Airey*.

51. The Court notes that the applicant was defendant in a libel action brought against him by a comparatively wealthy and famous individual. The proceedings were conducted in the High Court before a judge and jury and attracted a great deal of media and public interest. The applicant was faced with the burden of having to prove, on the balance of probabilities, that the allegations which he had made against his opponent were substantially true, and in order to do so was required to call witness and expert evidence, some of which was excluded as a result of his failure to comply with the rules of court. He was also required to scrutinise evidence submitted on behalf of the plaintiff and to cross-examine the plaintiff's witnesses and experts in the course of a trial which lasted over two weeks. He had no formal legal training and, although it appears that he had previously defended himself successfully in relatively minor criminal proceedings (see paragraph 11 above), the Court considers that the libel trial must have taken a significantly greater physical and emotional toll on the applicant than would have been the case on an experienced legal advocate.

However, the question remains whether, in all the circumstances, the lack of legal aid operated to deprive the applicant of a fair trial and breached his right to present an effective defence in violation of Article 6 § 1 of the Convention.

52. The Court does not consider the fact that the proceedings were held before a High Court judge and jury conclusive as regards this question. As it said in *Airey* (pp. 14-16, § 26), there may be occasions when the possibility of appearing before the High Court in person, even without a lawyer's assistance, will meet the requirements of Article 6 § 1. This is not a case

where domestic law required representation by counsel before the court concerned.

53. Similarly, the fact that the applicant was faced with the burden of proving the truth of the allegations made against Mr Christie cannot automatically require the provision of legal aid. It is true that the imposition of a burden of proof required the applicant to call witness and expert evidence and to rebut evidence submitted by the plaintiff. However, the Court notes that the applicant was a well-educated and experienced journalist who would have been capable of formulating cogent argument. His position in this respect can be contrasted with that of the applicant in *Airey*.

54. The Court considers that the rules pursuant to which both the trial judge and Court of Appeal excluded the evidence of Mr Moule and Mr Walusimbi were clear and unambiguous. In particular, Order 38, Rule 2A(5) set out the requirements for a valid "gist" statement in respect of witnesses of fact, while Order 38, Rule 37, provided no equivalent facility in respect of expert evidence (see paragraphs 25-26 above). The order for directions made on 28 June 1996 was also clear and unambiguous in setting out a timetable for the exchange of witness statements and expert reports. That timetable was subsequently amended by consent of the parties (see paragraph 12 above).

In all the circumstances, the Court believes that the applicant should have understood what was expected from him under the rules and the order for directions as regards submission of his own witness and expert evidence. If he was unsure as to any particular issue, he could have sought guidance during the hearing of 28 June 1996, at which he was present.

55. So far as the law of defamation is concerned, the Court does not consider that this was sufficiently complex to require a person in the applicant's position to have legal assistance under Article 6 § 1. The outcome of the libel action turned on the simple question of whether or not the applicant was able to show on the balance of probabilities that the allegations at issue were substantially true.

56. The Court notes that the applicant was represented by Mr Price from 30 April 1998 until commencement of the trial (see paragraphs 15 and 21 above). Mr Price had previously acted for the applicant's co-defendants in the action, whose interests were described by the trial judge and the Court of Appeal as "identical" to those of the applicant (see paragraph 20 above).

57. In relation to the excluded evidence of Mr Moule, the trial judge commented that a review would have revealed that the "gist" statement served in April 1997 did not comply with the order for directions (see paragraph 18 above). Indeed, Mr Price himself accepted in the Court of Appeal that the statement did not put forward any affirmative version of what Mr Moule might say. A fuller witness statement was not served until the afternoon of 12 June 1998, some six weeks after Mr Price had been

instructed and, in the words of the Court of Appeal, "the latest possible moment before the start of the trial" (see paragraph 20 above).

58. The exclusion of Mr Walusimbi's evidence about widespread drug taking and test evasion in international athletics does not appear to have diminished the applicant's ability to present his defence effectively because, as indicated by the Court of Appeal, that part of his evidence made no specific reference to Mr Christie and the subject was in any event dealt with by Professor Beckett. As for the more specific aspects of Mr Walusimbi's evidence, these were excluded by the trial judge on the basis that they had been neither sufficiently pleaded nor included in material referred to in the "gist" statement. The applicant did not appeal against this aspect of the trial judge's decision.

As a whole, that part of Mr Walusimbi's evidence elaborating on the "gist" statement was, in the words of the Court of Appeal, "very late evidence tendered in breach of court orders and the rules" (see paragraph 20 above).

59. It is therefore apparent that the applicant's failure to comply with the procedural requirements when submitting purported "gist" statements in respect of Mr Moule and Mr Walusimbi was not the only factor which weighed in the domestic judges' minds when deciding to exercise their discretion so as to exclude the evidence of those witnesses. Had fuller details of those witnesses' evidence been given earlier, or had the applicant's defence been amended prior to trial once he had a legal representative, those judges might have exercised their discretion differently and the applicant might have been able to present a fuller defence at trial.

60. The Court considers that the fact that the applicant was represented between 30 April 1998 and the commencement of the trial by a specialist defamation lawyer who had worked previously for the applicant's co-defendants in the action illustrates further that he was not prevented from presenting an effective defence to the libel action by his ineligibility for legal aid. The importance of this factor is not diminished by the fact that his lawyer was extremely busy reacting to Mr Christie's pre-trial strategy during the weeks leading up to the trial (see paragraphs 16-21 above). To the extent that the applicant was confused about any aspects of the relevant law and procedure in connection with the trial proceedings, it was open to him to seek guidance from Mr Price before they began.

61. Finally, as regards the applicant's emotional involvement in the case, the Court recalls that, in *Munro,* cited above, the Commission commented that the general nature of a defamation action, being one protecting an individual's reputation, is clearly to be distinguished from an application for judicial separation, which regulates the legal relationship between two individuals and may have serious consequences for any children of the family. For this reason, and with regard to the applicant's background and experience (see paragraph 9 above), the Court considers that the applicant's

emotional involvement was not incompatible with the degree of objectivity required by advocacy in court, notwithstanding the factors identified at paragraph 51 above.

62. In all the circumstances, the Court concludes that the applicant was not prevented from presenting his defence effectively to the High Court, nor was he denied a fair trial, by reason of his ineligibility for legal aid. It follows that there has been no violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

63. The applicant contended further that the unavailability of legal aid, exclusion of witness evidence and burden of proof which he faced, together with the order that he pay Mr Christie's costs and the injunction prohibiting repetition of the allegations, violated his right to freedom of expression under Article 10 of the Convention.

The relevant parts of Article 10 provide:

> "1. Everyone has the right to freedom of expression. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ..."

A. The parties' submissions

1. The applicant

64. The applicant submitted that the exclusion of defamation proceedings from the scope of legal aid under the 1988 Act was inconsistent with the importance of freedom of expression on the facts of his case, which concerned a defendant of limited means facing a defamation action brought against him by a wealthy claimant.

65. He argued that unrepresented defendants in defamation actions would often be at a material disadvantage as against their opponents, bearing in mind the complexity of law and procedure in the area and the fact that they carried the burden of proving the truth of the allegations at issue. This prospect might deter writers and publishers from publishing material of public interest which was in fact true. In support of this argument, the applicant cited a passage from the judgment of the Supreme Court of the United States in New York Times *v. Sullivan* (see paragraph 27 above). Alternatively, such a prospect might lead a writer or publisher to lose a defamation action which he or she would otherwise have won, which could in turn lead to an injunction and even closure or bankruptcy.

66. The applicant submitted further that the refusal to allow the evidence of Mr Moule and Mr Walusimbi violated Article 10 of the Convention. As a result of the refusal, his defence had failed and, ultimately, he had been bound by an injunction prohibiting repetition of allegations which he said were true. In the circumstances, it was disproportionate for the domestic courts to have excluded the evidence merely on the basis that, if it were allowed, an adjournment would have been necessary.

67. The applicant complained also that the imposition upon him of the burden of proving the truth of the allegations made against Mr Christie was itself disproportionate. He pointed to trends in the domestic common law which indicated that, although the standard of proof concerned was nominally the "balance of probabilities" test, in practice the more serious the allegation the more cogent was the evidence required to prove it. He proposed that a proper balance between freedom of speech and the protection of reputation would have required Mr Christie as plaintiff to prove that the allegations were false. Such a reversal of the current position would not drastically reduce the protection given to a plaintiff's reputation because publishers would still need to check the truth of proposed articles prior to publication.

68. The applicant claimed also that the order to pay Mr Christie's costs and the injunction prohibiting repetition of the allegations disproportionately interfered with his right to freedom of expression.

2. The Government

69. The Government recalled that the freedom of speech conferred by Article 10 of the Convention was not absolute and that, in particular, the Article did not authorise the publication of defamatory material.

70. They submitted that, if the unavailability of legal aid and the application of rules of procedure about submission of evidence were compatible with Article 6 of the Convention in the circumstances of a particular case, they must also be compatible with Article 10. Indeed, the "rights of others" for the purposes of Article 10 § 2 included the rights of plaintiffs in defamation proceedings to have a fair trial within a reasonable time. A person who had made a statement without prior restraint in exercise of their freedom of expression could legitimately expect no more than that, if it came to defending himself in court proceedings, he should have an opportunity of doing so in accordance with Article 6 § 1.

71. Examining Article 10 alone, the Government submitted that the rules of procedure were prescribed by law, pursued the legitimate aim of the protection of the rights of others, and were proportionate to that aim in striking a fair balance between the interests of opposing litigants. As for the allocation of the burden of proof in relation to the issue of justification, this did not interfere with freedom of expression and was, in any event, legitimate in light of the responsibilities placed upon journalists and

recognised by Article 10. The way in which the national authorities had struck the balance between the rights of defamation plaintiffs under Articles 6 § 1 and 8, and the rights of defamation defendants under Articles 6 § 1 and 10, fell well within the margin of appreciation which applied wherever a balance was sought to be struck between competing Convention rights.

B. The Court's assessment

1. General principles

72. The Court recalls that, as a general principle, whilst the mass media must not overstep the bounds imposed in the interests of the protection of the reputation of private individuals, it is incumbent on them to impart information and ideas concerning matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III).

73. However, Article 10 of the Convention does not guarantee wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article, the exercise of this freedom carries with it "duties and responsibilities" which are liable to assume significance when, as in the present case, there is a question of attacking the reputation of private individuals and undermining the "rights of others". By reason of these "duties and responsibilities", the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see, among other authorities, Bladet Tromsø *and Stensaas*, cited above, § 65).

2. Unavailability of legal aid and exclusion of witness evidence

74. The applicant complained under Article 10 about the unavailability of legal aid in defamation proceedings and the exclusion of the evidence of Mr Moule and Mr Walusimbi.

75. The Court has concluded in relation to Article 6 § 1 of the Convention that the applicant was not prevented from presenting his defence to the defamation action effectively in the High Court, nor were the proceedings made unfair, by reason of his ineligibility for legal aid (see paragraph 62 above). As a result, it considers that such ineligibility did not, on the facts of this case, interfere with the applicant's right to freedom of expression under Article 10 of the Convention.

76. As for the exclusion of the evidence of Mr Moule and Mr Walusimbi, the Court has already commented above that the rules

pursuant to which the exclusion was ordered were clear and unambiguous (see paragraph 54). It has noted also that the applicant and his legal representative could have taken certain steps earlier in the proceedings which might have had a bearing on the decision to exclude that evidence, but failed to do so (see paragraph 59).

77. The Court notes that the evidence concerned was not excluded on the simple ground that the relevant rules and the order for directions had not been complied with. Rather, the exclusion was ordered in the exercise of a judicial discretion provided by the rules and following detailed analysis by the trial judge and Court of Appeal of the competing public interests at stake and the balance which had to be struck between those interests on the facts of the applicant's case (see paragraph 20 above).

78. The Court notes further that, as a result of the balance which was struck by the Court of Appeal, the applicant was allowed to rely on the evidence of Professor Beckett at trial notwithstanding the fact that it had not been submitted in accordance with the rules. It considers that there are no grounds for criticising the way in which the trial judge and Court of Appeal balanced the competing interests involved.

79. Therefore, to the extent that the exclusion of the evidence of Mr Moule and Mr Walusimbi interfered with the applicant's right to freedom of expression under Article 10 of the Convention, the Court considers that such interference was justified under Article 10 § 2 as being necessary for the protection of the rights of Mr Christie.

3. The order to pay Mr Christie's costs and injunction prohibiting repetition of the allegations

80. It is noted that Mr Christie did not seek damages and so no award was made in that regard. As for the injunction (see paragraph 21 above), the Court does not consider this to have been phrased in unduly wide terms given the seriousness of the allegations which the applicant had failed to prove substantially true.

81. In light of the conclusions which it has reached in relation to the applicant's Article 6 § 1 complaint (see paragraph 62 above) and the nature of the allegations at issue (see paragraph 86 below), and in light of the applicant's failure to prove on the balance of probabilities that the allegations were substantially true, the Court considers that it was not disproportionate to require the applicant to pay Mr Christie's costs in relation to the defamation proceedings. Nor was it disproportionate to prohibit repetition of the allegations.

82. To the extent that the order and injunction were capable of discouraging the participation of the applicant and other journalists in debates over matters of legitimate public concern in the future, it follows that this was justified under Article 10 § 2 as being necessary for the protection of the reputation and rights of Mr Christie.

4. Burden of proof

83. The Court recalls that a careful distinction is made in its case-law between the reporting of factual statements on the one hand, and value judgments on the other. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible to proof (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 28, § 46).

84. It recalls further that, in Bladet Tromsø *and Stensaas* (cited above, § 66) it commented that special grounds were required before a newspaper could be dispensed from its ordinary obligation to verify factual statements that were defamatory of private individuals. The question whether such grounds existed depended in particular on the nature and degree of the defamation in question and the extent to which the newspaper could reasonably regard its sources as reliable with respect to the allegations.

85. In the present case, the jury found, by a majority of ten to two, that the allegations made against Mr Christie in the article at issue amounted to a factual statement that Mr Christie was a cheat who regularly used banned performance-enhancing drugs to improve his success in athletic competition (see paragraph 21 above). Furthermore, the Court notes that the article was directed specifically and exclusively at Mr Christie. The Court considers that the potential consequences of the allegations made in the article for an individual who had achieved fame and fortune purely as a result of his athletic achievements were very grave.

86. The Court is not in a position to comment as regards the extent to which the applicant could reasonably rely on his sources when writing the article, since the identity of those sources is unclear. However, the Court notes that a number of factors exist which indicate that the applicant was concerned with verifying the truth or reliability of the allegations to a high standard only after the event, once the defamation proceedings had been commenced against him. Firstly, the applicant stated in his application to the Court that the assessment of whether Mr Christie used or was justifiably to be suspected of using performance-enhancing drugs was inevitably going to involve considerable expert evidence, access to which was constrained by the applicant's limited financial means. Secondly, the offending article itself made no mention of any authoritative basis for the drug-taking allegation. Indeed, the applicant conceded in the article that "there is no bloody hypodermic needle, and no direct evidence that points the finger at Christie", and that the allegation was supported only by "circumstantial evidence" (see paragraph 9 above). Thirdly, the evidence of Mr Moule and Mr Walusimbi, which the applicant described as crucial to his case, was initially presented in very vague terms more than a year after the article was published, and was elaborated upon only immediately before the commencement of the trial.

87. In all the circumstances, the Court considers that the requirement that the applicant prove that the allegations made in the article were

substantially true on the balance of probabilities constituted a justified restriction on his freedom of expression under Article 10 § 2 of the Convention in the interests of the protection of the reputation and rights of Mr Christie.

5. Summary

88. For these reasons, the Court concludes that the unavailability of legal aid, exclusion of witness evidence, the order to pay Mr Christie's costs and the injunction as well as the rule on the burden of proof did not violate Article 10 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 6 § 1 of the Convention;

2. *Holds* that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 7 May 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President

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

THIRD SECTION

CASE OF MURPHY v. IRELAND

(Application no. 44179/98)

JUDGMENT

STRASBOURG

10 July 2003

FINAL

03/12/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Murphy v. Ireland,

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

Mr G. RESS, *President*,
Mr L. CAFLISCH,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mrs H.S. GREVE, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 7 November 2002 and 19 June 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 44179/98) against Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish national, Mr Roy Murphy ("the applicant"), on 31 July 1998.

2. The applicant was represented by Mr F.H. O'Reilly, a solicitor practising in Dublin. The Irish Government ("the Government") were represented by their Agent, Ms D. McQuade, of the Department of Foreign Affairs.

3. The applicant alleged that the prohibition of the broadcast of his advertisement pursuant to section 10(3) of the Radio and Television Act 1988 constituted a violation of his rights under Articles 9 and 10 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11). It was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1) and the present case was assigned to the newly composed Third Section (Rule 52 § 1).

5. The application was declared admissible on 9 July 2002 and the parties filed observations on the merits (Rule 59 § 1).

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 November 2002 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms D. MCQUADE, of the Department of Foreign Affairs, *Agent,*
Mr D. O'DONNELL, S.C.,
Mr B. MURRAY, S.C., *Counsel,*
Mr C. O'TOOLE, *Adviser.*

(b) *for the applicant*
Mr J. FINLAY, S.C.,
Mr G. HOGAN, S.C., *Counsel,*
Mr F. O'REILLY, *Solicitor.*

The applicant also attended.

The Court heard addresses by each of the counsel present.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1949 and lives in Dublin. He is a pastor attached to the Irish Faith Centre, a bible based Christian ministry in Dublin.

8. In early 1995 the Irish Faith Centre submitted an advertisement to an independent, local and commercial radio station for transmission. The text of the advertisement read as follows:

> "What think ye of Christ? Would you, like Peter, only say that he is the son of the living God? Have you ever exposed yourself to the historical facts about Christ? The Irish Faith Centre are presenting for Easter week an hour long video by Dr Jean Scott Phd on the evidence of the resurrection from Monday 10th - Saturday 15th April every night at 8.30 and Easter Sunday at 11.30am and also live by satellite at 7.30pm."

9. The radio station was prepared to broadcast the advertisement. However, in March 1995 the Independent Radio and Television Commission ("IRTC") stopped the broadcast pursuant to Section 10(3) of the Radio and Television Act 1988 ("the 1988 Act"). This ruling did not affect the later transmission of the video by satellite.

10. The applicant applied for leave to take judicial review proceedings. He cited the IRTC and the Attorney General as respondents and submitted that the IRTC had wrongly construed Section 10(3) and, alternatively and

mainly, that if the IRTC had correctly applied section 10(3) of the 1988 Act, that provision was unconstitutional.

11. By judgment delivered on 25 April 1997, the High Court found that the IRTC had not infringed section 10(3) of the 1988 Act. It further considered that the unspecified right to communicate guaranteed by Article 40(3)(1) of the Constitution was at issue since the advertisement had, as its principal purpose, the communication of information. However, it found that section 10(3) was a reasonable limitation on the right to communicate and that there were good reasons in the public interest for the ban.

12. In so concluding the High Court judge stated as follows:

> "I think that it would have been reasonable for [Parliament] to take the view that in Irish society religious advertising on commercial radio might be undesirable in the public interest. ... It is sufficient, in my view, if there were good reasons in the public interest for the ban. Irish people with religious beliefs tend to belong to particular churches and that being so religious advertising coming from a different church can be offensive to many people and might be open to the interpretation of proselytising. Religion has been a divisive factor in Northern Ireland and this is something which [Parliament] may well have taken into account. ... a person listening to commercial radio is for all practical purposes compelled to listen to the advertisements. That being so, it is legitimate for any [Parliament] to have regard to the type of advertisements which might be permitted. The impugned Section enjoys the presumption of constitutionality. It is not obvious to me that a restriction on religious advertising is not a reasonable restriction in the interest of the common good on this particular form of exercise of the right to communicate.
>
> Of course it has been suggested on behalf of the Applicant that a blanket restriction is not proportional and that even if some restriction would be reasonable it would have to be less draconian. The absolute restriction according to the argument of Counsel for the Applicant infringes the doctrine of proportionality. I cannot accept this view. On the legislation as it stands there are very few limitations on the right to advertise and in that sense proportionality has already been taken into account. But at any rate, I do not think that one could subdivide religious advertising. Once a reasonable view can be put forward that religious advertising might be undesirable in the public interest, it would be impossible in practice to devise a wording that might have the effect of permitting certain alleged categories of innocuous religious advertising. It is the fact that the advertisement is directed towards a religious end and not some particular aspect of a religious end which might be potentially offensive to the public."

13. The Supreme Court rejected the applicant's appeal by judgment dated 28 May 1998. The judgment began by noting that:

> "One can best glean the policy of the Act of 1988 by looking at the three kinds of prohibited advertisement collectively. One might get a false impression by singling out one kind of banned advertisement and ignoring the others. All three kinds of banned advertisement relate to matters which have proved extremely divisive in Irish society in the past. [Parliament] was entitled to take the view that the citizens would resent having advertisements touching on these topics broadcast into their homes and that such advertisements, if permitted, might lead to unrest. Moreover, [Parliament] may well have thought that in relation to matters of such sensitivity, rich men should not be able to buy access to the airwaves to the detriment of their poorer rivals."

14. The Supreme Court considered that religion was a private and a public affair and that the impugned provision was a restriction of the applicant's right freely to communicate and of his right to freedom of expression (Articles 40(3) and 40(6)(1) of the Constitution, respectively) which rights could be limited in the interests of the common good. The court cited with approval previous case-law which considered that the balance found by parliament between the individual rights and the common good should prevail:

> "... unless it was oppressive to all or some of the citizens or unless there is no reasonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen."

15. The court went on to point out that the real question was whether the limitation imposed upon the various constitutional rights was proportionate to the purpose which parliament wished to achieve. Again quoting with approval previous case-law, it described the principle of proportionality as follows:

> "In considering whether a restriction on the exercise of rights is permitted by the Constitution the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraints on the exercise of protected rights and the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights and by the Supreme Court of Canada in the following terms. 'The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right as little as possible; and (c) be such that the effects on the rights are proportional to the objective."

16. The Supreme Court found that section 10(3) of the 1988 Act complied with this test - the restriction was "minimalist", the applicant had the right to advance his views in speech or writing or by holding assemblies or associating with persons of like mind as himself; he had no lesser right than any other citizen to appear on radio or television; and the only restriction placed upon his activities was that he could not advance his views by a paid advertisement on radio or television. As regards the blanket nature of the ban and the applicant's argument that it would have been possible to introduce a more selective administrative system whereby inoffensive religious advertisements would be permitted, the Supreme Court noted:

> "No doubt this is true. But [parliament] may well have decided that it would be inappropriate to involve agents of the State in deciding which advertisements, in this sensitive area, would be likely to cause offence and which not."

17. The Supreme Court went on to conclude that:

> "It therefore appears to the court that the ban on religious advertising contained in section 10(3) of the 1988 Act is rationally connected to the objective of the legislation and is not arbitrary or unfair or based on irrational considerations. It does appear to impair the various constitutional rights referred to as little as possible and it does appear that its effects on those rights are proportional to the objective of the legislation."

18. In any event, once the impugned provision was broadly within the competence of parliament and parliament had respected the principle of proportionality, the Supreme Court indicated that it was not for it to interfere simply because it might have made a different decision. The presumption of constitutionality of the legislation had not therefore been rebutted and the applicant's appeal could not be allowed.

II. RELEVANT LAW

A. The Irish Constitution

19. Article 40 of the Constitution provides, in so far as relevant, as follows:

> "3(1) The State guarantees in its laws to respect, and, as far as practicable, by its laws defend and vindicate the personal rights of the citizen. ...
>
> 6(1) The State guarantees liberty for the exercise of the following rights, subject to public order and morality:–
>
> (i) the right of the citizens to express freely their convictions and opinions.
>
> The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.
>
> The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with the law."

20. Article 44, in so far as relevant, reads as follows:

> "2(1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen. ...
>
> (3) The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status."

B. Domestic legislation

1. The Broadcasting Authority Act 1960 ("the 1960 Act")

21. The 1960 Act was enacted to, *inter alia*, enable an Authority to be established for the purpose of providing a national television and sound broadcasting service. The national radio and television broadcaster ("RTE") was also established. Section 20(4) of the 1960 Act provided as follows:

> "The Authority shall not accept any advertisement which is directed towards any religious or political end or has any relation to any industrial dispute."

22. When introducing this provision the Minister explained to Seanad Éireann (the Senate) the rationale of this provision:

> "If advertisements directed towards these ends were permitted the Authority would have to accept advertisements from any religious group, including advertisements which the majority of viewers might consider very objectionable and offensive. Therefore, the only sound policy is not to permit any advertisements directed towards religious ends to be broadcast: otherwise the Authority would be placed in a very difficult position. There will of course be religious programmes as there have been on Radio Eireann, and appeals for funds for charitable purposes, but these are quite different and distinct from paid advertisements directed towards religious ends, and I think the policy enshrined in this subsection is the correct one."

23. Section 18 of the 1960 Act is entitled "Impartiality" and provides as follows:

> "(1) It shall be the duty of the Authority to secure that, when it broadcasts any information, news or feature which relates to matters of public controversy or is the subject of current public debate, the information, news or feature is presented objectively and impartially and without any expression of the Authority's own views.
>
> (2) Nothing in this section shall prevent the Authority from transmitting political party broadcasts."

2. The Radio and Television Act 1988 ("the 1988 Act")

24. The 1988 Act was enacted to establish the Independent Radio and Television Commission ("IRTC") having the function of entering into contracts for the provision of sound broadcasting and a television programme service additional to the services already provided by the national broadcaster, RTE.

25. Section 9 is entitled "Duty of sound broadcasting contractor in relation to programmes" and provides as follows:

> "(1) Every sound broadcasting contractor shall ensure that –
>
> (a) all news broadcast by him is reported and presented in an objective and impartial manner and without any expression of his own views;

(b) the broadcast treatment of current affairs, including matters which are either of public controversy or the subject of current public debate, is fair to all interests concerned and that the broadcast matter is presented in an objective and impartial manner and without any expression of his own views: Provided that should it prove impracticable in relation to a single broadcast to apply this paragraph, two or more related broadcasts may be considered as a whole, if the broadcasts are transmitted within a reasonable period of each other;

...

(2) Nothing in subsection (1) (a) or (1) (b) shall prevent a sound broadcasting contractor from transmitting political party broadcasts: Provided that a sound broadcasting contractor shall not, in the allocation of time for such broadcasts, give an unfair preference to any political party."

26. Section 10(3) of the 1988 Act applied to independent radio and television broadcasters the same prohibition applied to RTE (by section 20(4) of the 1960 Act). Section 10(3) provided as follows:

"No advertisement shall be broadcast which is directed towards any religious or political end or which has any relation to an industrial dispute."

3. The Radio and Television (Amendment) Bill 1999 ("the 1999 Bill")

27. This bill, never passed, proposed amending section 10(3) of the 1988 Act. This proposal was prompted by the Supreme Court's judgment in the present case and a subsequent prohibition of an advertisement by the *Irish Catholic* newspaper pursuant to that provision. During the parliamentary debate on this Bill, the Minister (for Arts, Heritage, Gaeltacht and the Islands) noted that:

"Essentially we are dealing with a provision that is nearly 40 years old. It can be argued that it is timely to reconsider a prohibition such as is contained in these subsections. It can be argued that the blanket ban contained in these provisions is too blunt an instrument to be used in this day and age for what is now a largely well educated society with a sophisticated understanding of the way media, including the very powerful radio and television media, work. It is helpful to our debate that in the recent past the constitutionality of this very provision – that is, the prohibition on advertising directed towards a religious end – was tested in the courts during 1997 and 1998."

28. Having referred in detail to the High and Supreme Court judgments in the present, the Minister went on:

"In dealing with the Bill, we are considering a proposal by the Opposition to amend a legislative provision that was found to be constitutional as recently as May 1998. We are being asked to amend a provision that was found by the Supreme Court not to be arbitrary or unfair and which impairs our constitutional rights as little as possible. The High Court and the Supreme Court acknowledged the sensitivity of the substance of the existing provisions of the section which the Bill is designed to amend. Anyone who reads these judgments must come to the conclusion that any amendment of the section which would give an agent of the State the power or responsibility of deciding which types of religious advertisements are permissible and which are not must be

approached with great care if we are not to create considerable and perhaps insurmountable difficulties for the [IRTC] as suggested in the Bill. ...

The Bill appears to have as its intention that the [IRTC] should have the scope to determine whether a political or religious newspaper or journal is *bona fide*. Where the journal or newspaper is bona fide, advertisements promoting the sale, for a cover charge of such publications, will not be prohibited under section 10(3) of the 1988 Act, provided the advertisement is directed to the promotion of the newspaper and is not sectarian or directed towards a political end. If the Bill were to be enacted, the [IRTC] would have a number of decisions to make. ... whether a particular religious journal or newspaper is bona fide ... [and] ... whether the advertisement promotes the publication and is not sectarian or directed towards a political end.

I am satisfied that the provisions in the proposed legislation would place the [IRTC] in the position of having to make a value judgment in distinguishing between publications. In order to come to a decision as to whether a particular publication is a *bona fide* political or religious journal, the [IRTC] would have to assess the goals of any particular publication and possibly the goals of the religious or political organisation itself. Furthermore, the [ITRTC] would have to make an additional value judgment in determining what is or is not sectarian. The Bill provides no guidelines or parameters within which the [IRTC] can make these difficult and sensitive judgments.

There is no provision for an appeals mechanism even though the Bill would give the [IRTC] the power to discriminate between one newspaper and another without providing any detailed grounds for doing so. As I indicated earlier, the High Court and Supreme Court judgments indicated the practical and administrative difficulties that would have to be overcome if a selective ban on the type of advertisements covered by section 10(3) of the 1988 Act was to be introduced. The Bill does not provide any means for dealing with the concerns expressed in these judgments. It would be foolhardy to progress without ensuring that we are not making matters worse.

Turning to the policy rather than the detail proposed in the Bill, it is legitimate to consider whether a more selective ban on advertising directed towards a religious end might be developed. However, to make the ban selective, the means selected would have to ensure that any system provided for assessing the suitability of advertisements would be applied within the limits of the Constitution and in a constitutional manner. At the very least, the rights contained in Article 44 of the Constitution would have to be respected and fair proceedings for those aggrieved would have to be provided. Making the ban selective could also be seen as a curtailment of the right to free speech and expression provided by Article 40.6.1 of the Constitution. It might be a wiser course to consider providing the [IRTC] with powers to ban a particular advertisement in relation to religious material if it considers that the advertisement in question offends public order or morality rather than possibly discriminating between different publications.

However, it is clear that advertising directed towards a religious end is a very special category of advertising. Advertising is to some extent regulated in most countries. Television advertising in particular is regulated throughout the European Union through, at a minimum, the Television without Frontiers Directive. That directive recognises the importance which individual member states attach to the regulation of broadcast advertising in that it provides that a member state may impose stricter regulation on broadcasters operating under its jurisdiction than is provided for in the directive.

The regulation of advertising tends to be based on the general provision that all advertising should be legal, honest, decent and truthful. This is provided for in the codes of standards, practice and prohibitions in advertising, sponsorship and other forms of commercial promotion in broadcasting services which were drawn up under the provisions of section 4(1) of the Broadcasting Act, 1990. The same basic principle is provided in the Code of Advertising Standards for Ireland drawn up by the Advertising Standards Authority for Ireland.

The Advertising Standards Authority for Ireland is a self-regulatory body, which was established by the advertising industry in 1981, and deals with advertising in most media including newspapers, posters and cinema as well as broadcasting. Understandably, the code drawn up under the [UK] Broadcasting Act 1990, does not deal with advertising directed towards a religious end as there is a blanket ban on such advertising. On the other hand, the [Advertising Standards Authority for Ireland] ASAI code specifically excludes advertisements whose principal purpose is to express the advertisers' position on political, religious, industrial relations, social or aesthetic matters or on an issue of public interest or concern from the scope of its code. It is interesting [503] that the [ASAI] decided not to apply its standards to these sensitive areas even though there is no statutory bar against it so doing.

It would be extremely difficult to regulate religious advertising in the same way as advertising for goods and services is regulated. How does one determine if an advertisement directed towards a religious end is truthful? No product or service is being sold. While religious advertisers may hold their beliefs with the utmost conviction, the claims made in such advertisements are matters of belief and are not measurable by any objective standard.

While I oppose the Bill, I am prepared to look at the policy which it attempts to put in place, that is, a more selective ban on advertising directed towards a religious end. If an appropriate amendment can be developed, I would hope to introduce it on Committee Stage during the passage of the Broadcasting Bill, which I hope to publish in the immediate future... . In considering an amendment, I will have to have regard for many of the issues raised in the judgments which I quoted earlier.

These issues include in particular in relation to matters of such sensitivity, that rich men should not be able to buy access to the airwaves to the detriment of their poorer rivals; the provisions of Article 40 of the Constitution conferring a right to communicate and the right of citizens to express freely their convictions and opinions will be clearly respected, and the provisions of Article 44 of the Constitution which guarantee freedom of conscience and the free profession of and practice of religion to every citizen subject to public order and morality and which prohibit any imposition by the State of any disabilities or the making of any discrimination on the grounds of religious profession, belief or status will also be respected.

To achieve these aims it will be necessary to give consideration to devising fair procedures and natural justice measures to ensure that the body charged with regulating such advertisements will uphold and be seen to uphold these rights.

It may be that if we are to consider relaxing the existing total ban on broadcast advertising directed towards a religious end, we must inevitably consider the removal of the prohibition of the ban in its entirety rather than the introduction of a more selective prohibition. Given the concerns which I have already mentioned, it may be the only safe way to proceed. However such a step cannot be taken lightly. To proceed

to a more selective prohibition or to the removal of the prohibition without qualification will need considerable thought and consultation. Broadcasting, both television and radio, is recognised as the most powerful mass communications medium ever developed. Audiences for certain programmes are measured in millions. Radio is a secondary medium in that it can be present while other activities in the workplace, the home or the car are being carried out. Unlike a newspaper or magazine where a page can be turned quickly after a brief scan, a person is compelled to listen to, or at least hear, a radio advertisement if the listener wishes to ensure that her or his enjoyment of the programme is not interrupted. Children and young people are constantly exposed to the images, messages and attitudes which are promulgated on radio and television.

Parents might quite properly wish to ensure that their children are exposed only to the religious profession of their choosing. It is possible that many such people would find advertising directed towards a religious end offensive simply because of the particular religious organisation which is making the advertisement. While it might be possible to prevent the broadcast of advertising directed towards a religious end during the hours of broadcasting devoted to children's programming, we all know that children and young people watch prime time television and listen to the radio at all hours so such a measure would only offer limited protection. I will not deal here with the alleged problems surrounding various cults and sects that have caused anxiety to families and whose activities could be interpreted as being directed towards a religious end.

We must proceed very cautiously in this sensitive area. Perhaps in an era of ever increasing numbers of broadcast services becoming available via satellite, which is outside the legislative regime which applies to indigenous broadcasters, the total prohibition on advertising directed towards a religious end is an anachronism. It may be time to rely on our broadcasters not to offend or alienate their audiences through unacceptable advertising in this area. However, any change to the present position must be brought about through careful consideration and consultation with bodies such as the churches, the [IRTC] and broadcasters and the public generally.

The Bill before the House does not address any of the concerns which I have mentioned. There are no definitions or parameters within which the [IRTC] would exercise the powers which the Bill seeks to confer on it. There are no safeguards or recourse provided for those who are aggrieved by the decisions which the [IRTC] might take if this Bill were enacted. The prohibitions in the Broadcasting Authority Acts relating to RTE are not addressed. While I accept that it is appropriate for the House to consider the policy proposed ... we cannot proceed without considerably more thought than is evidenced by the provisions of the Bill. The enactment of the Bill is likely to cause far more problems than it would resolve.

This is a sensitive issue and I commend the Deputies opposite for giving us an opportunity to discuss it at length. While I understand the laudable motives of the Deputies in publishing this Bill, it is important that further consideration is given to the matter. There will be an opportunity to discuss the whole issue of broadcasting when I publish my broadcasting Bill. I will consider this issue and could be in a position to look at the overall problem in that context. If wording can be found we can easily bring that into the Bill by way of an amendment on Committee Stage."

4. The Broadcasting Act 2001 ("the 2001 Act")

29. The 2001 Act was mainly designed to facilitate the introduction of digital terrestrial broadcasting in Ireland. The IRTC became the Broadcasting Commission of Ireland and was given expanded functions and powers in relation to digital broadcasting.

30. Section 18 of the 2001 Act applied section 10(3) of the 1988 Act to digital and other broadcasting services. However, section 65 of the 2001 Act relaxed the prohibition of the broadcasting of religious advertising as follows:

> "65. Nothing in section 20(4) of the Act of 1960 or section 10(3) of the Act of 1988 (including either of those sections as applied by this Act) shall be construed as preventing the broadcasting of a notice of the fact -
>
> (a) that a particular religious newspaper, magazine or periodical is available for sale or supply, or
>
> (b) that any event or ceremony associated with any particular religion will take place,
>
> if the contents of the notice do not address the issue of the merits or otherwise of adhering to any religious faith or belief or of becoming a member of any religion or religious organisation."

31. This section was proposed by the Minister at the Committee stage on 30 November 2000 as an added section to the Bill already published. The Committee accepted the proposal without debate.

C. Council Directive 89/552/EEC of 3 October 1989

32. The Directive co-ordinates certain provisions of Member States of the European Community on television broadcasting. Article 12 of the Directive provides, *inter alia*, that television advertising shall not prejudice respect for human dignity, include any discrimination on grounds of race, sex or nationality or be offensive to religious or political beliefs.

THE LAW

ALLEGED VIOLATION OF ARTICLES 9 AND 10 OF THE CONVENTION

33. The applicant complains under Articles 9 and 10 about section 10(3) of the 1988 Act.

Article 9

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom ..., to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society ..., for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Article 10

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

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of ... public safety, for the prevention of disorder or crime, for the protection of health or morals, ..."

A. The parties' submissions

1. The Government

34. The Government argued that the limitation on the applicant's rights under Articles 9 and 10 was so minimal as not to constitute an interference with those rights. They referred, *inter alia*, to the fact that the applicant could have otherwise advanced his views both orally and in writing, in the print media and in public assembly. He could also have appeared on radio and television and have transmitted the video by satellite and other means.

35. They also contended that any interference was "prescribed by law" (section 10(3) of the 1988 Act) and pursued aims (public order and safety together with the rights and freedoms of others) that were legitimate within the meaning of the second paragraph of Articles 9 and 10 of the Convention.

36. However, the majority of the Government's submissions to the Court concerned its contention that the prohibition of the broadcasting of religious advertisements was a proportionate response to those legitimate aims.

37. The Government maintained that certain key features of the case strongly suggested that a generous margin of appreciation should be accorded to the State as regards the means it chose to fulfil the aims it sought to achieve. The present case concerned the broadcasting (*Informationsverein Lentia and Others v. Austria*, judgment of

24 November 1993, Series A no. 276) of a paid advertisement (*Vgt Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, ECHR 2001-VI) which promoted a religious event and beliefs (*Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A and *Wingrove v. the United Kingdom*, judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V) and which contained no political or "public interest" element. In such circumstances, particular deference had to be paid to the domestic authorities' assessment in that they were uniquely positioned to identify and assess the strength of the relevant vital forces within Irish society which dictated the correct balance between the competing interests involved. Accordingly, if the Minister introducing section 20(4) of the 1960 Act, which was subsequently applied by section 10(3) of the 1988 Act to the independent radio and television stations, was of the view that the Irish population was unwilling to tolerate any religious advertising, then the State should be allowed to restrict such advertising.

38. As to the religious nature of the relevant advertisement, the Government accepted that the advertisement appeared innocuous and that it was to some extent simply informational. However, they pointed out that it was also based on an evident belief in, and the propagation of, certain religious beliefs. In any event, it was simply the religious nature of the advertisement that constituted sufficient justification for its restriction.

The Government observed that the rights of an individual to express religious beliefs were necessarily determined and limited by reference to the Article 9 rights of others (*Larissis and Others v. Greece*, judgment of 24 February 1998, *Reports*, §§ 63-64). Moreover, the Convention clearly applied, in the Government's view, a distinct standard to the control of religious expression so that religious offence was a legitimate basis for the prohibition of otherwise acceptable and protected speech. This was explained by the fact that religious belief was not the subject of reasoned decision making: rather it presented an intensely personal and private matter and concerned deeply held and profoundly important convictions. Consequently, the simple proclamation of the truth of one religion necessarily proclaims the untruth of another. As such even innocuous religious expression can lead to volatile and explosive reactions.

Moreover, the Government underlined the particularly country-specific religious sensitivities in Ireland, noting the description of such concerns by the domestic courts in the present case. It might have been that there was no contemporary religious disharmony in Ireland. However, religious division had characterised Irish history, a history which included proselytising and the creation of legal and social systems to undermine one religion. That historical context, the current manifestation of religious division in Northern Ireland together with the fact that the vast majority of the Irish population adhered to a religion (indeed, to one dominant religion) entitled the State in 1960 and again in 1988 to apprehend unusual sensitivity to religious issues

in contemporary Irish society on the part of adherents of both dominant and minority religions. Given this potentially incendiary situation, the State was entitled to act with caution in conditioning the circumstances in which religious material, and in particular religious advertising, would be made available in the broadcast media.

The Government disputed that the *Sunday Times* and *Handyside* judgments (*Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, and *Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30) allowed the applicant to broadcast religious advertisements that offended, shocked and disturbed. The *Sunday Times* case could be distinguished from the present case: the former concerned expression of a political or public interest nature, the print media, and an editorial feature in a newspaper. The Government rejected the implication from the applicant's reliance on the *Sunday Times* jurisprudence that, in the area of religious advertising, one has the right to be a bit shocking, somewhat disturbing and mildly offensive.

39. Turning to the audio-visual (as opposed to print) context of the prohibition, the Government recalled that Article 10 § 1 specifically foresaw the regulation by a licensing system of the manner in which broadcasting was organised in a State's territory which control had to be justified for one of the reasons included in the second paragraph of Article 10 of the Convention. According to Convention jurisprudence relevant considerations included the nature and objectives of the proposed station, its potential audience and the rights and interests of a specific audience. The Government argued that control of the broadcasting media had been accepted as necessary for, *inter alia*, the orderly regulation of broadcasting enterprises and the appropriate allocation of limited broadcasting resources. In addition, and critically for the purposes of the present case, such regulation was necessary given the particularly intrusive and compelling nature of the broadcast media together with its consequent impact and potential for offence (including on the passive recipient).

40. As to the advertising context of the prohibition, the Government distinguished between paid advertising space and programmes, the latter being subject to the universally recognised and fundamental requirement of impartiality and neutrality. This was an obligation of the national and the independent broadcasters (section 18 of the 1960 Act and section 9 of the 1988 Act) and required each programme dealing with a controversial matter to be balanced or that the overall programming of the station on such matters would be such as to give a sufficient hearing to other or opposing views. Given the necessary neutrality of programmes, the State could expect a fair degree of tolerance on the part of the recipient. Conversely, the Government maintained that advertising was, by definition, partisan, one-sided and unbalanced in which case the principle of impartiality could not

be, and was not, applied. The State could therefore reasonably expect a lower degree of tolerance of advertising, particularly on sensitive issues.

In addition, just as the restriction on broadcasting of advertising promoted neutrality and balance, allowing or obliging stations to accept advertising on religious issues would undermine that balance. Moreover, they pointed out that the applicant's position went so far as to challenge the requirement of impartiality even in a political context as he wrongly implied that any restriction on political advertising would be invalid (*Vgt Verein gegen Tierfabriken v. Switzerland*, cited above, §§ 66-67).

41. Furthermore, the Government maintained that the means chosen by the State to balance freedom of expression against those sensitivities was limited: it was concerned with broadcasting of religious advertisements only so that proportionality was thereby built into the overall regulatory regime.

42. The Government accepted that there might have been different ways of responding to the concerns outlined by it above but considered that the State was entitled to view certain alternatives as inherently unattractive.

43. They rejected the idea of permitting limited religious advertising. In the first place, any limitation would have unequal consequences for broadcasters. The national broadcaster (RTE) would be compelled to broadcast any advertisement which satisfied the relevant criteria whereas independent broadcasters would be free to refuse, accept or favour any religious advertising satisfying such criteria on purely commercial grounds. Indeed, permitting some form of religious broadcasting would have unequal consequences for religions with the larger religions potentially exploiting their dominant position or resources to obtain access to the broadcast media to the prejudice of smaller religions. The present prohibition, in contrast, ensured that one viewpoint was not allowed to dominate over another and it promoted a “level playing field” for all religions irrespective of their wealth, their dominance, their power and their current popularity (*United Christian Broadcasters v. the United Kingdom*, application no. 44802/98, decision of 7 November 2000).

Secondly, the assessment of any such restrictions would be inherently problematic. Restricting the amount of advertising from certain religious groups could easily have been perceived as discriminatory - individuals might have been prepared to accept that no one could advertise, but to control advertising by certain religions was bound to inflame some religious sensibilities. In addition, the Government wondered whether it was indeed possible to distinguish between the passionate and committed preacher and the incendiary proselytiser. A limitation based on the content of the advertisement raised the spectre of subjective religious censorship by either the State or by the broadcasters themselves. The involvement of the State, or indeed of any non-State agent, in such censorship could potentially be considered offensive of itself and, further, there was a risk that the familiar would be considered more permissible than the marginal and unfamiliar.

The Government also rejected the idea of a limitation based on the level of offence as suggested by the applicant (advertising which was "likely and bound" or "calculated" to cause offence): the Government reiterated that in the Irish context there was no such thing as "a little bit of offence" as the fact of religious advertising was considered of itself to be potentially offensive.

Thirdly, the Government noted that section 65 of the 2001 Act had somewhat diluted the force of section 10(3) of the 1988 Act. However, the Government maintained that the State was entitled to consider in 1960 and in 1988 that a restraint on all broadcasting of religious advertising was necessary whether the message was purely informational or not. This choice was not undermined by the decision incorporated in the 2001 Act to allow the broadcasting of informational advertisements only. In any event, the applicant's advertisement would, in the Government's view, have still fallen foul of section 65 of the 2001 Act. Furthermore, the new regime had its own associated difficulties: the dividing line between religious information and the underpinning religious assumptions of a message was difficult to establish.

44. Finally, the Government pointed out that the prohibition challenged by the present applicant was not unique. A statutory prohibition of religious advertising was in force in the United Kingdom until the Broadcasting Act 1990 and numerous self-regulatory codes continue to control such matters. Swiss law (section 18 of the Federal Radio and Television Act together with section 15 of the Radio and Television Ordinance) prohibited, *inter alia*, religious and political advertising. Council Directive 89/552/EEC also contained a restriction on religious advertising.

45. In such circumstances, the Government submitted that the Irish State was entitled, under Articles 9 and 10, to act with caution and to chose to prohibit the broadcasting of religious advertising.

2. The applicant

46. The applicant maintained that his being prevented from using his method of choice to advertise a religious event by the application of section 10(3) of the 1988 Act clearly constituted an interference with his rights under Articles 9 and 10 of the Convention. The above-cited *Handyside* judgment indicated that the protection of Article 10 extended to ideas that "offend, shock or disturb". He observed that the prohibition extended to all broadcasters and, while the possibility of advertising in other media and contexts may have reduced the impact of the interference, it remained nonetheless a significant and substantial one.

47. He accepted that the relevant restriction was "prescribed by law" and did not dispute that the aim of protecting public order and safety and the rights and freedoms of others constituted legitimate aims.

48. He also agreed that the main issue in the present case was whether the interference with his rights could be considered justified and he maintained that the Government had not demonstrated any "pressing social need" justifying the prohibition of the broadcasting of religious advertising, whether the matter was considered under Article 9 or under Article 10 of the Convention.

49. The applicant did not dispute that the above-cited *Otto-Preminger-Institut* and *Wingrove* cases indicated that a greater margin of appreciation was to be accorded to the State in matters of morals and religion. However, he submitted that, in both of those cases, the Court ended its examination of the applicable margin of appreciation by a reference to the final supervision of this Court. The State's margin was not therefore unlimited and did not absolve it from establishing the necessity of the restrictions in question, the Court being the final arbiter in that respect.

50. As to where the balance lay between the conflicting rights guaranteed by Articles 9 and 10, the applicant relied on the Court's statement in its *Otto-Preminger-Institut* judgment (§§ 46-50) where it was indicated that those who hold religious beliefs must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their own. In that case the Court found the expression in question to be so offensive as to be a malicious violation of the spirit of tolerance and that the "duties and responsibilities" of those who expressed themselves included an obligation to avoid in so far as possible expressions that were gratuitously offensive to others and thus an infringement of their rights. The applicant concluded that the key to the balance to be struck between the Article 10 rights of one person and the Article 9 rights of another lay in the degree of offensiveness in which the advertisement was couched.

However, he maintained that his advertisement was completely inoffensive. It may have advanced a particular religious view but it did not do so in terms which could possibly have caused offence to an adherent to any other religion. It fell to be contrasted with the expression at issue in the above-cited *Otto-Preminger-Institut* and *Wingrove* cases. Accordingly, a prohibition on religious advertising regardless of its nature or content could not be justified to protect the religious feeling of others. Such a prohibition would only be justified if the Article 9 rights of others included a right not to be exposed to any religious views different to their own. However, no such right exists under Article 9 or elsewhere in the Convention. Indeed, the applicant argued that such a position would be contrary to the pluralism, tolerance and broadmindedness required in a democratic society.

51. The applicant went on to point out that Ireland was religiously homogeneous being over ninety-five percent Roman Catholic. There was no contemporary problem of religious disharmony in Ireland. He submitted that broadcasts frequently related to controversial religious themes and that

the suggestion that listeners to a local radio would take offence at his innocuous advertisement stretched credulity. The applicant added that the relevant local radio station knew its audience well and would hardly willingly transmit an advertisement which it considered would be likely to offend its listeners.

52. He underlined that this was not a case about the licensing of broadcast media and did not concern the third sentence of Article 10 § 1 of the Convention. In any event, the relevant case-law (including *Groppera Radio AG and Others v. Switzerland*, judgment of 28 March 1990, Series A no. 173, § 64; *Informationsverein Lentia and Others*, cited above, at § 32; and *Radio ABC v. Austria*, judgment of 20 October 1997, *Reports* 1997-VI, § 28) provided that a restriction had to be justified under the third sentence of Article 10 § 1 as well as under the second paragraph of Article 10 of the Convention.

53. As to the Government's argument that the neutrality of broadcasting justified the prohibition, the applicant maintained that that argument presumed that any system of licensing could control the broadcast media and, in particular, impose conditions on the content of broadcasts which would not be compatible with the Convention if they were imposed on the print media. Such a principle would be, however, inconsistent with the principles laid down in the judgment in the above-cited case of *Informationsverein Lentia and Others v. Austria*. He argued that, in any event, it did not follow that the neutrality of the broadcast media would be undermined by the transmission of religious advertising. Much of the advertising broadcast was not commercial and related to sensitive issues including advertising about the effects of smoking, alcohol consumption, the importance of voting and about referenda. Indeed, the national broadcaster transmitted religious services of the Catholic and some Protestant Christian groupings and could publish notices advertising this. At fixed times twice a day bells were broadcast on RTE to signal Catholic prayer. Broadcasting religious material was not itself problematic and, indeed, it demonstrated that the Government was not concerned about favouring one religion over another.

54. As to the weight to be attached to the fact that the advertisement could have been published other than in the broadcast media, the applicant referred to the above-cited case of *Vgt Verein gegen Tierfabriken v. Switzerland* where the Court considered that access to such other media was indicative of the non-pressing nature of a restriction. Alternative publication means was not, in any event, sufficient justification for the exclusion from the broadcast media given the relatively reduced force and impact of the non-broadcast media.

55. The applicant disputed the Government's submission that alternative options were not feasible.

56. In the first place, he maintained that it would have been possible to have limited the prohibition to religious advertising couched in terms offensive to the religious beliefs of others. The precise terms by which this could be done, including the standard of offensiveness to be prohibited, would be a matter for the State and a certain margin of appreciation would be accorded in that respect. Contrary to the Government, the applicant considered such a restriction possible and he referred, in particular, to Council Directive No. 89/552/EEC.

According to the applicant, section 65 of the 2001 Act demonstrated that the State considered it possible to identify purely informational religious advertising and to allow the broadcasting of such advertising. Since his own advertisement contained an element of religious opinion and belief, he accepted in his oral submissions that his advertisement would be likely to fall foul of section 65 of the 2001 Act. However, he maintained that the dilution of the prohibition by section 65 of the 2001 Act was insufficient – the Convention also protected a person from expression on religious matters which was "likely and bound" or "calculated" to cause deep-seated offence to their religious beliefs.

57. Secondly, and as to the Government's wish to avoid benefiting dominant and powerful religious groups, the applicant noted that in the above-cited case of *Vgt Verein gegen Tierfabriken* the Government had referred to the risk of large and financially powerful groups seeking to exercise disproportionate influence through advertising. The Court, however, had found (at § 75 of that judgment) that the Government had not demonstrated in a "relevant and sufficient" manner why the grounds generally advanced in support of the prohibition of political advertising also served to justify the interference in the particular circumstances of the applicant association's case. The present applicant was in a similar position: there was no suggestion that he represented a large or powerful religion seeking to exercise a disproportionate influence through advertising. Indeed, section 65 of the 2001 Act was also inconsistent with any such concern by the Irish State: section 65 did not contain any limitation on access by religious groups to advertising notices in the broadcast media and, indeed, it could be argued that that section favoured large and well-established religions at the expense of smaller and less well-known groups because simple factual references to publications, events or ceremonies would be likely to have more impact in the case of established and familiar religions.

58. Thirdly, the applicant disagreed that the State would be put in an invidious position if it had to assess what kind of advertisement would cause offence. The State had already accepted that it would make a certain assessment under section 65 of the 2001 Act. In any event, bodies in many countries including Ireland regularly assessed commercial advertisements according to advertising standards which regulated, *inter alia*, the content and broadcasting of such advertisements. Accordingly, the applicant could

see no reason why the State should consider that assessing religious advertising would put them in an invidious position.

59. For these reasons, the applicant concluded that there was no pressing reason which justified the prohibition of his advertisement.

B. The Court's assessment

1. Interference

60. The Court notes that the applicant maintained that the application of section 10(3) of the 1988 Act in his case interfered with his rights guaranteed by Articles 9 and Article 10 of the Convention. While arguing that there had been no interference with his rights under either Article, the Government's submissions to the Court were, for the most part, expressed in terms of Article 10 of the Convention.

61. The Court considers that the matter essentially at issue in the present case is the applicant's exclusion from broadcasting an advertisement, an issue concerning primarily the regulation of his means of expression and not his profession or manifestation of his religion. It recalls that Article 10 protects not only the content and substance of information but also the means of dissemination since any restriction on the means necessarily interferes with the right to receive and impart information (*Öztürk v. Turkey* [GC], no. 22479/93, § 49, ECHR 1999-VI). Accordingly, the Court is of the view that the applicant's complaint about the prohibition contained in section 10(3) of the 1988 Act falls to be examined under Article 10 of the Convention. Given the parties' submissions concerning the scope of that Article and the above-cited *Handyside* judgment (see, in particular, § 49), the Court reiterates that even expression which could be considered offensive, shocking or disturbing to the religious sensitivities of others falls within the scope of the protection of Article 10, the question for the Court being whether any restriction imposed on that expression complies with the provisions of that Article.

In addition, having regard to the fact that the applicant was prevented from broadcasting the advertisement as a result of the application of section 10(3) of the 1988 Act, there clearly has been an interference with his right to freedom of expression.

2. "Prescribed by law"

62. The parties did not dispute, and the Court considers it clear, that the prohibition applied to the applicant was set out in a clear and accessible manner in section 10(3) of the 1988 Act.

3. Legitimate aim

63. The Government maintained that the prohibition sought to ensure respect for the religious doctrines and beliefs of others so that the aims of the impugned provision were public order and safety together with the protection of the rights and freedoms of others.

While disputing the necessity of the statutory provision, the applicant did not directly contest that these aims had been pursued by the enactment of section 10(3) of the 1988 Act.

64. The Court does not see any reason to doubt that these were indeed the aims of the impugned legislation and considers that they constituted legitimate aims for the purposes of Article 10 § 2 of the Convention (the above-cited *Otto-Preminger-Institut* judgment, at § 47).

4. "Necessary in a democratic society"

(a) General principles

65. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society. As paragraph 2 of Article 10 expressly recognises, however, the exercise of that freedom carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, is the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane (the above-cited *Otto-Preminger-Institut* judgment, §§ 46, 47 and 49).

66. No restriction on freedom of expression, whether in the context of religious beliefs or in any other, can be compatible with Article 10 unless it satisfies, *inter alia*, the test of necessity as required by the second paragraph of that Article. In examining whether restrictions to the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society" the Court has, however, consistently held that the Contracting States enjoy a certain but not unlimited margin of appreciation (the above-cited *Wingrove* judgment, § 53).

67. In this latter respect, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest (see, *mutatis mutandis*, among many other authorities, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, § 42; *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, § 43; and *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, § 63). However, a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals,

and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the "necessity" of a "restriction" intended to protect from such material those whose deepest feelings and convictions would be seriously offended (the above-cited *Wingrove* judgment, at § 58).

The Court therefore observes that it is this margin of appreciation which distinguishes the present case from the above-cited case of *Vgt Verein gegen Tierfabriken v. Switzerland*. In the latter case, the Court considered that the advertisement prohibited concerned a matter of public interest to which a reduced margin of appreciation applied.

68. It is for the European Court to give a final ruling on the restriction's compatibility with the Convention and it will do so by assessing in the circumstances of a particular case, *inter alia*, whether the interference corresponded to a “pressing social need” and whether it was “proportionate to the legitimate aim pursued”. Indeed, such supervision can be considered to be all the more necessary given the rather open-ended notion of respect for the religious beliefs of others and the risks of excessive interferences with freedom of expression under the guise of action taken against allegedly offensive material. In this regard, the scope of the restriction in the legislation is especially important. The Court's task in this case is therefore to determine whether the reasons relied on by the national authorities to justify the measures interfering with the applicant's freedom of expression are “relevant and sufficient” for the purposes of Article 10 § 2 of the Convention (the above-cited *Wingrove* judgment, §§ 53 and 58-59).

69. Moreover, it is recalled that the potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference. The Court has acknowledged that account must be taken of the fact that the audio-visual media have a more immediate and powerful effect than the print media (*Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, § 31).

(b) The application of those principles to the present case

70. The Court notes at the outset that the nature and purpose of the expression contained in the relevant advertisement accords with it being treated as religious, as opposed to commercial, expression even if the

applicant purchased the relevant broadcasting time (*Barthold v. Germany*, judgment of 25 March 1985, Series A no. 90, § 58).

71. The main factor which the Government considered justified the impugned prohibition was the particular religious sensitivities in Irish society which they submitted were such that the broadcasting of any religious advertising could be considered offensive. The applicant agreed that Article 10 permitted restrictions of religious expression which would offend others' religious sensitivities but submitted that the Convention did not protect an individual from being exposed to a religious view simply because it did not accord with his or her own, noting that his advertisement was innocuous and completely inoffensive. In any event, he disputed the Government's assessment of contemporary religious sensitivities in Ireland.

72. The Court agrees that the concepts of pluralism, tolerance and broadmindedness on which any democratic society is based (the above-cited *Handyside* judgment, at § 49) mean that Article 10 does not, as such, envisage that an individual is to be protected from exposure to a religious view simply because it is not his or her own. However, the Court observes that it is not to be excluded that an expression, which is not on its face offensive, could have an offensive impact in certain circumstances. The question before the Court is therefore whether a prohibition of a certain type (advertising) of expression (religious) through a particular means (the broadcast media) can be justifiably prohibited in the particular circumstances of the case.

73. Turning therefore to the country-specific religious sensitivities relied on by the Government, the Court has noted that the Minister identified, during the debate on the introduction of section 20(4) of the 1960 Act, the potential impact on religious sensitivities as justifying prudence in the context of the broadcasting of religious advertising and he drew a distinction between advertising time which was purchased and programming (paragraph 22 above). Section 20(4) was then applied to independent broadcasters through section 10(3) of the 1988 Act, the provision at issue in the present case. The Court has noted that, during the detailed debate on a proposed dilution of section 10(3) in April 1999, the Minister emphasised at some length the extreme sensitivity of the question of broadcasting of religious advertising in Ireland and the consequent necessity to proceed towards any proposed amendment of section 10(3) with care and on the basis of a full consideration of the issues and options (paragraphs 27-28 above).

Moreover, the domestic courts found that the Government were entitled to be prudent in this context. In particular, the High Court considered relevant the fact that religion had been a divisive issue in Northern Ireland. It further considered that Irish people with religious beliefs tended to belong to a particular church so that religious advertising from a different church might be considered offensive and open to the interpretation of proselytism.

Indeed, the High Court pointed out that it was the very fact that an advertisement was directed towards a religious end which might have been potentially offensive to the public. The Supreme Court also emphasised that the three subjects highlighted by section 10(3) of the 1988 Act concerned subjects which had proven "extremely divisive in Irish society in the past" and it also agreed that the Government had been entitled to take the view that Irish citizens would resent having advertisements touching on these topics broadcast into their homes and that such advertisements could lead to unrest.

74. The Court has also observed that the impugned provision was designed to correspond, and was indeed limited, to these particular concerns and that the bounds of the prohibition are an important consideration in the assessment of its proportionality (see paragraph 68 above).

The prohibition concerned only the audio-visual media. The State was, in the Court's view, entitled to be particularly wary of the potential for offence in the broadcasting context, such media being accepted by this Court (see paragraph 69) and acknowledged by the applicant, as having a more immediate, invasive and powerful impact including, as the Government and the High Court noted, on the passive recipient. He was consequently free to advertise the same matter in any of the print media (including local and national newspapers) and during public meetings and other assemblies.

Moreover, the prohibition related only to advertising. This Court considers that this limitation reflects a reasonable distinction made by the State between, on the one hand, purchasing broadcasting time to advertise and, on the other, coverage of religious matters through programming (including documentaries, debates, films, discussions and live coverage of religious events and occasions). Programming is not broadcast because a party has purchased airtime and, as outlined by the Government, must be impartial, neutral and balanced, the objective value of which obligation the parties did not dispute. The applicant retained the same right as any other citizen to participate in programmes on religious matters and to have services of his church broadcast in the audio-visual media. Advertising, however, tends to have a distinctly partial objective: it cannot be, and is not, therefore subject to the above-outlined principle of impartiality and the fact that advertising time is purchased would lean in favour of unbalanced usage by religious groups with larger resources and advertising.

Consequently, other than advertisements in the broadcast media, the applicant's religious expression was not otherwise restricted.

75. Such considerations provide, in the Court's view, highly "relevant reasons" justifying the Irish State's prohibition of the broadcasting of religious advertisements.

76. The applicant, however, also maintained that these reasons were not "sufficient" and, in particular, that the State could have achieved its aims by a more limited prohibition and, indeed, that it should have gone further than

the limited dilution of the prohibition contained in section 65 of the 2001 Act. However, the Court considers persuasive the Government's argument that a complete or partial relaxation of the impugned prohibition would sit uneasily with the nature and level of the religious sensitivities outlined above and with the principle of neutrality in the broadcast media.

77. In the first place, the Court would accept that a provision allowing one religion, and not another, to advertise would be difficult to justify and that a provision which allowed the filtering by the State or any organ designated by it, on a case by case basis, of unacceptable or excessive religious advertising would be difficult to apply fairly, objectively and coherently (the above-cited case of *United Christian Broadcasters Ltd v. the United Kingdom*). There is, in this context, some force in the Government's argument that the exclusion of all religious groupings from broadcasting advertisements generates less discomfort than any filtering of the amount and content of such expression by such groupings.

The applicant suggested that such a filtering process is already applied through the application of the principle of neutrality to programmes and programming. However, and as the Court has noted above, the distinct nature of advertising and programming means that the regulatory tools employed for programming are not directly applicable to advertising. The applicant also referred to the fact that advertisements (other than those prohibited by the impugned provision) are already subjected to advertising standards control. The Court does not, however, consider that the same public sensitivities and issues of neutrality arise in the case of religious advertisements and those concerning, for example, commercial services, goods or products.

78. Secondly, the Court considers it reasonable for the State to consider it likely that even a limited freedom to advertise would benefit a dominant religion more than those religions with significantly less adherents and resources. Such a result would jar with the objective of promoting neutrality in broadcasting and, in particular, of ensuring a “level playing field” for all religions in the medium considered to have the most powerful impact.

79. Thirdly, the applicant did not dispute the Government's concern that allowing limited religious advertising would result in unequal consequences for the national and independent broadcasters.

80. Fourthly, while the State has, subsequent to the facts of the present case, diluted section 10(3) of the 1988 Act (through section 65 of the 2001 Act), the Minister's comments in April 1999 together with the limited nature of the 2001 amendment do not undermine, and indeed are consistent with, the State's view of the religious sensitivities in Ireland in 1988 and its understanding of the consequent necessity for full reflection and prudence when considering any evolution including a relaxation of the provisions of section 10(3) of the 1988 Act. In addition, the nature of the assessment required by section 65 of the 2001 Act (whether or not the advertisement

amounted only to an announcement of the fact that a religious publication is for sale or that a religious event will take place) has been clearly chosen for its relatively objective and, consequently, uncontroversial nature.

81. Finally, and as to the parties' submissions concerning the existence of similar prohibitions on the broadcasting of religious advertising in other countries, the Court observes that there appears to be no clear consensus between the Contracting States as to the manner in which to legislate for the broadcasting of religious advertisements. Certain States have similar prohibitions (for example, Greece, Switzerland and Portugal), certain prohibit religious advertisements considered offensive (for example, Spain and see also Council Directive 89/552/EEC) and certain have no legislative restriction (the Netherlands). There appears to be no "uniform conception of the requirements of the protection of the rights of others" in the context of the legislative regulation of the broadcasting of religious advertising (see paragraph 67 above).

82. In the circumstances, and given the margin of appreciation accorded to the State in such matters, the Court considers that the State has demonstrated that there were "relevant and sufficient" reasons justifying the interference with the applicant's freedom of expression within the meaning of Article 10 of the Convention.

In consequence, it concludes that there has been no violation of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 10 of the Convention, under which Article the Court found the complaint was most appropriately considered.

Done in English, and notified in writing on 10 July 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President

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

CASE OF NILSEN AND JOHNSEN v. NORWAY

(Application no. 23118/93)

JUDGMENT

STRASBOURG

25 November 1999

In the case of Nilsen and Johnsen v. Norway,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr C.L. ROZAKIS,
Sir Nicolas BRATZA,
Mr M. PELLONPÄÄ,
Mr B. CONFORTI,
Mr A. PASTOR RIDRUEJO,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr C. BÎRSAN,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,

and also of Mr M. DE SALVIA, *Registrar*,

Having deliberated in private on 1 July and 20 October 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Norwegian Government ("the Government") on 24 November 1998 and 21 January 1999, respectively, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 23118/93) against the Kingdom of Norway lodged with the Commission under former Article 25 by Mr Arnold Nilsen and Mr Jan Gerhard Johnsen, both Norwegian nationals, on 2 November 1993.

1-2. *Note by the Registry.* Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

The Commission's request referred to former Articles 44 and 48 and to the declaration whereby Norway recognised the compulsory jurisdiction of the Court (former Article 46); the Government's application referred to former Articles 44 and 48 of the Convention and to Article 5 § 4 of Protocol No. 11. The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention.

2. In accordance with the provisions of Article 5 § 4 of Protocol No. 11 taken together with Rules 100 § 1 and 24 § 6 of the Rules of Court, a panel of the Grand Chamber decided on 14 January 1999 that the case would be examined by the Grand Chamber of Court.

3. The Grand Chamber included *ex officio* Mrs H.S. Greve, the judge elected in respect of Norway (Article 27 § 2 of the Convention and Rule 24 § 4), Mr L. Wildhaber, the President of the Court, Mrs E. Palm and Mr C.L. Rozakis, the Vice-Presidents of the Court, and Sir Nicolas Bratza and Mr M. Pellonpää, Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 § 3). The other members appointed to complete the Grand Chamber were Mr B. Conforti, Mr A. Pastor Ridruejo, Mr G. Bonello, Mr P. Kūris, Mr R. Türmen, Mrs F. Tulkens, Mrs V. Strážnická, Mr C. Bîrsan, Mr J. Casadevall, Mr A.B. Baka and Mr R. Maruste (Rule 24 § 3). Subsequently Mr M. Fischbach, substitute judge, replaced Mr Bonello, who was unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

4. Mr Wildhaber, acting through the Registrar, consulted the Agent of the Government and the applicants' lawyers on the organisation of the written procedure. Pursuant to the orders made in consequence on 8 February and 17 March 1999, the Registrar received the Government's and the applicants' memorials on 2 June 1999.

5. On 17 June 1999 the Commission produced certain documents from the file on the proceedings before it, as requested by the Registrar on the President's instructions. On various dates between 25 June and 10 July 1999 the Registrar received from the parties additional observations on the applicants' Article 41 claim.

6. In accordance with the Grand Chamber's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 1 July 1999.

There appeared before the Court:

(a) *for the Government*

Mr F. ELGESEM, Attorney, Attorney-General's Office
(Civil Matters), *Agent*,

Mr H. SÆTRE, Deputy to the Permanent Representative
of Norway to the Council of Europe, *Adviser*;

(b) *for the applicants*
Mr H. HJORT, *Advokat*,
Mr J. HJORT, *Advokat*, *Counsel*.

The Court heard addresses by Mr H. Hjort and Mr Elgesem and also the latter's reply to a question put by one of its members individually.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

7. The first applicant, Mr Arnold Nilsen, and the second applicant, Mr Jan Gerhard Johnsen, are Norwegian citizens born in 1928 and 1943 and living in Bergen. The first applicant is a police inspector, who at the material time was Chairman of the Norwegian Police Association (*Norsk Politiforbund*). The second applicant is a police constable and was at the relevant time Chairman of the Bergen Police Association (*Bergen Politilag*), a branch of the former association. At the material time they were both working in the Bergen police force.

8. In the 1970s Mr Gunnar Nordhus, then a law student, and Mr Edvard Vogt, then an associate professor of sociology at the University of Bergen, carried out an investigation into the phenomenon of violence in Bergen, a city of some 200,000 inhabitants. They gathered material from the local hospital relating to all patients subjected to violence during the period January 1975-July 1976. Later, they included material from other sources. In 1981 Mr Nordhus and Mr Vogt published a summary of their previous reports in a book entitled *Volden og dens ofre. En empirisk undersøkelse* ("Violence and its Victims. An Empirical Study"). The book extended to some 280 pages and included a 77-page chapter on police brutality, which it defined as the unlawful use of physical force during the performance of police duties. The authors found, *inter alia*, that 58 persons had been exposed to police brutality during the aforementioned period, 28 of whom had been medically examined, and that the police in Bergen were responsible for approximately 360 incidents a year of excessive and illegal use of force.

The book gave rise to a heated public debate. This involved in part researchers concerning the methods used and the scientific basis for the conclusions drawn, and in part members of the police and the prosecution.

9. In this connection the Ministry of Justice appointed a Committee (*utvalg*) of Inquiry consisting of Mr Anders Bratholm, professor of criminal and procedural law, and Mr Hans Stenberg-Nilsen, advocate before the Supreme Court. Their mandate was to verify whether the research of Mr Nordhus and Mr Vogt provided a basis for making any general observations as to the nature and extent of police brutality in Bergen.

Assisted by a statistics expert and an expert on the use of interviews, the Committee interviewed 101 persons, including 29 police officers, 2 public prosecutors, 4 doctors who had taken blood samples at Bergen police station, 5 social workers who dealt especially with young criminals in Bergen, 2 defence lawyers with extensive experience of criminal cases in Bergen, 13 witnesses of police brutality and 27 alleged victims of such misconduct. In a report published in 1982 under the title *Politivoldrapporten* ("Report on Police Brutality") Mr Bratholm and Mr Stenberg-Nilsen concluded:

> "Since the Committee of Inquiry has been unable to reach a conclusion regarding individual accounts of situations, but has considered all the material as a whole (see remarks on p. 88 with reference to the recommendation of the Reitgjerdet Commission), it will not, on the basis of the descriptions of the situations alone, be able to give any exact figure as to the number of incidents of police violence in Bergen. However, on the basis of all the information concerning police violence in Bergen received from various sources by the Committee, it believes that the nature and the extent of police violence are far more serious than seems to be generally believed. On the strength of the evidence as a whole, the Committee assumes that the real extent hardly differs from the two researchers' estimates. However, the essential point must be that even the most cautious estimates that can be made on this basis indicate that the extent is alarming."

10. The conclusions in the 1982 report and its premises were called into question by the Norwegian Police Association, amongst others. The association considered bringing defamation proceedings against Mr Bratholm, Mr Stenberg-Nilsen, Mr Nordhus and Mr Vogt but decided in 1983 to refrain from such action.

11. Newspapers in Bergen, in particular, took a keen interest in the debate following publication of the 1982 report. Prior to that, in 1981, the newspaper *Morgenavisen* had stated that Mr Nordhus had lied in connection with the collecting of material for his research. Mr Nordhus instituted defamation proceedings against the newspaper but in 1983 the Bergen City Court (*byrett*) dismissed the action on the ground that the accusation had been justified.

12. Mr Bratholm continued his work on police brutality, eventually as an independent researcher. In the spring of 1986 he published a book entitled *Politivold* ("Police Brutality"), with the subtitle *Omfang – årsak – forebyggelse. En studie i desinformasjon* ("Extent – Causes – Prevention. A Study in Misinformation"). He explained his use of the term "misinformation" as meaning the deliberate or negligent dissemination of incorrect information. It related to the "false" – or "misunderstood" –

loyalty, leading police officers witnessing the excessive and unlawful use of force to keep quiet or cover the perpetrator by giving false testimony. Taking the 1982 report as its point of departure the book provided additional facts, analyses and conclusions. It also contained strong criticism by Mr Bratholm of the City Court's judgment in the above-mentioned case brought by Mr Nordhus against *Morgenavisen*.

B. Publications containing impugned statements by the applicants

13. Following the publication of Mr Bratholm's book *Politivold* the second applicant, as Chairman of the Bergen Police Association, was interviewed by the newspaper *Dagbladet*. The interview was published in an article on 15 May 1986 entitled (all quotations below are translations from Norwegian) "Mr Bratholm out to get the police – An entire service has been denounced by anonymous persons" and read:

> " 'The mood of officers in the police force has been swinging between despair and anger. An entire service has been denounced by anonymous persons. Many of the officers dread making an appearance in town because there is always someone to believe that there must be something in these allegations.'
>
> This is what the Chairman of the Bergen Police Association, Mr Johnsen, told *Dagbladet*. He describes Professor Bratholm's recent report on police brutality in the Bergen police force as 'pure misinformation intended to harm the police'.
>
> 'Until the contrary has been proved, I would characterise this as a deliberate lie. The allegations come from anonymous sources and are clearly defamatory of the service.'
>
> 'Are you questioning Mr Bratholm's motives for exposing police brutality?'
>
> 'There must be other ulterior motives. It appears as if the purpose has been to undermine confidence in the police.'
>
> 'Would you suggest that the information be investigated internally?'
>
> 'If there is any truth in it, we will do what we can to remedy the situation. Such a situation is not to our credit, and we are not interested in having such people in the force.'
>
> 'So you do not exclude the possibility that misconduct has occurred?'
>
> 'I discount the possibility that any officers have committed such outrages as described. But I cannot exclude that some of them have in certain instances used force and gone too far.' "

14. On 16 May 1986 the first applicant, then Chairman of the Norwegian Police Association, was quoted in an article published by the newspaper *Bergens Tidende* under the headline "Unworthy of a law professor". The article read:

" 'It is beneath the dignity of a law professor to present something like this. The allegations are completely frivolous since they are based on anonymous sources. They have nothing to do with reality.'

This was stated by Mr Nilsen, Chairman of the Norwegian Police Association, in connection with the allegations made by Professor Bratholm in his book on police brutality.

'I have spent my whole working life in the Bergen police force, and can safely say that the allegations concerning police brutality bear no relation to reality. They are stories that would have been better suited to a weekly with space to fill than a so-called serious study', says Mr Nilsen.

Full parity

'I am puzzled by the motives behind such allegations,' continues the Chairman of the Police Association. 'At any rate, it cannot be in the interests of the rule of law and the public good to create such problems for an entire service. I would claim that the quality of the human resources within the police is fully on a par with that found among professors. We would not be able to base a charge against anyone on such flimsy grounds as Professor Bratholm does. Then, at any rate, there would not be any rule of law in this country.'

Would not be tolerated

'But you are not denying that police brutality does occur?'

'Of course not, but that is a different question. Here it is a question of systematic use of violence and pure theft. Such conduct would not be tolerated within a police force.'

Mr Nilsen points out that, although he has not studied the book closely, he considers that one cannot leave what has emerged so far unchallenged. The problem is that it is difficult to contest the allegations because it is not an individual, but an entire service, which feels it has been libelled. He does, however, agree with Chief of Police, Mr Oscar Hordnes, who told *Bergens Tidende* yesterday that there must be good reason for the Prosecutor-General [*Riksadvokaten*] to examine the matter more closely. The Police Association will also consider seeking a legal opinion on the book."

C. Further publications on police brutality

15. In the autumn of 1986 Mr Bratholm and Mr Nordhus published a book – *Dokumentasjon av politivold og andre overgrep i Bergen-politiet* ("Documentation of police brutality and other misconduct in the Bergen police force") in which Mr Bratholm stated:

"The harassment and persecution to which Mr Nordhus – and in part Mr Vogt – have been subjected in Bergen are reminiscent of the fate of dissidents in east European countries. I doubt that there is anyone among us whose situation is closer to that of these dissidents than Mr Nordhus. It is almost a wonder that he has had the courage and strength to continue his struggle to bring the truth to light.

…

It is impossible to say how many officers in the Bergen police force are involved in the unlawful practice described here; hopefully only a small minority. It is, however, difficult to believe that a great many in the force could be unaware of the conduct of certain colleagues. But their silence is ensured by the pressing demand for 'loyalty'. This has made it possible for the criminal sub-culture in the Bergen police force – whose activities encompass various kinds of offences – to survive and most likely to flourish.

...

There is reason to believe that many of the actions against Mr Nordhus and Mr Vogt are headed by somebody who is centrally placed – that there is somebody behind the scenes in the Bergen police force who is pulling the strings, plotting strategies and laying plans together with a few highly trusted persons. According to information that has come to light, it may now be possible to identify the key people responsible for some of the misconduct."

16. In the spring of 1987 Mr Bratholm published a further book entitled *Politiovergrep og personforfølgelse. 220 forklaringer om politivold og andre overgrep i Bergenspolitiet* ("Police misconduct and individual harassment. 220 statements concerning police brutality and other forms of misconduct in the Bergen police force"), which to some extent was an update of Mr Bratholm's and Mr Nordhus's book of 1986. In the introduction Mr Bratholm stated:

"Although abuse of power by the police does occur, and in some places far more frequently than in others, this does not mean that the majority of Norwegian police officers are guilty of such abuse. All the investigations indicate that a small minority of police officers have committed most of the incidents of abuse and are able to continue because the demands for 'loyalty' are so strong within the police."

17. In early 1988 the Norwegian law journal *Lov og Rett* published a special volume devoted to the issue of police violence. It included a number of articles by academics, amongst others by Mr Bratholm, criticising an investigation ordered by the Prosecutor-General (see paragraph 18 below).

Mr Bratholm also published a number of other articles on the subject of police brutality.

D. The "boomerang cases"

18. After receiving from Mr Bratholm an unexpurgated version of the book published in autumn 1986 mentioning the informers' names (which until then had been known to the researchers only), the Prosecutor-General ordered an investigation headed by *ad hoc* prosecutor Mr Erling Lyngtveit and police officers from another district.

In June 1987 the result of the Prosecutor-General's investigation was made public: 368 cases of alleged police brutality in Bergen had been investigated. Some 500 persons, including 230 police officers, had been

interviewed. Charges were brought against one police officer, who was subsequently acquitted. The overall conclusion reached in the investigation was essentially that the various allegations of police brutality were unfounded.

At the close of the investigation, fifteen of the interviewees were charged with having made false accusations against the police. Ten of these persons were later convicted in jury trials before the Gulating High Court (*lagmannsrett*), which took place during the period from November 1988 to March 1992 and were referred to as the "boomerang cases".

E. Further publications containing impugned statements

19. On 2 March 1988 a new statement by the first applicant was printed in *Annonseavisen* in Bergen in an article carrying the following headlines:

> "Dramatic turn in the debate on brutality
>
> Amnesty contacted
>
> The Police Association is preparing legal action"

The article read:

> "Not only has Professor Bratholm now issued a demand that a government committee of inquiry should be set up to review what was long ago concluded by the Prosecutor-General, but the Bergen Police Department has now been reported to Amnesty International for violating human rights! A delegation from the international secretariat in London has already been in Bergen. Their report is expected to be ready this spring.
>
> 'I have to admit that I was quite surprised when I was told about this recently. It seems as if gentlemen like Mr Nordhus, Mr Vogt and Mr Bratholm now realise that when one move does not work they try another', commented Mr Nilsen, Chairman of the Norwegian Police Association.
>
> In [his] view, the matter is about to get out of hand. He describes the reporting of the matter to Amnesty as an insult and feels that with the recent, sharp attacks by Professor Bratholm and others, the limits of what can be called impartial research have long since been exceeded. 'In my view, one is faced with a form of skulduggery and private investigation where there is good reason to question the honesty of the motives', Mr Nilsen said to *Annonseavisen*.
>
> Just before the weekend Mr Nilsen was in Bergen, where he had talks with the newly appointed board of the Bergen Police Association ... Mr Nilsen says it was natural that the recent sharp attacks by Mr Nordhus, Mr Vogt and Mr Bratholm were one of the topics discussed.
>
> 'I intend to contact our lawyer ... early this week. He has long ago sent a letter to Mr Bratholm in which we demand an apology for the statements he has made. I think you can count on our instituting defamation proceedings in this matter. We cannot put up with a situation where the same accusations continue to be made

against the Bergen police despite the fact that the force has been cleared after one of the greatest investigations of our time.'

Extended accusations

'But Mr Bratholm has no confidence in [prosecutor] Lyngtveit's competence and desire to have the whole matter investigated?'

'The fact that Professor Bratholm now calls into question the work carried out by Mr Lyngtveit and instituted by the Attorney-General [*Regjeringsadvokaten*] is in itself serious and remarkable. Now the charges have been extended to include superior police authorities as well.'

According to *Annonseavisen*'s sources, Mr Nilsen will very soon contact the Prosecutor-General to hear what the latter intends to do about Mr Bratholm's extended insinuations.

As regards the fact that Amnesty International is being brought into [the matter], Mr Vogt ... affirms that this is as a result of the organisation's wish to gain full insight into the situation in the Bergen police force."

20. In June 1988 the first applicant gave a speech as Chairman of the Norwegian Police Association at its annual general assembly, from which *Bergens Tidende* quoted in an article dated 7 June 1988 carrying the headline "Mr Bratholm accused of defamation". The article read, *inter alia*, as follows:

"... The Norwegian Police Association is serious about its threat to bring defamation proceedings against Professor Bratholm. According to Mr Nilsen, Chairman of the Association, a summons against Mr Bratholm will be issued within the next days requesting that two specific written statements he has made in connection with the police brutality case in Bergen be declared null and void.

...

Refused

'Professor Bratholm has had an opportunity to apologise for the two specific points which we find to be defamatory of the police as a professional group, but he has refused. Therefore we are instituting proceedings. No compensation will be claimed; we are merely seeking to have the statements declared null and void.'

Critical eyes

Mr Nilsen also mentioned this matter in his opening speech to the national assembly and said, among other things, that society's power structure had to tolerate critical eyes. However, this presupposed a responsible and reliable attitude on the part of the critics. He strongly denounced unobjective debates on police brutality fostered by powerful forces of high social status.

Dilettantes

'Mr Bratholm's status as a professor has lent credibility to the allegations of police brutality, and this has undermined the respect for and confidence in the

police. The Norwegian Police Association will not accept the appointment of a new commission to investigate allegations of police brutality; nor will it accept private investigations on a grand scale made by dilettantes and intended to fabricate allegations of police brutality which are then made public', said Mr Nilsen.

...

Verbal attacks

Mr Nilsen described verbal attacks on the police as an attempt to undermine the dignity and authority of the police."

21. In a special edition of the law journal *Juristkontakt*, published in the autumn of 1988, the police and the prosecution authorities presented their views on the investigation ordered by the Prosecutor-General and the ensuing investigation into the suspected false statements given by Mr Bratholm's informers.

F. Defamation proceedings

22. In July 1988 the Norwegian Police Association and its Bergen branch brought defamation proceedings against Mr Bratholm, seeking to have his above-cited statements in "Documentation of police brutality and other misconduct in the Bergen police force" declared null and void (see paragraph 15 above).

23. In May 1989 Mr Bratholm, for his part, instituted defamation proceedings against the applicants, requesting that a number of their statements be declared null and void.

24. In 1992, in view of the European Court of Human Rights' Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992 (Series A no. 239), the associations withdrew their defamation action against Mr Bratholm. The latter refused to withdraw his case against the applicants.

25. The Oslo City Court heard the case against the applicants from 24 August to 8 September 1992, during which evidence was taken from twenty-three witnesses and extensive documentary evidence was submitted.

In its judgment of 7 October 1992 the City Court observed, *inter alia*, that it was established that unlawful use of violence had occurred in Bergen and that, although it had emanated from very few police officers, the extent of the violence was problematic. Mr Bratholm had not assailed his opponents' integrity and had not expressed himself in a manner that could justify the applicants' attack on him. It found the following statements defamatory under Article 247 of the Penal Code and declared them null and void (*død og maktesløs, mortifisert*) under Article 253 § 1 (the numbering below follows that appearing in the national courts' judgments):

(Statements by the second applicant published by *Dagbladet* on 15 May 1986)

1.1 "He describes Professor Bratholm's recent report on police brutality in the Bergen police force as 'pure misinformation intended to harm the police'."

1.2 "Until the contrary has been proved I would characterise this as a deliberate lie."

1.3 "There must be other ulterior motives. It appears as if the purpose has been to undermine confidence in the police."

(Statements by the first applicant published by *Annonseavisen* and *Bergens Tidende* on 2 March and 7 June 1988 respectively)

2.2 "In my view, one is faced with a form of skulduggery and private investigation where there is good reason to question the honesty of the motives."

2.3 "The Norwegian Police Association will not accept ... private investigations on a grand scale made by dilettantes and intended to fabricate allegations of police brutality which are then made public."

On the other hand, the City Court rejected Mr Bratholm's claims with respect to the following statements by the first applicant published by *Bergens Tidende* on 16 May 1986 and 7 June 1988:

2.1 "I am puzzled by the motives behind such allegations. At any rate, it cannot be in the interests of the rule of law and the public good to create such problems for an entire service."

2.4 "Mr Nilsen described verbal attacks on the police as an attempt to undermine the dignity and authority of the police."

The City Court ordered the first applicant to pay 25,000 Norwegian kroner (NOK) for non-pecuniary damage to Mr Bratholm but dismissed the latter's claim for non-pecuniary damage against the second applicant on the ground that it had been submitted out of time. The City Court further ordered that the applicants pay Mr Bratholm respectively NOK 112,365.83 and NOK 168,541.91 for legal costs.

The City Court's judgment included the following reasons:

"Statement 1.1 ... is an unequivocal allegation that Mr Bratholm's book contains false allegations of police violence within the Bergen police. The expression 'misinformation' may be understood as being a neutral assertion that Mr Bratholm provides false information, or to mean that he should be aware that he [does so], or that he [does it] deliberately. The Court emphasises that the phrase 'pure misinformation intended to harm the police' must be read in connection with the rest of the text – particularly statement 1.2 and the last paragraph of the interview – and has come to the conclusion that an ordinary reader would understand the statement as follows:

'With the intent of harming the police, Mr Bratholm is deliberately imparting false information on police brutality.'

The Court has no doubt that this is an assertion that constitutes a defamatory allegation. It is both offensive to Mr Bratholm's sense of honour and liable to harm his reputation. The allegation is not a subjective characterisation, but an assertion about a

matter of fact that can be proved by means of evidence. The accusation can thus be declared null and void.

The Court would add that, when read in context, the statement cannot be construed as an accusation that Mr Bratholm himself is making false allegations of police brutality. However, even if the statement must be understood to be an allegation against persons other than Mr Bratholm (of making false accusations of police brutality), this does not alter its character as an allegation aimed at Mr Bratholm. When read in its entirety, the text clearly indicates that it is Mr Bratholm's book which Mr Johnsen is referring to.

…

When statement [1.2] is read in the context of the rest of the text, which essentially deals with Mr Bratholm's book, an ordinary reader would understand it as follows:

'Mr Bratholm is deliberately passing on assertions about police brutality which he knows are lies.'

Whether statement 1.2 can be interpreted in such a way that it also targets the informers is of no significance here either. Nor does the Court doubt that this statement constitutes a defamatory allegation directed at Mr Bratholm which may be declared null and void because its truth can be tested by evidence.

…

[Statement 1.3] must be understood as a clear assertion that Mr Bratholm's purpose (in writing the book *Politivold*) has been to undermine confidence in the police. When read in the context of the rest of the text, especially statements 1.1 and 1.2, it must be understood as an assertion that Mr Bratholm for this purpose is passing on allegations of police brutality which he knows to be untrue. The statement also includes an implicit denigration of Mr Bratholm's purpose as questionable and unworthy. 'Other motives' answers the question whether Mr Bratholm's motives can be doubted, i.e. as opposed to honourable motives such as, for instance, to promote the rule of law.

...

The Court has no doubt that the assertion is an allegation which has both offended Mr Bratholm's sense of honour and is liable to harm his reputation. The part of the assertion alleging that Mr Bratholm's intention is to undermine the police can be proved to be true or false. That Mr Bratholm's intention, with the statement worded as it is, must be understood by the reader as questionable or reprehensible is a subjective value judgment that can hardly be proved true or false. However, this does not in principle mean that statement 1.3 may not be declared null and void.

[Statement 2.2] is not unequivocal as to whom it is directed against. It can be understood as being directed against Mr Bratholm (probably also against others), when seen in the light of the two preceding passages stating that Mr Bratholm (together with Mr Vogt and Mr Nordhus) is trying a new move and that Mr Bratholm (amongst others) is transgressing the limits of neutral research. When read in its context, the statement may also be understood to imply that it is not at all directed against Mr Bratholm, but against Amnesty. Such an interpretation must be based on the fact that the newspaper interviewed Mr Nilsen just because Amnesty had become involved in the matter. As a third possibility, the Court mentions that the statement –

especially when read in the context of the caption in the newspaper – may be understood by an ordinary reader to imply that it is first of all directed at Mr Vogt and Mr Nordhus, but also at Mr Bratholm.

The Court has reached the conclusion that when read in context statement [2.2] must be interpreted in any event as an assertion that Mr Bratholm, among others, has questionable motives for his involvement, and that Mr Bratholm is engaged in and/or contributes to what Mr Nilsen describes as skulduggery and private investigation, not impartial research.

The statement in part includes value judgments ('skulduggery', 'private investigation'), which are not liable to be declared null and void. However, the statement also includes an assertion on matters of fact, i.e. that there are dishonest motives and that Mr Bratholm is not neutral.

The statement must obviously be understood to be an assertion that it is Mr Bratholm whose motives are dishonest. This follows from the first and second paragraphs preceding the statement, where Mr Nilsen first mentions that Mr Bratholm (together with Mr Nordhus and Mr Vogt) is trying a new move, and then claims that Mr Bratholm, among others, has exceeded the limits of impartial research.

The Court has no doubt that this assertion constitutes a defamatory allegation against Mr Bratholm. It is both offensive to his sense of honour and liable to harm his reputation. The truth of the allegation can be tested by evidence and it may therefore be declared null and void.

…

Statement 2.3 contains an assertion that allegations of police brutality are being fabricated and then made public. When read in connection with the rest of the text, this must be interpreted by an ordinary reader as an assertion that Mr Bratholm publicises false allegations of police brutality. This assertion can be proved to be true or false, and is in principle liable to be declared null and void.

The statement does not include only the said assertion. When the assertion is also understood to mean that Mr Bratholm is publicising allegations that he should have realised are false it follows that it is also offensive to Mr Bratholm's sense of honour and liable to harm his reputation. The assertion implies that he, as an expert, is heedlessly publicising false allegations of police brutality. However, when read in context the statement cannot be understood solely in this way.

The statement must be interpreted as an assertion that Mr Bratholm is taking part in a private investigation for the purpose of fabricating allegations of police brutality.

If the assertion is to be interpreted as also being directed at persons other than Mr Bratholm, this does not preclude its being directed at him. Accordingly, statement 2.3 must also be interpreted as a defamatory allegation against Mr Bratholm, the truth of which can be tested by evidence."

26. The applicants appealed against the City Court's judgment to the Supreme Court (*Høyesterett*), challenging the former court's interpretation of their statements. Without any support in their wording or the context, it had interpreted the statements as calling into question Mr Bratholm's

honesty and motives. In no event could the statements be regarded as unlawful, as they had been expressed in response to his damaging value judgments of the profession. The applicants invoked, *inter alia*, Article 250 of the Penal Code pursuant to which a court could refrain from imposing a penalty if the injured party had provoked the defendant or retaliated in a reprehensible manner. A crucial factor was that Mr Bratholm's attacks on the associations which the applicants represented constituted such provocation and retaliation.

In his cross-appeal Mr Bratholm challenged the City Court's findings with respect to statements 2.1 and 2.4. Moreover, he emphasised, *inter alia*, that he had not questioned the honesty of the applicants or any other officials. His criticism had been directed against a system and enjoyed special protection under Article 100 of the Constitution.

On 19 November 1992 the Appeals Selection Committee (*kjæremålsutvalget*) of the Supreme Court granted leave to appeal on points of law.

27. On 5 May 1993 the Supreme Court rejected both appeals, thereby upholding the City Court's judgment, and ordered each of the applicants to pay NOK 45,000 in additional costs to Mr Bratholm.

On behalf of the court, Mr Justice Schei stated, *inter alia*:

> "In the present case the interest in freedom of expression carries particular weight. The statements sought to be declared null and void were made in a public debate concerning police brutality. Police brutality – and by this I mean the use of illegal physical force by the police against individuals – is a matter of serious public concern. It is of central importance for democracy that a debate concerning such matters may take place as far as possible without a risk of sanctions being imposed on those who participate. It is of particular importance to allow a wide leeway for criticism in matters of public concern (see Article 100 of the Constitution). However, those who act in defence against the criticism, for instance the representatives of the Bergen police, should of course also enjoy this freedom of expression.
>
> ...
>
> However, freedom of expression does not go as far as [allowing] every statement in a debate, even if the debate relates to matters of public concern. Freedom of expression must be weighed against the rights of the injured party. The limit between statements which may be permissible and statements which may be declared null and void must in principle be set at statements which relate to the other person's personal honesty or motives ...
>
> Nor do accusations of lies, improper motives, dishonesty ... serve to promote freedom of expression but, perhaps, rather to suppress or prevent a debate which should have been allowed to take place.
>
> ...
>
> [The applicants'] argument that the [impugned] statements cannot be declared null and void because they include subjective value judgments which are not susceptible of proof, is in my view untenable. The statements include, among other things, accusations of deliberate lies, unworthy motives and intent to damage the police. The

truth of this type of statement can in principle be proved. The fact that [the applicants] have made no attempt to present such proof is another matter.

In the assessment of whether the [statements] are to be considered unlawful [*rettsstridig*] the aggrieved party's own conduct may also be relevant. A person who uses strong language may have to tolerate more than others. I will revert to Mr Bratholm's conduct. Suffice it to say, in this context, that I cannot see that his strong involvement [in the debate] can be decisive with respect to those statements which clearly question whether he is lying or has acceptable motives.

[The applicants] have submitted that, regardless of whether the statements are unlawful, the request for a null and void order must be refused, in accordance with an application by analogy of Article 250 of the Penal Code. To this I would ... say that [this] provision scarcely has any independent significance any longer – at least as regards provocation. In the case-law, the injured party's own conduct has become more central in the determination of [whether a statement should be considered unlawful] and in violation of Article 247 of the Penal Code. I fail to see that there can be any room for exemption from penalty if the statement is unlawful. This approach would be the same if Article 250 ... had also been applicable to nullification. For this reason alone, there are no grounds for application by analogy, as pleaded by [the applicants].

I should think that the reasoning I have ... presented is also correct in respect of retaliation. In any event there [was in the present case] no retaliation such as that required ...

...

I agree with the City Court that [the statements in question] fall under Article 247 of the Penal Code. Read in their context, they are directed against Mr Bratholm. In statement 1.2 he is accused of deliberate lies. An accusation of falsehood is also implied in statement 1.1 by the word 'misinformation'. [Statement] 1.3 implies unworthy motives and suggests malicious intent [underlying Mr Bratholm's attacks against the police]. This is also implied in statement 1.1. The defamatory nature of the [second applicant's] statements becomes clearer and is thus reinforced when the statements are read together.

The interest in freedom of expression cannot make these statements lawful. I refer to what I have said about statements which are directed against personal honesty and integrity.

It has been submitted that Mr Bratholm's own situation must be of central importance in the evaluation of the issue of lawfulness. He has, it is being alleged, made strong and derogatory statements against his opponents in the debate and must accept that an embarrassing light is put on him as well.

I agree that Mr Bratholm voices harsh criticism in his book 'Police Brutality'. A lot of this criticism is against a system, but a lot of it is also directed against persons.

Mr Bratholm uses a number of derogatory expressions. 'Misinformation' has been singled out as one of them. I cannot see, for instance, that the use of that expression carries any significant weight when the lawfulness of the impugned statements is being assessed. Mr Bratholm's point in using this expression has been, *inter alia*, to

expose a deliberate or negligent denial of the existence of police brutality. Such denial is a prerequisite for the occurrence of police brutality on an appreciable scale.

The word despotism has also been mentioned. In the manner it is used in the preface to Mr Bratholm's book it is not linked to the Bergen police force ... The fact that the use of words such as 'despotism' probably contributed to raising the temperature and the general noise level of the debate may be relevant to the assessment of the lawfulness [of the impugned statements]. Having regard to the entire context, however, I cannot see that Mr Bratholm's choice of words or manner of presentation of his views either in 'Police Brutality' or in connection with the commercialisation of the book can justify calling into question his integrity as was done in the statements under consideration.

It is noted that the appellants have forcefully submitted that their statements were made in their capacity as representatives of the police and that, as such, they must enjoy a particular protection against their statements being declared null and void. I agree that it was natural for Mr Johnsen and Mr Nilsen as representatives to look after the interests of the police officers in the debate. As I have already mentioned, their freedom of expression should be protected to the same extent as the freedom of those who direct the attention towards possible questionable circumstances within the police force. But, as already pointed out, there is a limit also in respect of them. That limit has been overstepped in this case.

Accordingly, I conclude along with the City Court that statements 1.1, 1.2 and 1.3 must be declared null and void.

I will now turn to Mr Nilsen's statements ...

[Statement 2.2] ... directly assails the honesty of Mr Bratholm's motives. That this is what is being questioned is reinforced when the statement is read in the context of the whole article ...

I therefore agree with the City Court that statement 2.2 must be declared null and void ...

...

Statement 2.3 is tantamount to an assertion that allegations of police brutality are being fabricated and then made public. In this, there clearly lies a statement to the effect that the published material is being tampered with. The statement appears in close connection with Mr Bratholm and must at any rate be perceived as applying also to him ...

... I therefore conclude that statement 2.3 but not statement 2.4 must be declared null and void ..."

28. In a concurring opinion Mr Justice Bugge stated, *inter alia*:

"I have reached the same conclusion and I agree on the essential points of the reasoning. However, for my part I have reached this conclusion with considerable doubts as to whether the appellants' statements were unlawful, having regard to the circumstances in which they were made. The basis for my doubts is as follows:

[Mr Justice Schei] pointed out that in a public debate on 'matters of public concern' ... the threshold for what the participants may state without being found liable for

defamation should be very high. Even if this is accepted, I agree that it should not legitimise attacks directed against the opponent's personal integrity, or which devalue or throw suspicion on his motives for participating in the debate.

...

For my part, I find it hard to see how the statements which the City Court ... declared null and void could be said to have been particularly directed against Mr Bratholm as a private individual. But I shall leave that aside, since I consider that in a heated public debate attacking another person's integrity and motives instead of what the person has stated must be deemed unlawful as such.

What in particular causes a problem for me is that – as I see it – it was Mr Bratholm himself who had called into question the integrity of the police, in particular that of the Bergen Police Department, when the debate on police brutality resumed in 1986. In Chapter 15 of [the book] he states the following about the concept 'misinformation':

> ' "Misinformation" can be defined in various ways. One possible definition is untrue information, irrespective of whether the information is provided in good faith. It may, for example, be discovered subsequently that the research was mistaken on some point.
>
> There is little reason to place such a wide construction on the concept of misinformation. It is more practical to understand it as meaning deliberate or negligent dissemination of incorrect information. Misinformation in this sense is a problem that is easier to deal with than when our understanding is broadened only gradually.
>
> ...
>
> If I were to base my conclusion on scattered information and impressions, it would be that the misinformation has been rather successful. The police, their organisations and supporters appear to have convinced fairly large parts of public opinion – which is hardly surprising. It is natural to call to mind how successful misinformation concerning the old Greenland police force has been for several decades. In spite of the extremely bad conditions there – and the fact that sound documentation of these conditions was provided by at least some of the Oslo newspapers from time to time, it was the misinformation that prevailed. The many members of the police that knew of the brutality did nothing to bring the circumstances to light.'

I cannot read this in any other way than that Mr Bratholm here indeed himself accuses his opponents in the debate – 'the police, its organisations and defenders' – of lack of integrity, of knowingly hiding factual circumstances and of acting on the basis of inappropriate motives.

It is in my view on this basis that the appellants' statements must be evaluated – and in particular those which were made after the publication of 'Police Brutality' in 1986. The appellants' submission that they, who naturally must have felt offended on behalf of the police, were entitled to reply in the same manner is not as such ill-founded.

In this connection it is in my view also of importance that the appellants expressed themselves on behalf of the police organisations in Bergen and at the national level, respectively. They acted as elected representatives and spokesmen of the members.

Very likely, and rightly so, they considered it an organisational duty to react to the attacks which were directed against the working methods of the police. It is not unusual in our society for the representatives of a profession to reply to public attacks in a way which might be lacking the necessary reflection and which might be somewhat inappropriate. The appellants were not familiar with the legislation on defamation either.

Mr Bratholm has maintained that there must be a difference between what well-known politicians must endure in respect of statements related to their political activities and the protection he enjoys when 'from his professional standpoint he engages in important matters of public concern'. I do not agree ... and do not understand ... how this can be argued. In my opinion and as a matter of principle, when a scholar – for example in law – embarks on a public debate on matters of public interest he should not enjoy a greater right to protection under the defamation legislation than a politician.

If I nevertheless agree with [Mr Justice Schei's] conclusions, it is because I accept that there is a need to provide the best possible terms for a debate on 'matters of public concern' and that [such a debate] might suffer if statements such as those dealt with in this case are not declared null and void, even if their background is taken into consideration."

G. Reopening of the "boomerang cases"

29. On 16 January 1998 the Supreme Court ordered the reopening of seven of the "boomerang cases". The requests to this effect which had been lodged in 1996 had been rejected by the Gulating High Court. The Supreme Court granted leave to appeal. Pursuant to section 392 of the Criminal Procedure Act the Supreme Court found, in its final decision, that in the special circumstances at hand the correctness of the convictions was doubtful and that weighty considerations warranted a reassessment of the guilt of the convicted persons. In the Supreme Court's view it was evident that police brutality had existed to a certain extent during the years 1974-86. The reason for the denial by police officers of any knowledge of such incidents had to be sought in "misunderstood loyalty". It was highly probable that some police officers had given false evidence during the investigations of police brutality in Bergen. On 16 April 1998 the seven convicted persons were acquitted at the request of the prosecution which had found it unnecessary to bring new charges, failing a sufficient general interest.

II. RELEVANT DOMESTIC LAW AND PRACTICE

30. Under Norwegian defamation law, there are three kinds of response to unlawful defamation, namely the imposition of a penalty under the provisions of the Penal Code, an order under its Article 253 declaring the defamatory allegation null and void (*mortifikasjon*) and an order under the Damage Compensation Act 1969 (*Skadeserstatningsloven* – Law no. 26 of

13 June 1969) to pay compensation to the aggrieved party. Only the latter two were at issue in the present case.

31. Under Article 253 of the Penal Code, a defamatory statement which is unlawful and has not been proved may be declared null and void by a court. The relevant part of this provision reads:

> "1. When evidence of the truth of an allegation is admissible and such evidence has not been produced, the aggrieved person may demand that the allegation be declared null and void unless otherwise provided by statute."

Such a declaration is applicable only with regard to factual statements, the truth of value judgments not being susceptible of proof.

Although the provisions on orders declaring a statement null and void are contained in the Penal Code, such an order is not considered a criminal sanction but a judicial finding that the defendant has failed to prove its truth and is thus viewed as a civil-law remedy.

In recent years there has been a debate in Norway as to whether one should abolish the remedy of null and void orders, which has existed in Norwegian law since the sixteenth century and which may also be found in the laws of Denmark and Iceland. Because of its being deemed a particularly lenient form of sanction, the Norwegian Association of Editors has expressed a wish to maintain it.

32. Section 3-6 of the Damage Compensation Act 1969 reads:

> "A person who has injured the honour or infringed the privacy of another person shall, if he has displayed negligence or if the conditions for imposing a penalty are fulfilled, pay compensation for the damage sustained and such compensation for loss of future earnings as the court deems reasonable, having regard to the degree of negligence and other circumstances. He may also be ordered to pay such compensation for non-pecuniary damage as the court deems reasonable.
>
> If the infringement has occurred in the form of printed matter, and the person who has acted in the service of the owner or the publisher thereof is responsible under the first subsection, the owner and publisher are also liable to pay the compensation. The same applies to any redress imposed under the first subsection, unless the court finds that there are special grounds for dispensation …"

33. Conditions for holding a defendant liable for defamation are set out in Chapter 23 of the Penal Code, Articles 246 and 247 of which provide:

> "Article 246. Any person who by word or deed unlawfully defames another person, or who is accessory thereto, shall be liable to fines or imprisonment for a term not exceeding six months.
>
> Article 247. Any person who, by word or deed, behaves in a manner that is likely to harm another person's good name and reputation or to expose him to hatred, contempt, or loss of the confidence necessary for his position or business, or who is accessory thereto, shall be liable to fines or imprisonment for a term not exceeding one year. If the defamation is committed in print or in broadcasting or otherwise under especially aggravating circumstances, imprisonment for a term not exceeding two years may be imposed."

A limitation to the applicability of Article 247 follows from the requirement that the expression must be unlawful (*rettsstridig*). While this is expressly stated in Article 246, Article 247 has been interpreted by the Supreme Court to include such a requirement.

Further limitations to the application of Article 247 are contained in Article 249, the relevant part of which reads:

> "1. Punishment may not be imposed under Articles 246 and 247 if evidence proving the truth of the accusations is adduced.
>
> …"

PROCEEDINGS BEFORE THE COMMISSION

34. Mr Arnold Nilsen and Mr Jan Gerhard Johnsen lodged an application (no. 23118/93) with the Commission on 2 November 1993. They complained that the City Court's and the Supreme Court's judgments constituted an unjustified interference with their right to freedom of expression under Article 10 of the Convention, which provision had therefore been violated.

35. The Commission declared the application admissible on 10 September 1997. In its report of 9 September 1998 (former Article 31 of the Convention), it expressed the unanimous opinion that there had been a violation of Article 10. The full text of the Commission's opinion is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

36. At the hearing on 1 July 1999 the Government invited the Court to hold that, as submitted in their memorial, there had been no violation of Article 10 of the Convention.

37. On the same occasion the applicants reiterated their request to the Court to find a violation of Article 10 and to make an award of just satisfaction under Article 41.

1. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but copies of the Commission's reports are obtainable from the Registry.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

38. The applicants complained that the Oslo City Court's judgment of 7 October 1992 (see paragraph 25 above), which the Supreme Court upheld on 5 May 1993 (see paragraphs 27-28 above), had constituted an unjustified interference with their right to freedom of expression under Article 10 of the Convention, which reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

39. It was common ground that the impugned measures constituted an "interference by [a] public authority" with the applicants' right to freedom of expression as guaranteed under the first paragraph of Article 10. Nor was it disputed that the interference was "prescribed by law" and pursued a legitimate aim, namely "the protection of the reputation or rights of others". The Court sees no reason to doubt that these two conditions for regarding the interference as permissible under the second paragraph of this Article were fulfilled.

The arguments of those appearing before the Court centred on the third condition, that the interference be "necessary in a democratic society". The applicants and the Commission argued that this condition had not been complied with and that Article 10 had therefore been violated. The Government contested this.

A. Arguments of those appearing before the Court

1. The Commission and the applicants

40. The Commission stressed that the impugned statements had been expressed in the course of a public debate on a matter of serious public concern. Mr Bratholm's position was not very different from that of a politician, bearing in mind his function as government-appointed expert

responsible for reviewing the findings published by Mr Nordhus and Mr Vogt in the early 1980s and his frequent participation in public debates (see paragraphs 8-12 and 15-17 above); accordingly, he had to display a greater degree of tolerance, also because of his own choice of words which were susceptible of arousing indignation notably within the police. Like Mr Bratholm, the applicants and their membership too were entitled under Article 6 § 2 of the Convention to be presumed innocent until proved guilty of having committed an offence. A common denominator of all the impugned statements was their character as responses by elected police representatives to the serious and repeated accusations voiced, in particular by Mr Bratholm, to the effect that police officers in Bergen had committed criminal offences on a large scale. The principal aim of the applicants' statements was not to question the qualities of Mr Bratholm's research and his personal motives but to defend the police force against very serious accusations emanating from various sources (see paragraphs 13-14 and 19-21 above). Although the impugned statements were no doubt polemical, they did not constitute a gratuitous attack on Mr Bratholm. The statements in issue were scarcely susceptible of proof and could in any event not be regarded as having been made in bad faith. The more recent acquittals of seven informers convicted in the "boomerang cases" was irrelevant to the present case (see paragraph 29 above). Considering the circumstances as a whole and, in particular, the tone of the debate which had been set not least by Mr Bratholm himself, the applicants' statements were not of such a character as to require protection of Mr Bratholm's reputation in the manner opted for by the national courts.

41. The applicants, who shared the view of the Commission, further stressed that it should be borne in mind that the impugned expressions were oral statements, allowing greater latitude to their authors in resorting to strong wording and exaggerations. Moreover, the applicants argued that their statements had been misconstrued by the Norwegian courts. The applicants had not questioned Mr Bratholm's personal honesty but had criticised his carelessness in promoting the untrue statements of his informers while giving these an appearance of veracity by shielding them under his cloak of moral authority. The Norwegian Supreme Court had based its reasoning on an untenable presupposition that statements relating to opinions and motives were not value judgments but could be proved as facts. In any event, the findings made by the Prosecutor-General in his investigations (1986-87) were sufficient proof of the veracity of the factual part of their statements (see paragraph 18 above). Moreover, when expressing his own value judgments of his opponents' acts and motives, Mr Bratholm had failed to display caution in his choice of words and had succeeded in undermining the authority of the police. In books, articles in law journals and newspapers and elsewhere he had repeatedly accused the police, especially in Bergen, of systematic criminal conduct (see paragraphs 12 and 15-17 above). The applicants were provoked to respond

in a public debate in which Mr Bratholm had acted as the attacker and set the tone. The applicants did nothing more than they were expected to do: they had a duty to stand up and speak for the average policeman and to defend their service and its reputation. Not only were the applicants expected, they were elected, to do so.

2. The Government

42. In the Government's submission, all the statements in issue had been directed at Mr Bratholm (or at least at him together with others) and conveyed possibly the most serious accusations that might be made against a scholar and researcher. They were principally aimed at, and did in fact amount to a gratuitous personal attack against, his honesty, integrity and motives. This was how the ordinary reader was bound to perceive the statements (see paragraphs 13-14 and 19-20 above). In this respect the domestic courts' interpretations of the expressions were well reasoned and were based on an acceptable assessment of the facts (see paragraphs 25 and 27 above). While the applicants never offered any explanation for their choice of words, the impugned allegations were statements of fact, which in principle were susceptible of proof. It was clear that the defamation proceedings at issue were an important stepping-stone on the way to the Supreme Court's decision in 1998 to reopen the "boomerang cases", a fatal blow to a central part of the applicants' reasoning, namely that the previous convictions proved that Mr Bratholm's informers had been lying (see paragraph 29 above). It was the Norwegian Police Association, not Mr Bratholm, who had set the tone of the debate, by describing the report of the 1981 Committee of Inquiry as a deliberate attempt to damage the reputation of the police (see paragraph 10 above). Mr Bratholm for his part had never accused the applicants or any named members of their associations of dishonesty or unworthy motives. Rather than promoting or facilitating a public debate on police violence, the statements were capable of obstructing the debate. Moreover, the present case did not concern freedom of the press.

B. The Court's assessment

1. General principles

43. According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic

society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

The test of "necessity in a democratic society" requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see the *Sunday Times* v. the United Kingdom (no. 1) judgment of 26 April 1979, Series A no. 30, p. 38, § 62). In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III).

The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (ibid., § 60).

44. A particular feature of the present case is that the applicants were sanctioned in respect of statements they had made as representatives of police associations in response to certain reports publicising allegations of police misconduct. While there can be no doubt that any restrictions placed on the right to impart and receive information on arguable allegations of police misconduct call for a strict scrutiny on the part of the Court (see the Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239, pp. 27-28, §§ 63-70), the same must apply to speech aimed at countering such allegations since it forms part of the same debate. This is especially the case where, as here, the statements in question have been made by elected representatives of professional associations in response to allegations calling into question the practices and integrity of the profession. Indeed, it should be recalled that the right to freedom of expression under Article 10 is one of the principal means of securing effective enjoyment of the right to freedom of assembly and association as enshrined in Article 11 (see *Rekvényi v. Hungary* [GC], no. 25390/94, § 58, ECHR 1999-III; the United Communist Party of Turkey and Others v. Turkey judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, p. 20, § 42; the Vogt v. Germany judgment of 26 September 1995, Series A no. 323, p. 30, § 64; the Young, James and Webster v. the United Kingdom judgment of 13 August 1981, Series A no. 44, pp. 23-24, § 57; see also, *mutatis mutandis*, the Swedish Engine Drivers' Union v. Sweden judgment of 6 February 1976, Series A no. 20, p. 15, § 40).

2. Application of those principles to the present case

45. In the case at hand the Norwegian Supreme Court, upholding the City Court's conclusions, found that two of Mr Nilsen's statements published on 2 March and 7 June 1988 and three of Mr Johnsen's statements published on 15 May 1986 were defamatory, "unlawful" (*rettsstridig*) and not proved to be true. The Supreme Court considered that the statements amounted to accusations against Mr Bratholm of falsehood (statement 1.1), of deliberate lies (statement 1.2), unworthy and malicious motives (statements 1.1 and 1.3), dishonest motives (statement 2.2) and having fabricated allegations of police brutality (statement 2.3). The manner in which Mr Bratholm had expressed his views in the book "Police Brutality", published in the spring of 1986, and in other publications, could not in the Supreme Court's view justify calling into question his integrity in the way done by the applicants. It therefore upheld the City Court's judgment declaring the statements in question null and void and ordering that the first applicant pay compensation to the plaintiff (the latter's compensation claim against the second applicant had been submitted out of time – see paragraphs 25 and 27 above).

The Court has considered the applicants' argument that the expressions at issue were primarily aimed at Mr Bratholm's informers and were not intended to harm him personally. However, it sees no grounds to question the Norwegian courts' findings that the statements were capable of adversely affecting Mr Bratholm's reputation. The reasons relied on by the national courts were clearly relevant to the legitimate aim of protecting his reputation.

46. As regards the further question whether the reasons were also sufficient, the Court observes that the case has its background in a long and heated public debate in Norway on investigations into allegations of police violence, notably in the city of Bergen. The occurrence, nature and extent of police violence were investigated by university researchers, a committee of inquiry and the Prosecutor-General and the issue was fought in the literature, in the press and in the courtroom (see paragraphs 8-21 above). As noted by the Norwegian Supreme Court, the impugned statements clearly bore on a matter of serious public concern (see paragraph 27 above). It must be recalled that, according to the Strasbourg Court's case-law, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see the Wingrove v. the United Kingdom judgment of 25 November 1996, *Reports* 1996-V, p. 1957, § 58; and *Sürek v. Turkey (no. 1)*[GC], no. 26682/95, § 61, ECHR 1999-IV).

47. However, as also observed by the Supreme Court, even in debate on matters of serious public concern, there must be limits to the right to freedom of expression (see paragraph 27 above). Despite the particular role played by the applicants as representatives of professional associations and the privileged protection afforded under the Convention to the kind of speech in issue, the applicants had to act within the bounds set, *inter alia*, in

the interest of the "protection of the reputation or rights of others". What is in issue is whether the applicants exceeded the limits of permissible criticism.

48. In determining this question, the Court will have particular regard to the words used in the statements and to the context in which they were made public, in the light of the case as a whole, including the fact that they were oral statements reported by the press, thereby – presumably – reducing or eliminating the applicants' possibilities of reformulating, perfecting or retracting their statements before publication.

49. As regards one allegation, namely statement 1.2 accusing Mr Bratholm of deliberate lies, the Court agrees with the Government that it exceeded the limits of permissible criticism. This could be regarded as an allegation of fact susceptible of proof, for which there was no factual basis and which could not be warranted by Mr Bratholm's way of expressing himself. Declaring this statement null and void was justifiable in terms of Article 10.

50. On the other hand, unlike the national courts, the Court does not consider that, in so far as statements 1.1, 1.3, 2.2 and 2.3 were imputing improper motives or intentions to Mr Bratholm, they should be regarded as allegations of fact requiring the applicants to prove their truth (see paragraphs 13-14, 19-21 above). From the wording of the statements and the context, it is apparent that they were intended to convey the applicants' own opinions and were thus rather akin to value judgments.

51. In so far as the said statements implied that Mr Bratholm had misinformed about police violence and fabricated allegations of such misconduct, there existed at the material time certain objective factors supporting the applicants' questioning of Mr Bratholm's investigations. The libel action brought by Mr Nordhus and Mr Vogt in respect of allegations of lies in certain newspaper articles had been unsuccessful and the Prosecutor-General's criminal investigations of the Bergen police had reached the overall conclusion that the various allegations of police brutality were unfounded (see paragraphs 11 and 18 above). In the ensuing "boomerang cases" a number of informers had been convicted of false accusations against the police (see paragraph 18 above). It is true that the manner of conduct of those proceedings gave rise to criticism, notably by Mr Bratholm himself (see paragraph 17 above). The Court is also mindful of the differences as to focus, approach and evidentiary standards between these investigations and those conducted by Mr Bratholm. The Court is further aware that in the libel case against the applicants the City Court observed that the occurrence of unlawful use of force by the Bergen police had been established during the hearings before it and that, although this concerned very few police officers, the extent of the misconduct was problematic (see paragraph 25 above). It remains, however, that at the time when the Norwegian courts adjudicated the applicants' case (see paragraphs 25 and 27 above) there was some factual basis for their

statements to the effect that false and fabricated allegations of police brutality had been made. This is not altered by the fact that the Supreme Court subsequently reopened the "boomerang cases" and acquitted the defendants (see paragraph 29 above).

52. Moreover, like the Norwegian courts in their balancing of the competing interests under national law (see paragraphs 25 and 27 above), the Court, in applying the necessity test under Article 10, will also have regard to the role played by the injured party in the present case (see the Oberschlick v. Austria (no. 2) judgment of 1 July 1997, *Reports* 1997-IV, pp. 1275-76, §§ 31-35). In this respect, the Court disagrees with the Commission's opinion that on the strength of his activity as a government-appointed expert Mr Bratholm could be compared to a politician who had to display a greater degree of tolerance. In the Court's view, it was rather what he did beyond this function, by his participation in public debate, which is relevant.

In this connection, the Court notes that Mr Justice Schei had regard to the harsh criticism voiced by Mr Bratholm in his book "Police Brutality" (published in the spring of 1986) against a system and, to a large extent, also against individuals. He had used a number of derogatory expressions, such as "misinformation" and "despotism" (see paragraph 27 above). Mr Justice Bugge, who in his concurring opinion (see paragraph 28 above) attached more significance to this factor, quoted certain passages from the book which commented on the phenomenon of misinformation by the police. Mr Justice Bugge could not read this in any other way than that Mr Bratholm himself was thereby accusing his opponents in the debate – "the police, its organisations and defenders" – of lack of integrity, of deliberately covering up the actual situation and of professing false motives for their actions. In the view of Mr Justice Bugge, it was against this background that the applicants' statements had to be assessed, especially those which followed the publication of the book. The applicants were therefore not entirely unjustified in claiming that they were entitled to "hit back in the same way". In this context it was also significant that the applicants were speaking, as elected representatives of the national and local police associations, on behalf of their members and had rightly felt that they had an obligation to counter the attacks on the police's working methods (ibid.).

The Court cannot but share this reasoning and notes, in addition, that Mr Bratholm spoke, amongst other things, of a "criminal sub-culture" in the Bergen police (see paragraph 15 above). However, bearing in mind that the applicants were, in their capacity as elected representatives of professional associations, responding to criticism of the working methods and ethics within the profession, the Court considers that, in weighing the interests of free speech against those of protection of reputation under the necessity test in Article 10 § 2 of the Convention, greater weight should be attached to the plaintiff's own active involvement in a lively public discussion than was

done by the national courts when applying national law (see paragraph 44 above). The statements at issue were directly concerned with the plaintiff's contribution to that discussion. In the Court's view, a degree of exaggeration should be tolerated in the context of such a heated and continuing public debate of affairs of general concern, where on both sides professional reputations were at stake.

53. Against this background, notwithstanding the Norwegian courts' conclusions under domestic law, the Court is not satisfied that statements 1.1, 1.3, 2.2 and 2.3 exceeded the limits of permissible criticism for the purposes of Article 10 of the Convention. At the heart of the long and heated public discussion was the question of the truth of allegations of police violence and there was factual support for the assumption that false allegations had been made by informers. The statements in question essentially addressed this issue and the admittedly harsh language in which they were expressed was not incommensurate with that used by the injured party who, since an early stage, had participated as a leading figure in the debate. Accordingly, the Court finds that the resultant interference with the applicants' exercise of their freedom of expression was not supported by sufficient reasons in terms of Article 10 and was disproportionate to the legitimate aim of protecting the reputation of Mr Bratholm. There has thus been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. Mr Nilsen and Mr Johnsen sought just satisfaction under Article 41 of the Convention, which provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

55. The applicants each requested 25,000 Norwegian kroner (NOK) in compensation for non-pecuniary damage flowing from the violation of their right to freedom of expression.

56. The Court agrees with the Government that the finding of a violation in itself constitutes adequate just satisfaction for any non-pecuniary damage allegedly sustained by the applicants.

B. Pecuniary damage

57. The applicants further requested the Court to make an award in respect of certain sums totalling NOK 440,242.74 which the Norwegian

courts had ordered them to pay to Mr Bratholm. This included NOK 370,907.74 for the latter's costs before the City Court and the Supreme Court, NOK 25,000 for non-pecuniary damage (to be paid by the first applicant) and NOK 44,335 for loss of interest (see paragraphs 25 and 27 above).

The applicants explained that the above amounts had been covered on an *ex gratia* basis, without any prior agreement, by the Norwegian Police Association and that, if an award were made under this head, they would reimburse the amounts to the association.

58. The Government did not object to the above claims.

59. The Court recalls that, according to its case-law, compensation of damage is recoverable only to the extent that a causal link is established between the violation of the Convention and the damage sustained. In the instant case a violation of Article 10 has been found by reason of the decisions concerning all of the impugned statements made by the first applicant and two of the three contested statements made by the second applicant. In the light of this, the Court awards the first applicant the amount – NOK 25,000 – which he was ordered to pay in compensation and both applicants jointly NOK 350,000 in respect of the remainder of their claim under this head.

C. Costs and expenses

60. The applicants further claimed reimbursement of costs and expenses in respect of the following items:

(i) NOK 645,912 for their costs and expenses in the domestic proceedings;

(ii) NOK 175,000 for the work of their lawyers in the Strasbourg proceedings;

(iii) NOK 22,000 in costs for translation;

(iv) NOK 18,000 for travel and subsistence expenses in connection with the hearing before the Court on 1 July 1999.

In so far as the above amounts had been covered *ex gratia* by the Norwegian Police Association, the applicants undertook to reimburse to the latter any award made by the Court.

61. The Government contested the above claim, arguing that the number of hours and the rates were excessive.

62. The Court, in accordance with its case-law, will consider whether the costs and expenses claimed were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for instance, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, p. 83, § 77). As regards item (i), the Court recalls its finding that the decision of the national courts declaring one of the second applicant's statements null and void was justified under Article 10 § 2.

Accordingly, deciding on an equitable basis, it awards the applicants NOK 250,000 on this point, while items (ii) to (iv) should be reimbursed in their entirety.

D. Interest pending the proceedings before the national courts and the Convention institutions

63. The applicants in addition claimed NOK 325,000 in simple interest (approximately 5% per year for six years) on the amounts claimed in respect of pecuniary damage and domestic costs and expenses.

64. The Government considered this claim unfounded.

65. The Court finds that some pecuniary loss must have been occasioned by reason of the periods that elapsed from the times when the various costs were incurred until the Court's award (see, for example, the Darby v. Sweden judgment of 23 October 1990, Series A no. 187, p. 14, § 38; the *Observer* and *Guardian* v. the United Kingdom judgment of 26 November 1991, Series A no. 216, p. 38, § 80 (d); and Bladet Tromsø *and Stensaas* cited above, § 83). Deciding on an equitable basis and having regard to the rates of inflation in Norway during the relevant period, it awards the applicants NOK 50,000 with respect to their claim under this head.

E. Default interest

66. According to the information available to the Court, the statutory rate of interest applicable in Norway at the date of adoption of the present judgment is 12% per annum. The Court, in accordance with its established case-law, deems this rate appropriate with regard to the sums awarded in the present judgment.

FOR THESE REASONS, THE COURT

1. *Holds* by twelve votes to five that there has been a violation of Article 10 of the Convention;

2. *Holds* by thirteen votes to four that the finding of a violation of Article 10 in itself constitutes adequate just satisfaction for the non-pecuniary damage alleged by the applicants;

3. *Holds* by twelve votes to five that the respondent State is to pay the applicants, within three months,
   (a) for pecuniary damage 375,000 (three hundred and seventy-five thousand) Norwegian kroner;

(b) for costs and expenses, 465,000 (four hundred and sixty-five thousand) Norwegian kroner;
(c) for additional interest, 50,000 (fifty thousand) Norwegian kroner;

4. *Holds* by twelve votes to five that simple interest at an annual rate of 12% shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 November 1999.

Luzius WILDHABER
President

Michele DE SALVIA
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) dissenting opinion of Mr Rozakis;
(b) dissenting opinion of Mr Kūris, Mr Türmen, Mrs Strážnická and Mrs Greve.

L.W.
M. de S.

DISSENTING OPINION OF JUDGE ROZAKIS

I am regretfully unable to follow the majority of the Court and find a violation of Article 10 in this case. I believe that this is a case where the courts in Norway acted correctly by properly weighing the conflicting interests of the parties involved in the dispute, in proceedings concerning defamation of an individual by two police officers.

I would like to start the discussion on my dissenting view by identifying the statements of the policemen that I consider not only defamatory, from a domestic-law point of view, but also not covered by the protection of the freedom of expression enshrined by Article 10 of the Convention. These are the statements of the second applicant that (a) "until the contrary has been proved, I would characterise this as a deliberate lie" and (b) "there must be other ulterior motives. It appears as if the purpose has been to undermine confidence in the police". The first can be regarded, as the Court rightly said, "as an allegation of fact susceptible of proof, for which there was no factual basis and which could not be warranted by Mr Bratholm's way of expressing himself", while the second was aimed at casting doubt on the integrity, impartiality and good faith of Mr Bratholm, and to affect adversely his reputation. These two statements would have sufficed, to my mind, to lead the Norwegian courts to the sanction imposed, and our Court, correspondingly, to find a non-violation of Article 10. The fact that the latter has, while distancing itself from the first statement, opted for finding a violation in the present case, obliges me to append my dissent to the judgment.

The reasons which have led me to a different conclusion from that of the majority of the Court are the following:

(a) The nature of the speech that we have been called upon to protect in this case does not necessarily belong to the highest "echelon" of the speech that, according to the Strasbourg case-law, merits protection under Article 10 of the Convention. Indeed it does not enter within the sphere of the freedom of the press; it is not even, properly speaking, political speech. The interests protected by the expression of the two policemen are basically trade-union interests within the framework of a discussion of a matter of public concern. Although the criminally sanctioned statements were uttered in the course of a debate of more general public interest, their aim was to protect the particular interests of a professional body – the Norwegian police.

(b) The person against whom the speech was directed was a private person, an individual whose main aim was to establish the responsibility of the police in respect of instances of ill-treatment by the latter, through research into the matter and using scientific techniques. The exchange of views between the two parties – Mr Bratholm and the police – became heated, and Mr Bratholm may be considered as having also contributed to the increase of tension during the debate. Yet, it should not be forgotten that Mr Bratholm was not a politician and could not be equated with a politician, and that the character of his speech was heavily influenced by the strong language used by the Norwegian police to attack his views. In any event, the character of Mr Bratholm's expressions, although severely criticising the Norwegian police, never deteriorated to the level of personal insults and statements degrading the honour of specific persons. I should also add, at this juncture, that Mr Bratholm was careful enough to underline that his accusations against the Norwegian police, documented by pieces of evidence, were not directed generally against the force as such, but against a minority of policemen whom he considered responsible for the ill-treatment of citizens.

(c) The Norwegian courts imposed sanctions on the applicants which were proportionate to the legitimate aim pursued, namely the protection of the reputation of Mr Bratholm. It should be recalled that the Supreme Court of Norway, which was the last court having dealt with the matter, upheld the City Court's judgment, declaring the statements in question null and void and ordering that the first applicant pay compensation to the plaintiff. The second applicant did not pay compensation, because the plaintiff's compensation claim against him had been submitted out of time. It is obvious that the applicants did not suffer any other inconvenience, or a criminal conviction, imprisonment, etc.

Under these circumstances and for the reasons explained, I consider that Article 10 of the Convention has not been violated. I should, in conclusion, stress that all European legal systems, in their effort to protect the reputation of individuals, provide for defamation as a criminally punishable offence. This homogeneity of the European legal systems must be taken into account when our Court deals with matters of violations of Article 10, because it represents a common denominator, a common stance of the European States *vis-à-vis* a specific type of human behaviour. Although the Court is not obliged to conclude that defamation proceedings and the ensuing convictions are always and indiscriminately justified, in application of paragraph 2 of Article 10, the common approach of the European States in this matter is a factor to be seriously taken into account when weighing the various rights and interests involved in Article 10 cases.

DISSENTING OPINION OF JUDGES KŪRIS, TÜRMEN, STRÁŽNICKÁ AND GREVE

We formed part of the minority which voted against the finding of a violation of Article 10 of the Convention in this case.

The case concerns freedom of expression, not freedom of the press. Article 10 § 2 of the Convention sets out the limits of the permissible restrictions on freedom of expression. The question in this case is whether the interference complained of by the applicants was "necessary in a democratic society", that is whether:

– it corresponded to a pressing social need,

– it was proportionate to the legitimate aim pursued, and

– the reasons given by the national authorities to justify it are relevant and sufficient.

National authorities, in particular the courts, have a certain margin of appreciation in assessing whether such a need exists and what measures should be adopted to deal with it. This Court's function is to review the latter and give a final ruling as to whether a restriction is reconcilable with freedom of expression as protected by Article 10.

The restrictions imposed in the present case derived from five of the applicants' statements reported in the Norwegian press being declared null and void and the first applicant being ordered to pay compensation to Professor Bratholm (the latter's compensation claim against the second applicant being time-barred).

In short, the case concerns the language used by two members of the police force in Bergen in a long-lasting and heated debate over research-based allegations of police brutality – or more precisely the use of excessive force – in Bergen. Professor Bratholm entered the debate as a member of a government-appointed commission of inquiry set up to examine the matter. He later acted outside this official framework and pursued the issue, participating in the public debate also in his capacity as a criminal-law specialist. The two members of the Bergen police force – that is members of the very police force under scrutiny/investigation – held office in the local and the national police association respectively.

Before addressing the specifics of the case, we wish to emphasise the ever present and vital need for every society to exercise strict supervision over all use of force in the name of society. States have a monopoly over

force to protect democracy and the rule of law in society, but this monopoly also entails the danger of force being abused to the detriment of the very values it is meant to uphold. The abuse of force by officials is not just one of many issues of broad general interest, it is considered to be a matter of primary concern in any society. It suffices to recall the provisions in the 1984 United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Norway is a Party to that Convention and has to abide by its provisions. The European Convention on Human Rights provides in Article 53 ("Safeguard for existing human rights"):

> "Nothing in [the] Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."

By virtue of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Norway has undertaken to prevent in any territory under its jurisdiction not only torture but also other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (Article 16 § 1); the State shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture or other form of cruel, inhuman or degrading treatment or punishment has been committed (Article 12); the State shall, moreover, ensure that any individual who alleges that he has been subjected to torture or other forms of cruel, inhuman or degrading treatment or punishment has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities, and steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given (Article 13).

In the present case we cannot ignore the fact that Professor Bratholm was attacked by the applicants because of his work on alleged police brutality in Bergen. The purpose of these attacks was to suppress the debate on this issue which was of vital public concern. As Justice Bugge of the Norwegian Supreme Court stated in his concurring opinion: "I accept that there is a need to provide the best possible terms for a debate on 'matters of public concern' and that [such a debate] might suffer if statements such as those dealt with in this case are not declared null and void, even if their background is taken into consideration."

The Oslo City Court and the Supreme Court of Norway found the applicants' statements that were declared null and void to be defamatory, unlawful and not proved to be true.

The four impugned statements on which we disagree with the majority were made at different times; they were as follows:

On 15 May 1986 an interview with Mr Jan Gerhard Johnsen was published by *Dagbladet*, an Oslo-based newspaper. The interview included the following:

> 1.1 "He describes Professor Bratholm's recent report on police brutality in the Bergen police force as 'pure misinformation intended to harm the police'."
>
> 1.3 "There must be other ulterior motives. It appears as if the purpose has been to undermine confidence in the police."

Mr Johnsen, as mentioned above, himself worked in the Bergen police force – against which the allegations of police brutality were made – and he was Chairman of the Bergen Police Association (*Bergen Politilag*). In the same interview he made the statement 1.2 on which we agree with the findings of the majority.

On 2 March 1988 an interview with Mr Arnold Nilsen was published by *Annonseavisen*, a newspaper circulated for free to every household in Bergen. The interview, *inter alia*, read:

> 2.2 "In my view, one is faced with a form of skulduggery and private investigation where there is good reason to question the honesty of the motives."

On 7 June 1988 Mr Nilsen's opening address to the annual general assembly meeting of the Norwegian Police Association was published by *Bergens Tidende*, a Bergen-based newspaper. It included, *inter alia*:

> 2.3 "The Norwegian Police Association will not accept ... private investigations on a grand scale made by dilettantes and intended to fabricate allegations of police brutality, which are then made public."

Mr Nilsen himself worked in the Bergen police force – against which the allegations of police brutality were made – and he was Chairman of the Norwegian Police Association (*Norsk Politiforbund*).

As regards all the five statements it is obvious that the two applicants when speaking wore more than one hat. They were part of the police force under scrutiny/investigation and at the same time they held office in the local or national association of that force. Thus, statement 2.3 was made to the annual general assembly of the national police association. Notwithstanding this, none of the statements has been demonstrated actually to have been made on behalf of the police associations. Conversely, the press releases and statements from the police as such presented to this Court were carefully worded to balance the need for the police service to maintain respect and a good general reputation and the need for whatever were untrue allegations to be properly dismissed. We appreciate that particularly the role of Mr Nilsen, holding office in the national police association when working in the Bergen police force as he did, cannot have been easy.

Under these circumstances we do not share the findings of the majority to the effect that, at the time when the Norwegian courts adjudicated on the applicants' case, there was some factual basis for their statements that false and fabricated allegations of police brutality had been made. Both of the applicants worked inside the force in question – about which the final conclusion was that

> "the occurrence of unlawful use of force by the Bergen police force had been established ... and that, although this concerned very few police officers, the extent of the misconduct was problematic".

This conclusion, which was reached by the Oslo City Court, was based, *inter alia*, on witness statements from police officers who worked or had worked within the Bergen police force. With insider knowledge of this very police force the applicants could both at the very least – already when the statements were made in 1986 (statements 1.1 and 1.3) – have known that Professor Bratholm's allegations ought to merit a proper investigation.

Mr Nilsen's statements (statements 2.2 and 2.3) were made after the investigation of November 1986 to May 1987 ordered by the Prosecutor-General. This investigation was based on the allegations made in the material from Professor Bratholm and others, but was supplemented during the course of the investigation by additional information. A total of 368 cases were registered and some 500 persons interviewed, including 230 officers and officials from the police service. The outcome of the investigation was that:

– 264 cases were dropped as there was found to be no criminal offence;
– 45 cases were not prosecuted due to the lack of solid evidence;
– 46 cases were not prosecuted as they were time-barred;
– 12 cases were not prosecuted for other reasons;
– one case was eventually tried in court and the accused was acquitted.

Thus, a total of 104 cases turned out to be of some substance. The findings of the investigators were made public at a press conference attended by Mr Nilsen.

The applicants argued only that under the Convention the statements should be allowed as far as they had some factual basis and were not made in bad faith. We find it to be of significance that neither of the two applicants has expressly stated that he was acting in good faith when he made his statements.

At the time when Mr Nilsen made his statements, a number of informants who had alleged excessive use of force by members of the Bergen police force had already been formally reported by the latter for having given false statements.

After the investigation, 50 to 60 of the informants who had alleged police brutality were investigated for having provided false information. Of these 15 were indicted and 10 were convicted. Seven of those convicted who were

given prison sentences (one a suspended prison sentence only) – they were all convicted between 2 November 1988 and 23 May 1990 – later had their cases retried by the Norwegian Supreme Court and were all acquitted on 16 January 1998. In the meantime they had already served their prison sentences. We find this relevant to this case, in particular because it proves that Justice Bugge was right in his predictions in his concurring opinion in the Norwegian Supreme Court.

The language used in each of the impugned statements made by the applicants was, as recognised by our colleagues in the majority, *de facto* capable of affecting Professor Bratholm's reputation. Furthermore – and that we find significant to the Court's test under Article 10 of the Convention – each statement, by the very influence it could have on the reputation of Professor Bratholm, had a strong potential for denying or hampering the urgent social needs as spelled out in the provisions of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment quoted above. A potential that was demonstrated in the later "boomerang cases" – informants on police brutality actually had to serve prison sentences and wait for a decade or more to see justice done.

We share the finding of the Norwegian Supreme Court that the impugned statements were statements of fact that were capable of being proved. All five statements were, in our opinion, essentially different ways of saying that Professor Bratholm was deliberately not telling the truth. The intention with all the statements was the same, and one that does not correspond to the purpose of the police or its associations.

It seems to us that two separate cases of freedom of speech are involved in the present case. One is the freedom of speech of Professor Bratholm to publish the results of his research as to alleged police brutality in Bergen. The second is the freedom of speech of the applicants as representatives of the police force endeavouring to intimidate Professor Bratholm and to cover up any police brutality as may have occurred in Bergen. It appears clear to us that between these two conflicting freedoms the public interest lies in protecting Professor Bratholm's freedom of expression against defamation and intimidation by the police association.

Against this background we would hold that there has been no violation of Article 10 of the Convention in the present case. We find that the interference complained of by the applicants was "necessary in a democratic society", that is, the interference corresponded to a "pressing social need" and was proportionate to the legitimate aim pursued and the reasons given by the Norwegian Supreme Court are relevant and sufficient.

The contrary conclusion will in our opinion have the consequence in practice of allowing debates on matters of public concern to be suppressed by defamatory remarks and as such does not contribute to enhancing freedom of expression in the States Party to the Convention.

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

COURT (PLENARY)

CASE OF OBERSCHLICK v. AUSTRIA

(Application no. 11662/85)

JUDGMENT

STRASBOURG

23 May 1991

In the Oberschlick case[*],

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 51 of the Rules of Court[**] and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 22 November 1990, as a Chamber, and on 23 January and 25 April 1991 in plenary session,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 16 February 1990, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art.

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[*] The case is numbered 6/1990/197/257. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] The amendments to the Rules of Court which entered into force on 1 April 1989 are applicable to this case.

47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 11662/85) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by an Austrian citizen, Mr Gerhard Oberschlick, in June 1985.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 and Article 10 (art. 6-1, art. 10) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and sought leave to present his case himself. On 24 April 1990 the President granted this leave, subject to the applicant's being assisted by an Austrian jurist (Rule 30 para. 1, second sentence). At the same time he authorised the applicant to use the German language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 March 1990 the President drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr Thór Vilhjálmsson, Mrs D. Bindschedler-Robert, Mr J. Pinheiro Farinha, Sir Vincent Evans, Mr N. Valticos, Mr S.K. Martens and Mr I. Foighel (Article 43 in fine of the Convention[*] and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Austrian Government ("the Government"), the Delegate of the Commission and the applicant on the need for a written procedure (Rule 37 para. 1). In accordance with the orders made in consequence, the registry received, on 29 June and 3 July 1990 respectively, the Government's and the applicant's memorials.

In a letter of 19 July 1990 the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing. Subsequently, the Secretary produced a number of documents requested by the Registrar on the President's instructions.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 14 June 1990 that the oral proceedings should open on 19 November 1990 (Rule 38).

6. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

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[*] Note by the Registrar: as amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

There appeared before the Court:
- for the Government
Mr W. OKRESEK, Federal Chancellery, *Agent*,
Mr F. HAUG, Federal Ministry of Foreign Affairs,
Mr S. BENNER, Federal Ministry of Justice, *Advisers*;
- for the Commission
Mr L. LOUCAIDES, *Delegate*;
- for the applicant
Mr H. TRETTER, Assistant.

7. The Court heard their addresses and their replies to its questions. During the hearing the Government and the applicant filed several documents; the latter also lodged supplementary observations on the application of Article 50 (art. 50) of the Convention. Subsequently the Government was invited to comment thereon and replied on 21 January 1991. After the closing of the procedure, the registry received on 4 February 1991 several observations by the applicant which were rejected in accordance with Rule 37 para. 1, second sub-paragraph.

8. On 22 November 1990 the Chamber had relinquished jurisdiction in favour of the plenary Court (Rule 51).

9. Having taken note of the Government's agreement and the opinions of the Commission and the applicant, the Court decided, on 23 January 1991, to proceed to judgment without holding a further hearing (Rule 26).

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

10. Mr Oberschlick, an Austrian journalist residing in Vienna, was at the relevant time the editor of the review Forum.

A. Background to the case

11. On 29 March 1983 - during the parliamentary election campaign - it was reported in a television programme that Mr Walter Grabher-Meyer, then Secretary General of one of the political parties which participated in the governing coalition, the Austrian Liberal Party (FPÖ), had suggested that the family allowances for Austrian women should be increased by 50% in order to obviate their seeking abortions for financial reasons, whilst those paid to immigrant mothers should be reduced to 50% of their current levels. He had justified his statement by saying that immigrant families were placed in a discriminatory position in other European countries as well.

12. On 20 April 1983 the applicant and several other persons laid a criminal information (Strafanzeige) against Mr Grabher-Meyer. However, the Vienna public prosecutor's office decided on 1 June 1983 not to prosecute him.

13. On the day it was laid, the full text of the criminal information was published by the applicant in Forum. The cover page of the relevant issue contained a summary of its contents, including the title : "Criminal information against the Liberal Party Secretary General (Strafanzeige gegen FPÖ-Generalsekretär)". The following text appeared at page 9:

(Translation)

"CRIMINAL INFORMATION against WALTER GRABHER-MEYER

Date of birth unknown, occupation: Secretary General, c/o FPÖ (Liberal Party), Federal Central Office, Kärntnerstrasse 28, 1010 Vienna

ON SUSPICION OF

1. the misdemeanour (Vergehen) of incitement to hatred, contrary to Article 283 of the Criminal Code,

2. the misdemeanour (Vergehen) of incitement to commit criminal offences and expressing approval of criminal offences, contrary to Article 282 of the Criminal Code, and

3. the offence (Verbrechen) of activities within the meaning of sections 3 and 3d of the Constitutional Law of 8 May 1945 (StGBl. no. 13) on the prohibition of the National Socialist Party (NSDAP) ("Prohibition Act").

THE FACTS

'The Secretary General of the Liberal Party, Mr Walter Grabher-Meyer today proposed raising family allowances for Austrian women by 50%, the aim of this measure being to deter Austrian women from having abortions for financial reasons. At the same time Walter Grabher-Meyer demanded that family allowances from the Austrian State for mothers of migrant workers' families (Gastarbeitermütter) should be reduced to half the present level. Grabher-Meyer stated that migrant worker families are placed in a less favourable position in other European countries too.'

ORF (Austrian Broadcasting Corporation), Television programmes 1 + 2 Late News 29.3.1983

Count 1:

Walter Grabher-Meyer's public statement was made in a way which offends human dignity and is directed against a group of persons defined by their membership of a people, ethnic group or State; in the present case, by the fact that they do not have Austrian citizenship.

The contrasting treatment of Austrian women, who are to be spared the need for abortions by being placed in a better financial position, and mothers of migrant

workers' families who are not only not to be treated in the same way, but who are moreover, according to Walter Grabher-Meyer's suggestion, to have their family allowances halved (allowances which in his opinion are too low to prevent abortion for financial reasons), gives the impression, which must in all likelihood have been intended by him, that mothers of migrant workers' families and their unborn children are an inferior, worthless or less valuable sector of the population as a whole, and that it is in the interests of the Austrian people for such mothers to have abortions.

Walter Grabher-Meyer has thereby presented migrant workers as being undeserving or unworthy of the respect of their fellow human beings; the authors of this information regard this as a tendentious incitement to hatred of and contempt for migrant workers in Austria, object thereto and lay this information.

Count 2:

Walter Grabher-Meyer is publicly proposing - and thereby calling in particular on the Austrian Parliament and the Federal Government to introduce - measures which constitute the substance of the offence of activities within the meaning of sections 3 and 3d of the Prohibition Act (see below).

Count 3:

Under section 3 of the Prohibition Act, activities of any sort on behalf of the NSDAP or its aims are prohibited, even if such activities are carried out outside that organisation.

Section 3d of the Prohibition Act says that "A person who in public or in the presence of several persons ... instigates, incites or seeks to induce conduct prohibited by section 1 or section 3, in particular any person who for this purpose glorifies or extols the aims, organs or actions of the NSDAP, shall, unless a more serious offence appears therein, be punished by a term of imprisonment of from 10 to 20 years and confiscation of his entire property".

The authors of this information refer in this connection to the 25 points of the NSDAP Manifesto of 24.2.1920. They note that, until the passing of the NSDAP Prohibition Act of 8 May 1945 by the Provisional Government, this manifesto remained the party's sole programme and that it therefore contains in authentic and complete form the aims of the NSDAP's programme. It says inter alia that:

'5. A person who does not have German nationality is to be able to live in Germany only as a visitor and must be subject to aliens legislation.

7. We demand that the State undertake, first and foremost, to provide opportunities for employment and the subsistence of its citizens. If it is not possible to feed the entire population of the State, citizens of foreign nations (non-citizens) must be expelled from the Reich.

8. All further immigration of non-Germans is to be prevented. We demand that all non-Germans who have immigrated to Germany since 2 August 1914 be compelled to leave the Reich immediately.'

Creating a hostile attitude to citizens of foreign nations (non-citizens), and placing them in a less favourable position, to such an extent that it became difficult for them to live in the Reich and they were forced to leave, were essential aims of the NSDAP and its policy.

Walter Grabher-Meyer's proposal to increase family allowances for Austrian women by 50% in order to stop them having abortions for financial reasons, and at the same time to reduce family allowances for mothers of migrant workers' families to half the present level, represents a cynical means of driving citizens of foreign nations out of the Republic of Austria and indeed forcing those who stay in the Republic of Austria to have abortions; being entirely consistent with and corresponding to the philosophy and aims of the NSDAP that 'the State must first and foremost provide opportunities for employment and the subsistence of its citizens', these proposals are aimed, amongst other things, at improving the living conditions of citizens (Austrian mothers) by worsening those of migrant workers and, at the same time, at preventing all further immigration of non-Austrians (see above, NSDAP points 7 and 8).

From this it is apparent that Walter Grabher-Meyer has undertaken activities which correspond to the aims of the NSDAP, or at the very least has extolled its measures against citizens of foreign nations by proposing that such measures be applied in Austria.

As to the accuracy of these allegations, the authors of this information rely on their own statements, the ORF newsreaders' scripts for the Late News on television programmes 1 and 2 on 29.3.1983 and the NSDAP manifesto of 24.2.1920.

This criminal information is therefore laid against Walter Grabher-Meyer etc.

(Signed):..., Gerhard Oberschlick"

B. Private prosecution against the applicant

1. First set of proceedings

14. On 22 April 1983 Mr Grabher-Meyer brought a private prosecution for defamation (üble Nachrede, Article 111 of the Criminal Code - see paragraph 25 below) against the applicant and the other signatories of the criminal information. He also sought the immediate seizure of the relevant issue of Forum (sections 33 and 36 of the Media Act - Mediengesetz) and compensation from its owners (section 6 of the Media Act - see paragraph 26 below).

15. The Review Chamber (Ratskammer) of the Vienna Regional Criminal Court (Landesgericht für Strafsachen - "the Regional Court") decided on the same day to order the discontinuance of the proceedings under Article 485 para. 1 (4) of the Code of Criminal Procedure (see paragraph 28 below). It found that the publication did not constitute the criminal offence defined in Article 111 of the Criminal Code, since the case did not concern the wrongful attribution of a certain (dishonest) behaviour,

but only value-judgments (Bewertung) on behaviour which, as such, had been correctly described.

16. On appeal by Mr Grabher-Meyer the Vienna Court of Appeal (Oberlandesgericht), composed of Mr Cortella, as President, and Mr Schmidt and Mr Hagen, quashed the above decision on 31 May 1983. It held that for the average reader the publication must have created the impression that a contemptible attitude (verächtliche Gesinnung) was ascribed to Mr Grabher-Meyer. The authors had disregarded the standards of fair journalism by going beyond a comparative and critical analysis of his statements and insinuating motives which he had not himself expressed, in particular by alleging that he had been guided by National Socialist attitudes. Accordingly, the case was referred back to the Regional Court.

2. Second set of proceedings

(a) Before the Regional Court

17. On 20 July 1983 the defamation proceedings against the signatories of the criminal information other than Mr Oberschlick were severed from the main proceedings by the Regional Court and referred for decision to the Vienna District Court for Criminal Matters (Strafbezirksgericht), on the ground that those persons had not been associated with the publication in Forum. On 9 April 1984 the former proceedings were discontinued.

18. On 25 July 1983 the Regional Court ordered the publication in Forum of information about the defamation proceedings against the applicant (section 37 of the Media Act - see paragraph 26 below). This decision was confirmed by the Court of Appeal on 7 September 1983.

19. The Regional Court held a hearing on 11 May 1984, during which it heard evidence from Mr Grabher-Meyer and the applicant.

The latter offered evidence that what he had written was true (Wahrheitsbeweis), claiming that in this respect it was sufficient to establish that a criminal information had actually been laid in the terms published in Forum. He argued that by reporting his suspicions he had been fulfilling a legal duty and that he was therefore exculpated under Article 114 of the Criminal Code (see paragraph 25 below). The fact that the legal qualification of Mr Grabher-Meyer's statements might have been erroneous could not be held against him because he was not a lawyer.

20. On the same day the applicant was convicted of defamation (Article 111 paras.1 and 2) and sentenced to a fine of 4,000 Austrian schillings or, in default, to 25 days' imprisonment. The Regional Court also made the following orders against the owners (Medieninhaber) of Forum - the Association of Editors and Employees of Forum (Verein der Redakteure und Angestellten des Forum): the seizure of the relevant issue of Forum, the publication of its judgment (sections 33 and 34 of the Media Act), and the award to Mr Grabher-Meyer of compensation of 5,000 schillings (section 6

of the Media Act). In addition, they were declared to be jointly and severally liable for the payment of the fine (section 35 para. 1 of the Media Act - see paragraph 26 below).

In its judgment of 11 May 1984, the Regional Court held that it was bound by the opinion expressed by the Court of Appeal in its decision of 31 May 1983 (see paragraph 16 above). Therefore the objective conditions for the offence of defamation were satisfied.

Mr Oberschlick also fulfilled the subjective requirements because he had acknowledged that he had intended to draw attention to what, in his opinion, was the National Socialist way of thinking of Mr Grabher-Meyer. Mr Oberschlick had, however, not established the truth of his allegations nor justified them. In the Regional Court's view, it was not sufficient that this politician had made the criticised statements and that a criminal information regarding it had been laid in the terms published in Forum. The statements in question did not necessarily show the intentions Mr Oberschlick had inferred therefrom. It could also be understood as a proposal to reallocate the notoriously limited resources of the Family Compensation Fund in favour of Austrians in order to stem the influx of migrant workers. This admittedly revealed a xenophobic way of thinking, but did not yet amount to a National Socialist attitude or to a criminal offence.

The fact that the publication involved only a reprint of the criminal information did not exculpate the applicant. Whilst everyone was free to report to the police facts which he considered constituted a criminal offence, it went far beyond the mere reporting of a criminal suspicion to publish the text of the information in a periodical and thus to make it accessible to the general public. There was no justification for doing so. In this respect, the applicant could not invoke a legal duty under Article 114 of the Criminal Code, namely to draw the public's attention to the (allegedly) Nazi mentality of a high-ranking official of a governing party. That allegation came under the general rule that a person who had made an attack of this kind through the media had to prove that it was true.

21. Mr Oberschlick subsequently requested on several occasions to be supplied with a copy of the record of the hearing, but without success. It seems that it was not until after the communication of the written judgment on 24 August 1984 that the record reached the applicant. On 6 September he applied for a rectification of the trial record which, according to him, failed to mention certain statements by Mr Grabher-Meyer which were of importance for assessing the evidence concerning the truth of the applicant's allegations. He had allegedly stated at the trial, inter alia, that he was opposed to excessive immigration of foreigners (Überfremdung) and that for tactical reasons he approved the "stop foreigners" campaign ("Ausländer Halt") which had been conducted by a right-wing political party and had subsequently been prohibited. He had also allegedly admitted having

considered social-policy measures directed against the children of foreign workers in Austrian schools.

On 4 October 1984 the Regional Court rejected this application, after having consulted the transcriber, on the ground that after five months the judge had no recollection of the detailed statements. It nevertheless pointed out that although the latter did not appear in the transcriber's notes, similar statements did.

(b) Before the Court of Appeal

22. On 17 December 1984 the Vienna Court of Appeal, composed of the same judges and again presided over by Mr Cortella (see paragraph 16 above), dismissed the applicant's appeal (Berufung).

In relation to a complaint concerning the Regional Court's decision of 4 October 1984 (see paragraph 21 above), the Court of Appeal observed that this decision was final. Furthermore, it did not appear that the Regional Court had failed to determine any requests made during the trial concerning the record. In any event, the statements in question were irrelevant for the judgment on the merits of the matter.

23. The Court of Appeal then dealt with the substantive issues. In its view, the Regional Court had not been legally bound by the Court of Appeal's earlier decision concerning the qualification of the offence. The Court of Appeal, however, saw no reason to depart from that decision. What was decisive was that Mr Grabher-Meyer was alleged to have had motives which he himself had not expressed. The case therefore did not concern the (possibly incorrect) legal qualification of his statements, but allegations putting a stain on his character which objectively could not be inferred from those statements.

According to the Court of Appeal, the Regional Court had rightly held that what had to be proved was the truth of the critical inferences as to Mr Grabher-Meyer's character made in the article and had rightly found that the applicant had failed to bring this proof. The fact that a short report on the criminal information against this politician would not have been punishable did not justify the conclusion that a full reprint of it was not punishable either. The publication in the form of a criminal information was intended to ensure that the accusation as to his character made therein would have a particularly telling effect on the average reader. Neither the right to report a criminal suspicion (Article 86 para. 1 of the Code of Criminal Procedure - see paragraph 27 below) nor the exception provided for in Article 114 para. 2 of the Criminal Code (see paragraph 25 below) justified the publication because it was not appropriate (mangels Anlassadäquanz): it had been insinuated, without a sufficient basis in the facts, that Mr Grabher-Meyer held National Socialist attitudes.

24. The written text of the judgment was served upon the applicant on 7 January 1985.

On 25 September 1985 he requested the Attorney-General (Generalprokurator) to file a plea of nullity for the preservation of the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes), but he was informed on 9 January 1986 that the Attorney-General did not intend to take any action.

II. THE RELEVANT DOMESTIC LAW

A. Substantive law applicable

1. The offence of defamation

25. Article 111 of the Criminal Code provides:

> "1. Anyone who in such a way that it may be perceived by a third person accuses another of possessing a contemptible character or attitude or of behaviour contrary to honour or morality and of such a nature as to make him contemptible or otherwise lower him in public esteem shall be liable to imprisonment not exceeding six months or a fine ...
>
> 2. Anyone who commits this offence in a printed document, by broadcasting or otherwise in such a way as to make the defamation accessible to a broad section of the public shall be liable to imprisonment not exceeding one year or a fine ...
>
> 3. The person making the statement shall not be punished if it is proved to be true. As regards the offence defined in paragraph 1, he shall also not be liable if circumstances are established which gave him sufficient reason to assume that the statement was true."
>
> Under Article 112, "evidence of the truth and of good faith shall not be admissible unless the person making the statement pleads the correctness of the statement or his good faith ...".

Under Article 114 para. 1 "conduct of the kind mentioned in Article 111 ... is justified if it constitutes the fulfilment of a legal duty or the exercise of a right". Under paragraph 2 of the same provision "a person who is forced for special reasons to make an allegation within the meaning of Article 111 ... in the particular form and manner in which it was made, is not to be punished, unless that allegation is untrue and the offender could have been aware thereof if he had acted with the necessary care".

2. The relevant provisions of the Media Act

26. Section 6 of the Media Act provides for the strict liability of the publisher in cases of defamation; the victim can thus claim compensation from him. Furthermore, the publisher may be declared to be liable jointly

and severally with the person convicted of a media offence for the fines imposed and for the costs of the proceedings (section 35).

The person defamed may request the forfeiture of the publication by which a media offence has been committed (section 33). Under section 36 he may also request the immediate seizure of such a publication if section 33 is likely to be applied subsequently, unless the adverse consequences of seizure would be disproportionate to the legal interest to be protected by this measure. Seizure shall not be ordered if that interest can instead be protected by the publication of information that criminal proceedings have been instituted (section 37). Finally, the victim may request the publication of the judgment in so far as this appears necessary for the information of the public (section 34).

B. Procedural provisions applicable

1. Criminal information

27. The first sentence of Article 86 para. 1 of the Code of Criminal Procedure reads as follows:

> "Anybody who acquires knowledge of criminal conduct such as automatically attracts public prosecution shall have the right to report it."

Furthermore, section 3 (g) para. 2 of the Prohibition Act imposes a duty to denounce offences under this Act in certain circumstances. Failure to fulfil this duty may be punished by imprisonment for between five and ten years.

2. Defamation proceedings

28. Under the special simplified procedure - which was followed in this instance -, if a single judge of the Regional Court is of the opinion that the facts of the case do not constitute a criminal offence, he shall seek a decision by the Review Chamber of the Regional Court (Article 485 para. 1 (4) of the Code of Criminal Procedure), which shall order the discontinuance of the proceedings if it shares his view (Article 486 para. 3). The prosecution may appeal against such an order (Article 486 para. 4). If the Court of Appeal upholds the appeal and refers the case back to the Regional Court, the following special rules apply:

Article 486 para. 5

> "The trial court shall not be bound by decisions of the Review Chamber or of the court of second instance which confirm ... that the facts constitute a criminal offence ..."

Article 489 para. 3

"Those members of the court of second instance who participated at a previous stage in the decision of the Review Chamber to discontinue the proceedings or in the determination of an appeal against such a decision (Article 486) shall be disqualified from hearing or determining an appeal."

3. General rules concerning disqualification of or challenge to a judge

29. Disqualification of a judge (Ausschliessung) is governed by the following provisions of the Code of Criminal Procedure:

Article 70 para. 1

"A judge is obliged to bring circumstances which disqualify him to the immediate attention of the president of the court of which he is a member ..."

Article 71

"From the moment when grounds for his disqualification come to his knowledge, every judicial officer (Gerichtsperson) shall refrain from any judicial acts, on pain of nullity. The judicial officer concerned may carry out judicial acts which are urgent, but only where there is danger in delay and if another judge or registrar cannot be appointed immediately. ..."

30. Furthermore, under Article 72 the parties to the proceedings may challenge (ablehnen) a judge if they can show that there are reasons for doubting his complete impartiality. Although Article 72 refers expressly to grounds "other than disqualification", it is the practice of the courts to apply Article 72 also in cases where a party raises an issue relating to a judge's disqualification. In fact, the disqualification of a first-instance judge cannot subsequently be pleaded in nullity proceedings unless he was challenged before or at the trial or immediately after the ground for disqualification became known to the party (Article 281 para. 1 (1) of the Code of Criminal Procedure). The procedure applicable in this respect is the following:

Article 73

"Where a party seeks to challenge a judge, he may make an application in writing to the court of which the judge is a member or make an oral declaration to this effect before the registrar. He may do this at any time, except that, where the challenge concerns a member of the trial court, it must be made not later than 24 hours before the beginning of the hearing and, where it is directed against the whole court, not later than three days after service of the summons to attend the hearing. The application must specify and, as far as possible, justify the reasons for the challenge."

Article 74

"(1) As a rule it is for the president of the court of which the challenged judicial officer is a member to decide on the admissibility of the challenge.

(2) ...

(3) No appeal lies against such a decision ..."

4. Rules concerning trial records

31. Records of hearings before criminal courts in Austria are usually drawn up in summary form unless, for special reasons, the court orders the preparation of a shorthand transcript. A shorthand transcript must be prepared if this is requested by a party who advances the costs thereof (Article 271 para. 4).

In other cases the record is limited to a note of all essential formalities of the proceedings. The parties are free to request the recording of specific points in order to preserve their rights (Article 271 para. 1, applicable to single-judge proceedings by virtue of Article 488).

32. Where the establishment of a verbatim version is important, the judge shall, upon the request of a party, order that particular passages be read out at once (Article 271 para. 2).

The answers of the defendant and the depositions of the witnesses and experts shall be mentioned only if they contain deviations from, alterations of or additions to the statements recorded in the files or if the witnesses or experts are heard for the first time at the trial (Article 271 para. 3).

33. The parties are free to inspect the completed record and its appendices and to make copies thereof (Article 271 para. 5). Case-law has established that they are entitled to request additions or corrections to the record at the trial or afterwards, as long as an appeal is pending (Evidenzblatt, "EvBl", 1948, p. 32 and Sammlungstrafsachen, 32/108). The court’s decision on such a request is final and is not open to appeal (Richterzeitung, 1967, p. 88, EvBl. 1948/243).

It is only total failure to prepare a trial record that is a ground of nullity (Article 281 para. 1 (3)). Other deficiencies in the record cannot be pleaded in nullity proceedings, except failure to decide on motions concerning the record which were made during the trial (Article 281 para. 1 (4)).

PROCEEDINGS BEFORE THE COMMISSION

34. In his application (no. 11662/85) of 16 June 1985 to the Commission, Mr Oberschlick alleged violations of Article 6 para. 1 (art. 6-1) (right to a fair hearing by an impartial tribunal established by law) and Article 10 (art.

10) (right to freedom of expression) of the Convention, as a result of the defamation proceedings instituted against him and his subsequent conviction.

35. The Commission declared the application admissible on 10 May 1989. In its report of 14 December 1989 (Article 31) (art. 31), the Commission expressed the opinion that there had been a violation of Article 10 (art. 10) (nineteen votes to two) and also of Article 6 para. 1 (art. 6-1) in relation to the proceedings before the Court of Appeal (twenty votes to one), but not in relation to the proceedings before the Regional Court (unanimously).

The full text of the Commission's opinion and the two dissenting opinions contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS MADE TO THE COURT

36. In his memorial of 3 July 1990 the applicant made the following requests:

1. that the Court find:

(a) that his conviction and sentence constituted a violation of his right to freedom of expression as guaranteed by Article 10 (art. 10) of the Convention;

(b) that the proceedings at first and second instance, which led to his conviction and sentence, constituted a violation of his right to a fair trial as guaranteed by Article 6 para. 1 (art. 6-1) of the Convention;

2. that the Court instruct the Republic of Austria to annul the seizure of issue no. 352/353 of the magazine Forum;

3. that, in accordance with Article 50 (art. 50) of the Convention, the Court afford the applicant just satisfaction comprising specified costs and compensation for the non-material damage occasioned by the injustice of which he had been the victim.

The Government confirmed at the hearing held on 19 November 1990 the conclusions set out in their memorial of 29 June 1990. They asked the Court to reject the application because it had been lodged out of time (Article 26 in fine of the Convention) (art. 26), or to find that neither Article 6 para. 1 (art. 6-1) nor Article 10 (art. 10) of the Convention had been violated.

[*] Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 204 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. PRELIMINARY OBJECTION

37. By way of preliminary objection, the Government pleaded, as they had already done before the Commission, that Mr Oberschlick had not complied with the rule, in Article 26 (art. 26) of the Convention, that applications to the Commission must be lodged "within a period of six months from the date on which the final decision was taken" ("dans le délai de six mois, à partir de la date de la décision interne définitive"). This plea was made with regard, firstly, to his main complaints under Articles 6 para. 1 and 10 (art. 6-1, art. 10) and, secondly, to the specific complaint concerning the rectification of the trial record.

A. The main complaints under Articles 6 para. 1 and 10 (art. 6-1, art. 10)

38. The Government observed that the application did not reach the Commission until 25 June 1985, whereas the final decision by the Vienna Court of Appeal had been pronounced orally more than six months previously, on 17 December 1984. In their opinion the date of the communication of the written text of the judgment (7 January 1985) was irrelevant for this purpose (see paragraphs 22 and 24 above).

Mr Oberschlick contended in reply that his application must be deemed to have been introduced on the date which it bore, namely 16 June 1985. In any event, the six-month period should run from service of the written text of the judgment, since no substantial application could be made to the Commission on the basis of the summary of the court’s reasoning given when the judgment was pronounced.

39. Following its usual practice, the Commission accepted that the application was filed on 16 June 1985, that is the last day of the six-month time-limit "if [it] should have to be counted as from the date when the final judgment was pronounced orally".

40. Having regard to the circumstances of the case, the Court accepts that, as regards his main complaints, Mr Oberschlick’s application was posted on 16 June 1985 and, accordingly, was introduced within the time-limit prescribed by Article 26 (art. 26).

B. Complaint concerning the rectification of the trial record (Article 6 para. 1) (art. 6-1)

41. The Government further submitted that, as regards the refusal of Mr Oberschlick's request for rectification of the trial record, his application was clearly out of time, because the six-month period began to run on 30 October 1984, when the Regional Court's decision of 4 October 1984 in the matter - which was final - was served on the applicant.

42. The Court does not share this view. National proceedings would be unduly delayed and complicated if applications concerning procedural decisions, such as the present one, had to be filed before the final decision on the merits. Consequently, with regard to such procedural decisions, even if they have become final before the termination of the proceedings, the six-month period mentioned in Article 26 (art. 26) runs only as from the same date as that which is relevant with regard to the final decision on the merits.

The application thus cannot be deemed to be out of time in this respect either.

C. Conclusion

43. In conclusion, the Government's preliminary objection has to be rejected.

II. ALLEGED VIOLATION OF ARTICLE 6 para. 1 (art. 6-1)

44. Mr Oberschlick alleged that he had not received a "fair hearing" by an "impartial tribunal established by law", within the meaning of Article 6 para. 1 (art. 6-1) of the Convention which, as far as relevant, provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law..."

A. Proceedings before the Vienna Regional Court

1. Rectification of the trial record

45. Before the Commission, the applicant complained of the Regional Court's refusal to rectify the trial record which, he said, did not accurately reproduce certain statements made by Mr Grabher-Meyer, the private prosecutor, that were of particular importance for proving the truth of the applicant's allegations (see paragraph 21 above).

In its report (paragraph 85) the Commission concluded that there had been no violation of Article 6 para. 1 (art. 6-1) on this account. The applicant declared before the Court that, with one exception relating to

another point, he fully shared the conclusions of the Commission and he did not go further into the question of the rectification of the trial record. In these circumstances the Court sees no reason to examine it.

2. Fairness of the proceedings

46. Mr Oberschlick claimed that he had been deprived of a fair trial in the second set of proceedings, in that on 11 May 1984 the Regional Court had erroneously considered itself bound by the Court of Appeal's decision in the first set of proceedings (see paragraphs 20 and 23 above).

47. Although the Regional Court's finding was held to be contrary to domestic law (Article 486 para. 5 of the Code of Criminal Procedure, see paragraph 28 above), it does not, in the Court's view, constitute of itself a violation of the Convention.

The Regional Court in fact considered the evidence before it and reached the fully-reasoned conclusion that the applicant was guilty (see paragraph 20 above). This decision was subsequently upheld on appeal.

B. Proceedings before the Court of Appeal

48. Before the Commission Mr Oberschlick contended mainly that the Vienna Court of Appeal, when hearing his case in the second set of proceedings, was not an "independent and impartial tribunal" and was not "established by law" because, contrary to Article 489 para. 3 of the Code of Criminal Procedure (see paragraph 28 above), it was presided over by the same judge as in the first set.

Before the Court Mr Oberschlick supplemented this complaint by submitting that in the meantime he had been led to believe that not only the presiding judge but also the other two appeal judges had participated on both occasions. From the Government's reply to a question put by the Court it then appeared that this was correct.

49. The Commission concluded that, as a result of the participation of a judge who should have withdrawn from the case in accordance with Article 489 para. 3 of the Code of Criminal Procedure, the Court of Appeal was on the second occasion not "established by law" and, as a separate issue, not "impartial" (see paragraphs 99 and 103 of its report).

50. The Court notes that the applicant's two complaints coincide in substance.

Article 489 para. 3 of the Code of Criminal Procedure, which lays down that the Court of Appeal shall not comprise, in a case like this, any judge who has previously dealt with it in the first set of proceedings (see paragraph 28 above), manifests the national legislature's concern to remove all reasonable doubts as to the impartiality of that court. Accordingly the failure to abide by this rule means that the applicant's appeal was heard by a

tribunal whose impartiality was recognised by national law to be open to doubt.

51. The Government argued that by failing, at the hearing of 17 December 1984, to challenge or raise any objection to the participation of the presiding judge (Articles 73, 281 para. 1, sub 1, and 345 para. 2 of the Code of Criminal Procedure), the applicant had waived his right to have him replaced.

According to the Court's case-law, waiver of a right guaranteed by the Convention - in so far as it is permissible - must be established in an unequivocal manner (see, inter alia, the Barberà, Messegué and Jabardo judgment of 6 December 1988, Series A no. 176, p. 35, para. 82).

Here, not only the President but also the other two members of the Court of Appeal should have withdrawn ex officio in accordance with Article 489 para. 3 of the Code of Criminal Procedure. Whatever the position might have been with respect to the presiding judge, neither the applicant nor his counsel were aware until well after the hearing of 17 December 1984 that the other two judges had also participated in the decision of 31 May 1983.

It is thus not established that the applicant had waived his right to have his case determined by an "impartial" tribunal.

52. There has accordingly been a violation of Article 6 para. 1 (art. 6-1) of the Convention in this respect.

III. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

A. The issues to be decided

53. According to Article 10 (art. 10) of the Convention,

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Mr Oberschlick alleged that his conviction for defamation and the other related court decisions (see paragraph 20 above) had breached his right to freedom of expression as guaranteed in this Article.

54. It was not disputed that the applicant's conviction by the Vienna Regional Court on 11 May 1984 (see paragraph 20 above), as upheld by the Vienna Court of Appeal on 17 December 1984 (see paragraphs 22-23 above), constituted an "interference" with his right to freedom of expression.

Nor was it contested that this interference was "prescribed by law", namely Article 111 of the Criminal Code (see paragraph 25 above), and was aimed at protecting the "reputation or rights of others" within the meaning of Article 10 para. 2 (art. 10-2) of the Convention.

Argument before the Court concentrated on the question whether the interference was "necessary in a democratic society" to achieve that aim.

55. The applicant stressed that in a democratic society the role of periodicals like Forum included critical comment on social or legal policy proposals made by politicians. In this regard the press should be free to choose the form of comment it thought most appropriate to its aim. In the present case he had limited himself to reporting and giving his own interpretation of Mr Grabher-Meyer's proposal with regard to family allowances for foreigners. The Austrian courts had denied him the right not only of giving his opinion as to whether the proposal constituted a revival of National Socialism, but also of making historical comparisons on the basis of present facts.

The applicant's complaint was accepted by the Commission.

56. According to the Government, Mr Oberschlick had overstepped the limits of justifiable and reasonable criticism. The impugned publication amounted, according to the Austrian courts, to an accusation that Mr Grabher-Meyer held National Socialist ideas, the impact of this accusation being strengthened by the form chosen. They held that the applicant had not been able to prove that his accusation was well-founded and that he was therefore guilty of defamation.

In the opinion of the Government, it was not for the European Court to decide whether this reasoning of the Austrian courts was correct; this followed from the margin of appreciation to be left to the national authorities: they were better placed than the international judge to determine what matters should be regarded as defamatory, since this depended to a certain extent on national conceptions and legal culture.

B. General principles

57. The Court recalls that freedom of expression, as secured in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 (art. 5-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those

that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, inter alia, the Handyside judgment of 7 December 1976, Series A no. 24, p. 23, para. 49, and the Lingens judgment of 8 July 1986, Series A no. 103, p. 26, para. 41).
Article 10 (art. 10) protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.

58. These principles are of particular importance with regard to the press. Whilst it must not overstep the bounds set, inter alia, for "the protection of the reputation of others", its task is nevertheless to impart information and ideas on political issues and on other matters of general interest (see, mutatis mutandis, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 40, para. 65, and the above-mentioned Lingens judgment, loc. cit.).

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. This is underlined by the wording of Article 10 (art. 10) where the public's right to receive information and ideas is expressly mentioned. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention (see the above-mentioned Lingens judgment, Series A no. 103, p. 26, para. 42).

59. The limits of acceptable criticism are accordingly wider with regard to a politician acting in his public capacity than in relation to a private individual. The former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.

A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues (see the above-mentioned Lingens judgment, Series A no. 103, ibid.).

60. The Court's task in this case has to be seen in the light of these principles. What are at stake are the limits of acceptable criticism in the context of public debate on a political question of general interest. In such cases the Court has to satisfy itself that the national authorities did apply standards which were in conformity with these principles and, moreover, that in doing so they based themselves on an acceptable assessment of the relevant facts.

For this purpose the Court will consider the impugned judicial decisions in the light of the case as a whole, including the applicant's publication and the context in which it was written (see, inter alia, the above-mentioned Lingens judgment, Series A no. 103, p. 25, para. 40).

C. Application of these principles

61. The applicant was convicted for having reproduced in Forum the text of a criminal information which he and other persons had laid against Mr Grabher-Meyer. During an election campaign, this politician had made certain public statements, reported in a television programme, concerning foreigners' family allowances, and proposed that such persons should receive less favourable treatment than Austrians (see paragraphs 11-13 above). The applicant had expressed the opinion that this proposal corresponded to the philosophy and the aims of National Socialism as stated in the NSDAP Manifesto of 1920 (see paragraph 13 above).

The Court agrees with the Commission that the insertion of the text of the said information in Forum contributed to a public debate on a political question of general importance. In particular, the issue of different treatment of nationals and foreigners in the social field has given rise to considerable discussion not only in Austria but also in other member States of the Council of Europe.

Mr Oberschlick's criticisms, as the Commission pointed out, sought to draw the public's attention in a provocative manner to a proposal made by a politician which was likely to shock many people. A politician who expresses himself in such terms exposes himself to a strong reaction on the part of journalists and the public.

62. In its judgment of 11 May 1984 the Regional Court found that the article in question, "despite its designation as a criminal information, gives the impression of being intended to condemn" the character of the politician. It therefore held that Mr Oberschlick's allegations against him came under the general rule (Article 111 para. 3 of the Criminal Code - see paragraph 25 above) that a person making a defamatory statement through the media incurs criminal liability unless he proves that it is true. Since, in the Regional Court's opinion, Mr Grabher-Meyer's proposal were "inconclusive" evidence of his alleged National Socialist attitude and criminal behaviour and since no further evidence had been submitted, it found that the applicant had failed to prove his allegations and was therefore guilty (see paragraph 20 above).

In its decision of 17 December 1984 the Vienna Court of Appeal basically confirmed these assessments (see paragraph 23 above).

63. The Court, however, cannot subscribe to them. The information, as published by Mr Oberschlick, began by reciting the facts under the heading "Sachverhalt", that is reporting Mr Grabher-Meyer's statements. It is undisputed that this part of the information was factually correct. What followed was an analysis of these statements, on the basis of which the authors of the information concluded that this politician had knowingly expressed ideas that corresponded to those professed by the Nazis.

The Court can regard the latter part of the information only as a value-judgment, expressing the opinion of the authors as to the proposal made by this politician, which opinion was clearly presented as derived solely from a comparison of this proposal with texts from the National Socialist Party Manifesto.

It follows that Mr Oberschlick had published a true statement of facts followed by a value-judgment as to those facts. The Austrian courts held, however, that he had to prove the truth of his allegations. As regards value-judgments this requirement is impossible of fulfilment and is itself an infringement of freedom of opinion (see the above-mentioned Lingens judgment, Series A no. 103, p. 28, para. 46).

As to the form of the publication, the Court accepts the assessment made by the Austrian courts. It notes that they did not establish that "the presentation of the article in the form of a criminal information" was misleading in the sense that, as a consequence thereof, a significant number of the readers were led to believe that a public prosecution had been instituted against Mr Grabher-Meyer or even that he had already been convicted. The Austrian courts said no more than that this particular form of presentation was intended to ensure that what in their eyes was an accusation as to his character would have "a particularly telling effect on the average reader". In the opinion of the Court, however, in view of the importance of the issue at stake (see paragraph 61 above), Mr Oberschlick cannot be said to have exceeded the limits of freedom of expression by choosing this particular form.

64. It follows from the foregoing that the interference with Mr Oberschlick’s exercise of his freedom of expression was not "necessary in a democratic society ... for the protection of the reputation ... of others".

There has, accordingly, been a violation of Article 10 (art. 10) of the Convention.

IV. APPLICATION OF ARTICLE 50 (art. 50)

65. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicant requested the Court to direct the Government of Austria: (a) to rehabilitate him and formally set aside the judgment of 17 December 1984; and (b) to annul the seizure of issue no. 352/353 of Forum.

The Court, however, is not empowered to make directions of this kind (see, mutatis mutandis, the Hauschildt judgment of 24 May 1989, Series A no. 154, p. 23, para. 54).

Mr Oberschlick also sought compensation for pecuniary and non-pecuniary damage, as well as the reimbursement of costs and expenses. He claimed that certain of these amounts should be increased by interest at the rate of 11% per annum.

A. Pecuniary damage

66. The applicant sought firstly sums corresponding to the fine imposed (4,000 schillings) and the costs awarded to the private prosecutor (14,123.84 schillings) by the Austrian courts. Having regard to the direct link between these items and the violation of Article 10 (art. 10) found by the Court, he is, as the Government agreed, entitled to recover the full amount of 18,123.84 schillings.

67. The applicant also claimed one symbolic Austrian schilling for the seizure of issue no. 352/353 of Forum (see paragraphs 13 and 20 above) and 38,280 schillings for the cost of publishing in that magazine, in pursuance of section 37 of the Media Act (see paragraphs 18 and 26 above), information concerning the defamation proceedings.

The Court notes that the damage referred to was in fact sustained by the owners of Forum and that Mr Oberschlick did not furnish any explanation as to why he should be entitled to compensation under these heads. No award can therefore be made to him for them.

B. Non-pecuniary damage

68. The applicant sought 70,000 schillings for non-pecuniary damage, on account of the perplexity, anxiety and uncertainty occasioned by the prosecution for defamation.

The Government contested both the existence of any such damage and the amount claimed.

69. The Court does not exclude that the applicant may have sustained some prejudice of the kind alleged as a result of the breaches of Articles 6 para. 1 and 10 (art. 6-1, art. 10). It considers, however, that in the circumstances of the case the findings of violation in this judgment constitute of themselves sufficient just satisfaction.

C. Costs and expenses

70. The applicant claimed 9,753 schillings for his costs and expenses in Austria. These items fall to be taken into account, since they were incurred to prevent or redress the breaches found by the Court. The amount, which

was accepted by the Government, appears reasonable to the Court and is therefore awarded in full.

71. For his costs and expenses before the Convention institutions, Mr Oberschlick sought reimbursement of the fees due to Mr Fiebinger, who had prepared the initial application to the Commission (4,000 schillings), and to Mr Tretter, who had assisted the applicant throughout the proceedings (60,000 schillings), as well as his own and Mr Tretter's travel expenses to Strasbourg for the purpose of attending the Court's hearing on 19 November 1990 (11,532 schillings). The Government contested only the amount of Mr Tretter's fees which, in their view, should be reduced to 30,000 schillings.

The Court, however, finds the sums claimed to be reasonable and therefore allows them in their entirety.

72. The applicant is thus entitled to 85,285 schillings for his costs and expenses.

D. Interest

73. Mr Oberschlick claimed that interest of 11% per annum should be added to certain of the above sums; he based this claim on the argument that he had been obliged to borrow in order to meet the costs involved. Although the Government have asked for proof of the latter allegation, no evidence has been submitted in due time. The Court therefore dismisses this claim.

FOR THESE REASONS, THE COURT

1. Rejects unanimously the Government's preliminary objection;

2. Holds unanimously that, in the second set of proceedings, there has been a violation of Article 6 para. 1 (art. 6-1) of the Convention as regards the impartiality of the Vienna Court of Appeal, but not as regards the fairness of the trial before the Vienna Regional Court;

3. Holds by sixteen votes to three that there has been a violation of Article 10 (art. 10) of the Convention;

4. Holds unanimously that Austria is to pay to the applicant 18,123.84 Austrian schillings (eighteen thousand one hundred and twenty-three schillings and eighty-four groschen) for pecuniary damage, and 85,285 Austrian schillings (eighty-five thousand two hundred and eighty-five schillings) for costs and expenses;

5. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 May 1991.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Mr Thór Vilhjálmsson;

(b) partly dissenting opinion of Mr Matscher, approved by Mrs Bindschedler-Robert;

(c) concurring opinion of Mr Martens;

(d) concurring opinion of Mr Morenilla;

R.R.
M.-A.E.

PARTLY DISSENTING OPINION OF JUDGE THOR VILHJALMSSON

To my regret I have found it unavoidable to part company with the majority of the Court on the question of Article 10 (art. 10). I have voted for non-violation of that Article (art. 10) and would like to explain briefly my point of view.

The idea or ideal underlying the European Convention on Human Rights is that the invididual should be protected vis-à-vis the State. The protection afforded to freedom of expression by Article 10 (art. 10) of our Convention clearly has this aim. The Lingens judgment shows that very harsh words expressed in the context of political debate enjoy this protection. However, as is stated at the beginning of paragraph 2 of this Article (art. 10-2), the exercise of this freedom "carries with it duties and responsibilities". In this context one often has to keep in mind Article 8 (art. 8) of the Convention, concerning the right to respect for private life, as well as what is said in paragraph 2 of Article 10 (art. 10-2) on the protection of the reputation or rights of others. The two principles enshrined in Articles 8 and 10 (art. 8, art. 10) must both be respected in every democratic society worthy of that name. In our time and our part of the world, the application of rules intended to protect these principles is marked by the power of the media and the inability of the individual to protect his reputation. Legal rules have frequently proved not to be an effective tool in this respect, but this fact - as I consider it to be - should not influence our Court when it applies the Convention. The Austrian legislation described in paragraphs 25-33 of the judgment is an example of a set of rules enacted by a member State in order to meet the obligations flowing from Article 8 (art. 8) of our Convention.

The present case should be decided by an interpretation of Article 10 (art. 10) which takes into account the principle enshrined in Article 8 (art. 8). I am not of the opinion that the decisive question is whether or not a value-judgment is involved. Neither do I agree with the majority when it says that it regards "the latter part of the information only as a value-judgment".

The applicant had, of course, a right to voice strong disagreement with the statements of Mr Grabher-Meyer, as reported in a television programme on 29 March 1983. This he could do without breaching Austrian law. He chose, however, to print in full a "criminal information" - a kind of private criminal summons - laid by himself and others, in which Mr Grabher-Meyer was said to be suspected of contravening three provisions of Austrian penal law. The criminal-law setting thus given to his criticism took it out of the sphere of mere political debate and carried it into the arena of personal attack, thereby impinging on private life. The contents of the document printed were also, in my opinion, characterised by exaggerations. Here I have especially in mind the strong words to the effect that the statement corresponded to the aims of the Nazis or extolled measures applied by them.

These very same words found in the text published by the applicant also, it seems to me, fall outside the ambit of value-judgments. The programme and the acts of the Nazis constitute a set of facts and the statement is another fact. Whether or not that statement reflected that programme and those acts is a question of factual assessment and my own conclusion is that it did not. The applicant, in my opinion, transgressed the limits of freedom of expression and violated the rules on respect for the reputation of the person concerned that are necessary in a democratic society.

As in other cases, I have voted on Article 50 (art. 50) on the basis of the findings of the majority.

PARTLY DISSENTING OPINION OF JUDGE MATSCHER, APPROVED BY JUDGE BINDSCHEDLER-ROBERT

(Translation)

1. I do not oppose the somewhat lenient decision to treat the present application as having been introduced within the six-month time-limit for the purposes of Article 26 (art. 26).

In my view, Rule 38 para. 3 of the Commission's Rules of Procedure should be construed as meaning that the date which the application bears can be decisive only where the person concerned is in a position to prove that he did in fact despatch the application on that date.

It is inconceivable that a lawyer who submits an application on the last day before the expiry of a time-limit should not do so by registered letter, in order to be able to prove, should it be necessary, that the time-limit in question has been complied with.

It is equally incomprehensible that the Commission should not have kept in its file the envelope, which would also have made it possible to verify by the postmark the date on which the application in question was in fact despatched.

2. I fully endorse the reasoning in the Lingens judgment (Series A no. 103, p. 26, para. 42), reiterated in the present judgment, to the effect that the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual.

Criticism of political conduct may be expressed in press articles, in other publications or through other media, or again in a political debate. If the applicant, as a journalist, had had recourse to one of these means, criticism, even if it were harsh and bitter - but not going beyond the limits of decency -, would have been acceptable and his conviction for such criticism would indeed have constituted an interference with his freedom of expression which would not be covered by paragraph 2 of Article 10 (art. 10-2).

However, in the present case, the applicant did not engage in criticism of this type. He chose to proceed by another means, namely to lodge with the competent authority, and the very day on which his review appeared, a criminal information against X. - in which he accused the person in question of very serious crimes - and to reproduce this information in that review, thereby giving the impression, at least to the average reader, that criminal proceedings had actually been instituted against X. This is a very important aspect of the case to which, regrettably, the majority of the Court has not thought right to accord the weight which in my view it merited.

In so acting, the applicant did not confine himself to permissible criticism, but perpetrated a treacherous attack on the reputation of a politician. Thus he did not respect the "duties and responsibilities" which freedom of expression carries with it; his conviction cannot therefore be

regarded as a measure which was unnecessary and disproportionate for the purposes of this provision.

The majority of the Court also found a violation in the fact that the Austrian court had supposedly required Mr Oberschlick to prove his accusations, proof which the majority regarded as impossible to establish since the criminal information constituted a value-judgment. I am, on the other hand, of the opinion that this information was merely an affirmation of certain facts - moreover an unfounded affirmation -, facts which in themselves were susceptible to proof. The Austrian court’s judgment did not therefore infringe freedom of expression by regarding them as such.

CONCURRING OPINION OF JUDGE MARTENS

1. I have voted in favour of rejecting the Austrian Government's preliminary objection because it was examined and rejected by the Commission: for the reasons given in my separate opinion in the Brozicek case (Series A no. 167, pp. 23 et seq.) I think that the Court should leave it to the Commission to determine whether such pleas are founded or not.

2. In the present case the Court has for the first time[*] extended the doctrine that I question to a preliminary objection based on an alleged failure to observe the time-limit specified in Article 26 (art. 26). It seems to me that the reasons given in my afore-mentioned opinion are all the more cogent when it comes to extending that doctrine, and especially extending it to the present type of preliminary objection, and should have led the Court to refrain from doing so. In this connection I would make the following three points.

Firstly, assuming jurisdiction to examine the present preliminary objection should lead to consideration of the question whether Rule 44 para. 4 (present numbering) of the Commission's Rules of Procedure - as applied in the Commission's case-law over more than three decades - is the best way of supplementing the last words of Article 26 (art. 26) of the Convention. There is, however, no reason for the Court to do this as there are no complaints that either the Rule or its application by the Commission are unsatisfactory. This is well illustrated by the fact that this is the first time after all these years that a Government reiterates before the Court an objection of this kind[**]!

Secondly, reviewing whether the Commission has correctly applied its rules to the case at hand necessarily draws the Court into pure questions of fact which, under the Convention system, should be left to the Commission.

Lastly, differences of opinion between the Commission and the Court as to questions of that kind could lead to a result that I would find completely unacceptable: imagine, for example, an applicant who, after fighting his case strenuously before the Commission and then before the Court for five

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[*] See, however, note 2.

[**] In the "Vagrancy cases" an objection based on non-observance of the time-limit had been raised by the Government for the first time at the oral hearings before the Court; the Court therefore held that the Government was estopped (see the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 11, pp. 32-33, para. 58).

or six years, is told that all his efforts have been in vain because in the Court's opinion his application was made a day too late!

CONCURRING OPINION OF JUDGE MORENILLA

In this case the Court has decided to reject the Government's preliminary objection as to the admissibility of Mr Oberschlick's application. This conclusion does not, however, reflect a certain disparity in the reasoning. Like Judge Martens, I have voted in favour of rejecting the objection starting from the premise that the decision of the Commission should be respected for the reasons expressed in my dissenting opinion in the Cardot case (judgment of 19 March 1991, Series A no. 200) in which I subscribed entirely to the analysis and conclusions of Judge Martens [in his separate opinion] in the Brozicek case (Series A no. 167, p. 23 et seq.).

As I said on that occasion, the role of this Court is not to act as a Court of Appeal from the Commission, examining the case-files to check if an application was correctly admitted. In the allocation of roles under the Convention, the two organs set up to ensure the observance of the engagements undertaken by States' Parties (Article 19) (art. 19) have each different functions with clear-cut boundaries to avoid any overlapping. The main province of the Commission is to decide on the admissibility of petitions, according to Article 27 (art. 27) of the Convention, while the jurisdiction of the Court "shall extend to all cases concerning the interpretation and application of the present Convention" as provided for in Articles 45 and 46 (art. 45, art. 46) of the Convention.

The preliminary objection raised by the Government in this case is a paradigm of the undesired consequences of the appeal jurisdiction assumed by this Court in questions of admissibility following the De Wilde, Ooms and Versyp judgment of 18 June 1971 (Series A no. 12, pp. 29-31, paras. 49-55): the Government's preliminary objection is based on a mere question of fact - the date of the introduction of the application before the Commission - and, as such, it should be decided by this organ on the basis of its undisputed practice and in accordance with Articles 27 para. 3, 28 and 31 (art. 27-3, art. 28, art. 31) of the Convention, and in the light of Rule 44 para. 3 of its own Rules of Procedure which confers on the Commission a margin of appreciation in deciding on the date of introduction of the first communication from the applicant setting out the object of the application.

Moreover the re-examination of this question by the Court involves not only a fresh assessment of the basis for the Commission's decision in this matter but it also amounts to questioning the practice of the Commission based on its own experience, as well as the compatibility with the Convention of Rule 44 para. 3 of the Commission's Rules of Procedure.

The fact that in the present case the Court and the Commission have shared the same views with regard to the time-limit objection does not exclude:

(1) the applicant's uncertainty as to the outcome, since after winning his case before the Commission he may, with good reason, fear that at the end

of a long procedure the Court may not decide on the merits of his complaint;

(2) the possibility of two contradictory decisions that may endanger public confidence in the Convention system's ability to protect the rights of the individual; and

(3) a time-consuming activity of the Court with no real effect on the protection of individual rights because either - as in this case - the Court confirms the Commission's finding and proceeds to examine the merits of the case or it quashes the decision and declares itself unable to take cognisance of the applicant's complaints.

In my view, having regard to the uniqueness of the preliminary objection in the present case, the Court has missed an opportunity to reconsider its established case-law on the examination of admissibility objections and to leave all matters of admissibility entirely to the Commission thereby respecting its "final" decision on such questions.

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

COURT (PLENARY)

CASE OF OBSERVER AND GUARDIAN v. THE UNITED KINGDOM

(Application no. 13585/88)

JUDGMENT

STRASBOURG

26 November 1991

In the case of the Observer and Guardian v. the United Kingdom[*],

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 51 of the Rules of Court[**] and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr J. PINHEIRO FARINHA,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr S. K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J. M. MORENILLA,
Mr F. BIGI,
Mr A. BAKA,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 28 June and 24 October 1991,

Delivers the following judgment, which was adopted on the last-mentioned date:

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[*] The case is numbered 51/1990/242/313. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] The amended Rules of Court which entered into force on 1 April 1989 are applicable to the present case.

PROCEDURE

1. The case was referred to the Court on 12 October 1990 by the European Commission of Human Rights ("the Commission") and on 23 November 1990 by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government"), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 13585/88) against the United Kingdom lodged with the Commission under Article 25 (art. 25) on 27 January 1988 by two companies incorporated in England, The Observer Ltd and Guardian Newspapers Ltd, and five British citizens, Mr Donald Trelford, Mr David Leigh, Mr Paul Lashmar, Mr Peter Preston and Mr Richard Norton-Taylor.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46) and the Government's application, to Article 48 (art. 48). The object of the request and the application was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) and also, in the case of the request, Articles 13 and 14 (art. 13, art. 14) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

3. On 15 October 1990 the President of the Court decided, under Rule 21 para. 6 and in the interest of the proper administration of justice, that a single Chamber should be constituted to consider both the instant case and the Sunday Times (no. 2) case[*].

The Chamber thus constituted included ex officio Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 October 1990 the President drew by lot, in the presence of the Registrar, the names of the seven other members, namely Mr J. Cremona, Mrs D. Bindschedler-Robert, Mr F. Matscher, Mr R. Macdonald, Mr C. Russo, Mr R. Bernhardt and Mr R. Pekkanen (Article 43 in fine of the Convention[**] and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government,

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[*] Case no. 50/1990/241/312.

[**] As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

the Delegate of the Commission and the representatives of the applicants on the need for a written procedure (Rule 37 para. 1) and the date of the opening of the oral proceedings (Rule 38).

In accordance with the President's orders and directions, the registry received, on 15 April 1991, the applicants' memorial and, on 18 April, the Government's. By letter of 31 May 1991, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 21 March 1991 the Chamber decided, pursuant to Rule 51, to relinquish jurisdiction forthwith in favour of the plenary Court.

6. On 25 March 1991 the President granted, under Rule 37 para. 2, leave to "Article 19" (the International Centre against Censorship) to submit written comments on a specific issue arising in the case. He directed that the comments should be filed by 15 May 1991; they were, in fact, received on that date.

7. As directed by the President, the hearing, devoted to the present and the Sunday Times (no.2) cases, took place in public in the Human Rights Building, Strasbourg, on 25 June 1991. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government
  Mrs A. GLOVER, Legal Counsellor,
  Foreign and Commonwealth Office, *Agent*,
  Mr N. BRATZA, Q.C.,
  Mr P. HAVERS, Barrister-at-Law, *Counsel*,
  Mrs S. EVANS, Home Office,
  Mr D. BRUMMELL, Treasury Solicitor, *Advisers*;
- for the Commission
  Mr E. BUSUTTIL, *Delegate*;
- for the applicants in the present case
  Mr D. BROWNE, Q.C., *Counsel*,
  Mrs J. MCDERMOTT, Solicitor;
- for the applicants in the Sunday Times (no. 2) case
  Mr A. LESTER, Q.C.,
  Mr D. PANNICK, Barrister-at-Law, *Counsel*,
  Mr M. KRAMER,
  Ms K. RIMELL, Solicitors,
  Mr A. WHITAKER, Legal Manager,
  Times Newspapers Ltd, *Adviser*.

The Court heard addresses by Mr Bratza for the Government, by Mr Busuttil for the Commission and by Mr Browne and Mr Lester for the applicants, as well as replies to questions put by the President of the Court.

8. The applicants filed a number of documents on the occasion of the hearing.

On 23 July, 5 August and 2 September 1991, respectively, the registry received supplementary particulars of the applicants' claim under Article 50 (art. 50) of the Convention, the observations of the Government on that claim and the applicants' reply to those observations. By letter of 17 September, the Deputy Secretary to the Commission informed the Registrar that the Delegate left this matter to the Court's discretion.

AS TO THE FACTS

I. INTRODUCTION

A. The applicants

9. The applicants in this case (who are hereinafter together referred to as "O.G.") are (a) The Observer Ltd, the proprietors and publishers of the United Kingdom national Sunday newspaper Observer, Mr Donald Trelford, its editor, and Mr David Leigh and Mr Paul Lashmar, two of its reporters; and (b) Guardian Newspapers Ltd, the proprietors and publishers of the United Kingdom national daily newspaper The Guardian, Mr Peter Preston, its editor, and Mr Richard Norton-Taylor, one of its reporters. They complain of interlocutory injunctions imposed by the English courts on the publication of details of the book Spycatcher and information obtained from its author, Mr Peter Wright.

B. Interlocutory injunctions

10. In litigation where the plaintiff seeks a permanent injunction against the defendant, the English courts have a discretion to grant the plaintiff an "interlocutory injunction" (a temporary restriction pending the determination of the dispute at the substantive trial) which is designed to protect his position in the interim. In that event the plaintiff will normally be required to give an undertaking to pay damages to the defendant should the latter succeed at the trial.

The principles on which such injunctions will be granted - to which reference was made in the proceedings in the present case - were set out in American Cyanamid Co. v. Ethicon Ltd ([1975] Appeal Cases 396) and may be summarised as follows.

(a) It is not for the court at the interlocutory stage to seek to determine disputed issues of fact or to decide difficult questions of law which call for detailed argument and mature consideration.

(b) Unless the material before the court at that stage fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction, the court should consider, in the light of the particular circumstances of the case, whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

(c) If damages would be an adequate remedy for the plaintiff if he were to succeed at the trial, no interlocutory injunction should normally be granted. If, on the other hand, damages would not provide an adequate remedy for the plaintiff but would adequately compensate the defendant under the plaintiff's undertaking if the defendant were to succeed at the trial, there would be no reason to refuse an interlocutory injunction on this ground.

(d) It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience arises.

(e) Where other factors appear evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo.

C. Spycatcher

11. Mr Peter Wright was employed by the British Government as a senior member of the British Security Service (MI5) from 1955 to 1976, when he resigned. Subsequently, without any authority from his former employers, he wrote his memoirs, entitled Spycatcher, and made arrangements for their publication in Australia, where he was then living. The book dealt with the operational organisation, methods and personnel of MI5 and also included an account of alleged illegal activities by the Security Service. He asserted therein, inter alia, that MI5 conducted unlawful activities calculated to undermine the 1974-1979 Labour Government, burgled and "bugged" the embassies of allied and hostile countries and planned and participated in other unlawful and covert activities at home and abroad, and that Sir Roger Hollis, who led MI5 during the latter part of Mr Wright's employment, was a Soviet agent.

Mr Wright had previously sought, unsuccessfully, to persuade the British Government to institute an independent inquiry into these allegations. In 1987 such an inquiry was also sought by, amongst others, a number of prominent members of the 1974-1979 Labour Government, but in vain.

12. Part of the material in Spycatcher had already been published in a number of books about the Security Service written by Mr Chapman Pincher. Moreover, in July 1984 Mr Wright had given a lengthy interview to Granada Television (an independent television company operating in the United Kingdom) about the work of the service and the programme was shown again in December 1986. Other books and another television programme on the workings and secrets of the service were produced at

about the same time, but little Government action was taken against the authors or the media.

D. Institution of proceedings in Australia

13. In September 1985 the Attorney General of England and Wales ("the Attorney General") instituted, on behalf of the United Kingdom Government, proceedings in the Equity Division of the Supreme Court of New South Wales, Australia, to restrain publication of Spycatcher and of any information therein derived from Mr Wright's work for the Security Service. The claim was based not on official secrecy but on the ground that the disclosure of such information by Mr Wright would constitute a breach of, notably, his duty of confidentiality under the terms of his employment. On 17 September he and his publishers, Heinemann Publishers Australia Pty Ltd, gave undertakings, by which they abided, not to publish pending the hearing of the Government's claim for an injunction.

Throughout the Australian proceedings the Government objected to the book as such; they declined to indicate which passages they objected to as being detrimental to national security.

II. THE INTERLOCUTORY PROCEEDINGS IN ENGLAND AND EVENTS OCCURRING WHILST THEY WERE IN PROGRESS

A. The Observer and Guardian articles and the ensuing injunctions

14. Whilst the Australian proceedings were still pending, there appeared, on Sunday 22 and Monday 23 June 1986 respectively, short articles on inside pages of the Observer and The Guardian reporting on the forthcoming hearing in Australia and giving details of some of the contents of the manuscript of Spycatcher. These two newspapers had for some time been conducting a campaign for an independent investigation into the workings of the Security Service. The details given included the following allegations of improper, criminal and unconstitutional conduct on the part of MI5 officers:

(a) MI5 "bugged" all diplomatic conferences at Lancaster House in London throughout the 1950's and 1960's, as well as the Zimbabwe independence negotiations in 1979;

(b) MI5 "bugged" diplomats from France, Germany, Greece and Indonesia, as well as Mr Kruschev's hotel suite during his visit to Britain in the 1950's, and was guilty of routine burglary and "bugging" (including the entering of Soviet consulates abroad);

(c) MI5 plotted unsuccessfully to assassinate President Nasser of Egypt at the time of the Suez crisis;

(d) MI5 plotted against Harold Wilson during his premiership from 1974 to 1976;

(e) MI5 (contrary to its guidelines) diverted its resources to investigate left-wing political groups in Britain.

The Observer and Guardian articles, which were written by Mr Leigh and Mr Lashmar and by Mr Norton-Taylor respectively, were based on investigations by these journalists from confidential sources and not on generally available international press releases or similar material. However, much of the actual information in the articles had already been published elsewhere (see paragraph 12 above). The English courts subsequently inferred that, on the balance of probabilities, the journalists' sources must have come from the offices of the publishers of Spycatcher or the solicitors acting for them and the author (see the judgment of 21 December 1987 of Mr Justice Scott; paragraph 40 below).

15. The Attorney General instituted proceedings for breach of confidence in the Chancery Division of the High Court of Justice of England and Wales against O.G., seeking permanent injunctions restraining them from making any publication of Spycatcher material. He based his claim on the principle that the information in the memoirs was confidential and that a third party coming into possession of information knowing that it originated from a breach of confidence owed the same duty to the original confider as that owed by the original confidant. It was accepted that an award of damages would have been an insufficient and inappropriate remedy for the Attorney General and that only an injunction would serve his purpose.

16. The evidential basis for the Attorney General's claim was two affidavits sworn by Sir Robert Armstrong, Secretary to the British Cabinet, in the Australian proceedings on 9 and 27 September 1985. He had stated therein, inter alia, that the publication of any narrative based on information available to Mr Wright as a member of the Security Service would cause unquantifiable damage, both to the service itself and to its officers and other persons identified, by reason of the disclosures involved. It would also undermine the confidence that friendly countries and other organisations and persons had in the Security Service and create a risk of other employees or former employees of that service seeking to publish similar information.

17. On 27 June 1986 ex parte interim injunctions were granted to the Attorney General restraining any further publication of the kind in question pending the substantive trial of the actions. On an application by O.G. and after an inter partes hearing on 11 July, Mr Justice Millett (sitting in the Chancery Division) decided that these injunctions should remain in force, but with various modifications. The defendants were given liberty to apply to vary or discharge the orders on giving twenty-four hours' notice.

18. The reasons for Mr Justice Millett's decision may be briefly summarised as follows.

(a) Disclosure by Mr Wright of information acquired as a member of the Security Service would constitute a breach of his duty of confidentiality.

(b) O.G. wished to be free to publish further information deriving directly or indirectly from Mr Wright and disclosing alleged unlawful activity on the part of the Security Service, whether or not it had been previously published.

(c) Neither the right to freedom of speech nor the right to prevent the disclosure of information received in confidence was absolute.

(d) In resolving, as in the present case, a conflict between the public interest in preventing and the public interest in allowing such disclosure, the court had to take into account all relevant considerations, including the facts that this was an interlocutory application and not the trial of the action, that the injunctions sought at this stage were only temporary and that the refusal of injunctive relief might cause irreparable harm and effectively deprive the Attorney General of his rights. In such circumstances, the conflict should be resolved in favour of restraint, unless the court was satisfied that there was a serious defence of public interest that might succeed at the trial: an example would be when the proposed publication related to unlawful acts, the disclosure of which was required in the public interest. This could be regarded either as an exception to the American Cyanamid principles (see paragraph 10 above) or their application in special circumstances where the public interest was invoked on both sides.

(e) The Attorney General's principal objection was not to the dissemination of allegations about the Security Service but to the fact that those allegations were made by one of its former employees, it being that particular fact which O.G. wished to publish. There was credible evidence (in the shape of Sir Robert Armstrong's affidavits; see paragraph 16 above) that the appearance of confidentiality was essential to the operation of the Security Service and that the efficient discharge of its duties would be impaired, with consequent danger to national security, if senior officers were known to be free to disclose what they had learned whilst employed by it. Although this evidence remained to be tested at the substantive trial, the refusal of an interlocutory injunction would permit indirect publication and permanently deprive the Attorney General of his rights at the trial. Bearing in mind, inter alia, that the alleged unlawful activities had occurred some time in the past, there was, moreover, no compelling interest requiring publication immediately rather than after the trial.

In the subsequent stages of the interlocutory proceedings, both the Court of Appeal (see paragraphs 19 and 34 below) and all the members of the Appellate Committee of the House of Lords (see paragraphs 35-36 below) considered that this initial grant of interim injunctions by Mr Justice Millett was justified.

19. On 25 July 1986 the Court of Appeal dismissed an appeal by O.G. and upheld the injunctions, with minor modifications. It referred to the

American Cyanamid principles (see paragraph 10 above) and considered that Mr Justice Millett had not misdirected himself or exercised his discretion on an erroneous basis. It refused leave to appeal to the House of Lords. It also certified the case as fit for a speedy trial.

As amended by the Court of Appeal, the injunctions ("the Millett injunctions") restrained O.G., until the trial of the action or further order, from:

> "1. disclosing or publishing or causing or permitting to be disclosed or published to any person any information obtained by Peter Maurice Wright in his capacity as a member of the British Security Service and which they know, or have reasonable grounds to believe, to have come or been obtained, whether directly or indirectly, from the said Peter Maurice Wright;
>
> 2. attributing in any disclosure or publication made by them to any person any information concerning the British Security Service to the said Peter Maurice Wright whether by name or otherwise."

The orders contained the following provisos:

> "1. this Order shall not prohibit direct quotation of attributions to Peter Maurice Wright already made by Mr Chapman Pincher in published works, or in a television programme or programmes broadcast by Granada Television;
>
> 2. no breach of this Order shall be constituted by the disclosure or publication of any material disclosed in open court in the Supreme Court of New South Wales unless prohibited by the Judge there sitting or which, after the trial there in action no. 4382 of 1985, is not prohibited from publication;
>
> 3. no breach of this Order shall be constituted by a fair and accurate report of proceedings in (a) either House of Parliament in the United Kingdom whose publication is permitted by that House; or (b) a court of the United Kingdom sitting in public."

20. On 6 November 1986 the Appellate Committee of the House of Lords granted leave to appeal against the Court of Appeal's decision. The appeal was subsequently withdrawn in the light of the House of Lords decision of 30 July 1987 (see paragraphs 35-36 below).

B. The first-instance decision in Australia

21. The trial of the Government's action in Australia (see paragraph 13 above) took place in November and December 1986. The proceedings were reported in detail in the media in the United Kingdom and elsewhere. In a judgment delivered on 13 March 1987 Mr Justice Powell rejected the Attorney General's claim against Mr Wright and his publishers, holding that much of the information in Spycatcher was no longer confidential and that publication of the remainder would not be detrimental to the British Government or the Security Service. The undertakings not to publish were then discharged by order of the court.

The Attorney General lodged an appeal; after a hearing in the New South Wales Court of Appeal in the week of 27 July 1987, judgment was reserved. The defendants had given further undertakings not to publish whilst the appeal was pending.

C. Further press reports concerning Spycatcher; the Independent case

22. On 27 April 1987 a major summary of certain of the allegations in Spycatcher, allegedly based on a copy of the manuscript, appeared in the United Kingdom national daily newspaper The Independent. Later the same day reports of that summary were published in The London Evening Standard and the London Daily News.

On the next day the Attorney General applied to the Queen's Bench Division of the High Court for leave to move against the publishers and editors of these three newspapers for contempt of court, that is conduct intended to interfere with or prejudice the administration of justice. Leave was granted on 29 April. In this application (hereinafter referred to as "the Independent case") the Attorney General was not acting - as he was in the breach of confidence proceedings against O.G. - as the representative of the Government, but independently and in his capacity as "the guardian of the public interest in the due administration of justice".

Reports similar to those of 27 April appeared on 29 April in Australia, in The Melbourne Age and the Canberra Times, and on 3 May in the United States of America, in The Washington Post.

23. On 29 April 1987 O.G. applied for the discharge of the Millett injunctions (see paragraph 19 above) on the ground that there had been a significant change of circumstances since they were granted. They referred to what had transpired in the Australian proceedings and to the United Kingdom newspaper reports of 27 April.

The Vice-Chancellor, Sir Nicolas Browne-Wilkinson, began to hear these applications on 7 May but adjourned them pending the determination of a preliminary issue of law, raised in the Independent case (see paragraph 22 above), on which he thought their outcome to be largely dependent, namely "whether a publication made in the knowledge of an outstanding injunction against another party, and which if made by that other party would be in breach thereof, constitutes a criminal contempt of court upon the footing that it assaults or interferes with the process of justice in relation to the said injunction". On 11 May, in response to the Vice-Chancellor's invitation, the Attorney General pursued the proceedings in the Independent case in the Chancery Division of the High Court and the Vice-Chancellor ordered the trial of the preliminary issue.

24. On 14 May 1987 Viking Penguin Incorporated, which had purchased from Mr Wright's Australian publishers the United States publication rights

to Spycatcher, announced its intention of publishing the book in the latter country.

25. On 2 June 1987 the Vice-Chancellor decided the preliminary issue of law in the Independent case. He held that the reports that had appeared on 27 April 1987 (see paragraph 22 above) could not, as a matter of law, amount to contempt of court because they were not in breach of the express terms of the Millett injunctions and the three newspapers concerned had not been a party to those injunctions or to a breach thereof by the persons they enjoined. The Attorney General appealed.

26. On 15 June 1987 O.G., relying on the intended publication in the United States, applied to have the hearing of their application for discharge of the Millett injunctions restored (see paragraph 23 above). The matter was, however, adjourned pending the outcome of the Attorney General's appeal in the Independent case, the hearing of which began on 22 June.

D. Serialisation of Spycatcher begins in The Sunday Times

27. On 12 July 1987 the United Kingdom national Sunday newspaper The Sunday Times, which had purchased the British newspaper serialisation rights from Mr Wright's Australian publishers and obtained a copy of the manuscript from Viking Penguin Incorporated in the United States, printed - in its later editions in order to avoid the risk of proceedings for an injunction - the first instalment of extracts from Spycatcher. It explained that this was timed to coincide with publication of the book in the United States, which was due to take place on 14 July.

On 13 July the Attorney General commenced proceedings for contempt of court against Times Newspapers Ltd, the publisher of The Sunday Times, and Mr Andrew Neil, its editor (hereinafter together referred to as "S.T."), on the ground that the publication frustrated the purpose of the Millett injunctions.

E. Publication of Spycatcher in the United States of America

28. On 14 July 1987 Viking Penguin Incorporated published Spycatcher in the United States of America; some copies had, in fact, been put on sale on the previous day. It was an immediate best-seller. The British Government, which had been advised that proceedings to restrain publication in the United States would not succeed, took no legal action to that end either in that country or in Canada, where the book also became a best-seller.

29. A substantial number of copies of the book were then brought into the United Kingdom, notably by British citizens who had bought it whilst visiting the United States or who had purchased it by telephone or post from American bookshops. The telephone number and address of such bookshops

willing to deliver the book to the United Kingdom were widely advertised in that country. No steps to prevent such imports were taken by the British Government, which formed the view that although a ban was within their powers, it was likely to be ineffective. They did, however, take steps to prevent the book's being available at United Kingdom booksellers or public libraries.

F. Conclusion of the Independent case

30. On 15 July 1987 the Court of Appeal announced that it would reverse the judgment of the Vice-Chancellor in the Independent case (see paragraph 25 above). Its reasons, which were handed down on 17 July, were basically as follows: the purpose of the Millett injunctions was to preserve the confidentiality of the Spycatcher material until the substantive trial of the actions against O.G.; the conduct of The Independent, The London Evening Standard and the London Daily News could, as a matter of law, constitute a criminal contempt of court because publication of that material would destroy that confidentiality and, hence, the subject-matter of those actions and therefore interfere with the administration of justice. The Court of Appeal remitted the case to the High Court for it to determine whether the three newspapers had acted with the specific intent of so interfering (sections 2(3) and 6(c) of the Contempt of Court Act 1981).

31. The Court of Appeal refused the defendants leave to appeal to the House of Lords and they did not seek leave to appeal from the House itself. Neither did they apply to the High Court for modification of the Millett injunctions. The result of the Court of Appeal's decision was that those injunctions were effectively binding on all the British media, including The Sunday Times.

G. Conclusion of the interlocutory proceedings in the Observer, Guardian and Sunday Times cases; maintenance of the Millett injunctions

32. S.T. made it clear that, unless restrained by law, they would publish the second instalment of the serialisation of Spycatcher on 19 July 1987. On 16 July the Attorney General applied for an injunction to restrain them from publishing further extracts, maintaining that this would constitute a contempt of court by reason of the combined effect of the Millett injunctions and the decision in the Independent case (see paragraph 30 above).

On the same day the Vice-Chancellor granted a temporary injunction restraining publication by S.T. until 21 July 1987. It was agreed that on 20 July he would consider the application by O.G. for discharge of the Millett injunctions (see paragraph 26 above) and that, since they effectively bound

S.T. as well, the latter would have a right to be heard in support of that application. It was further agreed that he would also hear the Attorney General's claim for an injunction against S.T. and that that claim would fail if the Millett injunctions were discharged.

33. Having heard argument from 20 to 22 July 1987, the Vice-Chancellor gave judgment on the last-mentioned date, discharging the Millett injunctions and dismissing the claim for an injunction against S.T.

The Vice-Chancellor's reasons may be briefly summarised as follows.

(a) There had, notably in view of the publication in the United States (see paragraphs 28-29 above), been a radical change of circumstances, and it had to be considered if it would be appropriate to grant the injunctions in the new circumstances.

(b) Having regard to the case-law and notwithstanding the changed circumstances, it had to be assumed that the Attorney General still had an arguable case for obtaining an injunction against O.G. at the substantive trial; accordingly, the ordinary American Cyanamid principles (see paragraph 10 above) fell to be applied.

(c) Since damages would be an ineffective remedy for the Attorney General and would be no compensation to the newspapers, it had to be determined where the balance of convenience lay; the preservation of confidentiality should be favoured unless another public interest outweighed it.

(d) Factors in favour of continuing the injunctions were: the proceedings were only interlocutory; there was nothing new or urgent about Mr Wright's allegations; the injunctions would bind all the media, so that there would be no question of discrimination; undertakings not to publish were still in force in Australia; to discharge the injunctions would mean that the courts were powerless to preserve confidentiality; to continue the injunctions would discourage others from following Mr Wright's example.

(e) Factors in favour of discharging the injunctions were: publication in the United States had destroyed a large part of the purpose of the Attorney General's actions; publications in the press, especially those concerning allegations of unlawful conduct in the public service, should not be restrained unless this was unavoidable; the courts would be brought into disrepute if they made orders manifestly incapable of achieving their purpose.

(f) The matter was quite nicely weighted and in no sense obvious but, with hesitation, the balance fell in favour of discharging the injunctions.

The Attorney General immediately appealed against the Vice-Chancellor's decision; pending the appeal the injunctions against O.G., but not the injunction against S.T. (see paragraph 32 above), were continued in force.

34. In a judgment of 24 July 1987 the Court of Appeal held that:

(a) the Vice-Chancellor had erred in law in various respects, so that the Court of Appeal could exercise its own discretion;

(b) in the light of the American publication of Spycatcher, it was inappropriate to continue the Millett injunctions in their original form;

(c) it was, however, appropriate to vary these injunctions to restrain publication in the course of business of all or part of the book or other statements by or attributed to Mr Wright on security matters, but to permit "a summary in very general terms" of his allegations.

The members of the Court of Appeal considered that continuation of the injunctions would: serve to restore confidence in the Security Service by showing that memoirs could not be published without authority (Sir John Donaldson, Master of the Rolls); serve to protect the Attorney General's rights until the trial (Lord Justice Ralph Gibson); or fulfil the courts' duty of deterring the dissemination of material written in breach of confidence (Lord Justice Russell).

The Court of Appeal gave leave to all parties to appeal to the House of Lords.

35. After hearing argument from 27 to 29 July 1987 (when neither side supported the Court of Appeal's compromise solution), the Appellate Committee of the House of Lords gave judgment on 30 July, holding, by a majority of three (Lord Brandon of Oakbrook, Lord Templeman and Lord Ackner) to two (Lord Bridge of Harwich - the immediate past Chairman of the Security Commission - and Lord Oliver of Aylmerton), that the Millett injunctions should continue. In fact, they subsequently remained in force until the commencement of the substantive trial in the breach of confidence actions on 23 November 1987 (see paragraph 39 below).

The majority also decided that the scope of the injunctions should be widened by the deletion of part of the proviso that had previously allowed certain reporting of the Australian proceedings (see paragraph 19 above), since the injunctions would be circumvented if English newspapers were to reproduce passages from Spycatcher read out in open court. In the events that happened, this deletion had, according to the Government, no practical incidence on the reporting of the Australian proceedings.

36. The members of the Appellate Committee gave their written reasons on 13 August 1987; they may be briefly summarised as follows.

(a) Lord Brandon of Oakbrook

(i) The object of the Attorney General's actions against O.G. was the protection of an important public interest, namely the maintenance as far as possible of the secrecy of the Security Service; as was recognised in Article 10 para. 2 (art. 10-2) of the Convention, the right to freedom of expression was subject to certain exceptions, including the protection of national security.

(ii) The injunctions in issue were only temporary, being designed to hold the ring until the trial, and their continuation did not prejudge the decision to be made at the trial on the claim for final injunctions.

(iii) The view taken in the courts below, before the American publication, that the Attorney General had a strong arguable case for obtaining final injunctions at the trial was not really open to challenge.

(iv) Publication in the United States had weakened that case, but it remained arguable; it was not clear whether, as a matter of law, that publication had caused the newspapers' duty of non-disclosure to lapse. Although the major part of the potential damage adverted to by Sir Robert Armstrong (see paragraph 16 above) had already been done, the courts might still be able to take useful steps to reduce the risk of similar damage by other Security Service employees in the future. This risk was so serious that the courts should do all they could to minimise it.

(v) The only way to determine the Attorney General's case justly and to strike the proper balance between the public interests involved was to hold a substantive trial at which evidence would be adduced and subjected to cross-examination.

(vi) Immediate discharge of the injunctions would completely destroy the Attorney General's arguable case at the interlocutory stage, without his having had the opportunity of having it tried on appropriate evidence.

(vii) Continuing the injunctions until the trial would, if the Attorney General's claims then failed, merely delay but not prevent the newspapers' right to publish information which, moreover, related to events that had taken place many years in the past.

(viii) In the overall interests of justice, a course which could only result in temporary and in no way irrevocable damage to the cause of the newspapers was to be preferred to one which might result in permanent and irrevocable damage to the cause of the Attorney General.

(b) Lord Templeman (who agreed with the observations of Lords Brandon and Ackner)

(i) The appeal involved a conflict between the right of the public to be protected by the Security Service and its right to be supplied with full information by the press. It therefore involved consideration of the Convention, the question being whether the interference constituted by the injunctions was, on 30 July 1987, necessary in a democratic society for one or more of the purposes listed in Article 10 para. 2 (art. 10-2).

(ii) In terms of the Convention, the restraints were necessary in the interests of national security, for protecting the reputation or rights of others, for preventing the disclosure of information received in confidence and for maintaining the authority of the judiciary. The restraints would prevent harm to the Security Service, notably in the form of the mass circulation, both now and in the future, of accusations to which its members

could not respond. To discharge the injunctions would surrender to the press the power to evade a court order designed to protect the confidentiality of information obtained by a member of the Service.

(c) Lord Ackner (who agreed with the observations of Lord Templeman)

(i) It was accepted by all members of the Appellate Committee that: the Attorney General had an arguable case for a permanent injunction; damages were a worthless remedy for the Crown which, if the Millett injunctions were not continued, would lose forever the prospect of obtaining permanent injunctions at the trial; continuation of the Millett injunctions was not a "final locking-out" of the press which, if successful at the trial, would then be able to publish material that had no present urgency; there was a real public interest, that required protection, concerned with the efficient functioning of the Security Service and it extended, as was not challenged by the newspapers, to discouraging the use of the United Kingdom market for the dissemination of unauthorised memoirs of Security Service officers.

(ii) It would thus be a denial of justice to refuse to allow the injunctions to continue until the trial, for that would sweep aside the public-interest factor without any trial and would prematurely and permanently deny the Attorney General any protection from the courts.

(d) Lord Bridge of Harwich

(i) The case in favour of maintaining the Millett injunctions - which had been properly granted in the first place - would not be stronger at the trial than it was now; it would be absurd to continue them temporarily if no case for permanent injunctions could be made out.

(ii) Since the Spycatcher allegations were now freely available to the public, it was manifestly too late for the injunctions to serve the interest of national security in protecting sensitive information.

(iii) It could be assumed that the Attorney General could still assert a bare duty binding on the newspapers, but the question was whether the Millett injunctions could still protect an interest of national security of sufficient weight to justify the resultant encroachment on freedom of speech. The argument that their continuation would have a deterrent effect was of minimal weight.

(iv) The attempt to insulate the British public from information freely available elsewhere was a significant step down the road to censorship characteristic of a totalitarian regime and, if pursued, would lead to the Government’s condemnation and humiliation by the European Court of Human Rights.

(e) Lord Oliver of Aylmerton

(i) Mr Justice Millett’s initial order was entirely correct.

(ii) The injunctions had originally been imposed to preserve the confidentiality of what were at the time unpublished allegations, but that confidentiality had now been irrevocably destroyed by the publication of Spycatcher. It was questionable whether it was right to use the injunctive remedy against the newspapers (who had not been concerned with that publication) for the remaining purpose which the injunctions might serve, namely punishing Mr Wright and providing an example to others.

(iii) The newspapers had presented their arguments on the footing that the Attorney General still had an arguable case for the grant of permanent injunctions and there was force in the view that the difficult and novel point of law involved should not be determined without further argument at the trial. However, in the light of the public availability of the Spycatcher material, it was difficult to see how it could be successfully argued that the newspapers should be permanently restrained from publishing it and the case of the Attorney General was unlikely to improve in the meantime. No arguable case for permanent injunctions at the trial therefore remained and the Millett injunctions should accordingly be discharged.

H. Conclusion of the Australian proceedings; further publication of Spycatcher

37. On 24 September 1987 the New South Wales Court of Appeal delivered judgment dismissing the Attorney General's appeal (see paragraph 21 above); the majority held that his claim was not justiciable in an Australian court since it involved either an attempt to enforce indirectly the public laws of a foreign State or a determination of the question whether publication would be detrimental to the public interest in the United Kingdom.

The Attorney General appealed to the High Court of Australia. In view of the publication of Spycatcher in the United States and elsewhere, that court declined to grant temporary injunctions restraining its publication in Australia pending the hearing; it was published in that country on 13 October. The appeal was dismissed on 2 June 1988, on the ground that, under international law, a claim - such as the Attorney General's - to enforce British governmental interests in its security service was unenforceable in the Australian courts.

Further proceedings brought by the Attorney General against newspapers for injunctions were successful in Hong Kong but not in New Zealand.

38. In the meantime publication and dissemination of Spycatcher and its contents continued worldwide, not only in the United States (around 715,000 copies were printed and nearly all were sold by October 1987) and in Canada (around 100,000 copies printed), but also in Australia (145,000 copies printed, of which half were sold within a month) and Ireland (30,000 copies printed and distributed). Nearly 100,000 copies were sent to various

European countries other than the United Kingdom and copies were distributed from Australia in Asian countries. Radio broadcasts in English about the book were made in Denmark and Sweden and it was translated into twelve other languages, including ten European.

III. THE SUBSTANTIVE PROCEEDINGS IN ENGLAND

A. Breach of confidence

39. On 27 October 1987 the Attorney General instituted proceedings against S.T. for breach of confidence; in addition to injunctive relief, he sought a declaration and an account of profits. The substantive trial of that action and of his actions against O.G. (see paragraph 15 above) - in which, by an amendment of 30 October, he now claimed a declaration as well as an injunction - took place before Mr Justice Scott in the High Court in November-December 1987. He heard evidence on behalf of all parties, the witnesses including Sir Robert Armstrong (see paragraph 16 above). He also continued the interlocutory injunctions, pending delivery of his judgment.

40. Mr Justice Scott gave judgment on 21 December 1987; it contained the following observations and conclusions.

(a) The ground for the Attorney General's claim for permanent injunctions was no longer the preservation of the secrecy of certain information but the promotion of the efficiency and reputation of the Security Service.

(b) Where a duty of confidence is sought to be enforced against a newspaper coming into possession of information known to be confidential, the scope of its duty will depend on the relative weights of the interests claimed to be protected by that duty and the interests served by disclosure.

(c) Account should be taken of Article 10 (art. 10) of the Convention and the judgments of the European Court establishing that a limitation of free expression in the interests of national security should not be regarded as necessary unless there was a "pressing social need" for the limitation and it was "proportionate to the legitimate aims pursued".

(d) Mr Wright owed a duty to the Crown not to disclose any information obtained by him in the course of his employment in MI5. He broke that duty by writing Spycatcher and submitting it for publication, and the subsequent publication and dissemination of the book amounted to a further breach, so that the Attorney General would be entitled to an injunction against Mr Wright or any agent of his, restraining publication of Spycatcher in the United Kingdom.

(e) O.G. were not in breach of their duty of confidentiality, created by being recipients of Mr Wright's unauthorised disclosures, in publishing

their respective articles of 22 and 23 June 1986 (see paragraph 14 above): the articles were a fair report in general terms of the forthcoming trial in Australia and, furthermore, disclosure of two of Mr Wright's allegations was justified on an additional ground relating to the disclosure of "iniquity".

(f) S.T., on the other hand, had been in breach of the duty of confidentiality in publishing the first instalment of extracts from the book on 12 July 1987 (see paragraph 27 above), since those extracts contained certain material which did not raise questions of public interest outweighing those of national security.

(g) S.T. were liable to account for the profits accruing to them as a result of the publication of that instalment.

(h) The Attorney General's claims for permanent injunctions failed because the publication and worldwide dissemination of Spycatcher since July 1987 had had the result that there was no longer any duty of confidence lying on newspapers or other third parties in relation to the information in the book; as regards this issue, a weighing of the national security factors relied on against the public interest in freedom of the press showed the latter to be overwhelming.

(i) The Attorney General was not entitled to a general injunction restraining future publication of information derived from Mr Wright or other members of the Security Service.

After hearing argument, Mr Justice Scott imposed fresh temporary injunctions pending an appeal to the Court of Appeal; those injunctions contained a proviso allowing reporting of the Australian proceedings (see paragraphs 19 and 35 above).

41. On appeal by the Attorney General and a cross-appeal by S.T., the Court of Appeal (composed of Sir John Donaldson, Master of the Rolls, Lord Justice Dillon and Lord Justice Bingham) affirmed, on 10 February 1988, the decision of Mr Justice Scott.

However, Sir John Donaldson disagreed with his view that the articles in the Observer and The Guardian had not constituted a breach of their duty of confidence and that the claim for an injunction against these two newspapers in June 1986 was not "proportionate to the legitimate aim pursued". Lord Justice Bingham, on the other hand, disagreed with Mr Justice Scott's view that S.T. had been in breach of duty by publishing the first instalment of extracts from Spycatcher, that they should account for profits and that the Attorney General had been entitled, in the circumstances as they stood in July 1987, to injunctions preventing further serialisation.

After hearing argument, the Court of Appeal likewise granted fresh temporary injunctions, pending an appeal to the House of Lords; O.G. and S.T. were given liberty to apply for variation or discharge if any undue delay arose.

42. On 13 October 1988 the Appellate Committee of the House of Lords (Lord Keith of Kinkel, Lord Brightman, Lord Griffiths, Lord Goff of

Chieveley and Lord Jauncey of Tullichettle) also affirmed Mr Justice Scott's decision. Dismissing an appeal by the Attorney General and a cross-appeal by S.T., it held:

> "(i) That a duty of confidence could arise in contract or in equity and a confidant who acquired information in circumstances importing such a duty should be precluded from disclosing it to others; that a third party in possession of information known to be confidential was bound by a duty of confidence unless the duty was extinguished by the information becoming available to the general public or the duty was outweighed by a countervailing public interest requiring disclosure of the information; that in seeking to restrain the disclosure of government secrets the Crown must demonstrate that disclosure was likely to damage or had damaged the public interest before relief could be granted; that since the world-wide publication of Spycatcher had destroyed any secrecy as to its contents, and copies of it were readily available to any individual who wished to obtain them, continuation of the injunctions was not necessary; and that, accordingly, the injunctions should be discharged.
>
> (ii) (Lord Griffiths dissenting) that the articles of 22 and 23 June [1986] had not contained information damaging to the public interest; that the Observer and The Guardian were not in breach of their duty of confidentiality when they published [those] articles; and that, accordingly, the Crown would not have been entitled to a permanent injunction against both newspapers.
>
> (iii) That The Sunday Times was in breach of its duty of confidence in publishing its first serialised extract from Spycatcher on 12 July 1987; that it was not protected by either the defence of prior publication or disclosure of iniquity; that imminent publication of the book in the United States did not amount to a justification; and that, accordingly, The Sunday Times was liable to account for the profits resulting from that breach.
>
> (iv) That since the information in Spycatcher was now in the public domain and no longer confidential no further damage could be done to the public interest that had not already been done; that no injunction should be granted against the Observer and The Guardian restraining them from reporting on the contents of the book; and that (Lord Griffiths dissenting) no injunction should be granted against The Sunday Times to restrain serialising of further extracts from the book.
>
> (v) That members and former members of the Security Service owed a lifelong duty of confidence to the Crown, and that since the vast majority of them would not disclose confidential information to the newspapers it would not be appropriate to grant a general injunction to restrain the newspapers from future publication of any information on the allegations in Spycatcher derived from any member or former member of the Security Service."

B. Contempt of court

43. The substantive trial of the Attorney General's actions for contempt of court against The Independent, The London Evening Standard, the London Daily News (see paragraph 22 above), S.T. (see paragraph 27 above) and certain other newspapers took place before Mr Justice Morritt in

the High Court in April 1989. On 8 May he held, inter alia, that The Independent and S.T. had been in contempt of court and imposed a fine of £50,000 in each case.

44. On 27 February 1990 the Court of Appeal dismissed appeals by the latter two newspapers against the finding that they had been in contempt but concluded that no fines should be imposed. A further appeal by S.T. against the contempt finding was dismissed by the Appellate Committee of the House of Lords on 11 April 1991.

PROCEEDINGS BEFORE THE COMMISSION

45. In their application (no. 13585/88) lodged with the Commission on 27 January 1988, O.G. alleged that the interlocutory injunctions in question constituted an unjustified interference with their freedom of expression, as guaranteed by Article 10 (art. 10) of the Convention. They further claimed that, contrary to Article 13 (art. 13), they had no effective remedy before a national authority for their Article 10 (art. 10) complaint and that they were victims of discrimination in breach of Article 14 (art. 14).

46. The Commission declared the application admissible on 5 October 1989. In its report of 12 July 1990 (Article 31) (art. 31), it expressed the opinion:

(a) by six votes to five, that there had been a violation of Article 10 (art. 10) in respect of temporary injunctions imposed on O.G. for the period from 11 July 1986 to 30 July 1987;

(b) unanimously, that there had been a violation of Article 10 (art. 10) in respect of temporary injunctions imposed on O.G. for the period from 30 July 1987 to 13 October 1988;

(c) unanimously, that there had been no violation of Article 13 or Article 14 (art. 13, art. 14) .

The full text of the Commission’s opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment[*].

[*] Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 216 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

47. At the hearing on 25 June 1991, the Government invited the Court to make the findings set out in their memorial, namely that there had been no breach of O.G.'s rights under Articles 10, 13 or 14 (art. 10, art. 13, art. 14).

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10) OF THE CONVENTION

48. O.G. alleged that, by reason of the interlocutory injunctions to which they had been subject from 11 July 1986 to 13 October 1988, they had been victims of a violation of Article 10 (art. 10) of the Convention, which provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

This allegation was contested by the Government. It was accepted by the Commission, by a majority as regards the period from 11 July 1986 to 30 July 1987 and unanimously as regards the period from 30 July 1987 to 13 October 1988.

49. The restrictions complained of clearly constituted, as was not disputed, an "interference" with O.G.'s exercise of their freedom of expression, as guaranteed by paragraph 1 of Article 10 (art. 10-1). Such an interference entails a violation of Article 10 (art. 10) if it does not fall within one of the exceptions provided for in paragraph 2 (art. 10-2); the Court must therefore examine in turn whether the interference was "prescribed by law", whether it had an aim or aims that is or are legitimate under Article 10 para. 2 (art. 10-2) and whether it was "necessary in a democratic society" for the aforesaid aim or aims.

A. Was the interference "prescribed by law"?

50. O.G. did not deny that the grant of the interlocutory injunctions was in accordance with domestic law. Although they laid no emphasis on this point at the hearing, they did maintain in their memorial that the interference complained of was not "prescribed by law" for the purposes of Article 10 (art. 10). This contention was challenged by the Government and was not accepted by the Commission.

51. It is true that the Attorney General's actions for breach of confidence raised issues of law which were not clarified until judgment had been given on the merits. However, O.G.'s complaint was not directed to this aspect of the case, but solely to the legal principles upon which the injunctions were granted, which principles were, in their submission, neither adequately accessible nor sufficiently foreseeable (see the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 31, para. 49).

52. In the Court's view, no problem arises concerning accessibility, since the relevant guidelines had been enunciated by the House of Lords several years previously, in 1975, in American Cyanamid Co. v. Ethicon Ltd (see paragraph 10 above).

53. (a) As regards foreseeability, O.G. advanced three specific arguments.

(i) It was not clear whether the American Cyanamid decision had overruled certain earlier rules relating to the grant of injunctions in particular areas of the law. The Court notes, however, that O.G. themselves recognised that the principles laid down in that decision had been expressed to be applicable to all classes of action.

(ii) There had never been a case similar to theirs in which the American Cyanamid principles had been applied. This fact, in the Court's view, is of little consequence in the present context: since the principles were expressed to be of general application, recourse had perforce to be had to them from time to time in novel situations, so that their utilisation on this occasion involved no more than the application of existing rules to a different set of circumstances.

(iii) It was not until judgment was given on the merits of the Attorney General's actions (see paragraphs 39-42 above) that it became clear that an injunction would be granted in a case of this kind only on proof of potential detriment to the public interest. This, however, suggests that there was a greater likelihood of a restriction being imposed under the law as it stood previously.

(b) More generally, having examined the American Cyanamid principles in the light of its above-mentioned Sunday Times judgment (Series A no. 30), and especially paragraph 49 thereof, the Court entertains no doubt that they were formulated with a degree of precision that is sufficient in a matter of this kind. It considers that O.G. must have been able to foresee, to an

extent that was reasonable in the circumstances, a risk that the interlocutory injunctions would be imposed.

54. The interference was accordingly "prescribed by law".

B. Did the interference have aims that are legitimate under Article 10 para. 2 (art. 10-2)?

55. The Government submitted that the interlocutory injunctions were designed to protect the Attorney General's rights at the substantive trial and therefore had the aim, that was legitimate in terms of paragraph 2 of Article 10 (art. 10-2), of "maintaining the authority of the judiciary". Before the Court, they also asserted that the injunctions indirectly served the aim of protecting national security, since the underlying purpose of the Attorney General's actions was to prevent the effective operation of the Security Service from being undermined.

Although O.G. expressed certain reservations on the second of these points, they did not seek to deny that the interference had a legitimate aim.

56. The Court is satisfied that the injunctions had the direct or primary aim of "maintaining the authority of the judiciary", which phrase includes the protection of the rights of litigants (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 34, para. 56). Perusal of the relevant domestic judgments makes it perfectly clear that the purpose of the order made against O.G. was - to adopt the description given by Lord Oliver of Aylmerton (Attorney General v. Times Newspapers Ltd [1991] 2 Weekly Law Reports 1019G) - "to enable issues between the plaintiff and the defendants to be tried without the plaintiff's rights in the meantime being prejudiced by the doing of the very act which it was the purpose of the action to prevent".

It is also incontrovertible that a further purpose of the restrictions complained of was the protection of national security. They were imposed, as has just been seen, with a view to ensuring a fair trial of the Attorney General's claim for permanent injunctions against O.G. and the evidential basis for that claim was the two affidavits sworn by Sir Robert Armstrong, in which he deposed to the potential damage which publication of the Spycatcher material would cause to the Security Service (see paragraph 16 above). Not only was that evidence relied on by Mr Justice Millett when granting the injunctions initially (see paragraph 18 (e) above), but considerations of national security featured prominently in all the judgments delivered by the English courts in this case (see paragraphs 18, 34, 36 and 40 above). The Court would only comment - and it will revert to this point in paragraph 69 below - that the precise nature of the national security considerations involved varied over the course of time.

57. The interference complained of thus had aims that were legitimate under paragraph 2 of Article 10 (art. 10-2).

C. Was the interference "necessary in a democratic society"?

58. Argument before the Court was concentrated on the question whether the interference complained of could be regarded as "necessary in a democratic society". After summarising the relevant general principles that emerge from its case-law, the Court will, like the Commission, examine this issue with regard to two distinct periods, the first running from 11 July 1986 (imposition of the Millett injunctions) to 30 July 1987 (continuation of those measures by the House of Lords), and the second from 30 July 1987 to 13 October 1988 (final decision on the merits of the Attorney General's actions for breach of confidence).

1. General principles

59. The Court's judgments relating to Article 10 (art. 10) - starting with Handyside (7 December 1976; Series A no. 24), concluding, most recently, with Oberschlick (23 May 1991; Series A no. 204) and including, amongst several others, Sunday Times (26 April 1979; Series A no. 30) and Lingens (8 July 1986; Series A no. 103) - enounce the following major principles.

(a) Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.

(b) These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".

(c) The adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (art. 10).

(d) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review

under Article 10 (art. 10) the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

60. For the avoidance of doubt, and having in mind the written comments that were submitted in this case by "Article 19" (see paragraph 6 above), the Court would only add to the foregoing that Article 10 (art. 10) of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such. This is evidenced not only by the words "conditions", "restrictions", "preventing" and "prevention" which appear in that provision, but also by the Court's Sunday Times judgment of 26 April 1979 and its markt intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989 (Series A no. 165). On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.

2. The period from 11 July 1986 to 30 July 1987

61. In assessing the necessity for the interference with O.G.'s freedom of expression during the period from 11 July 1986 to 30 July 1987, it is essential to have a clear picture of the factual situation that obtained when Mr Justice Millett first imposed the injunctions in question.

At that time O.G. had only published two short articles which, in their submission, constituted fair reports concerning the issues in the forthcoming hearing in Australia; contained information that was of legitimate public concern, that is to say allegations of impropriety on the part of officers of the British Security Service; and repeated material which, with little or no action on the part of the Government to prevent this, had for the most part already been made public.

Whilst substantially correct, these submissions do not tell the whole story. They omit, in the first place, O.G.'s acknowledgment, before Mr Justice Millett, that they wished to be free to publish further information deriving directly or indirectly from Mr Wright and disclosing alleged unlawful activity on the part of the Security Service, whether or not it had been previously published (see paragraph 18 (b) above). What they also omit is the fact that in July 1986 Spycatcher existed only in manuscript form. It was not then known precisely what the book would contain and, even if the previously-published material furnished some clues in this respect, it might have been expected that the author would seek to say

something new. And it was not unreasonable to suppose that where a former senior employee of a security service - an "insider", such as Mr Wright - proposed to publish, without authorisation, his memoirs, there was at least a risk that they would comprise material the disclosure of which might be detrimental to that service; it has to be borne in mind that in such a context damaging information may be gleaned from an accumulation of what appear at first sight to be unimportant details. What is more, it was improbable in any event that all the contents of the book would raise questions of public concern outweighing the interests of national security.

62. Mr Justice Millett's decision to grant injunctions - which, in the subsequent stages of the interlocutory proceedings, was accepted as correct not only by the Court of Appeal but also by all the members of the Appellate Committee of the House of Lords (see paragraph 18 in fine above) - was based on the following line of reasoning. The Attorney General was seeking a permanent ban on the publication of material the disclosure of which would, according to the credible evidence presented on his behalf, be detrimental to the Security Service; to refuse interlocutory injunctions would mean that O.G. would be free to publish that material immediately and before the substantive trial; this would effectively deprive the Attorney General, if successful on the merits, of his right to be granted a permanent injunction, thereby irrevocably destroying the substance of his actions and, with it, the claim to protect national security.

In the Court's view, these reasons were "relevant" in terms of the aims both of protecting national security and of maintaining the authority of the judiciary. The question remains whether they were "sufficient".

63. In this connection, O.G. objected that the interlocutory injunctions had been granted on the basis of the American Cyanamid principles which, in their opinion, were incompatible with the criteria of Article 10 (art. 10). They maintained that, in a case of this kind, those principles were unduly advantageous to the plaintiff since he had to establish only that he had an arguable case and that the balance of convenience lay in favour of injunctive relief; in their submission, a stricter test of necessity had to be applied when it was a question of restricting publication by the press on a matter of considerable public interest.

The American Cyanamid case admittedly related to the alleged infringement of a patent and not to freedom of the press. However, it is not the Court's function to review those principles in abstracto, but rather to determine whether the interference resulting from their application was necessary having regard to the facts and circumstances prevailing in the specific case before it (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 41, para. 65).

In any event, perusal of the relevant judgments reveals that the English courts did far more than simply apply the American Cyanamid principles inflexibly or automatically; they recognised that the present case involved a

conflict between the public interest in preventing and the public interest in allowing disclosure of the material in question, which conflict they resolved by a careful weighing of the relevant considerations on either side.

In forming its own opinion, the Court has borne in mind its observations concerning the nature and contents of Spycatcher (see paragraph 61 above) and the interests of national security involved; it has also had regard to the potential prejudice to the Attorney General's breach of confidence actions, this being a point that has to be seen in the context of the central position occupied by Article 6 (art. 6) of the Convention and its guarantee of the right to a fair trial (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 34, para. 55). Particularly in the light of these factors, the Court takes the view that, having regard to their margin of appreciation, the English courts were entitled to consider the grant of injunctive relief to be necessary and that their reasons for so concluding were "sufficient" for the purposes of paragraph 2 of Article 10 (art. 10-2).

64. It has nevertheless to be examined whether the actual restraints imposed were "proportionate" to the legitimate aims pursued.

In this connection, it is to be noted that the injunctions did not erect a blanket prohibition. Whilst they forbade the publication of information derived from or attributed to Mr Wright in his capacity as a member of the Security Service, they did not prevent O.G. from pursuing their campaign for an independent inquiry into the operation of that service (see paragraph 14 above). Moreover, they contained provisos excluding certain material from their scope, notably that which had been previously published in the works of Mr Chapman Pincher and in the Granada Television programmes (see paragraph 19 above). Again, it was open to O.G. at any time to seek - as they in fact did (see paragraphs 23 and 26 above) - variation or discharge of the orders.

It is true that although the injunctions were intended to be no more than temporary measures, they in fact remained in force - as far as the period now under consideration is concerned - for slightly more than a year. And this is a long time where the perishable commodity of news is concerned (see paragraph 60 above). As against this, it may be pointed out that the Court of Appeal (see paragraph 19 above) certified the case as fit for a speedy trial - which O.G. apparently did not seek - and that the news in question, relating as it did to events that had occurred several years previously, could not really be classified as urgent. Furthermore, the Attorney General's actions raised difficult issues of both fact and law: time was accordingly required for the preparation of the trial, especially since, as Lord Brandon of Oakbrook pointed out (see paragraph 36 (a) (v) above), they were issues on which evidence had to be adduced and subjected to cross-examination.

65. Having regard to the foregoing, the Court concludes that, as regards the period from 11 July 1986 to 30 July 1987, the national authorities were

entitled to think that the interference complained of was "necessary in a democratic society".

3. The period from 30 July 1987 to 13 October 1988

66. On 14 July 1987 Spycatcher was published in the United States of America (see paragraph 28 above). This changed the situation that had obtained since 11 July 1986. In the first place, the contents of the book ceased to be a matter of speculation and their confidentiality was destroyed. Furthermore, Mr Wright's memoirs were obtainable from abroad by residents of the United Kingdom, the Government having made no attempt to impose a ban on importation (see paragraph 29 above).

67. In the submission of the Government, the continuation of the interlocutory injunctions during the period from 30 July 1987 to 13 October 1988 nevertheless remained "necessary", in terms of Article 10 (art. 10), for maintaining the authority of the judiciary and thereby protecting the interests of national security. They relied on the conclusion of the House of Lords in July 1987 that, notwithstanding the United States publication: (a) the Attorney General still had an arguable case for permanent injunctions against O.G., which case could be fairly determined only if restraints on publication were imposed pending the substantive trial; and (b) there was still a national security interest in preventing the general dissemination of the contents of the book through the press and a public interest in discouraging the unauthorised publication of memoirs containing confidential material.

68. The fact that the further publication of Spycatcher material could have been prejudicial to the trial of the Attorney General's claims for permanent injunctions was certainly, in terms of the aim of maintaining the authority of the judiciary, a "relevant" reason for continuing the restraints in question. The Court finds, however, that in the circumstances it does not constitute a "sufficient" reason for the purposes of Article 10 (art. 10).

It is true that the House of Lords had regard to the requirements of the Convention, even though it is not incorporated into domestic law (see paragraph 36 above). It is also true that there is some difference between the casual importation of copies of Spycatcher into the United Kingdom and mass publication of its contents in the press. On the other hand, even if the Attorney General had succeeded in obtaining permanent injunctions at the substantive trial, they would have borne on material the confidentiality of which had been destroyed in any event - and irrespective of whether any further disclosures were made by O.G. - as a result of the publication in the United States. Seen in terms of the protection of the Attorney General's rights as a litigant, the interest in maintaining the confidentiality of that material had, for the purposes of the Convention, ceased to exist by 30 July 1987 (see, mutatis mutandis, the Weber judgment of 22 May 1990, Series A no. 177, p. 23, para. 51).

69. As regards the interests of national security relied on, the Court observes that in this respect the Attorney General's case underwent, to adopt the words of Mr Justice Scott, "a curious metamorphosis" (Attorney General v. Guardian Newspapers Ltd (no. 2) [1990] 1 Appeal Cases 140F). As emerges from Sir Robert Armstrong's evidence (see paragraph 16 above), injunctions were sought at the outset, inter alia, to preserve the secret character of information that ought to be kept secret. By 30 July 1987, however, the information had lost that character and, as was observed by Lord Brandon of Oakbrook (see paragraph 36 (a) (iv) above), the major part of the potential damage adverted to by Sir Robert Armstrong had already been done. By then, the purpose of the injunctions had thus become confined to the promotion of the efficiency and reputation of the Security Service, notably by: preserving confidence in that Service on the part of third parties; making it clear that the unauthorised publication of memoirs by its former members would not be countenanced; and deterring others who might be tempted to follow in Mr Wright's footsteps.

The Court does not regard these objectives as sufficient to justify the continuation of the interference complained of. It is, in the first place, open to question whether the actions against O.G. could have served to advance the attainment of these objectives any further than had already been achieved by the steps taken against Mr Wright himself. Again, bearing in mind the availability of an action for an account of profits (see paragraphs 39-42 above), the Court shares the doubts of Lord Oliver of Aylmerton (see paragraph 36 (e)(ii) above) as to whether it was legitimate, for the purpose of punishing Mr Wright and providing an example to others, to use the injunctive remedy against persons, such as O.G., who had not been concerned with the publication of Spycatcher. Above all, continuation of the restrictions after July 1987 prevented newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern.

70. Having regard to the foregoing, the Court concludes that the interference complained of was no longer "necessary in a democratic society" after 30 July 1987.

D. Conclusion

71. To sum up, there was a violation of Article 10 (art. 10) from 30 July 1987 to 13 October 1988, but not from 11 July 1986 to 30 July 1987.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, TAKEN IN CONJUNCTION WITH ARTICLE 10 (art. 14+10)

72. O.G. complained that newspapers published abroad, which could be freely imported into the United Kingdom, were not bound by the

interlocutory injunctions; they thus had an advantage over the Observer and The Guardian in that country as well as in the latter's overseas markets. O.G. alleged that on this account they had been victims of a violation of Article 14 of the Convention taken in conjunction with Article 10 (art. 14+10), the former provision reading as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

73. The factual basis for the foregoing complaint was in part contested by the Government, who maintained that the publishers and distributors of foreign newspapers within the United Kingdom would, by operation of the law of contempt of court (see paragraph 30 above), equally have been subject to the restraints in question. In any event, the Court agrees with the Government and the Commission that this complaint has to be rejected.

Article 14 (art. 14) affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see, for example, the Fredin judgment of 18 February 1991, Series A no. 192, p. 19, para. 60). If and in so far as foreign newspapers were subject to the same restrictions as O.G., there was no difference of treatment. If and in so far as they were not, this was because they were not subject to the jurisdiction of the English courts and hence were not in a situation similar to that of O.G.

74. There was thus no violation of Article 14 taken in conjunction with Article 10 (art. 14+10).

III. ALLEGED VIOLATION OF ARTICLE 13 (art. 13) OF THE CONVENTION

75. O.G. complained of the fact that the English courts did not apply the proper principles in relation to Article 10 (art. 10) and that neither that provision nor the case-law relevant thereto had been incorporated into English law. They alleged that on this account they had been victims of a violation of Article 13 (art. 13) of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

76. The Court agrees with the Government and the Commission that this allegation has to be rejected.

The thrust of O.G.'s complaint under the Convention was that the imposition of interlocutory injunctions constituted an unjustified interference with their freedom of expression and it is clear that they not only could but also did raise this issue in substance before the domestic

courts. And it has to be recalled that the effectiveness of a remedy, for the purposes of Article 13 (art. 13), does not depend on the certainty of a favourable outcome (see the Soering judgment of 7 July 1989, Series A no. 161, p. 48, para. 122).

As regards the specific matters pleaded, the Court has held on several occasions that there is no obligation to incorporate the Convention into domestic law (see, for example, the James and Others judgment of 21 February 1986, Series A no. 98, p. 47, para. 84). Again, Article 13 (art. 13) does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention (see the same judgment, p. 47, para. 85).

77. There has accordingly been no violation of Article 13 (art. 13).

IV. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

78. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

O. G. made no claim for compensation for damage, but they did seek underalso o this provision reimbursement of their legal costs and expenses in the domestic and the Strasbourg proceedings, in a total amount of £212,430.28.

The Court has examined this issue in the light of the criteria established in its case-law and of the observations submitted by the Government and the applicants.

A. The domestic proceedings

79. The claim in respect of the domestic proceedings totalled £137,825.05. It did not extend to the 1987 hearing before the Vice-Chancellor (see paragraphs 32-33 above), the costs of which had already been paid by the Government to the applicants. Its breakdown is as follows:

(a) for the Court of Appeal hearing ended on 25 July 1986 (see paragraph 19 above): £55,624.11 (composed of £23,526.23 for the fees and disbursements of the applicants' solicitors and counsel, £17,364.29 for interest thereon for the period from 25 July 1986 to 25 June 1991 and £14,733.59 for the costs and interest paid by the applicants to the Attorney General);

(b) for the Court of Appeal hearing ended on 24 July 1987 (see paragraph 34 above): £31,098.20 (composed of £14,310.29 for the fees and

disbursements of the applicants' solicitors and counsel, £8,421.50 for interest thereon for the period from 24 July 1987 to 25 June 1991 and £8,366.41 for the costs and interest paid by the applicants to the Attorney General);

(c) for the House of Lords hearing ended on 30 July 1987 (see paragraphs 35-36 above): £51,102.74 (composed of £43,102.74 for the fees and disbursements of the applicants' solicitors and counsel and £8,000 for the costs paid by the applicants to the Attorney General).

80. The Court's observations on this claim are as follows.

(a) Having found no violation in respect of the period from 11 July 1986 to 30 July 1987 (see paragraphs 61-65 and 71 above), it agrees with the Government that no award should be made in respect of costs referable to the 1986 Court of Appeal hearing. However, the same does not apply to those referable to the 1987 Court of Appeal hearing: although the latter proceedings took place within the period in question, they post-dated the publication of Spycatcher in the United States of America (see paragraphs 28-29 above) and, like those before the House of Lords in 1987, are to be regarded as an attempt to obtain, through the domestic legal order, prevention of the violation that the Court has found to have occurred in the period from 30 July 1987 to 13 October 1988 (see paragraphs 66-71 above).

(b) The Court is unable to accept the Government's submission that the extra costs attributable to the fact that the Observer applicants and the Guardian applicants were represented by different firms of solicitors should be disallowed. They were entitled to instruct such lawyers as they chose. Nevertheless, bearing in mind that the interests of both sets of applicants were substantially the same, the Court shares the Government's view that the charges for the services of the total number of fee earners involved cannot all be considered to have been "necessarily" incurred.

(c) The Court also agrees with the Government's submission that the costs charged by the solicitors concerned cannot be regarded as reasonable as to quantum for the purposes of Article 50 (art. 50); furthermore, it also accepts that some reduction should be made in the amount claimed for counsel's fees before the House of Lords.

(d) The Court notes that, as regards the 1987 Court of Appeal hearing, the Government have raised no objection to the applicants' claim for interest and that the sum paid by the latter to the Attorney General itself included interest.

81. Having regard to the foregoing, the Court awards to the applicants, in respect of their own costs (including interest on those incurred in the Court of Appeal) and the amounts paid by them to the Attorney General, the sum of £65,000.

B. The Strasbourg proceedings

82. On the applicants' claim in respect of costs and expenses referable to the Strasbourg proceedings (totalling £74,605.23), the Court's observations are as follows.

(a) A reduction should be made to reflect the fact that no violation was found to have occurred in the period from 11 July 1986 to 30 July 1987. On the other hand, it would not be appropriate to make a significant reduction in respect of the unsuccessful complaints of breach of Articles 13 and 14 (art. 13, art. 14) (see paragraphs 72-77 above), since the bulk of the work done by the applicants' advisers related to Article 10 (art. 10) (see, mutatis mutandis, the Granger judgment of 28 March 1990, Series A no. 174, p. 21, para. 55).

(b) The remarks in paragraph 80(c) above concerning the solicitors' charges apply equally to the Strasbourg proceedings.

The Court also considers that, in the circumstances, certain of the amounts claimed by way of counsel's fees exceed what can be regarded as reasonable as between the parties.

83. Having regard to the foregoing, the Court awards the sum of £35,000.

C. Conclusion

84. The total amount to be paid to the applicants is accordingly £100,000. This figure is to be increased by any value-added tax that may be chargeable.

FOR THESE REASONS, THE COURT

1. Holds by fourteen votes to ten that there was no violation of Article 10 (art. 10) of the Convention during the period from 11 July 1986 to 30 July 1987;

2. Holds unanimously that there was a violation of Article 10 (art. 10) during the period from 30 July 1987 to 13 October 1988;

3. Holds unanimously that there has been no violation of Article 13 (art. 13) or of Article 14 taken in conjunction with Article 10 (art. 14+10);

4. Holds unanimously that the United Kingdom is to pay, within three months, to the applicants jointly the sum of £100,000 (one hundred thousand pounds), together with any value-added tax that may be chargeable, for costs and expenses;

5. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 November 1991.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Mr Pettiti, joined by Mr Pinheiro Farinha;

(b) partly dissenting opinion of Mr Walsh;

(c) partly dissenting opinion of Mr De Meyer (concerning prior restraint), joined by Mr Pettiti, Mr Russo, Mr Foighel and Mr Bigi;

(d) separate opinion of Mr De Meyer (concerning domestic remedies), joined by Mr Pettiti;

(e) separate opinion of Mr Valticos;

(f) partly dissenting opinion of Mr Martens;

(g) partly dissenting opinion of Mr Pekkanen; (h) partly dissenting opinion of Mr Morenilla.

R.R.
M.-A.E.

PARTLY DISSENTING OPINION OF JUDGE PETTITI, JOINED BY JUDGE PINHEIRO FARINHA

(Translation)

I voted for a violation of Article 10 (art. 10) also in respect of the first period, unlike the majority. In my view there was a violation as much for the first period concerning the Observer and The Guardian as for the second which also concerned The Sunday Times. Indeed I consider it to be contradictory to adopt a different position on these two periods while reaffirming the fundamental value in a democracy of the freedom of expression.

The injunction originated in the proposal to publish in Australia in 1985 Mr Wright's memoirs which included material already revealed by the books of Mr Pincher and by the Granada television programmes in the United Kingdom. "Secret agents" often publish their memoirs after their retirement and this does not in general give cause for concern to the States in question. The pretext for the proceedings instituted in Australia was not a betrayal of State secrets but a breach of confidentiality. The articles in the Observer and The Guardian of June 1986 concerned similar facts. The courts concluded that the source of the material was Spycatcher's publishers. The proceedings instituted by the Attorney General were founded on the breach of confidentiality. The interlocutory injunction issued by Mr Justice Millett in July 1986, based on a failure to comply with the duty of discretion, already constituted in my view an infringement of the freedom of expression. That freedom cannot be made subject to the criterion of confidentiality, otherwise there would no longer be any literature.

In any event the extension of the injunction beyond a few days or weeks (until October 1988) constituted an additional infringement of the freedom of expression, because where the press is concerned a delay in relation to items of current affairs deprives a journalist's article of a large part of its interest. The publication in America and in Europe of more significant memoirs by the heads of secret services has never given rise to a similar prohibition (see in France the books of Mr de Maranches and Mr Marion).

One gets the impression that the extreme severity of Mr Justice Millett's injunction and of the course adopted by the Attorney General was less a question of the duty of confidentiality than the fear of disclosure of certain irregularities carried out by the security service in the pursuit of political rather than intelligence aims.

In this respect there was a violation of the right to receive information, which is the second component of Article 10 (art. 10). To deprive the public of information on the functioning of State organs is to violate a fundamental democratic right.

However, the majority of the Court concerned itself with the first aspect rather than the second.

If the State believes that a publication puts at risk State secrets or national security, there are other procedural means at its disposal. If the State contests a failure to comply with the duty of discretion on the part of a retired civil servant, appropriate procedures are available. In the present case the State did not prosecute Mr Wright.

However, the United Kingdom should, by virtue of the positive obligation imposed by the European Convention, have secured the public's right to be informed. At the hearing the Government did not enlarge upon this issue.

An interim injunction, not subsequently lifted after a short period, is in effect a disguised means of instituting censure or restraint on the freedom of the press (other disguised means used in other countries include prosecution for alleged tax offences). The violation is in my view all the more patent in that it is confirmed by the decision finding a violation as regards the second period.

The majority's reasoning is indeed based on interference with the freedom of expression; but to explain the contrary decision concerning the first period the Court confines itself to stating as follows:

> "What they also omit is the fact that in July 1986 Spycatcher existed only in manuscript form. It was not then known precisely what the book would contain and, even if the previously-published material furnished some clues in this respect, it might have been expected that the author would seek to say something new. And it was not unreasonable to suppose that where a former senior employee of a security service - an 'insider', such as Mr Wright - proposed to publish, without authorisation, his memoirs, there was at least a risk that they would comprise material the disclosure of which might be detrimental to that service; it has to be borne in mind that in such a context damaging information may be gleaned from an accumulation of what appear at first sight to be unimportant details. What is more, it was improbable in any event that all the contents of the book would raise questions of public concern outweighing the interests of national security." (see paragraph 61 of the judgment)

The contradiction in the way the two periods were viewed is in my opinion the following: on the one hand, a decision imposing a restriction based on mere suppositions or assumptions by the Attorney General and the competent court is regarded as justified; on the other, the publication of the book in the United States and then its partial circulation are said to have rendered the continuation of the injunction unjustified.

But freedom of expression in one country cannot be made subject to whether or not the material in question has been published in another country. In the era of satellite television it is impossible to partition territorially thought and its expression or to restrict the right to information of the inhabitants of a country whose newspapers are subject to a prohibition.

The publication abroad was not truly material to the pretext invoked initially, namely confidentiality, because that had already been breached by Mr Pincher's books and the Granada programmes before Mr Justice Millett's order and because it was in any case very relative. It is possible, with hindsight, to measure the weakness of the Attorney General's argument, although he persisted with the proceedings in 1987 and in 1988. This requirement of confidentiality, which according to him was of major importance, was as it turned out regarded as insignificant by the courts as soon as the information had become known abroad and the book Spycatcher reached the United Kingdom clandestinely in the luggage of a few citizens and tourists.

It is true that in the decision on the merits Mr Justice Scott, in keeping with the great liberal and judicial tradition of the United Kingdom, found that the Observer and The Guardian had not infringed the duty of discretion, but he did so belatedly, not until 21 December 1987.

On 13 October 1988 the House of Lords rightly decided that it was not necessary to restrain the Observer and The Guardian from disseminating the contents of the book.

These contradictory decisions of eminent judges show the lack of clarity of the position adopted by the Attorney General. The first decision of the United Kingdom courts remains a surprising one. If the majority of the Court had reasoned on the basis of the "right to receive information" aspect, it would undoubtedly have found a violation for both periods.

It may be recalled that in the Elliniki Radiophonia Tiléorassi - Anonini Etairia case (Case no. 260/89), Mr Lenz, Advocate General at the Court of Justice of the European Communities, made the following observations in his Opinion: (unofficial translation)

"49. The Rules of the Convention must be regarded as an integral part of the Community legal system. Television Directive ... indicates in this connection that the first paragraph of Article 10 (art. 10) of the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by all the Member States, applied to the broadcasting and distribution of television services, is likewise a specific manifestation in Community law of a more general principle, namely the freedom of expression. This right must therefore be observed by the Community organs.

50. However, it is also clear that the Court of Justice is not required to rule in the first instance on alleged or real violations by the Member States of the human rights secured under that Convention (that is the role of the organs so designated by the European Convention on Human Rights); ..."

The judgment of the Court of Justice of the European Communities, delivered on 18 June 1991, contains the following passage: (unofficial translation)

> "41. As regards Article 10 (art. 10) of the European Convention on Human Rights ..., it should be noted in the first place that, as the Court has consistently held,

fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In so doing, the Court draws inspiration from constitutional traditions common to the Member States and from indications provided by the international treaties for the protection of human rights on which the member States have collaborated or of which they are signatories (see, inter alia, the judgment of 14 May 1974, Nold, Case no. 4/73 ECR [1974] 491, at paragraph 13). In this connection the European Convention on Human Rights is of particular significance (see, inter alia, the judgment of 15 May 1986, Johnston Case no. 222/84, ECR [1986] 1651, paragraph 18). It follows that, as the Court affirmed in the judgment of 13 July 1989, Wachauf (Case no. 5/88, ECR [1989] 2609, at paragraph 19), measures incompatible with the respect for the human rights therein recognised and secured are not permissible in the Community."

The eminent judge Lord Bridge appositely observed in the House of Lords in his dissenting opinion:

"Freedom of speech is always the first casualty under a totalitarian regime. Such a regime cannot afford to allow the free circulation of information and ideas among its citizens. Censorship is the indispensable tool to regulate what the public may and what they may not know. The present attempt to insulate the public in this country from information which is freely available elsewhere is a significant step down that very dangerous road. The maintenance of the ban, as more and more copies of the book Spycatcher enter this country and circulate here, will seem more and more ridiculous. If the Government are determined to fight to maintain the ban to the end, they will face inevitable condemnation and humiliation by the European Court of Human Rights in Strasbourg. Long before that they will have been condemned at the bar of public opinion in the free world." ([1987] 1 Weekly Law Reports 1286F)

The same line of thought is reflected in the words of Mr Redwood, a United Kingdom Secretary of State, when he gave vent to his anxiety concerning the "current flood of restrictive directives from the EEC which threatens the freedom of expression" (Le Monde, 3 November 1991).

The protection afforded by Article 10 (art. 10) is therefore essential; this has always been the approach of the European Court in its judgments: Sunday Times I, Barthold, Lingens.

The defence of democracy cannot be achieved without the freedom of the press. The countries of Eastern Europe which have thrown off the shackles of totalitarian rule have well understood this. The European Court through all its earlier judgments has shown its attachment to the protection of freedom of expression and the priority which this is acknowledged to have.

To remain consistent with its case-law it should, in my view, have found a violation for both periods.

The Council of Europe has together with the organs of the European Convention a crucial task: this is to introduce true freedom of expression in all its forms and at the same time guarantee the public’s right to receive information. This acquired democratic right must be preserved if we wish to protect freedom of thought!

PARTLY DISSENTING OPINION OF JUDGE WALSH

1. I agree with the majority of the Court that in respect of the period 30 July 1987 to 13 October 1988 there was a violation of Article 10 (art. 10) of the Convention by reason of the injunctions imposed on the applicants in respect of that period.

2. Unlike the majority of the Court I am of opinion that there was also a breach of Article 10 (art. 10) in respect of the period 11 July 1986 to 30 July 1987.

3. Freedom of the press is not totally unrestricted. The press in its pursuit of news is not free to counsel or to procure the commission of acts which are illegal, and may be restrained in appropriate cases from publishing material so gained, or may be liable in damages or may suffer both restraint and damages. In so far as breach of confidentiality amounts to an illegality either on the criminal side or on the civil side the newspapers will be so liable in respect of matters the revelation of which they have counselled or procured.

4. Their liability is not necessarily the same when their news gathering has benefited from windfall revelations which may have resulted from some breach of confidence for which they have no responsibility. It is a legitimate activity of the press to follow up such news and to publish the results of their inquiries provided in so doing they do not come in conflict with, say, national security. However that cannot be invoked to gain a restriction simply by an expression of opinion on the part of the authorities as was the case here. The issues of breach of confidence and national security were joined by the Government in the present case to the extent that the lines between them were blurred in the initial application for an injunction. The truth or falsity of the "revelations" was not put in issue. It appears to me that for the purposes of Article 10 (art. 10) of the Convention the publication of "revelations" cannot be restrained without at least an allegation of their truth by the moving party. If, as was done in the Australian hearing, the Government simply "admits the truth" for the purposes of the case the application to restrain becomes moot. Sufficient of the allegations by Mr Wright had already become public to enable the truth or otherwise of them to be ascertained. The identification of Mr Wright as the source did not affect that issue.

Even if the truth of the principal allegations is to be assumed, namely that the Security Service agents had indulged in illegal activities, that had already been publicly aired in a manner which left no doubt that Mr Wright, by his writings, conversations and television interview, was at least one source of the allegations. The applicant newspapers campaigned for an investigation of the allegations and their subsequent conduct was in furtherance of that campaign. They were not engaged directly or indirectly in debriefing Mr Wright on other knowledge he had gained as a secret

service agent. There was no indication that the newspapers were intent on publishing any material other than what was directly related to information already published and which it had not been sought to restrain. The "revelation" that Mr Wright was personally involved in the commission of the alleged illegal activities could scarcely be regarded as a restrainable piece of information in the light of all that was already known.

5. In view of the fact that the claim of confidentiality made in support of the initial application for a restraining order never made clear that a true breach of confidentiality was imminent, namely that true facts were threatened with disclosure, the Attorney General's position, which it was sought to protect, was never really made known at that stage. In my opinion the circumstances were insufficient to bring the case within the area of restrictions permitted by Article 10 para. 2 (art. 10-2) of the Convention.

It is clear that the matters the applicants had wished to deal with were of great interest to the public and perhaps even of concern. The public interest invoked by the Government appears to be equated with Government policy. That policy may very well justify, in the Government's view, making every effort to stem leakages from the Security Service or indeed in the interests of that service to take no action at all to deal with the allegations or indeed to pursue Mr Wright in any way available. These are policy matters and are not grounds for invoking the restrictions permitted by Article 10 para. 2 (art. 10-2) . Equally it may be understandable that, as was evident, the main objective of the proceedings was to act as a deterrent to those who in the future might be tempted to reveal secrets gained from their work as agents or members of the Security Service. That, however, is not a consideration which can justify the application of the restrictions on the press permitted by Article 10 para. 2 (art. 10-2). The relief sought against the applicants, as distinct from Mr Wright, has not been shown to have been, in all the circumstances, necessary in the democratic society which is the United Kingdom.

PARTLY DISSENTING OPINION OF JUDGE DE MEYER (concerning prior restraint), JOINED BY JUDGES PETTITI, RUSSO, FOIGHEL AND BIGI

I cannot endorse the Court's reasoning concerning prior restraint upon publications. Nor can I agree with its finding that, in the present case, the applicants' right to freedom of expression was not violated before the end of July 1987.

In my view, it was violated not only after that date and until the case was concluded in October 1988, but already from the very beginning of the proceedings in June 1986, when the Attorney General set about seeking injunctions against them.

My reasons for so finding are simple.

I firmly believe that "the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraint"[*]: in a free and democratic society there can be no room, in time of peace, for restrictions of that kind, and particularly not if these are resorted to, as they were in the present case, for "governmental suppression of embarrassing information"[**] or ideas.

Of course, those who publish any material which a pressing social need required should remain unpublished may subsequently be held liable in court, as may those acting in breach of a duty of confidentiality. They may be prosecuted if and in so far as this is prescribed by penal law, and they may in any case be sued for compensation if damage has been caused. They may also be subject to other sanctions provided for by law, including, as the case may be, confiscation and destruction of the material in question and forfeiture of the profit obtained.

Under no circumstances, however, can prior restraint, even in the form of judicial injunctions, either temporary or permanent, be accepted, except in what the Convention describes as a "time of war or other public emergency

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[*] Justice Black, joined by Justice Douglas, in the case, very similar to the present one, of the Pentagon Papers, New York Times v. U.S. and U.S. v. Washington Post (1971), 403 U.S. 713, at 717. Although they were there used in the context of the Constitution of the United States of America, these words perfectly express the general principle to be applied in this field.

[**] Justice Douglas, joined by Justice Black, in the same case, at 723-724.

threatening the life of the nation" and, even then, only "to the extent strictly required by the exigencies of the situation"[***].

[***] Article 15 (art. 15) of the Convention.

SEPARATE OPINION OF JUDGE DE MEYER (concerning domestic remedies), JOINED BY JUDGE PETTITI

I cannot subscribe to the third sub-paragraph of paragraph 76 of this judgment.

The reasons given in the second sub-paragraph suffice to conclude that there was, in the present case, no violation of the right of the applicants to an "effective remedy before a national authority".

The question whether a certain treaty is, or is not, "incorporated into domestic law" may be of some interest as regards other kinds of treaties. It has no relevance when fundamental rights are concerned: these are of such a nature that it cannot be necessary to have them formally "incorporated into domestic law".

As I stated already on another occasion, the object and purpose of the European Convention on Human Rights was not to create, but to recognise rights which must be respected and protected even in the absence of any instrument of positive law[*]. It has to be accepted that, everywhere in Europe, these rights "bind the legislature, the executive and the judiciary, as directly applicable law"[**] and as "supreme law of the land, ... anything in the constitution or laws of any State to the contrary notwithstanding"[***].

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[*] See my opinion concerning the Belilos case, Series A no. 132, p. 36. See also Article 1 (art. 1) of the Convention, particularly in the French text.

[**] See Article 1, section 3, of the Basic Law of the Federal Republic of Germany.

[***] See Article VI, section 2, of the Constitution of the United States of America.

SEPARATE OPINION OF JUDGE VALTICOS

(Translation)

While in full agreement with the foregoing judgment, I wish to comment on a passage which appears at paragraph 76 of the text. It is recalled therein, at the third sub-paragraph, that "the Court has held on several occasions that there is no obligation to incorporate the Convention into domestic law". This statement is correct, but remains somewhat over-succinct.

It cannot of course be disputed that under international law the strict obligation incumbent on States which ratify a convention concerning their legislation and their practice is to give effect to the convention at national level and that this does not necessarily mean that the actual terms of the convention must as such be transposed into the domestic legal system. What is essential is that the convention is, in one way or another, complied with. All this is beyond question and indeed elementary.

There is however in this connection a tendency towards over-simplification which leads to confusion. The starting point is that the formal effects which the ratification of a convention entails at domestic level naturally depend on the national constitutional system or practice and that, in this respect, under the said system (or practice) in several countries (moreover an increasing number of them) that ratification entails the incorporation of the ratified text into domestic law, while in others the two orders (international and municipal) remain distinct, even though sometimes the ratifying statute expressly enacts this incorporation. It is also worth noting that such incorporation is moreover effective, at least directly, only if the convention provisions are - according to the generally accepted expression - self-executing, in other words capable of execution without implementation by more specific (national) rules. All this is well-known and calls to mind old academic quarrels, happily mostly forgotten, and I trust that I shall be forgiven for recalling these self-evident truths.

I consider nevertheless that it is necessary to return, at least indirectly, to this question here because I wish to draw the following conclusion: yes, the Court is right when it affirms once again that States are not bound to incorporate the actual terms of the Convention into their national legal system. This statement should however be supplemented by adding: "but they are of course under a duty to give it effect". Some will say that this is only to state the obvious. Indeed it is, but the affirmation should be further qualified by: "and the obligation to give it effect is often best fulfilled where the terms of the Convention are transposed into the domestic legal system". This has nothing to do with national constitutional systems or with the old "monist" v. "dualist" quarrels. What is suggested is that the States whose constitutional system does not automatically effect such incorporation should carry it out by an express measure, whether legislative or otherwise,

following the ratification, accompanying it, if necessary, by provisions intended either to implement the provisions of a general nature or to adapt the national system to the new standards. Who would dispute that the national courts, whose attention would thus be drawn to the very terms of the Convention, which will have become national law, would find in the provisions, even the general ones, of the Convention, elements and criteria rendering their full application easier, and this may be the case even where the Government concerned consider that the existing legislation or case-law already gives effect to the Convention standards?

Although such a measure is not obligatory, it is nevertheless highly desirable with a view to ensuring not only better knowledge of the Convention but certainly also a more complete implementation thereof. This is the general conclusion which I have arrived at after more than thirty years of practice in the sphere of application of international conventions concerning human rights. It is, in the instant case, the necessary addition to the principle briefly set out by the Court.

PARTLY DISSENTING OPINION OF JUDGE MARTENS

A. Introduction

1. Like the majority of the Court, I consider that the interim injunctions, as maintained by Mr Justice Millett in his judgment of 11 July 1986, constituted an interference with O.G.'s exercise of their freedom of expression, within the meaning of paragraph 1 of Article 10 (art. 10-1). Unlike the majority, however, I find myself unable to accept that this interference was justified under paragraph 2 of that Article (art. 10-2) even during the period from 11 July 1986 to 30 July 1987.

More specifically, I am not satisfied that the requirement of necessity was met.

B. Particular features of the present case

2. The interim injunctions sought by the Attorney General against O.G. formed part of the legal campaign on which the British Government embarked when they learned that Mr Wright intended to publish his memoirs. This campaign started with the Attorney General's claim in the Australian courts for an injunction to restrain publication of the book. It continued when, after publishing short articles giving details of some of the contents of the book, O.G. refused to give undertakings that were acceptable to the Attorney General: he then sought permanent injunctions against any publication by O.G. of Spycatcher material and, within the ambit of these proceedings, interim injunctions to the same effect. Such interim injunctions were granted ex parte on 27 June 1986 and then continued, with some modifications, by Mr Justice Millett in his aforementioned judgment.

3. In legal terms, this campaign was based on the proposition that the disclosure by Mr Wright of information derived by him from his work for the Security Service would constitute a breach of a duty of confidentiality, as would disclosure by O.G., since they had obtained the information knowing that it originated from that breach. However, the Government's principal concern was - as Mr Justice Millett put it - "not with what Mr Wright says, but with the fact that it is a former senior officer of the Security Service who says it". Accordingly, their campaign was mainly designed to secure implementation of the idea that members of the Security Service - to quote the same judge - "simply cannot be allowed to write their memoirs". The appearance of confidentiality being essential to the effective operation of the Security Service, the damage caused by the news that one of its former senior members was contemplating publishing his memoirs could - to borrow again from Mr Justice Millett's judgment - "be undone

only if he was swiftly and effectively stopped, and seen to be stopped" (emphasis added). This applied to all indirect publication as well.

4. O.G., however, wished to be free to publish information which might come into their possession, even if it derived directly or indirectly from Mr Wright, in so far as it disclosed misconduct or unlawful activities on the part of members of the Security Service. Like Mr Wright in the Australian proceedings, they claimed that it was in the public interest that evidence of such misconduct should be published, part of such evidence being that the allegations thereof were made by a former senior officer of the service on the basis of information acquired by him whilst employed by it.

5.1 It follows from paragraph 4 that the impugned interim injunctions do constitute what is commonly called a "prior restraint".

5.2 When giving judgment on the appeal from Mr Justice Millett's decision, the Master of the Rolls started by saying, somewhat deprecatingly: "'Prior Restraint' are two of the most emotive words in the media vocabulary." There is, however, no ground for deprecating the emotion these words tend to generate, because they designate, especially with regard to the media, what undoubtedly is, after censorship, the most serious form of interference with a freedom which, as this Court has rightly emphasised time and again, constitutes one of the essential foundations of a democratic society (see, as the most recent example, the Oberschlick judgment of 23 May 1991, Series A no. 204, paras. 57 et seq.). In the present case the prior restraint concerned, moreover, possible comment by two "responsible newspapers" (I quote again from the Master of the Rolls) "in the context of public debate on a political question of general interest" (borrowed from paragraph 60 of the Oberschlick judgment). Its consequences were all the more dramatic since, under the doctrine of contempt of court as understood (apparently for the first time) by the Court of Appeal in the Independent case, it gagged not only O.G. but all media within the jurisdiction of the English courts.

C. The Court's task when reviewing necessity

6. In its Handyside judgment of 7 December 1976 (Series A no. 24, pp. 23-24, para. 50) the Court had already made it clear that when reviewing the "necessity" of an interference it had to decide, on the basis of the different data available, "whether the reasons given by the national authorities to justify the actual measures of 'interference' they take are relevant and sufficient under Article 10 para. 2 (art. 10-2)" (idem: the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 38, para. 62, and the Barthold judgment of 25 March 1985, Series A no. 90, p. 25, para. 55). Recently, in paragraph 60 of its aforementioned Oberschlick judgment, the Court specified that this test implies that it has to satisfy itself that the national authorities "did apply standards which were in conformity with

these principles" - i.e. the principles to be derived from Article 10 (art. 10) - "and, moreover, that in doing so they based themselves on an acceptable assessment of the relevant facts".

D. Application of this test

7. Accordingly, in order to determine whether the prior restraint can be held justified it is necessary to examine very carefully: (a) whether, in deciding to impose this exceptional measure, the national authorities did apply standards which were in conformity with the principles to be derived from Article 10 (art. 10); and (b) whether, in doing so, they based themselves on an acceptable assessment of the relevant facts.

In my opinion, such examination cannot but lead to the conclusion that both limbs of this question must be answered in the negative. I will explain why.

E. The standards used

8. I start with the first limb: what standards were applied (paragraphs 9 and 10) and are they in conformity with the principles to be derived from Article 10 (art. 10) (paragraph 11)? I note that, in addressing these two questions, it is sufficient to analyse the judgment of Mr Justice Millett, because in the subsequent stages of the interlocutory proceedings not only was his decision held to be justified, but also no fundamental criticism was levelled as to the legal principles on which he had based it.

9.1 Mr Justice Millett started from the assumption that there was at best a conflict of two legitimate public interests: on the one hand, the (incontestable) interest the public has in the maintenance of confidentiality within any organisation as a condition for its efficiency and, on the other, the (possible) interest of the public in being informed of unlawful acts or other misconduct. He held that the applications to discharge the ex parte injunctions could be granted only if O.G. had satisfied him that the latter interest existed and outweighed the former.

9.2 Leaving aside (as immaterial for the present purposes) the complication that interim injunctions had already been granted ex parte so that it was O.G. who had to apply for their discharge, the conclusion must be that the standard used by the national judge for deciding whether or not to impose a prior restraint was: an interim injunction sought for the purpose of preserving confidentiality should be granted unless the defendant satisfies the court that (a) disclosure is in the public interest and (b) this interest outweighs the interest in preserving confidentiality.

10.1 Mr Justice Millett left open the question whether the standard he used was an exception to or an application of the American Cyanamid principles (see, for these principles, paragraph 10 of the Court’s judgment),

but held that he was satisfied that pecuniary compensation to either party would be wholly inappropriate. He continued by saying that, "in resolving the conflict" of interests, one of the particular facts he had to take into account was that "a refusal of injunctive relief may cause irreparable harm and effectively deprive the plaintiff of his right".

10.2 In my opinion, one can only infer from these and similar passages that the judge did apply the American Cyanamid principles, at least to the extent of tacitly assuming that the material before him did not disclose that the Attorney General did not have any real prospect of succeeding in his claim for a permanent injunction.

11.1 Are these standards in conformity with the principles to be derived from Article 10 (art. 10)? I do not think so.

11.2 I take first Mr Justice Millett's starting-point, namely that there was at best a conflict between two legitimate public interests, one in the maintenance of confidentiality, the other in receiving information about misconduct or impropriety. Evidently, for him these two interests had, in principle, the same weight. This is, however, incompatible with Article 10 (art. 10). Under that provision the interest in freely receiving information clearly in principle outweighs the interest in "preventing the disclosure of information received in confidence": the latter interest is not in itself sufficient to justify an interference with the right to freedom of expression, but does so only if and in so far as the interference is "necessary in a democratic society". Similarly, under Article 10 (art. 10) it is not for the press, if threatened by a prior restraint, to ward off the interference by satisfying the court that (a) there is a public interest in imparting and receiving the information with regard to which the injunction is sought, and (b) this interest outweighs the interest in preserving the confidentiality of that information. That is to turn things topsy-turvy: under Article 10 (art. 10), freedom of the press is the rule and this implies that what has to be justified is the interference; therefore it is for the party seeking the restraint - in this case the Attorney General - to satisfy the court that the requirements of paragraph 2 are met, i.e. that the restraint can be said to be "necessary in a democratic society" (in the rather strict meaning these words have according to this Court's settled case-law) for the preservation of confidentiality.

11.3 Thus, the standard used unduly tipped the balance in advance in favour of the Attorney General, the party who was seeking to restrict freedom of expression. This is all the more serious because, when applying that standard, Mr Justice Millett - following the American Cyanamid principles as he did (see paragraph 10.2 above) - again favoured the Attorney General in a way which is incompatible with the principles to be derived from Article 10 (art. 10).

11.4 When applying the above standard, Mr Justice Millett was, as he pointed out, taking into account "that this is an interlocutory application and

not the trial". Yet, without more ado, he also took into account that refusal of injunctive relief might "deprive the plaintiff of his right". In particular, he did so without going explicitly into the question whether the plaintiff in fact had any right and without inquiring what the Attorney General's chances were of obtaining permanent injunctions at the trial. As I have already said in paragraph 10.2 above, it must be inferred that the judge confined himself to ascertaining that, on the material before him, it could not be said that on the face of it the Attorney General's claim did not have any real chance of success.

11.5 When assessing whether this approach is in conformity with the principles to be derived from Article 10 (art. 10), it is important to realise that the interim injunction sought by the Attorney General in the interlocutory proceedings was merely a derivative from the permanent injunction sought by him in the main proceedings. I say "merely a derivative" because the interim injunction did not serve an independent purpose, but was intended solely to prevent (further) indirect publication until the court had had the opportunity to take a final decision as to whether indirect publication would be allowed or not.

11.6 It is also to be noted that under Article 10 (art. 10) both the interim and the permanent injunction could be granted only if they could be said to be "necessary in a democratic society". Just as the interim injunction is merely a derivative from the permanent one, so the necessity requirement for granting the former is but a derivative from that for granting the latter. Accordingly, the application for the interlocutory prior restraint could be granted only if the court were satisfied at that stage that the Attorney General's claim in the main proceedings would probably meet the requirement of necessity. It could hold the interlocutory injunction to be "necessary", within the meaning of Article 10 para. 2 (art. 10-2), only if it were satisfied that the claim for a permanent injunction would probably be accepted. If that was open to serious doubts or even merely uncertain, the interference could hardly be qualified as necessary: this, as the Court has repeatedly and rightly stressed, is a rather strict requirement, especially where the freedom of expression of the press in matters of public interest is at stake.

11.7 It follows that: (a) to comply with the principles to be derived from Article 10 (art. 10), Mr Justice Millett should have imposed the interim prior restraint only if the Attorney General had satisfied him that the claim for a permanent injunction would probably succeed; and (b) by confining himself to examining whether it was evident that that claim did not have any real chance of success, the judge in fact applied a standard which was at variance with those principles.

F. The assessment of the facts

12.1 I now turn to the second limb of the question outlined in paragraph 7 above: was Mr Justice Millett's decision based on an acceptable assessment of the relevant facts? And I note that the expression "the relevant facts" implies (inter alia) reviewing whether facts that should have been taken into account under Article 10 (art. 10) were indeed duly considered. In this respect, I recall that the injunctions sought by the Attorney General against O.G. formed part of the legal campaign on which the British Government embarked when they learned that Mr Wright intended to publish his memoirs. Within the ambit of this campaign the relationship between the English and the Australian proceedings was similar to that which existed between the interlocutory and the main proceedings in England, as outlined in paragraphs 11.5 and 11.6 above: just as the Attorney General started the interim proceedings in order to preserve his position in his claim for a permanent injunction restraining all indirect publication of Spycatcher material, so he made that claim in order to preserve his position in the Australian case, where he asked for an injunction restraining publication of the book itself.

It follows that the probable outcome of the English proceedings (the relevance of which has been discussed in paragraphs 11.4 - 11.7 above) would depend to a large extent on that of the Australian proceedings: would the Attorney General's endeavours to stop the imminent publication of the memoirs be likely to succeed? If their success would have been open to serious doubts, the same would have applied to the prospects of his claim for a permanent injunction against O.G. If, at the moment when the English courts would have to decide whether or not to grant that claim, his action concerning direct publication had already failed or was likely to do so shortly, those courts would hardly be in a position to hold that a permanent injunction against indirect publication should nevertheless be regarded as necessary.

12.2 These considerations show that Mr Justice Millett should have asked himself whether it was likely that the Government would attain what he - after a judicious analysis of the allegations made and the evidence submitted by the Attorney General - rightly considered as their goal, namely to stop swiftly and effectively Mr Wright's attempts to publish memoirs which should not even have been written (see paragraph 3 above). The learned judge failed, however, to do so and therefore cannot be said to have based his decision on an acceptable assessment of the relevant facts (see paragraph 6 above).

12.3 There is a second and, to my mind, still more important ground for so holding, namely that, if the question whether the Government would succeed in effectively keeping Spycatcher from the public had been considered, it should have been answered in the negative.

As the Government had been advised, proceedings to restrain publication of the book in the United States of America would fail (see paragraph 28 of the judgment). It was likely (and the events in 1987 clearly confirmed this) that Mr Wright had been similarly advised. It does not appear that Mr Justice Millett considered the repercussions of these facts and yet, within the context of the relationship between the English and the Australian proceedings, they are of decisive importance. The impossibility of preventing publication in the United States highlights that in this "age of information" information and ideas just cannot be stopped at frontiers any longer. Article 10 para. 1 (art. 10-1) has explicitly drawn the legal consequences of this situation. Accordingly, under Article 10 (art. 10) the impossibility of restraining publication in the United States perforce implied that restraint in Australia could not be held to be "necessary", within the meaning of paragraph 2. It is immaterial whether the Australian courts would have drawn this conclusion when confronted with that impossibility. For it is the conclusion which a court in a member State should have drawn and that is what should have been deemed decisive in the context of the dispute between O.G. and the United Kingdom.

These considerations suggest that one of the respects in which I differ from the majority of the Court comes down to this: whereas for them the fact that the book had been published in the United States in the meantime is the sole decisive reason for holding that prior restraint on indirect publication in England was thenceforth no longer justified, for me the fact that the book could be legally published in the United States made it, even at the time when the Attorney General introduced his breach of confidence actions, so unlikely that Mr Wright could effectively be stopped that the interim injunction should never have been granted. But Mr Justice Millett did not take this factor into account, just as he did not consider what chances the Attorney General had of winning the Australian case.

G. Conclusion

13. To sum up: in my opinion, Mr Justice Millett’s decision was based on standards that were not in conformity with the principles to be derived from Article 10 (art. 10) and also on a factual assessment which, in the light of this provision, is incomplete to a decisive degree. I therefore find myself unable to accept that, even during the period from 11 July 1986 to 30 July 1987, the interference was "necessary" under paragraph 2 of that Article (art. 10-2).

PARTLY DISSENTING OPINION OF JUDGE PEKKANEN

I regret that I am unable to agree with the majority of the Court that there was no violation of Article 10 (art. 10) of the Convention on account of the temporary injunctions binding on the applicants in the period from 11 July 1986 to 30 July 1987.

I agree with the majority that Article 10 (art. 10) does not prohibit the imposition on the press of prior restraints, as such, on the publication of certain news or information. However, taking into account the vital importance in a democratic society of freedom of expression and freedom of the press, the State's margin of appreciation in these cases is very narrow indeed. The use of prior restraints must be based, in my opinion, on exceptionally relevant and weighty reasons which clearly outweigh the public's legitimate interest in receiving news and information without hindrance. This leads me to the general conclusion that prior restraints can be imposed on the press only in very rare and exceptional circumstances and usually only for very short periods of time.

The aim of the temporary injunctions in this instance was to preserve the status quo during judicial proceedings. As such, this is a legitimate aim. But was there a pressing social need for these measures in a democratic society and were they proportionate to the aims pursued?

First of all, I would stress that in today's world news and information travel very quickly and easily from country to country and that it is practically impossible to stop this. As the present case shows, temporary injunctions imposed on the Observer and Guardian applicants - which were binding on all the British media through the operation of the doctrine of the contempt of court - could not prevent the flow of the information in question from abroad. Prior restraint was, therefore, not an effective means of achieving the aim of preserving the status quo. Furthermore, before the temporary injunctions were granted, the confidentiality of the material concerned had to a large extent already been destroyed by previous publications and television interviews. Accordingly, there was no need for the restrictions on this occasion.

These considerations alone show, in my opinion, that in the instant case there was no pressing social need for so drastic a measure as prohibiting the press from disseminating information.

PARTLY DISSENTING OPINION OF JUDGE MORENILLA

1. I agree with the majority of the Court that the interlocutory injunctions imposed on the Observer and Guardian applicants ("O.G.") by Mr Justice Millett on 11 July 1986 ("the Millett injunctions") forbidding the publication of information obtained by Mr Peter Wright in his capacity as a member of the British Security Service - which injunctions extended to all the British media, including The Sunday Times, by virtue of the law of contempt of court and remained in force until 13 October 1988 - constituted an interference with O.G.'s freedom of expression and their right to hold opinions and to receive and impart information and ideas, guaranteed by Article 10 para. 1 (art. 10-1) of the Convention.

I also agree, but not without some hesitation, that this interference was "prescribed by law", as this expression is understood in the case-law of our Court (see the Sunday Times judgment of 26 April 1979, Series A no. 30, pp. 30-31, paras. 47-49): in accordance with the common-law system, it was based on judicial precedents and they were adequately accessible and the result of their application sufficiently foreseeable. Again, I share the majority's view that the injunctions were designed to protect the position of the Attorney General as a litigant pending the trial of his breach of confidence actions against O.G. and also served the purpose of protecting national security by preventing further dissemination of confidential information on the operation of the Security Service. Both of these aims are legitimate under paragraph 2 of Article 10 (art. 10-2).

I must, however, record my disagreement on the key issue, namely the necessity of such restrictions in a democratic society. At no time, in my opinion, were these temporary injunctions justified by a "pressing social need" or proportionate to any legitimate aims pursued. I must, therefore, dissent from the majority's conclusion regarding the period from 11 July 1986 to 30 July 1987.

2. In my view, this central issue should not have been separated into two periods, as was done by the Commission, "for the sake of clarity", and the majority of the Court. All the decisions, from that of Mr Justice Millett to that of the House of Lords in 1987, were part of the same interlocutory proceedings and O.G. were subject to essentially the same restrictions throughout the period from July 1986 to October 1988. Separating it into two has led to the somewhat inconsistent outcome of finding those restrictions to be partly in accordance with and partly in violation of the Convention.

On 29 April 1987 O.G. applied for the discharge of the Millett injunctions, notably because of reports that had appeared in three other English newspapers (see paragraphs 22-23 of the judgment). On 12 July 1987, a date intended to coincide with that of the publication of Spycatcher in the United States of America, The Sunday Times published a first extract

from the book (see paragraphs 27-28 of the judgment). Nevertheless, the House of Lords decided to maintain the injunctions and, as a result of the law of contempt of court, they bound all the British media, including The Sunday Times.

The publication of Spycatcher in the United States and the world-wide diffusion of Mr Wright's disclosures on the activities of MI5 are not "relevant", in my opinion, either to O.G.'s claim under Article 10 (art. 10) or to the breach of confidentiality that the Government imputed to them: they merely confirmed that to attempt to prevent the dissemination in English-speaking countries of information of general interest by imposing a judicial restraint on the British media was neither realistic nor effective.

3. The major principles emerging from the Court's case-law on Article 10 (art. 10) - with which principles I fully agree - are conveniently summarised in paragraph 59 of the present judgment and I do not need to elaborate on that summary here.

The Government have recalled the Court's observation, in its markt intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989 (Series A no. 165, p. 21, para. 37), that it should not substitute its own evaluation for that of the national courts where the latter, on reasonable grounds, have considered restrictions to be necessary. They have also submitted that the margin of appreciation to be afforded to the national authorities, in assessing whether the protection of national security demands the imposition of temporary restraints on publications, is a wide one.

The Court's observations in the markt intern case, which related to the publication in a specialised sector of the press of information of a commercial nature, do not in any way establish an exception to its supervisory jurisdiction, which is described in paragraph 59 (d) of the present judgment.

In the Convention system, the Court has been empowered to draw the line between the competence of the national courts and its own competence, while at the same time maintaining their respective responsibilities to secure the guaranteed rights and freedoms, according to Articles 1 and 19 (art. 1, art. 19). It is true that the State's margin of appreciation is wider when it is a question of protecting national security than when it is a question of maintaining the authority of the judiciary by safeguarding the rights of the litigants (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 36, para. 59, and the Leander judgment of 26 March 1987, Series A no. 116, p. 25, para. 59). However, the margin of appreciation concept must always be applied, taking into account the circumstances of each case, on the basis of a coherent interpretation of Article 10 (art. 10) in accordance with the European case-law and certainly not in a manner that could destroy the substance of freedom of expression.

4. The overriding importance of freedom of expression, the vital role of the press in a democratic society and the right of the public to receive

information on matters of general concern, all of which factors have been repeatedly emphasized in the case-law of this Court, required in the present case the application of a very strict test of necessity. When seeking to justify the restrictions imposed on O.G. on the grounds of the interests of national security and of preserving the Attorney General's rights until the trial, the Government have, in my opinion, failed to "establish convincingly" (see paragraph 59 (a) of the present judgment) that such a test was satisfied.

A. The interests-of-national-security issue

5. Like the members of the majority of the Commission, Mr Frowein, Mr Busuttil and Mr Weitzel, I am of the opinion that the primary concern of the English courts in the present case was not the protection of national security but the protection of confidentiality. The danger for national security was alleged indirectly, as resulting from the loss of confidentiality and the impairment of the efficiency and reliability of the Security Service. Thus, Mr Justice Millett said in his judgment (transcript, p. 11E-F): "It is obvious that a Security Service must be seen to be leak-proof. The appearance of confidentiality is essential for its proper functioning. Its members simply cannot be allowed to write their memoirs."

The interlocutory injunctions had the consequences that (1) a restraint was imposed without a full hearing of the plaintiff's arguments; and (2) the ban extended to all the media by operation of the common-law doctrine of criminal contempt of court. And, in fact, contempt of court proceedings were instituted against The Independent, The London Evening Standard, the London Daily News and The Sunday Times (see paragraphs 22 and 27 of the judgment).

The national judges were well aware of the gravity of the measure. Mr Justice Millett said in his judgment (transcript, p. 6B-C) that "prior restraint of publication is a serious interference with the freedom of the Press and the important constitutional right to freedom of speech". In the Court of Appeal on 25 July 1986, Sir John Donaldson began his judgment (transcript, p. 3A) by stating that "'Prior Restraint' are two of the most emotive words in the media vocabulary. Accordingly The Guardian and the Observer reacted swiftly and forcefully to news that Mr Justice MacPherson had granted an ex parte injunction on 27 June 1986 ...".

6. In fact, distrust for these provisional restraints on the press is long-established in the common-law tradition. Blackstone wrote in 1765 in his "Commentaries on the Law of England" a sentence which it has become obligatory to quote: "The liberty of the Press is indeed essential to the nature of a free State: but this consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published."

The United States case-law cited by "Article 19", the International Centre against Censorship (see paragraph 6 of the present judgment), has consistently held that the principal purpose of the First Amendment's guarantee is to prevent prior restraints. With regard to the national-security aim the United States Supreme Court declared in Near v. Minnesota (283 U.S./718) that: "The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right."

The other leading decisions of that Court, such as those in New York Times Co. Ltd v. the U.S., 403 U.S./713 (1971) (the Pentagon Papers case), Landmark Communications Inc. v. Virginia, 425 U.S./829 (1978) (the Landmark case), Nebraska Association v. Stuart, 427 U.S./ 593 (1976) and U.S. v. The Progressive, 486 F. supp. 990 (1979) (the Hydrogen Bomb case), have consistently required that very strict conditions ("all but totally absolute") must be satisfied before prior restraints can be imposed on the publication of information on matters related to national security. In the words of the Nebraska judgment, "the thread running through all these cases is that prior restraints on speech or publication are the most serious and least tolerable infringement on the First Amendment rights ... A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraints 'freeze' it, at least for a time." Justice Brennan, concurring with the judgment, stated "although variously expressed it was evident that even the exception was to be construed very, very narrowly: when disclosure 'will surely result in direct, immediate and irreparable damage to our nation or its people'".

7. While sharing the view of the majority expressed in paragraph 60 of the present judgment, I believe that restrictions on freedom of expression such as those imposed on O.G. allegedly to protect national security are very far from fulfilling these standards. The Government have not shown the "direct, immediate and irreparable damage" to the security of the United Kingdom that was or would have been occasioned by the articles published by O.G. or from the disclosures which it was feared at the time that Mr Wright might make. Mr Justice Millett said in his judgment (transcript, p. 10F): "It is clear from those passages [in Sir Robert Armstrong's affidavits] that the true nature of the Attorney General's objection is not to the fresh dissemination of allegations about past activities of the Security Service of the kind outlined in the recent articles published by the defendants. They are ancient history and have been the subject of widespread previous publicity."

The "appearance of confidentiality" may be "essential to the effective operation of the Security Service" - as it is to other public services - but, for the purposes of Article 10 para. 2 (art. 10-2) of the Convention, it does not,

in my opinion, of itself justify the imposition, on the grounds of protecting national security, of a prior restraint that impairs freedom of the press and the right of the public to be properly informed. Dissemination of the information in question could be restricted "only if it appeared absolutely certain" that its diffusion would have the adverse consequence legitimately feared by the State (see, mutatis mutandis, the above-mentioned Sunday Times judgment, Series A no. 30, pp. 41-42, para. 66).

The two Law Lords who dissented from the decision of the House of Lords of 30 July 1987 expressed their views on this point. Lord Bridge of Harwich said that "freedom of speech is always the first casualty under a totalitarian regime. Such a regime cannot afford to allow the free circulation of information and ideas among its citizens. Censorship is the indispensable tool to regulate what the public may and what they may not know. The present attempt to insulate the public in this country from information which is freely available elsewhere is a significant step down that very dangerous road" (Attorney General v. Guardian Newspapers Ltd [1987] 1 Weekly Law Reports 1286F). Lord Oliver of Aylmerton stated that "to attempt, even temporarily, to create a sort of judicial cordon sanitaire against the infection from abroad of public comment and discussion is not only, as I believe, certain to be ineffective but involves taking the first steps upon a very perilous path" (ibid., 1321D).

8. When considering whether the injunctions imposed on O.G. by the national authorities were necessary for and proportionate to the aim of protecting national security, I see the following circumstances as militating against the necessity of so serious a restriction.

(a) The Government had neither indicated precisely what information in the articles published by O.G. imperilled British security operations nor demonstrated the imminent or substantial danger for national security they created.

(b) The articles, which appeared on the inside pages of the newspapers, were short and fair reports on the issues in the Australian proceedings. The allegations about the activities of MI5 had, according to Mr Justice Scott (Attorney General v. Guardian Newspapers Ltd (No. 2) [1990] 1 Appeal Cases 128-138), been divulged before in twelve books and three television programmes, and especially in two books written by Mr Chapman Pincher in 1981 and 1984 and in a television interview with Mr Wright himself that had been publicly announced in advance. And, as the Vice-Chancellor, Sir Nicolas Browne-Wilkinson, stated (Attorney General v. Guardian Newspapers Ltd [1987] 1 Weekly Law Reports 1264C), "in the present case, it is not suggested, nor could it be, that The Guardian and the Observer have in any sense been involved in any activity with Mr Wright leading to the publication of his book ... . They have not aided and abetted Mr Wright in his breach of duty." He concluded that if "a third party who is not a participator in the confidant’s breach of duty receives information which at

the time of receipt is in the public domain - that is to say, he gets it from the public domain - in my judgment he would not, as at present advised, come under any duty of confidence" (ibid., 1265E).

(c) The Government had neither taken any steps to prosecute Mr Wright or the authors or editors of the earlier publications under the Official Secrets Act 1911 nor brought civil actions for breach of confidence seeking a declaration, damages or an account of profits.

(d) The claim for permanent injunctions against the newspapers was based on rather hypothetical grounds, for example: (1) their information was obtained directly or indirectly from Mr Wright; (2) they wished to publish further disclosures about the activities of the Security Service; (3) this would endanger the efficient operation of the Service and its "appearance of confidentiality"; and (4) this would also encourage other members or former members of the Service to publish confidential information.

(e) The evidence adduced by the Attorney General at the interlocutory stage was the two affidavits sworn by Sir Robert Armstrong in the Australian proceedings, which emphasized that the preservation of the appearance of confidentiality was essential to the effective operation of the Security Service. It deserves to be stressed that, in fact, as the Commission pointed out in its report (paragraph 89), "the evidence upon which the House of Lords based its decision on the merits in October 1988 was substantially available at the outset in July 1986 and fully available by July 1987".

B. The maintenance-of-the-authority-of-the-judiciary issue

9. As stated before, one aim of the temporary injunctions was the preservation of the rights of the Attorney General pending the substantive trial. The Government contended that the imposition of an interlocutory injunction to restrain publication of material which is the subject-matter of an action might, if publication in advance of the trial would destroy the substance of the action, in principle be considered necessary in a democratic society for maintaining the authority of the judiciary, in terms of the Court’s above-mentioned Sunday Times judgment (Series A no. 30, p. 42, para. 66). While accepting in abstracto such a proposition, I consider, nevertheless, that in the circumstances of the present case the Government have failed to show that the grant of an injunction on this ground responded to any "pressing social need" or that the measure was proportionate to the aim pursued.

10. Interlocutory injunctions provisionally restrain the parties to a civil suit from taking any action that could endanger the final decision of the court. They are thus designed to preserve the status quo until the trial in order to ensure, in a case where an award of damages would not compensate for the injury caused by the defendant, that the judgment will be effective.

The general principles governing the grant of interlocutory injunctions were enunciated by the House of Lords in American Cyanamid Co. v. Ethicon Ltd ([1975] Appeal Cases 396; see paragraph 10 of the present judgment), a case relating to the alleged infringement of a patent. On that occasion the House modified the former criteria by directing that, instead of examining whether the evidence disclosed a prima facie case of infringement, the court should only check whether the plaintiff's claim for a permanent injunction had any real prospect of success, that is whether he had an arguable case. If the claim was not "frivolous or vexatious", the question whether an injunction should be granted was to be determined in the light of the "balance of convenience" between the conflicting interests of the litigants.

It was on the basis of these American Cyanamid rules that the Millett injunctions were granted and subsequently upheld in the interlocutory proceedings. 11. The application of these revised criteria clearly favours a plaintiff who seeks a temporary injunction because, without having a full trial on the main issue of whether or not the alleged confidential information may be published, he can succeed merely by showing that his case is "arguable".

Indeed, in the present case the rigid application of the American Cyanamid principles led to the "inevitable" imposition of a prior restraint on the media, which directly impaired O.G.'s freedom of expression and the right of the public to be informed quickly about matters of legitimate general concern, such as allegedly unlawful activities on the part of the Security Service.

Consequently, the legal strategy of the Attorney General turned out to be in conflict with the "necessity" test under Article 10 para. 2 (art. 10-2) of the Convention and the national courts, when balancing the conflicting interests at issue, did not give sufficient weight to the fundamental importance in a democratic society of freedom of expression.

The particular circumstances of the case, to which I have already referred in section A above, and the following factors, which were all clearly apparent when the claims for interlocutory injunctions were determined, meant that the restrictions on the media sought by the Government were not justified under Article 10 para. 2 (art. 10-2) for the aim of maintaining the authority of the judiciary.

(a) For the first time the Attorney General was instituting private-law proceedings relating to a breach by a former employee of the Security Service of his duty of confidence and, relying on a commercial-law precedent, was seeking an interlocutory injunction to preserve his claim for a permanent injunction as the sole means of protecting that duty of confidence. Lord Oliver of Aylmerton said, "I have not been able to find nor have your Lordships been referred to any previously reported decision which could be said to be even remotely parallel to the instant case"

(Attorney General v. Guardian Newspapers Ltd [1987] 1 Weekly Law Reports 1315G).

(b) In June 1986 Mr Wright's disclosures were already in the public domain and the information was no longer confidential because, as stated above, they had been published in several books and divulged by him in a television interview, with no reaction on the part of the Government. Mr Justice Millett was very explicit on this point when saying in his judgment, "the allegations themselves may be compiled from a number of published sources by anyone who takes the trouble to go to them" and "the objection is not to the allegations themselves, but to Mr Wright's input. It is true that Mr Wright has provided information on previous occasions, once in a television interview and, if footnotes to certain published works are to be believed, by collaborating with their author" (transcript, pp. 5C and 13B).

(c) As a consequence, the aim of preserving the status quo could not be attained because of the leakage of the confidential information and the absence of any previous reaction by the Government.

(d) The application of the American Cyanamid principles to a case of breach of confidence involving matters of legitimate public concern had the consequence of imposing on the media - without a full hearing on the issue of whether or not the information might be published - a prior restraint implying, because of the threat of contempt of court proceedings, a partial self-censorship.

In fact, the rationale of the Millett injunctions was to maintain the "appearance of confidentiality" of the Security Service by forbidding - through the imposition on the media, albeit temporarily, of an immediate restraint - the publication of anticipated further disclosures or "leakages" in the Service.

The English courts arrived at this decision after applying the "balance of convenience" test and this resulted in a serious limitation on freedom of expression. Mr Justice Millett said on this point (transcript, p. 8D) that "it makes no difference that the claim to suppress publication is made by the Government and not by a private litigant; the principles remain the same". However, while that test may be correct under English law, it is not acceptable when it comes to deciding whether a limitation of freedom of expression of the kind involved in this case is justified under Article 10 para. 2 (art. 10-2) of the Convention. I agree with the majority of the Commission that, when it is the Government which seek to restrict the dissemination of information that is of considerable public interest, the need for a temporary injunction "should be established with particular clarity and certainty" because of the predominant place occupied by freedom of expression and the international obligation incumbent on the public authorities not to interfere with it.

(e) The fact that, as noted in the interlocutory decisions, O.G. were in no way involved in Mr Wright's proposed publication was overshadowed by

their admission that they wished to publish credible information, of legitimate public concern, relating to the unlawful operation of the Security Service or the misconduct of its members. Mr Justice Millett's opinion that "disclosures to the proper authorities may be sufficient in some cases" also seems inconsistent with the right to receive and impart information and ideas enshrined in Article 10 (art. 10). The public has a right to be promptly informed on such matters, irrespective of whether a report is made to the proper authorities with a view to prosecution and punishment. Since a limitation on freedom of the press was involved, greater weight should have been given to the "iniquity defence" (the right to report misconduct) relied on by O.G.

The dangers of so rigid an application of this precedent were pointed out by Lord Oliver of Aylmerton when he said: "The guidelines laid down by this House in American Cyanamid Co. v. Ethicon Ltd ... have come to be treated as carved on tablets of stone, so that a plaintiff seeking interlocutory relief has never to do more than show that he has a fairly arguable case. Thus the effect in a contest between a would-be publisher and one seeking to restrain the publication of allegedly confidential information is that the latter, by presenting an arguable case, can effectively through the invocation of the law of contempt, restrain until the trial of the action, which may be two or more years ahead, publication not only by the defendant but by anyone else within the jurisdiction and thus stifle what may, in the end, turn out to be perfectly legitimate comment until it no longer has any importance or commands any public interest" (Attorney General v. Times Newspapers Ltd [1991] 2 Weekly Law Reports 1022B).

(f) The discretionary grant of an interlocutory injunction should not prejudice the final determination of the action, but the court, under the American Cyanamid principles, has to consider if the plaintiff has shown an "arguable case" or if he has a "good cause". The fumus boni iuris of the main action is thus an important element in the exercise of the discretion.

The circumstances of the present case did not show, or at least did not show with sufficient clarity, that the Attorney General had an arguable case for a permanent injunction. All the interlocutory decisions nevertheless reached the opposite conclusion and consequently the temporary injunctions were granted to preserve his rights pending trial.

Today, however, with the benefit of hindsight and after the judgments on the merits delivered at three levels, it is easy to affirm that such a "good cause" did not exist. The terms used by the judges leave no doubt on this issue. In his very thorough judgment of 21 December 1987 Mr Justice Scott said: "It is equally unacceptable that the government's assertion of what national security requires should suffice to decide the limitations that must be imposed on freedom of speech or of the press"; "In my view the articles represented the legitimate and fair reporting of a matter that the newspapers were entitled to place before the public, namely the court action in

Australia"; and he concluded categorically: "The Guardian and the Observer were not in breach of confidence in publishing the articles about the Australian Spycatcher case in their respective editions of 23 June 1986 and 22 June 1986." (Attorney General v. Guardian Newspapers Ltd (No. 2) [1990] 1 Appeal Cases 144B, 167H and 172H).

Likewise, when the House of Lords gave judgment on 13 October 1988, Lord Keith of Kinkel said (ibid., 264A): "I consider that on balance the prospects are that the Crown would not have been held entitled to a permanent injunction. Scott J. and the majority of the Court of Appeal took that view, and I would not be disposed to differ from them." Lord Brightman affirmed (ibid., 266E): "I agree with the majority of your Lordships that, despite the reprehensible leakage of information which was the source of these articles about the then forthcoming Australian proceedings, the articles were not in fact damaging to the public interest and are not therefore a proper foundation for any case by the Crown against these newspapers." And Lord Goff of Chieveley expressed himself in similar terms (ibid., 290C): "the articles were very short: they give little detail of the allegations: a number of the allegations had been made before: and in so far as the articles went beyond what had previously been published, I do not consider that the judge erred in holding that, in the circumstance, the claim to an injunction was not proportionate to the legitimate aim pursued."

(g) The "temporary" and "provisional" nature of the interlocutory measures cannot justify under the Convention the restriction imposed on O.G.. As they asserted, "in many media cases, an interlocutory injunction is effectively a final injunction, because news is perishable ; a delay of weeks, months or more is equivalent to no publication". To "postpone" - the word used in the domestic judgments - information for more than two years could result in finding that the content had volatilised because of the transient character of the news.

(h) Finally, it was also obvious that the injunctions did not correspond to a "pressing social need" because, as the facts of this case have demonstrated, they were useless and unreal. It was plainly unreal to seek, by a judicial order, to restrain dissemination of news of general interest, or to seek, by an injunction against the media, to discourage members of State authorities who have access to secret, classified or simply confidential information of general interest from publishing it. And this unreality is even more evident when the news is written or broadcast in English: information is diffused universally in this language, notably by American or foreign publications or broadcasts that are sold or received in the United Kingdom. In today’s circumstances such an injunction is an illusory measure since many of these media are outside the jurisdiction of the English courts.

Like the Vice-Chancellor in his judgment of 22 July 1987 (see paragraph 33 of the present judgment), I think that "there is a limit to what can be

achieved by orders of the court. If the courts were to make orders manifestly incapable of achieving their avowed purpose, such as to prevent the dissemination of information which is already disseminated, the law would to my mind indeed be an ass ... The truth of the matter is that in the contemporary world of electronics and jumbo jets news anywhere is news everywhere. But whilst the news is international, the jurisdiction of this court is strictly territorial" (Attorney General v. Guardian Newspapers Ltd [1987] 1 Weekly Law Reports 1269F and H).

This pragmatic reasoning is, in my opinion, sufficient to demonstrate that what is clearly impracticable cannot be considered "necessary". Likewise, the very limited effect of the ban on the British media shows that the restraints imposed on O.G. were manifestly disproportionate.

12. Consequently, taking all these factors separately and as a whole, I must depart from the majority's conclusion (see paragraph 65 of the judgment) that the national authorities were entitled to think that the interference complained of was necessary in a democratic society. Furthermore, I believe that the reasons expressed in paragraphs 68 and 69 of the judgment for finding a violation in the period after 30 July 1987 were also valid as regards the earlier period, when such of the information published in Spycatcher as was relevant was already known to the public (see paragraph 12 of the judgment).

I therefore conclude that there was a violation of Article 10 (art. 10) of the Convention in the period from 11 July 1986 to 30 July 1987, as well as in that from 30 July 1987 to 13 October 1988.

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

CASE OF OKÇUOĞLU v. TURKEY

(Application no. 24246/94)

JUDGMENT

STRASBOURG

8 July 1999

This judgment is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.

In the case of Okçuoğlu v. Turkey,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr A. PASTOR RIDRUEJO,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mr J.-P. COSTA,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A. BAKA,
Mr R. MARUSTE,
Mr K. TRAJA,
Mr F. GÖLCÜKLÜ , *ad hoc judge*,

and also of Mr P.J. MAHONEY and Mrs M. DE BOER-BUQUICCHIO and *Deputy Registrars*,

Having deliberated in private on 11 March 1999 and 16 June 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") on 17 March 1998, within the three-month

Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 24246/94) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Ahmet Zeki Okçuoğlu, on 15 March 1994.

The Commission's request referred to former Articles 44 and 48(a) of the Convention and to Rule 32 § 2 of Rules of former Court A[1]. The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 § 1, 10 and 14 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of former Court A, the applicant stated that he wished to take part in the proceedings and designated Mr S. Okçuoğlu of the Istanbul Bar as the lawyer who would represent him (former Rule 30). Mr R. Bernhardt, President of the Court at the time, subsequently authorised the applicant's lawyer to use the Turkish language in the written procedure (former Rule 27 § 3).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal in particular with procedural matters that might arise before the entry into force of Protocol No. 11, Mr R. Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the written procedure (former Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received a letter in lieu of a memorial from the applicant on 27 July 1998 and the Government's memorial on 24 August. On 29 September the Government produced documents as appendices to their memorial and on 14 October the applicant lodged a document in support of his claims for just satisfaction (Article 41 of the Convention).

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. On 22 October 1998 Mr Wildhaber had decided that, in the interests of the proper administration of justice, a single Grand Chamber should be constituted to hear the instant case and twelve other cases against Turkey, namely: Karataş v. Turkey (application no. 23168/94); Arslan v. Turkey (no. 23462/94); Polat v. Turkey (no. 23500/94); Ceylan v. Turkey (no. 23556/94); Gerger v. Turkey (no. 24919/94); Erdoğdu and İnce v. Turkey (nos. 25067/94 and 25068/94); Başkaya and Okçuoğlu v. Turkey (nos. 23536/94 and 24408/94); Sürek and Özdemir v. Turkey (nos. 23927/94 and 24277/94); Sürek v. Turkey no. 1 (no. 26682/95);

1. Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States bound by that Protocol.

Sürek v. Turkey no. 2 (no. 24122/94); Sürek v. Turkey no. 3 (no. 24735/94) and Sürek v. Turkey no. 4 (no. 24762/94).

5. The Grand Chamber constituted for that purpose included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, Mr M. Fischbach and Mr J.-P. Costa, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mrs F. Tulkens, Mrs V. Stráznická, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr A.B. Baka, Mr R. Maruste and Mrs S. Botoucharova (Rules 24 §§ 3 and 5 (a) and 100 § 4).

On 19 November 1998 Mr Wildhaber exempted Mr Türmen from sitting after his withdrawal from the case having regard to the decision of the Grand Chamber in the case of Oğur v. Turkey taken in accordance with Rule 28 § 4. On 16 December 1998 the Government notified the registry that Mr F. Gölcüklü had been appointed *ad hoc* judge (Rule 29 § 1).

Subsequently Mrs Botoucharova, who was unable to take part in the further consideration of the case, was replaced by Mr K. Traja, the first substitute judge (Rule 24 § 5 (b)).

6. On 11 March 1999 the Grand Chamber decided not to hold a public hearing in view of the material on the case file and the fact that the applicant and the Government had said that they did not require one (Article 31 § (a) of the Convention and Rules 31, 59 § 2 and 71).

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. Mr Ahmet Zeki Okçuoğlu is a Turk of Kurdish origin and was born in 1950. He lives in Istanbul and works as a lawyer.

8. In May 1991, a magazine, "Demokrat" (*Democrat*), published in its issue no. 12 an article on a round-table debate it had organised under the chairmanship of Mr M.İ.S. in which the applicant had taken part. The applicant's comments were recorded in the article, entitled "The past and present of the Kurdish problem" (*Kürt Sorununun Dünü ve Bugünü*), as follows:

> "***M.İ.S.*** – Leaving aside the humanitarian side to the current tragic plight of the Kurds in Iraq, there are important political aspects to the problem, the main one perhaps being the intensification, with the crisis in the Gulf, of relations at international level

between the Kurdish movements. At this stage, one question needs to be asked: what did we hope to gain from the relations established with the United States and the European States and what have we in fact achieved? ... If you would allow me to, I should like to return to the question ... of the orchestrating of developments in the regional situation, mainly by the United States and the West,... Mr Okçuoğlu, could I ask you to frame your answer in the context of the unitary State?

A.Z. Okçuoğlu – Your question is badly put. It involves certain ideological considerations. Before answering, I think I should explain what the Kurdish question is about. It concerns a nation of some 40,000,000 people, one which has existed in the region since history began and one which has, in company with the other nations established here, played a major role historically; but it is also a nation which has, since the beginning of this century and under the influence of the international and regional powers, been deprived of its national rights, seen its territory divided up between the States in the region and been divested of its sovereign rights so as to be subjected instead to the hegemony of other States. If we are to make progress on this question, that must be the starting point. Admittedly, that does not mean to say that a radical solution to the problem will be found from one day to the next.

Coming back to your question ... the idea that the Kurdish problem has been fuelled by outside forces, by imperialist powers, is not new. For about a century some observers have seen the problem in those terms. The underlying reasons may be summarised as follows.

Firstly, there are the concerns of the nations which keep the Kurds under their domination. From the beginning, those powers have attempted to assert that the problem is that the Kurds are not a national entity, have no claims of their own and are manipulated by outside forces. Their aim, then, is to prevent international powers intervening in the problem and to cast doubt on its legitimacy and to distract attention from it. There is also the international socialist movement and the doctrine of imperialism which prevails in such circles. As you know, the Soviet Union was akin to an empire in the classic sense. The Soviet Government has always been against the Kurds as it considered that, if it the Kurds were given certain rights, the nations it controlled by force would inevitably also assert claims, and discussion of such issues at the international level would render its networks less inaccessible. That is why the Soviets have since the days of Lenin consistently sided with the powers who have kept the Kurds under their domination and why the local socialist satellite powers have invariably put forward similar arguments. Given the negative attitude of these socialist powers towards the Kurds, the relationship between the sovereign power of the former and the official ideology of the latter has also played a role. That attitude was reinforced by the Soviet position. Soviet ideology is in itself an ideology of the sovereign nation. In that regard, the ideology of Soviet sovereignty and the Turkish national ideology as applied in the region were at one. However, the said doctrine of imperialism does not end there. After the seventies, the Kurds, under the influence of Soviet and Chinese socialist propaganda, whether consciously or subconconsciously, adopted the same tack. That led the Kurdish movement into a series of dead ends.

The allegation that the Kurdish problem arose as a result of provocations from outside is ill-founded. If one has to speak of imperialist protectionism in the Middle East, it will be noted that it has been of no benefit to the Kurds, whereas, shielded by the imperialist powers concerned, the Turks, the Arabs and the Persians have done quite well. If the British had not intervened in favour of the Ottomans in the Crimean War, the Russian Tsar would have expurgated the Ottoman State from the history books and would have seized the Byzantine heritage. Contrary to what is suggested by some left-wing historians, the imperialists tried to save the 'sick man' rather than to kill him. That applies to the Arabs, too. Up till now, the only people in the Middle East – if you except the Palestinians – who have fought for their national rights are the Kurdish people. The Turks, Arabs and Persians have not fired a single bullet for their national rights. Not a shot was fired when the British invaded the Ottoman State in 1918. The so-called war of independence was merely a consequence of an historical conflict between the Greeks and the Turks. The question of who was right is a controversial one. The resistance against the French, launched at Antep and Urfa, was Kurdish. More precisely, it was Turco-Kurdish resistance that developed under the aegis of the local authorities. It was the spontaneous resistance of the people. Neither the Turkish army nor the political authorities played any part in it. The Kurds have fallen behind in obtaining their national rights not, as is suggested in certain quarters, because they are dependent on external powers, but, on the contrary, because they have failed to forge international relations and because the international powers have refused them admission.

While the Kurdish problem is the problem of the Kurds, its solution is also of concern to the regional and international powers as it directly affects their interests. The question cannot be dealt with using concepts, such as imperialism, anti-imperialism, socialism and anti-socialism, that bear scant resemblance to the true position. You cannot say: 'It's our problem. You, the United States, England, the Soviets, the Turks, don't interfere; you, the Arabs, the Persians, stay out of this'. We must solve the problem with all those whose interests are at stake. With or without their help. There, too, it has to be said that of all the parties involved in the Kurdish problem, it is the Kurds who have taken the least initiative. So, the Kurds must be realistic. As the question concerns their existence and is posed at a time when their efforts have been minimal, it would be foolhardy to attempt to solve the problems by denying that initiatives have been taken or opposing them. In practice, the Kurds must on this point work out how and to what extent they can play a bigger role in finding a solution to the problem. That would be the practical approach.

...

M.İ.S. – I wouldn't want you to take what I said the wrong way. I do not suggest that the Kurdish revolt is dependent on imperialist factors. All I say is that the countries in the region do not have the resources to solve the problems that exist here by themselves. Accordingly, the continued presence of the international powers seems likely. Under those circumstances, how can the Kurds play a greater role?

A.Z. Okçuoğlu – Firstly, when considering the Kurdish problem the international powers are mindful of their own interests. We have to be aware of that and determine where our common interest lies. There are a number of nations like the Kurds in the world. Although the United Nations Charter and the fundamental treaties refer to peoples' right to self-determination, it is not in practice accepted that that right applies to the Kurds, any more than it is accepted that it applies to a series of other nations. Such nations only manage to obtain certain humanitarian and cultural rights that do not extend beyond the boundaries of the countries in which they live. None of them have been able to achieve more than that. The problems of peoples confined to minority status cannot readily be referred to and resolved without taking this factor into account. All the boundaries need changing, but that is very difficult to achieve. For that reason, I believe that the Kurds have committed an error of judgement. By that I do not mean that they must accept their present status right to the bitter end. If they wish to enter the history books, they have to be aware of the international implications their presence entails.

I would add that I attach no credit to the idea that the Kurds have been 'deceived or sold'. Recently, the United States cautioned them to act with restraint; they broke off their relations with Talabani and turned down all his requests for arms. In my view, the Kurds have committed an error of judgement. They have adopted a quite radical approach, one for which the organisations of Iraqi Kurdistan cannot be held responsible. The Kurds, believing Saddam to be finished, attempted to rise up spontaneously in reaction to the oppression to which they have been subjected for years. Barzani and Talabani, in company with the other Kurdish leaders, were forced to accept that process. We are not strong enough to face the likes of America, France, the Soviets or a Saddam exhausted to the point where he is no longer able to stay on his feet. We have to examine the problem in the light of these realities. The urgent need is to ensure the democratic unity of the Kurds. We must abandon the notion of hostility. No side is strong enough to destroy the other and in any event there is no reason to come to that. Our relations should be friendly, not hostile. Similarly, when we forge relations with the western powers, it is necessary and even essential to afford preference to national values.

...

For my part, I am opposed to the definition of primitive nationalism that has often been asserted in recent times. The use of such terminology sometimes reveals a lack of discernment. Nationalism takes two known forms. The first is that of the oppressor nation, the second that of the nation that is oppressed. Beyond that, scientific research into nationalism has not come up with any other definition. It is difficult to know what the notion of 'primitive nationalism' covers: does it dismiss nationalism wholesale or does it suggest another form of nationalism? It is unclear. Besides, this terminology is unscientific, of no value and merely serves to reflect certain absurd political preoccupations.

I do not subscribe to the theory that the Kurds' lack of success is due to primitive nationalism. In fact, it is not the Kurds who are responsible for their lack of success. The reasons for it are to be found in the international status of the Kurds. A number of nations in the world are in the same position as the Kurds. None of them has had, up till now, an opportunity to draw its own frontiers, whether by force of arms or otherwise. How can we expect the Kurds to be given an opportunity that has been

offered to no other nation? Let us take the example of Lithuania. The Lithuanians had organised a referendum on the question of their independence and had subsequently declared themselves independent by an overwhelming majority. Yet when the United States gave their approval, the Soviets invaded with tanks. Lithuania was isolated. We have to speak therefore with the benefit of hindsight. Since the beginning of the century the struggle has continued in Iraqi Kurdistan. The only people engaged in combat in the Middle East are the Kurdish people. Despite that, their position has not improved at all. The Kurds will certainly find a solution to their problem, but one must be aware that the factors coming into play do not depend solely on the Kurds.

I should now like to clarify the notion of nationalism about which so much has been said. As you know, nationalist movements began in the west with the French Revolution and subsequently spread to Asia and Africa. The colonies were freed as a result of nationalism. However, the issue of nationality remains alive. There continue to be peoples who have been deprived of their national rights. If they are to be freed they must show nationalist sentiment. The fact that nationalist movements attract an imprecatory reaction from those whom they cause to suffer is understandable. Conversely, it is impossible to comprehend why people who claim to be on the side of the oppressed, who call themselves revolutionaries or innovators, should react in a similar fashion.

The nationalism of the oppressed nation cannot be considered to be a usurpation of the rights of another nation. On the contrary, I believe that internationalism in the modern sense is inherent in nationalism. I do not approve of lumping together all kinds of nationalism, without being aware of the difference between the nationalism of the oppressor nation and the nationalism of the nation that is oppressed. If you ignore that difference, then you are serving the cause of the oppressor nation.

Why do Turkish socialists, who outlaw Kurdish nationalism, not take a look at themselves? They defend the staunchest nationalism of all time, namely Kemalism, yet they ban Kurdish nationalism. Prohibiting an oppressed nation from being nationalistic is to condemn it to slavery.

My friend S. consistently holds the same line. His politics are always reactionary. The Kurds may react, but building a policy on the back of that reaction will not achieve much. In politics, one doesn't have friends or enemies, one has interests. Furthermore, politics is the art of seeking the feasible. Is the position of people who criticise advocates of autonomy and of Kurdish independence any different from that reached by the Kurdish national movement in Iraq? Not at all. In Turkey, too, some benefit has been gained, but not from policies geared towards independence. Those in favour of independence may on occasion agree voluntarily to limit their demands saying: 'Decree a general amnesty, allow us to get organised'. They even add: 'We don't want a separation'. Such policies cannot be brought to fruition with plays on words. Today, the Kurds must come up with medium-term policies that are adapted to the international context."

9. On 10 June 1991 the Public Prosecutor of the Istanbul National Security Court no. 2 ("National Security Court") accused the applicant of disseminating propaganda against the "indivisibility of the State". Relying on the comments set out above (see paragraph 8 above), he requested the application of section 8(1) of the Prevention of Terrorism Act (Law no. 3713 – see paragraph 17 below) and confiscation of the copies of the relevant issue of the aforementioned magazine (see paragraph 16 below).

10. The applicant denied the charges before the National Security Court, arguing, in particular, that he had never intended to promote separatism.

11. On 11 March 1993 the National Security Court, composed of three judges, including a military judge, found the applicant guilty of the offence charged and sentenced him under section 8(1) of Law no. 3713 to one year, eight months' imprisonment and a fine of 41,666,666 Turkish liras ("TRL"), to be paid in twenty monthly instalments. It also ordered confiscation of the publications concerned.

After verifying that the document in issue was an accurate transcription of what had been said at the round-table debate in which the applicant had taken part, the National Security Court found, *inter alia*, that in his comments, the applicant had asserted that some Turkish nationals had been deprived of their "national rights" as a result of their Kurdish origin and that their territory had been divided up between the States in the region concerned. According to the applicant, the Kurdish population – dominated by these States – was fighting to acquire its national rights.

The National Security Court held that those comments, taken as a whole, amounted to separatist propaganda that was detrimental to the unity of the Turkish nation and the territorial integrity of the Turkish State and justified Mr Okçuoğlu's conviction.

12. In a judgment of 24 September 1993, the Court of Cassation dismissed an appeal by the applicant.

13. On 20 February 1995, at the applicant's request, the National Security Court agreed to deduct from the applicant's sentence the period from 28 October to 18 November 1990 which he had spent in pre-trial detention in connection with earlier criminal proceedings. Consequently, he was granted automatic parole.

The applicant paid the fine that had been imposed on him that same day.

14. On 30 October 1995 Law no. 4126 of 27 October 1995 came into force. *Inter alia*, it reduced the length of prison sentences that could be imosed under section 8 of Law no. 3713 while increasing the level of fines (see paragraph 17 below). In a transitional provision relating to section 2, Law no. 4126 provided that sentences imposed pursuant to section 8 of Law no. 3713 would be automatically reviewed (see paragraph 18 below).

15. Consequently, the National Security Court reviewed the applicant's case on the merits. In its judgment of 8 March 1996 it reduced Mr Okçuoğlu's prison sentence to one year, one month and ten days but increased the fine to TRL 111,111,110.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal law

1. The Criminal Code

16. Article 36 § 1 of the Criminal Code reads as follows:

Article 36 § 1

"In the event of conviction, the court shall order the seizure and confiscation of any object which has been used for the commission or preparation of the crime or offence..."

3. The Prevention of Terrorism Act (Law no. 3713)

17. The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991), has been amended by Law no 4126 of 27 October 1995, which came into force on 30 October 1995 (see paragraph 18 below). Sections 8 and 13 read as follows:

Former section 8 § 1

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited, irrespective of the methods used and the intention. Any person who engages in such an activity shall be sentenced to not less than two and not more than five years' imprisonment and a fine of from fifty million to one hundred million Turkish liras."

New section 8 §§ 1 and 3

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited. Any person who engages in such an activity shall be sentenced to not less than one and not more than three years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras. The penalty imposed on a reoffender may not be commuted to a fine.

...

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of printed matter or by means of mass communication other than periodicals within the meaning of the second paragraph, those responsible and the owners of the means of mass communication shall be sentenced to not less than six months' and not more than two years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras...

..."

Former section 13

"The penalties for the offences contemplated in the present law may not be commuted to a fine or any other measure, nor may they be accompanied by a reprieve."

New section 13

"The penalties for the offences contemplated in the present Law may not be commuted to a fine or any other measure, nor may they be accompanied by a reprieve.

However, the provisions of this section shall not apply to convictions pursuant to section 8."

3. Law no. 4126 of 27 October 1995 amending Law no. 3713

18. The Law of 27 October 1995 contains a "transitional provision relating to section 2" that applies to the amendments which that law makes to the sentencing provisions of section 8 of Law no. 3713. That transitional provision provides:

"In the month following the entry into force of the present Law, the court which has given judgment shall re-examine the case of a person convicted pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) and, in accordance with the amendment... to section 8 of Law no. 3713, shall reconsider the term of imprisonment imposed on that person and decide whether he should be allowed the benefit of sections 4 and 6 of Law no. 647 of 13 July 1965."

4. The Code of Criminal Procedure

19. The relevant provisions of the Code of Criminal Procedure concerning the grounds on which defendants may appeal on points of law against judgments of courts of first instance read as follows:

Article 307

"An appeal on points of law may not concern any issue other than the lawfulness of the impugned judgment.

Non-application or erroneous application of a legal rule shall constitute unlawfulness."

Article 308

"Unlawfulness is deemed to be manifest in the following cases:

1- where the court is not established in accordance with the law;

2- where one of the judges who have taken the decision was barred by statute from participating;

..."

B. Case-law

20. The Government supplied copies of several decisions given by the prosecutor attached to the Istanbul National Security Court withdrawing charges against persons suspected of inciting people to hatred or hostility, especially on religious grounds (Article 312 of the Criminal Code), or of disseminating separatist propaganda against the indivisible unity of the State (section 8 of Law no. 3713 – see paragraph 17 above). In the majority of cases where offences had been committed by means of publications the reasons given for the prosecutor's decision included such considerations as the fact that the proceedings were time-barred, that some of the constituent elements of the offence could not be made out or that there was insufficient evidence. Other grounds included the fact that the publications in issue had not been distributed, that there had been no unlawful intent, that no offence had been committed or that those responsible could not be identified.

Furthermore, the Government submitted a number of decisions of the National Security Courts as examples of cases in which defendants accused of the above-mentioned offences had been found not guilty. These were the judgments of 19 November (no. 1996/428) and 27 December 1996 (no. 1996/519); 6 March (no. 1997/33), 3 June (no. 1997/102), 17 October (no. 1997/527), 24 October (no. 1997/541) and 23 December 1997 (no. 1997/606); 21 January (no. 1998/8), 3 February (no. 1998/14), 19 March (no. 1998/56), 21 April 1998 (no. 1998/ 87) and 17 June 1998 (no. 1998/133).

As regards more particularly proceedings against authors of works dealing with the Kurdish problem, the National Security Courts in these cases reached their decisions on the ground that there had been no dissemination of "propaganda", one of the constituent elements of the offence, or on account of the objective nature of the words used.

C. The National Security Courts

21. The National Security Courts were created by Law no. 1773 of 11 July 1973, in accordance with Article 136 of the 1961 Constitution. That law was annulled by the Constitutional Court on 15 June 1976. The courts in question were later reintroduced into the Turkish judicial system by the 1982 Constitution. The relevant part of the statement of reasons contains the following passage:

> "There may be acts affecting the existence and stability of a State such that when they are committed special jurisdiction is required in order to give judgment expeditiously and appropriately. For such cases it is necessary to set up National Security Courts. According to a principle inherent in our Constitution, it is forbidden to create a special court to give judgment on a specific act after it has been committed. For that reason the National Security Courts have been provided for in our Constitution to try cases involving the above-mentioned offences. Given that the special provisions laying down their powers have been enacted in advance and that the courts have been created before the commission of any offence …, they may not be described as courts set up to deal with this or that offence after the commission of such an offence."

The composition and functioning of the National Security Courts are subject to the following rules.

1. The Constitution

22. The constitutional provisions governing judicial organisation are worded as follows:

Article 138 §§ 1 and 2

> "In the performance of their duties, judges shall be independent; they shall give judgment, according to their personal conviction, in accordance with the Constitution, statute and the law.
>
> No organ, authority, ... or ... person may give orders or instructions to courts or judges in the exercise of their judicial powers, or send them circulars or make recommendations or suggestions to them."

Article 139 § 1

"Judges … shall not be removed from office or compelled to retire without their consent before the age prescribed by the Constitution…"

Article 143 §§ 1-5

"National Security Courts shall be established to try offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free democratic system of government, and offences which directly affect the State's internal or external security.

National Security Courts shall be composed of a president, two other regular members, two substitute members, a prosecutor and a sufficient number of assistant prosecutors.

The president, one of the regular members, one of the substitutes and the prosecutor, shall be appointed from among judges and public prosecutors of the first rank, according to procedures laid down in special legislation; one regular member and one substitute shall be appointed from among military judges of the first rank and the assistant prosecutors from among public prosecutors and military judges.

Presidents, regular members and substitute members ... of National Security Courts shall be appointed for a renewable period of four years.

Appeal against decisions of National Security Courts shall lie to the Court of Cassation.

..."

Article 145 § 4

"Military legal proceedings

The personal rights and obligations of military judges ... shall be regulated by law in accordance with the principles of the independence of the courts, the safeguards enjoyed by the judiciary and the requirements of military service. Relations between military judges and the commanders under whom they serve in the performance of their non-judicial duties shall also be regulated by law..."

2. Law no. 2845 on the creation and rules of procedure of the National Security Courts

23. Based on Article 143 of the Constitution, the relevant provisions of Law no. 2845 on the National Security Courts, provide:

Section 1

"In the capitals of the provinces of ... National Security Courts shall be established to try persons accused of offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free, democratic system of government and offences directly affecting the State's internal or external security."

Section 3

"The National Security Courts shall be composed of a president, two other regular members and two substitute members."

Section 5

"The president of a National Security Court, one of the [two] regular members and one of the [two] substitutes ... shall be civilian ... judges, the other members, whether regular or substitute, military judges of the first rank..."

Section 6 §§ 2, 3 and 6

"The appointment of military judges to sit as regular members and substitutes shall be carried out according to the procedure laid down for that purpose in the Military Legal Service Act.

Except as provided in the present Law or other legislation, the president and the regular or substitute members of the National Security Courts ... may not be appointed to another post or place, without their consent, within four years...

...

If, after an investigation concerning the president or a regular or substitute member of a National Security Court conducted according to the legislation concerning them, competent committees or authorities decide to change the duty station of the person concerned, the duty station of that judge or the duties themselves ... may be changed in accordance with the procedure laid down in that legislation."

Section 9 § 1

"National Security Courts shall have jurisdiction to try persons charged with

...

(d) offences having a connection with the events which made it necessary to declare a state of emergency, in regions where a state of emergency has been declared in accordance with Article 120 of the Constitution,

(e) offences committed against the Republic, whose constituent qualities are enunciated in the Constitution, against the indivisible unity of the State – meaning both the national territory and its people – or against the free, democratic system of government and offences directly affecting the State's internal or external security.

..."

Section 27 § 1

"The Court of Cassation shall hear appeals against the judgments of the National Security Courts."

Section 34 §§ 1 and 2

"The rules governing the rights and obligations of ... military judges appointed to the National Security Courts and their supervision ..., the institution of disciplinary proceedings against them, the imposition of disciplinary penalties on them and the investigation and prosecution of any offences they may commit in the performance of their duties ... shall be as laid down in the relevant provisions of the laws governing their profession...

The observations of the Court of Cassation on military judges, the assessment reports on them drawn up by Ministry of Justice assessors ... and the files on any investigations conducted in respect of them ... shall be transmitted to the Ministry of Justice."

Section 38

"A National Security Court may be transformed into a Martial Law Court, under the conditions set forth below, when a state of emergency has been declared in all or part of the territory in respect of which the National Security Court concerned has jurisdiction, provided that within that territory there is more than one National Security Court…"

3. The Military Legal Service Act (Law no. 357)

24. The relevant provisions of the Military Legal Service Act are worded as follows:

Additional section 7

"The aptitude of military judges ... appointed as regular or substitute members of the National Security Courts that is required for promotion or advancement in salary step, rank or seniority shall be determined on the basis of assessment reports drawn up according to the procedure laid down below, subject to the provisions of the present Law and the Turkish Armed Forces Personnel Act (Law no. 926).

(a) The first superior competent to carry out assessment and draw up assessment reports for military judges, whether regular or substitute members ... shall be the Minister of State in the Ministry of Defence, followed by the Minister of Defence.

..."

Additional section 8

"Members ... of the National Security Courts belonging to the Military Legal Service ... shall be appointed by a committee composed of the personnel director and the legal adviser of the General Staff, the personnel director and the legal adviser attached to the staff of the arm in which the person concerned is serving and the Director of Military Judicial Affairs at the Ministry of Defence..."

Section 16(1) and (3)

"Military judges ... shall be appointed by a decree issued jointly by the Minister of Defence and the Prime Minister and submitted to the President of the Republic for approval, in accordance with the provisions on the appointment and transfer of members of the armed forces...

...

The procedure for appointment as a military judge shall take into account the opinion of the Court of Cassation, the reports by Ministry of Justice assessors and the assessment reports drawn up by the superiors..."

Section 18(1)

"The rules governing the salary scales, salary increases and various personal rights of military judges ... shall be as laid down in the provisions relating to officers."

Section 29

"The Minister of Defence may apply to military judges, after considering their defence submissions, the following disciplinary sanctions:

A. A warning, which consists in giving the person concerned notice in writing that he must exercise more care in the performance of his duties.

...

B. A reprimand, which consists in giving the person concerned notice in writing that a particular act or a particular attitude has been found to be blameworthy.

...

The said sanctions shall be final, mentioned in the assessment record of the person concerned and entered in his personal file..."

Section 38

"When military judges ... sit in court they shall wear the special dress of their civilian counterparts..."

4. The Military Criminal Code

25. Article 112 of the Military Criminal Code of 22 May 1930 provides:

"It shall be an offence, punishable by up to five years' imprisonment, to abuse one's authority as a civil servant in order to influence the military courts."

5. Law no. 1602 of 4 July 1972 on the Supreme Military Administrative Court

26. Under section 22 of Law no. 1602 the First Division of the Supreme Military Administrative Court has jurisdiction to hear applications for judicial review and claims for damages based on disputes relating to the personal status of officers, particularly those concerning their professional advancement.

PROCEEDINGS BEFORE THE COMMISSION

27. Mr Okçuoğlu applied to the Commission on 15 March 1994. He submitted that he had been denied a fair trial before the National Security Court as it could not be regarded as an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention. He also maintained that his conviction for the comments he had made at the round table constituted a violation of Articles 9 and 10, taken individually or together with Article 14.

28. The Commission declared the application (no. 24246/94) admissible on 14 October 1996. In its report of 11 December 1997 (former Article 31), it expressed the opinion by 31 votes to 1 that there had been a violation of Article 6 § 1 and of Article 10, considered jointly with Article 9, and that no separate issue arose under Article 14.

The full text of the Commission's opinion and of the partly dissenting opinions contained in the report is reproduced as an annex to this judgment[1].

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1999), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT

29. In their memorial, the Government invited the Court to hold that the applicant's conviction did not constitute a violation of Articles 9, 10 or 14 of the Convention, or of Article 6 § 1 as:

> "... the military judge did not act in a biased manner in this case and indeed the applicant made no complaint of that nature before the national courts."

30. In his letter in lieu of a memorial, Mr Okçuoğlu referred to the submissions he had made in his application and observations before the Commission, as set out in the Commission's report of 11 December 1997 (see paragraph 29 above). He also sought just satisfaction under Article 41 of the Convention.

AS TO THE LAW

I. SCOPE OF THE CASE

31. Before the Court the applicant also complained of a breach of Article 7 of the Convention. The Court observes, however, that as Mr Okçuoğlu did not raise that complaint at the admissibility stage of the procedure before the Commission (see paragraph 27 above), it has no jurisdiction to examine it (see, *mutatis mutandis*, the Findlay v. the United Kingdom judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 277, § 63).

II. ALLEGED VIOLATION OF ARTICLES 9 AND 10 OF THE CONVENTION

32. In his application Mr Okçuoğlu submitted that his conviction pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) had breached Articles 9 and 10 of the Convention. At the hearing before the Court, however, he did not object to the proposal made by the Government and the Commission that this complaint should be considered from the standpoint of Article 10 alone (see, among other authorities, the Incal v. Turkey judgment of 9 June 1998, *Reports* 1998-.., p. .., § 60), which provides:

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

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

33. Those appearing before the Court agreed that the applicant's conviction following publication of his comments amounted to an interference with the exercise of his right to freedom of expression. Such an interference breaches Article 10 unless it satisfies the requirements of the second paragraph of Article 10. The Court must therefore determine whether it was "prescribed by law", was directed towards one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve the aims concerned.

1. "Prescribed by law"

34. Neither the applicant nor the Government expressed a view as to whether section 8 of the Prevention of Terrorism Act (Law no. 3713) could be regarded as a "law" for the purposes of the Convention.

35. The Commission found that the applicant's conviction had been based on section 8 of the Prevention of Terrorism Act and accordingly considered that the interference was prescribed by law.

36. Like the Commission, the Court finds that since the applicant's conviction was based on section 8 of the Prevention of Terrorism Act (Law no. 3713) the resultant interference with his right to freedom of expression could be regarded as "prescribed by law", especially as the applicant has not specifically disputed this.

2. Legitimate aim

37. The applicant did not express a view on this point.

38. The Government submitted that the aim of the interference in issue had been not only to maintain "national security" and prevent "[public] "disorder", as the Commission had found, but also to preserve "territorial integrity" and "national unity".

39. The Court considers that, having regard to the sensitivity of the security situation in south-east Turkey (see the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, p. 2539, § 10) and to the need for the authorities to be alert to acts capable of fuelling additional violence, the measures taken against the applicant can be said to have been in furtherance of certain of the aims mentioned by the Government, namely the protection of national security and territorial integrity and the prevention of disorder and crime. This is certainly true where, as with the situation in south-east Turkey at the time of the circumstances of this case, the separatist movement had recourse to methods which rely on the use of violence.

3. "Necessary in a democratic society"

(a) Arguments of those appearing before the Court

(i) The applicant

40. The applicant considered that he had kept within the bounds of fair comment with his remarks. In his submission, he had been convicted solely for having expressed his views on the "Kurdish question".

(ii) The Government

41. The Government asserted that, as the Istanbul National Security Court had found, the applicant had been guilty of disseminating separatist propaganda by taking part in the debate in issue. The words used by the applicant during the debate were a call to the the feelings, intellect and will of citizens of Kurdish origin to form their own State, at a time when the PKK were attacking soldiers and civilians alike on all fronts and brutally massacring dozens of people every day. Like the other participants, Mr Okçuoğlu had thus helped the cause of separatist violence.

Article 10 left Contracting States a particularly broad margin of appreciation in cases where their territorial integrity was threatened by terrorism. What is more, when confronted with the situation in Turkey the Turkish authorities had a duty to prohibit all separatist propaganda, which could only incite violence and hostility between society's various component groups and thus endanger human rights and democracy.

Lastly, since the magazine concerned had been published at a time when, taking advantage of the disorder created on the border with Iraq by the Gulf War, the PKK had been escalating its operations in south-eastern Turkey, the Government emphasised the "duties and responsibilities" which exercise of the rights protected by Article 10 carried with it and submitted in conclusion that the applicant's conviction had by no means been disproportionate to the aims pursued.

(iii) The Commission

42. The Commission likewise adverted to the "duties and responsibilities" mentioned in the second paragraph of Article 10, which made it important for people expressing an opinion in public on sensitive political issues to ensure that they did not condone "unlawful political violence". Freedom of expression nevertheless included the right to engage in open discussion of difficult problems like those with which Turkey was confronted with a view to analysing, for example, the underlying causes of the situation or to expressing opinions on possible solutions.

The Commission noted that in his comments the applicant had sought to explain the Kurdish question from an historical perspective. It considered that he had expressed his views in a relatively moderate way and had not approved the use of violence by Kurdish separatists. The applicant's conviction therefore constituted a form of censorship, which was incompatible with the requirements of Article 10.

(b) The Court's assessment

43. The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out in, for example, the Zana v. Turkey judgment (cited above, p. 2547-48, § 51) and the Fressoz and Roire v. France judgment of 21 January 1999 (*Reports* 1999-, p. ..., § 45).

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

(iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

44. Since the applicant was convicted of disseminating separatist propaganda through the medium of a periodical, the impugned interference must also be seen in the context of the essential role of the press in ensuring the proper functioning of political democracy (see among many other authorities, the Lingens v. Austria judgment of 8 July 1986, Series A, no. 103, p. 26, § 41; and the above-mentioned Fressoz and Roire judgment, p. ..., § 45). While the press must not overstep the bounds set, *inter alia*, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders (see, *mutatis mutandis*, the Lingens judgment cited above, p. 26, §§ 41-42).

45. In his comments, Mr Okçuoğlu sought to explain through the history of international relations the current situation of the population of Kurdish origin. Although his analysis was not neutral and included consideration of what could be done to remedy the situation described, the language used does not appear to have been extreme or excessive.

46. In any event, the Court recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see the Wingrove v. the United Kingdom judgment of 25 November 1996, *Reports* 1996-V, p. 1957, § 58). Furthermore, the limits of permissible criticism are wider with regard to the

government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks (see the Incal v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, p. 1567, § 54). Finally, where such remarks constitute an incitement to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

47. The Court takes into account, furthermore, the background to the cases submitted to it, particularly problems linked to the prevention of terrorism (see the above-mentioned Incal judgment, p. 1568, § 58). On that point, it takes note of the Turkish authorities' concern about the dissemination of views which they consider might exacerbate the serious disturbances that have been going on in Turkey for some fifteen years (see paragraph 39 above).

48. The Court observes, however, that the applicant's comments, made during a round-table debate, were published in a periodical whose circulation was low, thereby significantly reducing their potential impact on "national security", "public order" or "territorial integrity". The Court further notes that although some of his remarks paint a negative picture of the population of Turkish origin and make his comments hostile in tone, they nevertheless do not amount to incitement to engage in violence, armed resistance, or an uprising. That, in the Court's view is an essential factor to be taken into consideration.

49. Furthermore, the Court is struck by the severity of the penalty imposed on the applicant – particularly the fact that he was sentenced to one year, eight months' imprisonment – and the persistence of the prosecution's efforts to secure his conviction. In that regard, it notes that after completing his prison sentence, the applicant was ordered to pay an additional fine under Law no. 4126, which had just come into into force (see paragraph 18 above).

The Court notes in that connection that the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference.

50. In conclusion, Mr Okçuoğlu's conviction was disproportionate to the aims pursued and accordingly not "necessary in a democratic society". There has therefore been a violation of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

51. The applicant complained that the presence of a military judge on the bench of the National Security Court which tried and convicted him meant that he had been denied a fair hearing in breach of Article 6 § 1 of the Convention, the relevant part of which provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law..."

52. The Government contested that allegation whereas the Commission accepted it.

53. In the applicant's submission, the military judges appointed to the National Security Courts such as the Istanbul National Security Court are dependent on the executive, being appointed by the joint decree of the Minister of Defence and the Prime Minister, subject to the approval of the President of the Republic. He pointed to the fact that their professional assessment and promotion as well as their security of tenure were within the control of the executive branch and in turn the army. The ties which bound them to the executive and to the army made it impossible for military judges to discharge their functions on the bench in an independent and impartial manner. The applicant further stressed that the independence and impartiality of military judges and hence of the courts on which they sat were compromised since these judges are unable to take a position which might be contradictory to the views of their commanding officers.

The applicant stated that these considerations impaired the independence and impartiality of the Istanbul National Security Court and prevented him from receiving a fair trial, in violation of Article 6 § 1.

54. The Government replied that the rules governing the appointment of military judges to the National Security Courts and the guarantees which they enjoy in the performance of their judicial functions on the bench were such as to ensure that these courts fully complied with the requirements of independence and impartiality within the meaning of Article 6 § 1. The Government disputed the applicant's argument that military judges were accountable to their superior officers. In the first place, it was an offence under Article 112 of the Military Code for a public official to attempt to influence the performance by a military judge of his judicial functions (see

paragraph 25 above). Secondly, the assessment reports referred to by the applicant related only to conduct of a military judge's non-judicial duties. Military judges have access to their assessment reports and are able to challenge their content before the Supreme Military Administrative Court (see paragraph 26 above). When acting in a judicial capacity a military judge is assessed in exactly the same manner as a civilian judge.

55. The Government added that the fact that a military judge had sat in the National Security Court had not impaired the fairness of the applicant's trial. Neither the military judge's hierarchical superiors, nor the public authorities which had appointed him to the court had any interest in the proceedings or in the outcome of the case.

The Government also impressed upon the Court the need to have particular regard to the security context in which the decision to establish National Security Courts was taken pursuant to Article 143 of the Constitution. In view of the experience of the armed forces in the anti-terrorism campaign the authorities had considered it necessary to strengthen these courts by including a military judge in order to provide them with the necessary expertise and knowledge to deal with threats to the security and integrity of the State.

56. The Commission concluded that the Istanbul National Security Court could not be regarded as an independent and impartial tribunal for the purposes of Article 6 § 1 of the Convention. The Commission referred in this respect to its opinion in the Incal v. Turkey case in it's Article 31 report adopted on 25 February 1997 and the reasons supporting that opinion.

57. The Court recalls that in its Incal v. Turkey judgment of 9 June 1998 (*Reports* 1998-IV, p. 1547) and in its Çıraklar v. Turkey judgment of 28 October 1998 (*Reports* 1998-, p. ...) it had to address arguments similar to those raised by the Government in the instant case. In those judgments the Court noted that the status of military judges sitting as members of National Security Courts did provide some guarantees of independence and impartiality (see the above-mentioned Incal judgment, p. 1571, § 65 and paragraph 22 above). On the other hand, the Court found that certain aspects of these judges' status made their independence and impartiality questionable (ibid., § 68): for example, the fact that they are servicemen who still belong to the army, which in turn takes its orders from the executive; the fact that they remain subject to military discipline; and the fact that decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army (see paragraphs 23-24 above). Mr Okçuoğlu mentioned some of these shortcomings in his observations.

58. As in its Incal judgment the Court considers that its task is not to determine *in abstracto* the necessity for the establishment of National Security Courts in the light of the justifications advanced by the Government. Its task is to ascertain whether the manner in which the Istanbul National Security Court functioned infringed Mr Okçuoğlu's right to a fair trial, in particular whether, viewed objectively, he had a legitimate reason to fear that the court which tried him lacked independence and impartiality (see the above-mentioned Incal judgment, p. 1572, § 70; and the above-mentioned Çıraklar judgment, p. ..., § 38).

As to that question, the Court sees no reason to reach a conclusion different from that in the cases of Mr Incal and Mr Çıraklar, both of whom, like the present applicant, were civilians. It is understandable that the applicant – prosecuted in a National Security Court for disseminating propaganda aimed at undermining the territorial integrity of the State and national unity - should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service (see paragraph 23 above). On that account he could legitimately fear that the Istanbul National Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, the applicant's fears as to that court's lack of independence and impartiality can be regarded as objectively justified. The proceedings in the Court of Cassation were not able to dispel these fears since that court did not have full jurisdiction (see the above-mentioned Incal judgment, p.1573, § 72 *in fine*).

59. For these reasons the Court finds that there has been a breach of Article 6 § 1.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 10

60. The applicant submitted that he had been prosecuted on account of his writings merely because they were the work of a person of Kurdish origin and concerned the Kurdish question. He argued that on that account he was a victim of discrimination contrary to Article 14 of the Convention read in conjunction with Article 10. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

61. The Government submitted that the judgment delivered when the applicant was convicted showed that Mr Okçuoğlu had been prosecuted not because he belonged to a particular ethnic group, but because he had disseminated separatist propaganda that jeopardised the fundamental interest of the national collectivity.

62. The Commission expressed the opinion that no separate issue arose under Article 14 read in conjunction with Article 10.

63. Having regard to its conclusion that there has been a violation of Article 10 taken separately (see paragraph 50 above), the Court does not consider it necessary to examine the complaint under Article 14.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. The applicant sought just satisfaction under Article 41, which provides:

> "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

65. The applicant sought reparation for the damage he had sustained but left the amount to the discretion of the Court.

66. The Government expressed no opinion.

67. The Court notes that there is no evidence before it of any pecuniary damage. On the other hand, the applicant suffered distress on account of the facts of the cause. Ruling on an equitable basis, it consequently awards him FRF 40,000 for non-pecuniary damage.

B. Costs and expenses

68. The applicant also left the issue of costs and expenses to the discretion of the Court. He did however state that he was contractually bound to pay his lawyer 25,000 US dollars in fees.

69. The Government expressed doubts as to the truth of that statement.

70. On the basis of the information in its possession, the Court considers it reasonable to award the applicant FRF 20,000 by way of reimbursement of his costs and expenses.

C. Default interest

71. The Court deems it appropriate to adopt the statutory rate of interest applicable in France at the date of adoption of the present judgment which according to the information available to it, is 3.47% per annum.

FOR THESE REASONS THE COURT

1. *Holds* unanimously that there has been a breach of Article 10 of the Convention;
2. *Holds* by 16 votes to 1 that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* unanimously that no separate issue arises under Article 10 of the Convention taken together with Article 14;
4. *Holds* unanimously that
   (a) the respondent State is to pay the applicant, within three months, the following sums, to be converted into Turkish liras at the rate applicable on the date of settlement:
      (i) 40,000 (forty thousand) French francs for non-pecuniary damage;
      (ii) 20,000 (twenty thousand) French francs for costs and expenses;
   (b) simple interest at an annual rate of 3.47% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;
5. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 1999.

Signed: Luzius WILDHABER
President

Signed: Paul MAHONEY
Deputy Registrar

A declaration by Mr Wildhaber and, in accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Mrs Palm, Mrs Tulkens, Mr Fischbach, Mr Casadevall and Mrs Greve
(b) concurring opinion of Mr Bonello;
(c) partly dissenting opinion of Mr Gölcüklü

Initialled: L. W.
Initialled: P.J. M.

DECLARATION BY JUDGE WILDHABER

Although I voted against the finding of a violation of Article 6 § 1 of the Convention in the case of Incal v. Turkey of 9 June 1998 (*Reports* 1998-IV, p. 1547), I now consider myself bound to adopt the view of the majority of the Court.

JOINT CONCURRING OPINION OF JUDGES PALM, TULKENS, FISCHBACH, CASADEVALL AND GREVE

We share the Court's conclusion that there has been a violation of Article 10 in the present case although we have reached the same result by a route which employs the more contextual approach as set out in the dissenting opinion of Judge Palm in the case of Sürek v. Turkey (no. 1).

In our opinion the majority assessment of the Article 10 issue in this line of cases against the respondent State attaches too much weight to the form of words used in the publication and insufficient attention to the general context in which the words were used and their likely impact. Undoubtedly the language in question may be intemperate or even violent. But in a democracy, as our Court has emphasised, even "fighting" words may be protected by Article 10.

An approach which is more in keeping with the wide protection afforded to political speech in the Court's case-law is to focus less on the inflammatory nature of the words employed and more on the different elements of the contextual setting in which the speech was uttered. Was the language intended to inflame or incite to violence? Was there a real and genuine risk that it might actually do so? The answer to these questions in turn requires a measured assessment of the many different layers that compose the general context in the circumstances of each case. Other questions must be asked. Did the author of the offending text occupy a position of influence in society of a sort likely to amplify the impact of his words? Was the publication given a degree of prominence either in an important newspaper or through another medium which was likely to enhance the influence of the impugned speech? Were the words far away from the centre of violence or on its doorstep?

It is only by a careful examination of the context in which the offending words appear that one can draw a meaningful distinction between language which is shocking and offensive – which is protected by Article 10 – and that which forfeits its right to tolerance in a democratic society.

CONCURRING OPINION OF JUDGE BONELLO

I voted with the majority to find a violation of Article 10, but I do not endorse the primary test applied by the Court to determine whether the interference by the domestic authorities with the applicants' freedom of expression was justifiable in a democratic society.

Throughout these, and previous Turkish freedom-of-expression cases in which incitement to violence was an issue, the common test employed by the Court seems to have been this: if the writings published by the applicants supported or instigated the use of violence, then their conviction by the national courts was justifiable in a democratic society. I discard this yardstick as insufficient.

I believe that punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create 'a clear and present danger'. When the invitation to the use of force is intellectualised, abstract, and removed in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail.

I borrow what one of the mightiest constitutional jurists of all time had to say about words which tend to destabilise law and order: "We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country"[1].

The guarantee of freedom of expression does not permit a state to forbid or proscribe advocacy of the use of force except when such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action[2]. It is a question of proximity and degree[3].

In order to support a finding of clear and present danger which justifies restricting freedom of expression, it must be shown either that immediate serious violence was expected or was advocated, or that the past conduct of the applicant furnished reason to believe that his advocacy of violence would produce immediate and grievous action[4].

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[1]. Justice Oliver Wendell Holmes in *Abrahams v. United States*, 250 U.S. 616 (1919) at 630.
[2]. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) at 447.
[3]. *Schenck v. United States* 294 U.S. 47 (1919) at 52.
[4]. *Whitney v. California* 274 U.S. 357 (1927) at 376.

It is not manifest to me that any of the words with which the applicants were charged, however pregnant with mortality they may appear to some, had the potential of imminently threatening dire effects on the national order. Nor is it manifest to me that instant suppression of those expressions was indispensable for the salvation of Turkey. They created no peril, let alone a clear and present one. Short of that, the Court would be subsidising the subversion of freedom of expression were it to condone the convictions of the applicants by the criminal courts.

In summary "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose, through discussion, the falsehood and the fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence".[1]

[1]. Justice Louis D. Brandeis, in *Whitney v. California*, 274 U.S. 357 (1927) at 377.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Provisional translation*)

To my great regret, I do not agree with the view of the majority of the Court that there has been a violation of Article 6 § 1 in that the National Security Courts are not "independent and impartial tribunals" within the meaning of that provision owing to the presence of a military judge on the bench. In that connection, I refer to the dissenting opinion which I expressed jointly with those eminent judges Mr Thor Vilhjálmsson, Mr Matscher, Mr Foighel, Sir John Freeland, Mr Lopes Rocha, Mr Wildhaber and Mr Gotchev in the case of Incal v. Turkey of 9 June 1998 and to my individual dissenting opinion in the case of Çıraklar v. Turkey of 28 October 1998. I remain firmly convinced that the presence of a military judge in a court composed of three judges, two of whom are civil judges, in no way affects the independence and impartiality of the National Security Courts, which are courts of the non-military (ordinary) judicial order whose decisions are subject to review by the Court of Cassation.

I wish to stress that: (1) the conclusion of the majority results from an unjustified extension to the theory of outward appearances; (2) it does not suffice to say, as the majority do in paragraph 79 of the judgment, that it is "understandable that the applicants ... should be apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service", and then simply to rely on the Incal precedent (Çıraklar being a mere repetition of what was said in the Incal judgment); and (3) the majority's opinion is in the abstract and ought therefore, if it was to be justifiable, to have been better supported both factually and legally.

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

COURT (PLENARY)

CASE OF OPEN DOOR AND DUBLIN WELL WOMAN v. IRELAND

(Application no. 14234/88; 14235/88)

JUDGMENT

STRASBOURG

29 October 1992

In the case of Open Door and Dublin Well Woman v. Ireland[*],

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 51 of the Rules of Court and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,
Mr F. BIGI,
Sir John FREELAND,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr J. BLAYNEY, *ad hoc judge*,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 March and 23 September 1992,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 24 April 1991, and on 3 July 1991 by

[*] The case is numbered 64/1991/316/387-388. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

the Government of Ireland ("the Government"), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in two applications against Ireland lodged with the Commission under Article 25 (art. 25) on 10 August and 15 September 1988. The first (no. 14234/88) was brought by Open Door Counselling Ltd, a company incorporated in Ireland; the second (no. 14235/88) by another Irish company, Dublin Well Woman Centre Ltd, and one citizen of the United States of America, Ms Bonnie Maher, and three Irish citizens, Ms Ann Downes, Mrs X and Ms Maeve Geraghty.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and the declaration whereby Ireland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46) and the Government's application referred to Article 48 (art. 48). The object of the request and the application was to obtain a decision as to whether or not the facts of the case disclosed a breach by Ireland of its obligations under Articles 8, 10 and 14 (art. 8, art. 10, art. 14) and also, in the case of the application, to examine these issues in the context of Articles 2, 17 and 60 (art. 2, art. 17, art. 60).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30). On 23 January 1992 the President granted leave, pursuant to Rule 30 of the Rules of Court, to the first applicant company to be represented at the oral proceedings by a lawyer from the United States of America.

3. The Chamber to be constituted included ex officio Mr B. Walsh, the elected judge of Irish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). In a letter to the President of 8 May 1991, Mr Walsh stated that he wished to withdraw pursuant to Rule 24 para. 2, as the case arose out of a decision of the Irish Supreme Court in which he had participated. On 19 June the Agent of the Government informed the Registrar that the Hon. Mr Justice Blayney had been appointed as ad hoc judge (Article 43 of the Convention[*] and Rule 23) (art. 43).

On 26 April the President of the Court had drawn by lot the names of the other seven members of the Chamber, namely Mr J. Cremona, Mr L.-E. Pettiti, Mr J. De Meyer, Mrs E. Palm, Mr R. Pekkanen, Mr A.N. Loizou and Mr J.M. Morenilla (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the representatives of the applicants on

[*] As modified by Article 11 of Protocol No. 8 (P8-11), which entered into force on 1 January 1990.

the organisation of the procedure (Rules 37 para. 1 and 38). In accordance with the President's orders and directions, the Registrar received, on 31 October and 4 November 1991, the memorials of the applicants and the Government and, on 6 December 1991, the observations of the Delegate of the Commission.

5. On 28 August 1991, the President had granted, under Rule 37 para. 2, leave to "Article 19" (the International Centre against Censorship) to submit written comments on specific aspects of the case. Leave had been granted on the same date to the Society for the Protection of Unborn Children (S.P.U.C.). The respective comments were received on 28 November.

6. On 27 January 1992 the President consented to the filing of a document, pursuant to Rule 37 para. 1, second sub-paragraph, submitted by Dublin Well Woman Centre Ltd.

7. As directed by the President, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 March 1992. The Chamber had held a preparatory meeting beforehand during which it decided, pursuant to Rule 51, to relinquish jurisdiction forthwith in favour of the plenary Court. It also consented to the filing of various documents by the applicants and refused a request by lawyers acting on behalf of S.P.U.C. to address the Court.

There appeared before the Court:

- for the Government

Mrs E. KILCULLEN, Assistant Legal Adviser,
Department of Foreign Affairs, *Agent*,
Mr D. GLEESON, Senior Counsel,
Mr J. O'REILLY, Senior Counsel, *Counsel*,
Mr J.F. GORMLEY, Office of the Attorney General, *Adviser*;

- for the Commission

Mr J. FROWEIN, *Delegate*;

- for the applicants

Open Door Counselling Ltd
Mr F. CLARKE, Senior Counsel,
Mr D. COLE, Centre for Constitutional Rights (New York), *Counsel*,
Mr J. HICKEY, Solicitor,
Ms R. RIDDICK, *Adviser*;
Dublin Well Woman Centre Ltd and Others
Mr A. HARDIMAN, Senior Counsel,
Mr B. MURRAY, *Counsel*,
Ms B. HUSSEY, Solicitor,
Ms R. BURTENSHAW, Chief Executive,
Ms P. RYDER, Director,
Ms M. MCNEANEY, Counsellor, *Advisers*.

The Court heard addresses by Mr Gleeson and Mr O'Reilly for the Government, by Mr Frowein for the Commission and by Mr Clarke, Mr

Hardiman and Mr Cole for the applicants, as well as replies to questions put by the Court.

8. The Government made further submissions concerning the applicants' claims under Article 50 (art. 50) on 10 April 1992. Comments by the applicants in reply were filed on 15 June 1992.

AS TO THE FACTS

I. INTRODUCTION

A. The applicants

9. The applicants in this case are (a) Open Door Counselling Ltd (hereinafter referred to as Open Door), a company incorporated under Irish law, which was engaged, inter alia, in counselling pregnant women in Dublin and in other parts of Ireland; and (b) Dublin Well Woman Centre Ltd (hereinafter referred to as Dublin Well Woman), a company also incorporated under Irish law which provided similar services at two clinics in Dublin; (c) Bonnie Maher and Ann Downes, who worked as trained counsellors for Dublin Well Woman; (d) Mrs X, born in 1950 and Ms Maeve Geraghty, born in 1970, who join in the Dublin Well Woman application as women of child-bearing age. The applicants complained of an injunction imposed by the Irish courts on Open Door and Dublin Well Woman to restrain them from providing certain information to pregnant women concerning abortion facilities outside the jurisdiction of Ireland by way of non-directive counselling (see paragraphs 13 and 20 below).

Open Door and Dublin Well Woman are both non-profit- making organisations. Open Door ceased to operate in 1988 (see paragraph 21 below). Dublin Well Woman was established in 1977 and provides a broad range of services relating to counselling and marriage, family planning, procreation and health matters. The services offered by Dublin Well Woman relate to every aspect of women's health, ranging from smear tests to breast examinations, infertility, artificial insemination and the counselling of pregnant women.

10. In 1983, at the time of the referendum leading to the Eighth Amendment of the Constitution (see paragraph 28 below), Dublin Well Woman issued a pamphlet stating inter alia that legal advice on the implications of the wording of the provision had been obtained and that "with this wording anybody could seek a court injunction to prevent us offering" the non-directive counselling service. The pamphlet also warned

that "it would also be possible for an individual to seek a court injunction to prevent a woman travelling abroad if they believe she intends to have an abortion".

B. The injunction proceedings

1. Before the High Court

11. The applicant companies were the defendants in proceedings before the High Court which were commenced on 28 June 1985 as a private action brought by the Society for the Protection of Unborn Children (Ireland) Ltd (hereinafter referred to as S.P.U.C.), which was converted into a relator action brought at the suit of the Attorney General by order of the High Court of 24 September 1986 (the Attorney General at the relation of the Society for the Protection of Unborn Children (Ireland) Ltd v. Open Door Counselling Ltd and Dublin Well Woman Centre Ltd [1988] Irish Reports, pp. 593-627).

12. S.P.U.C. sought a declaration that the activities of the applicant companies in counselling pregnant women within the jurisdiction of the court to travel abroad to obtain an abortion were unlawful having regard to Article 40.3.3° of the Constitution which protects the right to life of the unborn (see paragraph 28 below) and an order restraining the defendants from such counselling or assistance.

13. No evidence was adduced at the hearing of the action which proceeded on the basis of certain agreed facts. The facts as agreed at that time by Dublin Well Woman may be summarised as follows:

(a) It counsels in a non-directive manner pregnant women resident in Ireland;

(b) Abortion or termination of pregnancy may be one of the options discussed within the said counselling;

(c) If a pregnant woman wants to consider the abortion option further, arrangements will be made by the applicant to refer her to a medical clinic in Great Britain;

(d) In certain circumstances, the applicant may arrange for the travel of such pregnant women;

(e) The applicant will inspect the medical clinic in Great Britain to ensure that it operates at the highest standards;

(f) At those medical clinics abortions have been performed on pregnant women who have been previously counselled by the applicant;

(g) Pregnant women resident in Ireland have been referred to medical clinics in Great Britain where abortions have been performed for many years including 1984.

The facts agreed by Open Door were the same as above with the exception of point (d).

14. The meaning of the concept of non-directive counselling was described in the following terms by Mr Justice Finlay CJ in the judgment of the Supreme Court in the case (judgment of 16 March 1988, [1988] Irish Reports 618 at p. 621):

> "It was submitted on behalf of each of the Defendants that the meaning of non-directive counselling in these agreed sets of facts was that it was counselling which neither included advice nor was judgmental but that it was a service essentially directed to eliciting from the client her own appreciation of her problem and her own considered choice for its solution. This interpretation of the phrase 'non-directive counselling' in the context of the activities of the Defendants was not disputed on behalf of the Respondent. It follows from this, of course, that non- directive counselling to pregnant women would never involve the actual advising of an abortion as the preferred option but neither, of course, could it permit the giving of advice for any reason to the pregnant women receiving such counselling against choosing to have an abortion."

15. On 19 December 1986 Mr Justice Hamilton, President of the High Court, found that the activities of Open Door and Dublin Well Woman in counselling pregnant women within the jurisdiction of the court to travel abroad to obtain an abortion or to obtain further advice on abortion within a foreign jurisdiction were unlawful having regard to the provisions of Article 40.3.3° of the Constitution of Ireland.

He confirmed that Irish criminal law made it an offence to procure or attempt to procure an abortion, to administer an abortion or to assist in an abortion by supplying any noxious thing or instrument (sections 58 and 59 of the Offences against the Person Act 1861 - see paragraph 29 below). Furthermore, Irish constitutional law also protected the right to life of the unborn from the moment of conception onwards.

An injunction was accordingly granted "... that the Defendants [Open Door and Dublin Well Woman] and each of them, their servants or agents, be perpetually restrained from counselling or assisting pregnant women within the jurisdiction of this Court to obtain further advice on abortion or to obtain an abortion". The High Court made no order relating to the costs of the proceedings, leaving each side to bear its own legal costs.

2. Before the Supreme Court

16. Open Door and Dublin Well Woman appealed against this decision to the Supreme Court which in a unanimous judgment delivered on 16 March 1988 by Mr Justice Finlay CJ rejected the appeal.

The Supreme Court noted that the appellants did not consider it essential to the service which they provided for pregnant women in Ireland that they should take any part in arranging the travel of women who wished to go abroad for the purpose of having an abortion or that they arranged bookings in clinics for such women. However, they did consider it essential to inform women who wished to have an abortion outside the jurisdiction of the court of the name, address, telephone number and method of communication with

a specified clinic which they had examined and were satisfied was one which maintained a high standard.

17. On the question of whether the above activity should be restrained as being contrary to the Constitution, Mr Justice Finlay CJ stated:

> "... the essential issues in this case do not in any way depend upon the Plaintiff establishing that the Defendants were advising or encouraging the procuring of abortions. The essential issue in this case, having regard to the nature of the guarantees contained in Article 40, s.3, sub-s.3 of the Constitution, is the issue as to whether the Defendants' admitted activities were assisting pregnant women within the jurisdiction to travel outside that jurisdiction in order to have an abortion. To put the matter in another way, the issue and the question of fact to be determined is: were they thus assisting in the destruction of the life of the unborn?
>
> I am satisfied beyond doubt that having regard to the admitted facts the Defendants were assisting in the ultimate destruction of the life of the unborn by abortion in that they were helping the pregnant woman who had decided upon that option to get in touch with a clinic in Great Britain which would provide the service of abortion. It seems to me an inescapable conclusion that if a woman was anxious to obtain an abortion and if she was able by availing of the counselling services of one or other of the Defendants to obtain the precise location, address and telephone number of, and method of communication with, a clinic in Great Britain which provided that service, put in plain language, that was knowingly helping her to attain her objective. I am, therefore, satisfied that the finding made by the learned trial Judge that the Defendants were assisting pregnant women to travel abroad to obtain further advice on abortion and to secure an abortion is well supported on the evidence ..."

The Court further noted that the phrase in Article 40.3.3° "with due regard to the equal right to life of the mother" did not arise for interpretation in the case since the applicants were not claiming that the service they were providing for pregnant women was "in any way confined to or especially directed towards the due regard to the equal right to life of the mother ...".

18. Open Door and Dublin Well Woman had submitted that if they did not provide this counselling service it was likely that pregnant women would succeed nevertheless in obtaining an abortion in circumstances less advantageous to their health. The Court rejected this argument in the following terms:

> "Even if it could be established, however, it would not be a valid reason why the Court should not restrain the activities in which the defendants were engaged.
>
> The function of the courts, which is not dependent on the existence of legislation, when their jurisdiction to defend and vindicate a constitutionally guaranteed right has been invoked, must be confined to the issues and to the parties before them.
>
> If the Oireachtas enacts legislation to defend and vindicate a constitutionally guaranteed right it may well do so in wider terms than are necessary for the resolution of any individual case. The courts cannot take that wide approach. They are confined to dealing with the parties and issues before them. I am satisfied, therefore, that it is no answer to the making of an order restraining these defendants' activities that there

may be other persons or the activities of other groups or bodies which will provide the same result as that assisted by these defendants' activities."

19. As to whether there was a constitutional right to information about the availability of abortion outside the State, the court stated as follows:

"The performing of an abortion on a pregnant woman terminates the unborn life which she is carrying. Within the terms of Article 40.3.3° it is a direct destruction of the constitutionally guaranteed right to life of that unborn child.

It must follow from this that there could not be an implied and unenumerated constitutional right to information about the availability of a service of abortion outside the State which, if availed of, would have the direct consequence of destroying the expressly guaranteed constitutional right to life of the unborn. As part of the submission on this issue it was further suggested that the right to receive and give information which, it was alleged, existed and was material to this case was, though not expressly granted, impliedly referred to or involved in the right of citizens to express freely their convictions and opinions provided by Article 40, s.6, sub-s.1 (i) of the Constitution, since, it was claimed, the right to express freely convictions and opinions may, under some circumstances, involve as an ancillary right the right to obtain information. I am satisfied that no right could constitutionally arise to obtain information the purpose of the obtaining of which was to defeat the constitutional right to life of the unborn child."

20. The court upheld the decision of the High Court to grant an injunction but varied the terms of the order as follows:

"... that the defendants and each of them, their servants or agents be perpetually restrained from assisting pregnant women within the jurisdiction to travel abroad to obtain abortions by referral to a clinic, by the making for them of travel arrangements, or by informing them of the identity and location of and the method of communication with a specified clinic or clinics or otherwise."

The costs of the Supreme Court appeal were awarded against the applicant companies on 3 May 1988.

21. Following the judgment of the Supreme Court, Open Door, having no assets, ceased its activities.

C. Subsequent legal developments

22. On 25 September 1989 S.P.U.C. applied to the High Court for a declaration that the dissemination in certain student publications of information concerning the identity and location of abortion clinics outside the jurisdiction was unlawful and for an injunction restraining its distribution. Their standing to apply to the courts for measures to protect the right to life of the unborn had previously been recognised by the Supreme Court following a similar action in the case of Society for the Protection of Unborn Children (Ireland) Ltd v. Coogan and Others ([1989] Irish Reports, pp. 734-751).

By a judgment of 11 October 1989 the High Court decided to refer certain questions to the European Court of Justice for a preliminary ruling

under Article 177 of the EEC Treaty concerning, inter alia, the question whether the right to information concerning abortion services outside Ireland was protected by Community law.

23. An appeal was brought against this decision and, on 19 December 1989, the Supreme Court granted an interlocutory injunction restraining the students from "publishing or distributing or assisting in the printing, publishing or distribution of any publication produced under their aegis providing information to persons (including pregnant women) of the identity and location of and the method of communication with a specified clinic or clinics where abortions are performed" (Society for the Protection of Unborn Children (Ireland) Ltd v. Stephen Grogan and Others, [1989] Irish Reports, pp. 753-771).

Mr Justice Finlay CJ (with whom Mr Justice Walsh, Mr Justice Griffin and Mr Justice Hederman concurred) considered that the reasoning of the court in the case brought against the applicant companies applied to the activities of the students:

> "I reject as unsound the contention that the activity involved in this case of publishing in the students' manuals the name, address and telephone number, when telephoned from this State, of abortion clinics in the United Kingdom, and distributing such manuals in Ireland, can be distinguished from the activity condemned by this Court in [the Open Door Counselling case] on the grounds that the facts of that case were that the information was conveyed during periods of one to one non-directive counselling. It is clearly the fact that such information is conveyed to pregnant women, and not the method of communication which creates the unconstitutional illegality, and the judgment of this Court in the Open Door Counselling case is not open to any other interpretation."

Mr Justice McCarthy also considered that an injunction should be issued and commented as follows:

> "In the light of the availability of such information from a variety of sources, such as imported magazines, etc., I am far from satisfied that the granting of an injunction to restrain these defendants from publishing the material impugned would save the life of a single unborn child, but I am more than satisfied that if the courts fail to enforce, and enforce forthwith, that guarantee as construed in A.G. (S.P.U.C.) v. Open Door Counselling Ltd ([1988] Irish Reports 593), then the rule of law will be set at nought."

24. In a judgment of 4 October 1991 on the questions referred under Article 177 of the EEC Treaty, following the Supreme Court's judgment, the Court of Justice of the European Communities ruled that the medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 of the Treaty. However it found that the link between the activity of the student associations and medical terminations of pregnancy carried out in clinics in another member State was too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction on the freedom to supply services within the meaning of Article 59 of the Treaty. The Court did not examine whether the prohibition was in breach of

Article 10 (art. 10) of the Convention. In the light of its conclusions concerning the restriction on services it considered that it had no jurisdiction with regard to national legislation "lying outside the scope of Community law". Accordingly, the restrictions on the publication of information by student associations were not considered to be contrary to Community law (see paragraphs 22-23 above, the Society for the Protection of Unborn Children (Ireland) Ltd v. Stephen Grogan and Others [1991] European Court Reports I, pp. 4733-4742).

25. The interpretation to be given to Article 40.3.3° of the Constitution also arose before the Supreme Court in the case of The Attorney General v. X and Others which concerned an application to the courts by the Attorney General for an injunction to prevent a 14-year-old girl who was pregnant from leaving the jurisdiction to have an abortion abroad. The girl alleged that she had been raped and had expressed the desire to commit suicide. The Supreme Court, in its judgment of 5 March 1992, found that termination of pregnancy was permissible under Article 40.3.3° where it was established as a matter of probability that there was a real and substantial risk to the life of the mother if such termination was not effected. Finding that this test was satisfied on the facts of the case the Supreme Court discharged the injunction which had been granted by the High Court at first instance.

A majority of three judges of the Supreme Court (Finlay CJ, Hederman and Egan JJ.) expressed the view that Article 40.3.3° empowered the courts in proper cases to restrain by injunction a pregnant woman from leaving the jurisdiction to have an abortion so that the right to life of the unborn might be defended and vindicated.

During the oral hearing before the European Court of Human Rights, the Government made the following statement in the light of the Supreme Court's judgment in this case:

> "... persons who are deemed to be entitled under Irish law to avail themselves of termination of pregnancy in these circumstances must be regarded as being entitled to have appropriate access to information in relation to the facilities for such operations, either in Ireland or abroad."

D. Evidence presented by the applicants

26. The applicants presented evidence to the Court that there had been no significant drop in the number of Irish women having abortions in Great Britain since the granting of the injunction, that number being well over 3,500 women per year. They also submitted an opinion from an expert in public health (Dr J.R. Ashton) which concludes that there are five possible adverse implications for the health of Irish women arising from the injunction in the present case:

1. An increase in the birth of unwanted and rejected children;
2. An increase in illegal and unsafe abortions;

3. A lack of adequate preparation of Irish women obtaining abortions;

4. Increases in delay in obtaining abortions with ensuing increased complication rates;

5. Poor aftercare with a failure to deal adequately with medical complications and a failure to provide adequate contraceptive advice.

In their written comments to the Court, S.P.U.C. claimed that the number of abortions obtained by Irish women in England, which had been rising rapidly prior to the enactment of Article 40.3.3°, had increased at a much reduced pace. They further submitted that the number of births to married women had increased at a "very substantial rate".

27. The applicants claimed that the impugned information was available in British newspapers and magazines which were imported into Ireland as well as in the yellow pages of the London telephone directory which could be purchased from the Irish telephone service. It was also available in publications such as the British Medical Journal which was obtainable in Ireland.

While not challenging the accuracy of the above information the Government observed that no newspaper or magazine had been produced in evidence to the Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE CONCERNING PROTECTION OF THE UNBORN

A. Constitutional protection

28. Article 40.3.3° of the Irish Constitution (the Eighth Amendment), which came into force in 1983 following a referendum, reads:

> "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

This provision has been interpreted by the Supreme Court in the present case, in the Society for the Protection of Unborn Children (Ireland) Ltd v. Grogan and Others ([1989] Irish Reports, p. 753) and in The Attorney General v. X and Others (see paragraphs 22-25 above).

B. Statutory protection

29. The statutory prohibition of abortion is contained in sections 58 and 59 of the Offences Against the Person Act 1861. Section 58 provides that:

> "Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing or shall unlawfully use any instrument or other means whatsoever with the like intent, and

whosoever, with intent to procure the miscarriage of any woman, whether she be or not be with child, shall unlawfully administer to her or cause to betaken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of a felony, and being convicted thereof shall be liable, [to imprisonment for life] ..."

Section 59 states that:

"Whoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour, and being convicted thereof, ..."

30. Section 16 of the Censorship of Publications Act 1929 as amended by section 12 of the Health (Family Planning) Act 1979 provides that:

"It shall not be lawful for any person, otherwise than under and in accordance with a permit in writing granted to him under this section

(a) to print or publish or cause or procure to be printed or published, or

(b) to sell or expose, offer or keep for sale or

(c) to distribute, offer or keep for distribution,

any book or periodical publication (whether appearing on the register of prohibited publications or not) which advocates or which might reasonably be supposed to advocate the procurement of abortion or miscarriage or any method, treatment or appliance to be used for the purpose of such procurement."

31. Section 58 of the Civil Liability Act 1961 provides that "the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, provided the child is subsequently born alive".

32. Section 10 of the Health (Family Planning) Act 1979 re-affirms the statutory prohibition of abortion and states as follows:

"Nothing in this Act shall be construed as authorising -

(a) the procuring of abortion,

(b) the doing of any other thing the doing of which is prohibited by section 58 or 59 of the Offences Against the Person Act, 1861 (which sections prohibit the administering of drugs or the use of any instruments to procure abortion) or,

(c) the sale, importation into the State, manufacture, advertising or display of abortifacients."

C. Case-law

33. Apart from the present case and subsequent developments (see paragraphs 11-25 above), reference has been made to the right to life of the unborn in various decisions of the Supreme Court (see, for example, McGee v. Attorney General [1974] Irish Reports, p. 264, G. v. An Bord Uchtala [1980] Irish Reports, p. 32, Norris v. Attorney General [1984] Irish Reports, p. 36).

34. In the case of G. v. An Bord Uchtala (loc. cit.) Mr Justice Walsh stated as follows:

> "[A child] has the right to life itself and the right to be guarded against all threats directed to its existence, whether before or after birth ... The right to life necessarily implies the right to be born, the right to preserve and defend and to have preserved and defended that life ..."

35. The Supreme Court has also stated that the courts are the custodians of the fundamental rights set out in the Constitution and that their powers in this regard are as ample as the defence of the Constitution requires (The State (Quinn) v. Ryan [1965] Irish Reports 70). Moreover, an infringement of a constitutional right by an individual may be actionable in damages as a constitutional tort (Meskell v. C.I.E. [1973] Irish Reports, p. 121).
In his judgment in The People v. Shaw ([1982] Irish Reports, p. 1), Mr Justice Kenny observed:

> "When the People enacted the Constitution of 1937, they provided (Article 40,s.3) that the State guaranteed in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen and that the State should, in particular, by its laws protect as best it might from unjust attack and in the case of injustice done, vindicate the life, person, good name and property rights of every citizen. I draw attention to the use of the words 'the State'. The obligation to implement this guarantee is imposed not on the Oireachtas only, but on each branch of the State which exercises the powers of legislating, executing and giving judgment on those laws: Article 6. The word 'laws' in Article 40,s.3 is not confined to laws which have been enacted by the Oireachtas, but comprehends the laws made by judges and by ministers of State when they make statutory instruments or regulations."

PROCEEDINGS BEFORE THE COMMISSION

36. In their applications (nos. 14234 and 14235/88) lodged with the Commission on 19 August and 22 September 1988 the applicants complained that the injunction in question constituted an unjustified interference with their right to impart or receive information contrary to Article 10 (art. 10) of the Convention. Open Door, Mrs X and Ms Geraghty further claimed that the restrictions amounted to an interference with their right to respect for private life in breach of Article 8 (art. 8) and, in the case

of Open Door, discrimination contrary to Article 14 in conjunction with Articles 8 and 10 (art. 14+8, art. 14+10).

37. The Commission joined the applications on 14 March 1989 and declared the case admissible on 15 May 1990. In its report of 7 March 1991 (Article 31) (art. 31), it expressed the opinion:

(a) by eight votes to five, that there had been a violation of Article 10 (art. 10) in respect of the Supreme Court injunction as it affected the applicant companies and counsellors;

(b) by seven votes to six, that there had been a violation of Article 10 (art. 10) in respect of the Supreme Court injunction as it affected Mrs X and Ms Geraghty;

(c) by seven votes to two, with four abstentions, that it was not necessary to examine further the complaints of Mrs X and Ms Geraghty under Article 8 (art. 8);

(d) unanimously, that there had been no violation of Articles 8 and 14 (art. 8, art. 14) in respect of Open Door.

The full text of the Commission's opinion and of the seven separate opinions contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

38. At the public hearing on 24 March 1992 the Government maintained in substance the arguments and submissions set out in their memorial whereby they invited the Court to find that there had been no breach of the Convention.

AS TO THE LAW

I. SCOPE OF THE DUBLIN WELL WOMAN CASE

39. In their original application to the Commission Dublin Well Woman and the two counsellors, Ms Maher and Ms Downes, alleged that the Supreme Court injunction constituted an unjustified interference with their right to impart information, in breach of Article 10 (art. 10) of the Convention.

[*] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 246-A of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

In their pleadings before the Court they further complained that there had also been a breach of Article 8 (art. 8). They had not raised this complaint before the Commission.

40. The scope of the Court's jurisdiction is determined by the Commission's decision declaring the originating application admissible (see, inter alia, the Brogan and Others v. the United Kingdom judgment of 29 November 1988, Series A no. 145-B, p. 27, para. 46). The Court considers that the applicants are now seeking to raise before the Court a new and separate complaint. As such it has no jurisdiction to entertain it.

II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Whether Ms Maher, Ms Downes, Mrs X and Ms Geraghty can claim to be "victims" of a violation of the Convention

41. The Government submitted, as they had done before the Commission, that only the corporate applicants could claim to be "victims" of an infringement of their Convention rights. Ms Maher, Ms Downes, Mrs X and Ms Geraghty had not been involved in the proceedings before the Irish courts. Moreover the applicants had failed to identify a single pregnant woman who could claim to be a "victim" of the matters complained of. In this respect the case was in the nature of an actio popularis, particularly as regards Mrs X and Ms Geraghty.

1. Ms MahDoneer and Ms Downes

42. The Delegate of the Commission pointed out that the Government's plea as regards the applicant counsellors (Ms Maher and Ms Downes) conflicted with their concession in the pleadings before the Commission that these applicants were subject to the restraint of the Supreme Court injunction and could therefore properly claim to have suffered an interference with their Article 10 (art. 10) rights.

43. The Court agrees with the Commission that Ms Maher and Ms Downes can properly claim to be "victims" of an interference with their rights since they were directly affected by the Supreme Court injunction. Moreover, it considers that the Government are precluded from making submissions as regards preliminary exceptions which are inconsistent with concessions previously made in their pleadings before the Commission (see, mutatis mutandis, the Pine Valley Developments Ltd and Others v. Ireland judgment of 29 November 1991, Series A no. 222, pp. 21-22, para. 47, and the Kolompar v. Belgium judgment of 24 September 1992, Series A no. 235-C, p. 54, para. 32).

2. Mrs X and Ms Geraghty

44. The Court recalls that Article 25 (art. 25) entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it (see, inter alia, the Johnston and Others v. Ireland judgment of 18 December 1986, Series A no. 112, p. 21, para. 42).

In the present case the Supreme Court injunction restrained the corporate applicants and their servants and agents from providing certain information to pregnant women. Although it has not been asserted that Mrs X and Ms Geraghty are pregnant, it is not disputed that they belong to a class of women of child-bearing age which may be adversely affected by the restrictions imposed by the injunction. They are not seeking to challenge in abstracto the compatibility of Irish law with the Convention since they run a risk of being directly prejudiced by the measure complained of. They can thus claim to be "victims" within the meaning of Article 25 para. 1 (art. 25-1).

B. Whether the application complies with the six-month rule

45. At the oral hearing the Government submitted that the application should be rejected under Article 26 (art. 26) for failure to comply with the six-month rule, on the grounds that the applicants were relying on case-law and arguments which were not raised before the domestic courts.

46. The Court observes that while this plea was made before the Commission (see Appendix II of the Commission's report) it was not re-iterated in the Government's memorial to the Court and was raised solely at the oral hearing. Rule 48 para. 1 of the Rules of Court, however, required them to file it before the expiry of the time-limit laid down for the filing of their memorial, with the result that it must therefore be rejected as being out of time (see, inter alia, the Olsson v. Sweden judgment of 24 March 1988, Series A no. 130, p. 28, para. 56).

C. Whether the applicants had exhausted domestic remedies

47. In their memorial the Government submitted - as they had also done before the Commission - that domestic remedies had not been exhausted, as required by Article 26 (art. 26), by:

1. Open Door as regards its complaints under Articles 8 and 14 (art. 8, art. 14);

2. both Open Door and Dublin Well Woman in so far as they sought to introduce in their complaint under Article 10 (art. 10) evidence and submissions concerning abortion and the impact of the Supreme Court

injunction on women's health that had not been raised before the Irish courts;

3. Ms Maher, Ms Downes, Mrs X and Ms Geraghty on the grounds that they had made no attempt to exhaust domestic remedies under Irish law and that they had not been involved in any capacity in the relevant proceedings before the Irish courts.

48. As regards (1) the Court observes that Open Door would have had no prospect of success in asserting these complaints having regard to the reasoning of the Supreme Court concerning the high level of protection afforded to the right to life of the unborn child under Irish law (see paragraphs 16-25 above).

49. As regards (2) Open Door and Dublin Well Woman are not introducing a fresh complaint in respect of which they have not exhausted domestic remedies. They are merely developing their submissions in respect of complaints which have already been examined by the Irish courts. Article 26 (art. 26) imposes no impediments to applicants in this regard. It is clear from the judgment of the Supreme Court that the applicants had in fact argued that an injunction would adversely affect women's health and that this submission was rejected (see paragraph 18 above).

50. Finally, as regards (3) it emerges from the judgments of the Supreme Court in the present case and in subsequent cases (see paragraphs 16-25 above) that any action brought by the four individual applicants would have had no prospects of success.

51. Accordingly, the Government's objection based on non- exhaustion of domestic remedies fails.

Conclusion

52. To sum up, the Court is able to take cognisance of the merits of the case as regards all of the applicants.

III. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

53. The applicants alleged that the Supreme Court injunction, restraining them from assisting pregnant women to travel abroad to obtain abortions, infringed the rights of the corporate applicants and the two counsellors to impart information, as well as the rights of Mrs X and Ms Geraghty to receive information. They confined their complaint to that part of the injunction which concerned the provision of information to pregnant women as opposed to the making of travel arrangements or referral to clinics (see paragraph 20 above). They invoked Article 10 (art. 10) which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...

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

54. In their submissions to the Court the Government contested these claims and also contended that Article 10 (art. 10) should be interpreted against the background of Articles 2, 17 and 60 (art. 2, art. 17, art. 60) of the Convention the relevant parts of which state:

Article 2 (art. 2)

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

..."

Article 17 (art. 17)

"Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

Article 60 (art. 60)

"Nothing in [the] Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."

A. Was there an interference with the applicants' rights?

55. The Court notes that the Government accepted that the injunction interfered with the freedom of the corporate applicants to impart information. Having regard to the scope of the injunction which also restrains the "servants or agents" of the corporate applicants from assisting "pregnant women" (see paragraph 20 above), there can be no doubt that there was also an interference with the rights of the applicant counsellors to impart information and with the rights of Mrs X and Ms Geraghty to receive information in the event of being pregnant.

To determine whether such an interference entails a violation of Article 10 (art. 10), the Court must examine whether or not it was justified under Article 10 para. 2 (art. 10-2) by reason of being a restriction "prescribed by

law" which was necessary in a democratic society on one or other of the grounds specified in Article 10 para. 2 (art. 10-2).

B. Was the restriction "prescribed by law"?

1. Arguments presented by those appearing before the Court

56. Open Door and Dublin Well Woman submitted that the law was not formulated with sufficient precision to have enabled them to foresee that the non-directive counselling in which they were involved would be restrained by the courts. It was not clear from the wording of Article 40.3.3° of the Constitution (the Eighth Amendment), which gave rise to many difficulties of interpretation and application, that those giving information to pregnant women would be in breach of this provision. In the same way, it was not clear whether it could have been used as a means of prohibiting access to foreign periodicals containing advertisements for abortion facilities abroad or of restricting other activities involving a "threat" to the life of the unborn such as travelling abroad to have an abortion.

In this respect the applicants pointed out that the provision had been criticised at the time of its enactment by both the Attorney General and the Director of Public Prosecutions on the grounds that it was ambiguous and uncertain. Furthermore, although there was an expectation that there would be legislation to clarify the meaning of the provision, none was in fact enacted.

They also maintained that on its face Article 40.3.3° is addressed only to the State and not to private persons. Thus they had no way of knowing that it would apply to non-directive counselling by private agencies. Indeed, since none of Ireland's other laws concerning abortion forbids such counselling or travelling abroad to have an abortion they had good reason to believe that this activity was lawful.

Finally, the insufficient precision of the Eighth Amendment was well reflected in the recent judgment of the Supreme Court of 5 March 1992 in The Attorney General v. X and Others which, as conceded by the Government, had the consequence that it would now be lawful to provide information concerning abortion services abroad in certain circumstances (see paragraph 25 above).

In sum, given the uncertain scope of this provision and the considerable doubt as to its meaning and effect, even amongst the most authoritative opinion, the applicants could not have foreseen that such non-directive counselling was unlawful.

57. The Government submitted that the legal position was reasonably foreseeable with appropriate legal advice, within the meaning of the Court's case-law. The applicants ought to have known that an injunction could be obtained against them to protect or defend rights guaranteed by the

Constitution, or recognised at common law, or under the principles of the law of equity. Indeed, evidence had now come to light subsequent to the publication of the Commission's report that Dublin Well Woman had actually received legal advice concerning the implications of the wording of the Amendment which warned that a court injunction to restrain their counselling activities was possible (see paragraph 10 in fine above). It was thus not open to the applicants, against this background, to argue that the injunction was unforeseeable.

58. For the Commission, the Eighth Amendment did not provide a clear basis for the applicants to have foreseen that providing information about lawful services abroad would be unlawful. A law restricting freedom of expression across frontiers in such a vital area required particular precision to enable individuals to regulate their conduct accordingly. Since it was not against the criminal law for women to travel abroad to have an abortion, lawyers could reasonably have concluded that the provision of information did not involve a criminal offence. In addition, the Government had been unable to show, with reference to case-law, that the applicant companies could have foreseen that their counselling service was a constitutional tort (see paragraph 35 above). Moreover, the wording of the Amendment suggested that legislation was to have been enacted regulating the protection of the rights of the unborn.

2. Court's examination of the issue

59. This question must be approached by considering not merely the wording of Article 40.3.3° in isolation but also the protection given under Irish law to the rights of the unborn in statute law and in case-law (see paragraphs 28-35 above).

It is true that it is not a criminal offence to have an abortion outside Ireland and that the practice of non-directive counselling of pregnant women did not infringe the criminal law as such. Moreover, on its face the language of Article 40.3.3° appears to enjoin only the State to protect the right to life of the unborn and suggests that regulatory legislation will be introduced at some future stage.

On the other hand, it is clear from Irish case-law, even prior to 1983, that infringement of constitutional rights by private individuals as well as by the State may be actionable (see paragraph 35 above). Furthermore, the constitutional obligation that the State defend and vindicate personal rights "by its laws" has been interpreted by the courts as not being confined merely to "laws" which have been enacted by the Irish Parliament (Oireachtas) but as also comprehending judge-made "law". In this regard the Irish courts, as the custodians of fundamental rights, have emphasised that they are endowed with the necessary powers to ensure their protection (ibid.).

60. Taking into consideration the high threshold of protection of the unborn provided under Irish law generally and the manner in which the courts have interpreted their role as the guarantors of constitutional rights, the possibility that action might be taken against the corporate applicants must have been, with appropriate legal advice, reasonably foreseeable (See the Sunday Times v. the United Kingdom judgment of 26 April 1979, Series A no. 30, p. 31, para. 49). This conclusion is reinforced by the legal advice that was actually given to Dublin Well Woman that, in the light of Article 40.3.3°, an injunction could be sought against its counselling activities (see paragraph 10 in fine above).

The restriction was accordingly "prescribed by law".

C. Did the restriction have aims that were legitimate under Article 10 para. 2 (art. 10-2)?

61. The Government submitted that the relevant provisions of Irish law are intended for the protection of the rights of others - in this instance the unborn -, for the protection of morals and, where appropriate, for the prevention of crime.

62. The applicants disagreed, contending inter alia that, in view of the use of the term "everyone" in Article 10 para. 1 (art. 10-1) and throughout the Convention, it would be illogical to interpret the "rights of others" in Article 10 para. 2 (art. 10-2) as encompassing the unborn.

63. The Court cannot accept that the restrictions at issue pursued the aim of the prevention of crime since, as noted above (paragraph 59), neither the provision of the information in question nor the obtaining of an abortion outside the jurisdiction involved any criminal offence. However, it is evident that the protection afforded under Irish law to the right to life of the unborn is based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion as expressed in the 1983 referendum (see paragraph 28 above). The restriction thus pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect. It is not necessary in the light of this conclusion to decide whether the term "others" under Article 10 para. 2 (art. 10-2) extends to the unborn.

D. Was the restriction necessary in a democratic society?

64. The Government submitted that the Court’s approach to the assessment of the "necessity" of the restraint should be guided by the fact that the protection of the rights of the unborn in Ireland could be derived from Articles 2, 17 and 60 (art. 2, art. 17, art. 60) of the Convention. They further contended that the "proportionality" test was inadequate where the

rights of the unborn were at issue. The Court will examine these issues in turn.

1. Article 2 (art. 2)

65. The Government maintained that the injunction was necessary in a democratic society for the protection of the right to life of the unborn and that Article 10 (art. 10) should be interpreted inter alia against the background of Article 2 (art. 2) of the Convention which, they argued, also protected unborn life. The view that abortion was morally wrong was the deeply held view of the majority of the people in Ireland and it was not the proper function of the Court to seek to impose a different viewpoint.

66. The Court observes at the outset that in the present case it is not called upon to examine whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2 (art. 2). The applicants have not claimed that the Convention contains a right to abortion, as such, their complaint being limited to that part of the injunction which restricts their freedom to impart and receive information concerning abortion abroad (see paragraph 20 above).

Thus the only issue to be addressed is whether the restrictions on the freedom to impart and receive information contained in the relevant part of the injunction are necessary in a democratic society for the legitimate aim of the protection of morals as explained above (see paragraph 63). It follows from this approach that the Government's argument based on Article 2 (art. 2) of the Convention does not fall to be examined in the present case. On the other hand, the arguments based on Articles 17 and 60 (art. 17, art. 60) fall to be considered below (see paragraphs 78 and 79).

2. Proportionality

67. The Government stressed the limited nature of the Supreme Court's injunction which only restrained the provision of certain information (see paragraph 20 above). There was no limitation on discussion in Ireland about abortion generally or the right of women to travel abroad to obtain one. They further contended that the Convention test as regards the proportionality of the restriction was inadequate where a question concerning the extinction of life was at stake. The right to life could not, like other rights, be measured according to a graduated scale. It was either respected or it was not. Accordingly, the traditional approach of weighing competing rights and interests in the balance was inappropriate where the destruction of unborn life was concerned. Since life was a primary value which was antecedent to and a prerequisite for the enjoyment of every other right, its protection might involve the infringement of other rights such as

freedom of expression in a manner which might not be acceptable in the defence of rights of a lesser nature.

The Government also emphasised that, in granting the injunction, the Supreme Court was merely sustaining the logic of Article 40.3.3° of the Constitution. The determination by the Irish courts that the provision of information by the relevant applicants assisted in the destruction of unborn life was not open to review by the Convention institutions.

68. The Court cannot agree that the State's discretion in the field of the protection of morals is unfettered and unreviewable (see, mutatis mutandis, for a similar argument, the Norris v. Ireland judgment of 26 October 1988, Series A no. 142, p. 20, para. 45).

It acknowledges that the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life. As the Court has observed before, it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals, and the State authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of the requirements of morals as well as on the "necessity" of a "restriction" or "penalty" intended to meet them (see, inter alia, the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 22, para. 48, and the Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133, p. 22, para. 35).

However this power of appreciation is not unlimited. It is for the Court, in this field also, to supervise whether a restriction is compatible with the Convention.

69. As regards the application of the "proportionality" test, the logical consequence of the Government's argument is that measures taken by the national authorities to protect the right to life of the unborn or to uphold the constitutional guarantee on the subject would be automatically justified under the Convention where infringement of a right of a lesser stature was alleged. It is, in principle, open to the national authorities to take such action as they consider necessary to respect the rule of law or to give effect to constitutional rights. However, they must do so in a manner which is compatible with their obligations under the Convention and subject to review by the Convention institutions. To accept the Government's pleading on this point would amount to an abdication of the Court's responsibility under Article 19 (art. 19) "to ensure the observance of the engagements undertaken by the High Contracting Parties ...".

70. Accordingly, the Court must examine the question of "necessity" in the light of the principles developed in its case-law (see, inter alia, the Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59). It must determine whether there existed a pressing social need for the measures in question and, in

particular, whether the restriction complained of was "proportionate to the legitimate aim pursued" (ibid.).

71. In this context, it is appropriate to recall that freedom of expression is also applicable to "information" or "ideas" that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, inter alia, the above-mentioned Handyside judgment, Series A no. 24, p. 23, para. 49).

72. While the relevant restriction, as observed by the Government, is limited to the provision of information, it is recalled that it is not a criminal offence under Irish law for a pregnant woman to travel abroad in order to have an abortion. Furthermore, the injunction limited the freedom to receive and impart information with respect to services which are lawful in other Convention countries and may be crucial to a woman's health and well-being. Limitations on information concerning activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society.

73. The Court is first struck by the absolute nature of the Supreme Court injunction which imposed a "perpetual" restraint on the provision of information to pregnant women concerning abortion facilities abroad, regardless of age or state of health or their reasons for seeking counselling on the termination of pregnancy. The sweeping nature of this restriction has since been highlighted by the case of The Attorney General v. X and Others and by the concession made by the Government at the oral hearing that the injunction no longer applied to women who, in the circumstances as defined in the Supreme Court's judgment in that case, were now free to have an abortion in Ireland or abroad (see paragraph 25 above).

74. On that ground alone the restriction appears over broad and disproportionate. Moreover, this assessment is confirmed by other factors.

75. In the first place, it is to be noted that the corporate applicants were engaged in the counselling of pregnant women in the course of which counsellors neither advocated nor encouraged abortion, but confined themselves to an explanation of the available options (see paragraphs 13 and 14 above). The decision as to whether or not to act on the information so provided was that of the woman concerned. There can be little doubt that following such counselling there were women who decided against a termination of pregnancy. Accordingly, the link between the provision of information and the destruction of unborn life is not as definite as contended. Such counselling had in fact been tolerated by the State authorities even after the passing of the Eighth Amendment in 1983 until the Supreme Court's judgment in the present case. Furthermore, the information that was provided by the relevant applicants concerning abortion facilities abroad was not made available to the public at large.

76. It has not been seriously contested by the Government that information concerning abortion facilities abroad can be obtained from other sources in Ireland such as magazines and telephone directories (see paragraphs 23 and 27 above) or by persons with contacts in Great Britain. Accordingly, information that the injunction sought to restrict was already available elsewhere although in a manner which was not supervised by qualified personnel and thus less protective of women's health. Furthermore, the injunction appears to have been largely ineffective in protecting the right to life of the unborn since it did not prevent large numbers of Irish women from continuing to obtain abortions in Great Britain (see paragraph 26 above).

77. In addition, the available evidence, which has not been disputed by the Government, suggests that the injunction has created a risk to the health of those women who are now seeking abortions at a later stage in their pregnancy, due to lack of proper counselling, and who are not availing themselves of customary medical supervision after the abortion has taken place (see paragraph 26 above). Moreover, the injunction may have had more adverse effects on women who were not sufficiently resourceful or had not the necessary level of education to have access to alternative sources of information (see paragraph 76 above). These are certainly legitimate factors to take into consideration in assessing the proportionality of the restriction.

3. Articles 17 and 60 (art. 17, art. 60)

78. The Government, invoking Articles 17 and 60 (art. 17, art. 60) of the Convention, have submitted that Article 10 (art. 10) should not be interpreted in such a manner as to limit, destroy or derogate from the right to life of the unborn which enjoys special protection under Irish law.

79. Without calling into question under the Convention the regime of protection of unborn life that exists under Irish law, the Court recalls that the injunction did not prevent Irish women from having abortions abroad and that the information it sought to restrain was available from other sources (see paragraph 76 above). Accordingly, it is not the interpretation of Article 10 (art. 10) but the position in Ireland as regards the implementation of the law that makes possible the continuance of the current level of abortions obtained by Irish women abroad.

4. Conclusion

80. In the light of the above, the Court concludes that the restraint imposed on the applicants from receiving or imparting information was disproportionate to the aims pursued. Accordingly there has been a breach of Article 10 (art. 10).

IV. ALLEGED VIOLATIONS OF ARTICLES 8 AND 14 (art. 8, art. 14)

81. Open Door also alleged a violation of the right to respect for private life contrary to Article 8 (art. 8) claiming that it should be open to it to complain of an interference with the privacy rights of its clients. Similarly, Mrs X and Ms Geraghty complained under this provision that the denial to them of access to information concerning abortion abroad constituted an unjustifiable interference with their right to respect for private life.

Open Door further claimed discrimination contrary to Article 14 in conjunction with Article 8 (art. 14+8) alleging that the injunction discriminated against women since men were not denied information "critical to their reproductive and health choices". It also invoked Article 14 in conjunction with Article 10 (art. 14+10) claiming discrimination on the grounds of political or other opinion since those who seek to counsel against abortion are permitted to express their views without restriction.

82. The applicants in the Dublin Well Woman case, in their memorial to the Court, similarly complained of discrimination contrary to Article 14, firstly, in conjunction with Article 8 (art. 14+8) on the same basis as Open Door, and secondly, in conjunction with Article 10 (art. 14+10) on the grounds that it followed from the decision of the Court of Justice of the European Communities in the Grogan case (see paragraph 24 above) that, had Dublin Well Woman been an "economic operator", they would have been permitted to distribute and receive such information.

83. The Court notes that the complaints of discrimination made by the applicants in Dublin Well Woman were made for the first time in the proceedings before the Court and that consequently it may be questioned whether it has jurisdiction to examine them (see paragraph 40 above). However, having regard to its finding that there had been a breach of Article 10 (art. 10) (see paragraph 80 above) the Court considers that it is not necessary to examine either these complaints or those made by Open Door, Mrs X and Ms Geraghty.

V. APPLICATION OF ARTICLE 50 (art. 50)

84. Article 50 (art. 50) provides as follows:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

85. Open Door made no claim for compensation for damage. Dublin Well Woman, on the other hand, claimed pecuniary damages amounting to IR£62,172 in respect of loss of income for the period January 1987 to June 1988 due to the discontinuance of the pregnancy counselling service.

86. The Government submitted that the claim should be rejected. In particular, they contended that it was made belatedly; that it was inconsistent with Dublin Well Woman's status as a non-profit- making company to claim pecuniary damage and was excessive.

87. The Court notes that the claim was made on 24 February 1992 and thus well in advance of the hearing of the case on 24 March 1992. Furthermore, it considers that even a non-profit- making company such as the applicant can incur losses for which it should be compensated.

The Government have submitted that it was unclear on what basis or in what manner the sum of IR£62,172 was computed and Dublin Well Woman has not indicated how these losses were calculated or sought to substantiate them. Nevertheless, the discontinuance of the counselling service must have resulted in a loss of income. Having regard to equitable considerations as required by Article 50 (art. 50), the Court awards IR£25,000 under this head.

B. Costs and expenses

1. Open Door

88. Open Door claimed the sum of IR£68,985.75 referable to both the national proceedings and to those before the Convention institutions. This sum did not take into account what had been received by way of legal aid from the Council of Europe in respect of fees. On 1 May 1992 Mr Cole, a lawyer who had appeared on behalf of Open Door, filed a supplementary claim for US$24,300 on behalf of the Centre for Constitutional Rights.

89. The Government considered the claim made by Open Door to be reasonable.

90. The Court observes that the claim made by Open Door includes an amount for the services of Mr Cole of the Centre for Constitutional Rights. It rejects his supplementary claim on behalf of the Centre for Constitutional Rights which was not itself a party to the proceedings. However, it allows Open Door's uncontested claim less 6,900 French francs paid by way of legal aid in respect of fees.

2. Dublin Well Woman

91. Dublin Well Woman claimed a total sum of IR£63,302.84 for costs and expenses incurred in the national proceedings. They further claimed IR£21,084.95 and IR£27,116.30 in respect of proceedings before the Commission and the Court. These sums did not take into account what had been received by way of legal aid in respect of fees and expenses.

92. The Government accepted that the claims for domestic costs were reasonable. However they submitted that, in the light of the claim made by Open Door, IR£16,000 and IR£19,000 were more appropriate sums for the proceedings before the Commission and Court.

93. The Court also considers that the amount claimed in respect of the proceedings before the Commission and Court is excessive taking into account the fees claimed by Open Door and the differences between the two applications. It holds that Dublin Well Woman should be awarded IR£100,000 under this head less 52,577 French francs already paid by way of legal aid in respect of fees and expenses.

94. The amounts awarded in this judgment are to be increased by any value-added tax that may be chargeable.

FOR THESE REASONS, THE COURT

1. Dismisses by fifteen votes to eight the Government's plea that Mrs X and Ms Geraghty cannot claim to be victims of a violation of the Convention;

2. Dismisses unanimously the remainder of the Government's preliminary objections;

3. Holds by fifteen votes to eight that there has been a violation of Article 10 (art. 10);

4. Holds unanimously that it is not necessary to examine the remaining complaints;

5. Holds by seventeen votes to six that Ireland is to pay to Dublin Well Woman, within three months, IR£25,000 (twenty-five thousand Irish pounds) in respect of damages;

6. Holds unanimously that Ireland is to pay to Open Door and Dublin Well Woman, within three months, in respect of costs and expenses, the sums resulting from the calculation to be made in accordance with paragraphs 90, 93 and 94 of the judgment;

7. Dismisses unanimously the remainder of the claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 29 October 1992.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr Cremona;

(b) partly dissenting opinion of Mr Matscher;

(c) dissenting opinion of Mr Pettiti, Mr Russo and Mr Lopes Rocha, approved by Mr Bigi;

(d) separate opinion of Mr De Meyer;

(e) concurring opinion of Mr Morenilla;

(f) partly dissenting opinion of Mr Baka;

(g) dissenting opinion of Mr Blayney.

R.R.
M.-A.E

DISSENTING OPINION OF JUDGE CREMONA

There are certain aspects in this case which merit special consideration in the context of the "necessary in a democratic society" requirement for the purposes of Article 10 para. 2 (art. 10-2) of the Convention.

Firstly, there is the paramount place accorded to the protection of unborn life in the whole fabric of Irish public policy, as is abundantly manifest from repeated pronouncements of the highest judicial and other national authorities.

Secondly, this is in fact a fundamental principle of Irish public policy which has been enshrined in the constitution itself after being unequivocally affirmed by the direct will of a strong majority of the people by means of the eminently democratic process of a comparatively recent national referendum.

Thirdly, in a matter such as this touching on profound moral values considered fundamental in the national legal order, the margin of appreciation left to national authorities (which in this case the judgment itself describes as wide), though of course not exempt from supervision by the Strasbourg institutions, assumes a particular significance. As has been said by the Court on other occasions -

(a) "it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals" so that "the view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject" (Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133, p. 22, para. 35; and see also Handyside v. the United kingdom judgment of 7 December 1976, Series A no. 24, p. 22, para. 48); and

(b) "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than an international judge to give an opinion on the exact content of these requirements as well as on the necessity of a restriction or penalty intended to meet them" (ibid.).

I think this assumes particular importance in the present case in view of the popular expression in a national referendum. The interference in question is in fact a corollary of the constitutional protection accorded to those unable to defend themselves (i.e. the unborn) intended to avoid setting at nought a constitutional provision considered to be basic in the national legal order and indeed, as the Government put it, to sustain the logic of that provision.

Fourthly, there is also a certain proportionality in that the prohibition in question in no way affects the expression of opinion about the permissibility of abortion in general and does not extend to measures restricting freedom of movement of pregnant women or subjecting them to unsolicited

examinations. It is true that, within its own limited scope the injunction was couched in somewhat absolute terms, but what it really sought to do was to reflect the general legal principle involved and the legal position as then generally understood.

I am convinced that any inconvenience or possible risk from the impugned injunction which has been represented as indirectly affecting women who may wish to seek abortions, or any practical limitation on the general effectiveness of such injunction cannot, in the context of the case as a whole, whether by themselves or in conjunction with other arguments, outweigh the above considerations in the overall assessment.

In conclusion, taking into account all relevant circumstances and in particular the margin of appreciation enjoyed by national authorities, I cannot find that the injunction in question was incompatible with Article 10 (art. 10) of the Convention. In my view it satisfied all the requirements of paragraph 2 (art. 10-2) thereof. There was thus no violation of that provision.

PARTLY DISSENTING OPINION OF JUDGE MATSCHER

(Translation)

1. (a) Despite the Court's reference (at paragraph 44 of the present judgment) to paragraph 42 of the Johnston and Others v. Ireland judgment (which incidentally does not appear to me to be to the point because it concerns a very different situation), I have my doubts about the status of "victims" of the applicants Mrs X and Ms Geraghty, who have in no way claimed that they wished to seek information of the type the disclosure of which the contested injunction restrained.

By according, in these circumstances, the status of victims to the two applicants, the Court has, to my mind, adopted too broad an interpretation of this requirement, which is an essential condition for any individual application; in so doing it is liable to destroy the distinction between such applications and applications of the actio popularis type, which are not permissible under the Convention.

This amounts to affirming that anyone could claim to be the victim of a violation of the right to receive information once there is a restriction in any Contracting State on the disclosure of certain information. In my opinion, to be the victim of an infringement of this right, an applicant must assert, at least plausibly, that he or she wished to obtain information whose disclosure had been restrained in breach of the requirements of Article 10 (art. 10).

(b) It is also my view that, for the reasons set out under (a) above, there has been no interference with the right protected by Article 10 (art. 10) in respect of these two applicants.

2. I subscribe fully to the opinion of the majority that the interference in question was "prescribed by law".

3. On the other hand, I cannot follow the majority where it finds a violation of the Convention in this case on the ground that the interference in question was not "necessary in a democratic society". I shall try to explain my position:

(a) The case under review highlights the tension which exists between two of the conditions provided for in the second paragraphs of Articles 8 to 11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2) of the Convention, which if satisfied may render permissible interferences with the rights guaranteed under those Articles, the conditions in issue here being that of a "legitimate aim" and that of "necessity in a democratic society".

According to my understanding of the position, the criterion of "necessity" relates exclusively to the measures which the State adopts in order to attain the (legitimate) "aim" pursued; it therefore concerns the appropriateness and proportionality of such measures, but it in no way empowers the European organs to "weigh up" or to call in question the legitimacy of the aim as such, in other words to inquire into whether it is

"necessary" to seek to attain such an aim (see my opinion - in which I dissented on other grounds - attached to the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, p. 33).

That is why I cannot accept the definition of the term "necessary" as "corresponding to a pressing social need", which in fact expresses the intention of the European Court to assess for itself whether it is "necessary" for a national legislature or a national court to seek to attain an aim which the Convention recognises as legitimate. (This definition is, moreover, wholly inappropriate for the assessment of the "necessity" of a measure which is designed only to protect the legal position or the interests of an individual; but that is not the situation here.)

(b) The aim which the Irish courts were pursuing by prohibiting all "institutionalised" activity for the provision of information concerning the possibilities of obtaining abortions in the United Kingdom (and the organisation of trips to and stays in British clinics carrying out abortions, although this was not in issue in the present application, see paragraph 53; it was nevertheless, in my view, an inherent aspect of the activities at least of Dublin Well Woman and - in assessing the legitimacy of the aim pursued and the necessity of the alleged interference - it cannot be dissociated from the first aspect, as the contested decision of the Irish courts concerned both aspects jointly) undoubtedly falls under "the prevention of disorder" and "the protection of (according to Irish standards) ... morals". I would mention further "the protection ... of the rights of others" (of the unborn child and also of his father). Indeed I consider that to reduce the problem of the "legitimate aim" solely to the protection of morals is to take too narrow a view of the case (see in this connection the very relevant arguments put forward by the Irish Government, paragraph 64 et seq. of the present judgment).

I leave aside the argument concerning "the prevention of crime", although it would not be correct to affirm that an abortion carried out abroad is lawful under Irish law (which is what might be understood from the judgment); it is not prosecuted simply because of the strictly territorial nature of Irish criminal law, but that does not mean that it can be classified as "lawful" for the purposes of Irish law.

(c) I shall refrain from expressing an opinion on whether, from the point of view of legislative policy, the prohibition of and the imposition of criminal sanctions for abortion in Ireland can still be regarded as reasonable and desirable, or indeed whether the consequences of such a policy may even be pernicious.

The choice was made by the legislature, following the 1983 referendum. The introduction of Article 40.3.3^{o} of the Constitution, protecting the life of unborn children and prohibiting abortion, is merely the legislature’s response to the democratically expressed will of the Irish people. I also accept that recently a number of derogations from this absolute prohibition

have been allowed. That choice must be respected and is in no way contrary to the requirements of the Convention, and it is not even necessary in this connection to have recourse to the notion of the margin of appreciation which the national legislature enjoys in respect of such measures.

(d) If the Convention recognises as legitimate the aim (or aims) which the Irish legislation seeks to attain, it is not for the European Court to call in question that aim simply because it may have different ideas in this regard.

It remains only to examine the "necessity", within the meaning of Article 10 para. 2 (art. 10-2), of the measures adopted by the Irish authorities, necessity to be assessed as explained under (a).

In my view those measures can be regarded as appropriate and as consistent with the criterion of proportionality.

There is, however, one more argument which has to be refuted in this discussion: it has been said that, in view of the fact that the women interested in having an abortion abroad were free to obtain the information they required from publications, whose distribution in Ireland was not prohibited, the ban on information services of the kind offered by the two applicant associations must inevitably be an ineffective measure, and thus no longer "necessary".

Nevertheless I consider there to be a considerable difference between advertisements in the press, whose circulation in a free country it is virtually impossible to prohibit, and the setting up of specific advice and information services (together with the organisation of trips to and stays in appropriate clinics in the United Kingdom which carry out abortions), so that the contested interference cannot be regarded as ineffective. Indeed it constitutes an entirely appropriate means - although evidently not 100% effective - to attain the (legitimate) aim pursued; in any event, without such a measure there was a risk that the aim in question would not be attained.

In these circumstances I do not see how the "necessity" of the contested measure can be denied.

4. I agree with the unanimous opinion of the Court that it is not necessary to consider whether there has been a breach of other provisions of the Convention.

5. Even if I had accepted the position of the majority of the Court as regards the substance of the case, I could not agree with the award of any sum to Dublin Well Woman in respect of pecuniary damage (at the most it might have been possible to envisage the award of compensation for non-pecuniary damage, if such a claim had been submitted). If this applicant is an idealistic, non-profit-making association, as it gave the Court to understand, it is not entitled to claim compensation for loss of earnings; if, on the other hand, it also operates as a commercial undertaking - a specialised travel agency - the whole case should equally appear to the majority in a rather different light.

DISSENTING OPINION OF JUDGES PETTITI, RUSSO AND LOPES ROCHA, APPROVED BY JUDGE BIGI

(Translation)

We did not vote with the majority of the Court on two points: firstly we do not accept that the two individual applicants had the status of victims and we share Judge Matscher's view in this respect; secondly we considered that the majority had adopted a wrong approach to the issue brought before it, perhaps because underlying the analysis of the application from the point of view of Article 10 (art. 10) of the European Convention on Human Rights was the problem of abortion.

It is our opinion that the effect of the criminal provisions in question should have been examined as if it were a typical problem of criminal law. On a general level more account should have been taken of the basis and object of the Irish legislation on the protection of life.

Let us consider what would be the position if Ireland's neighbouring States were to adopt legislation decriminalising drugs, whilst in Ireland itself they remained prohibited under the criminal law. If associations or organisations which provided services promoting trips for Irish nationals abroad and their introduction to the use of drugs in the countries concerned were prosecuted, the Court's approach under the Convention would probably lead to a finding that, in view of the sovereignty of States in the field of the criminal law and the margin of appreciation, Ireland would not be infringing Article 10 (art. 10) by prohibiting this type of provision of service. Similar reasoning should apply to activities of the kind engaged in by Open Door. In its judgment in the Grogan case (ECR 1992 - see paragraph 24 of the present judgment), the Court of Justice of the European Communities classified as the provision of services the medical interventions in question. The scope of the activities proposed by Open Door went beyond social welfare or medical advice and served the interests of agencies and practitioners.

It is worth recalling here the substance of the applicable Irish provisions.

The provision of the Constitution in issue (Article 40.3.3^{o}) (which was not in the original text adopted in 1937) was supported by the majority of the population and adopted in a national referendum in 1983. There was a substantial majority - 67% of the votes - opposed to abortion.

This new provision concerns solely the protection and preservation of human life and does not refer to sexual morality, or to public or private morality. The issues of freedom of expression are dealt with in general under Article 40.6.1^{o}(i) of the Constitution.

The judgments of the Irish courts examined only the question of the protection of human life as provided for in the Constitution.

The Constitution applies without distinction to all children in their mother's womb, irrespective of whether they were conceived in or out of wedlock.

It is not correct to regard the adoption of a position on the question of abortion as simply an expression of a view on morality and sexuality.

In our opinion the Court has failed to take sufficient account of the reference to "the rights of others" in Article 10 (art. 10) of the Convention and of Article 60 (art. 60) in relation to the provisions in the Irish legislation which afford a broader protection of rights than the Convention.

The Court confines itself to an assessment of the moral issues without really replying to the reasoning invoked by the Government to explain why they had to conform to the Constitution.

The injunctions of the Irish courts concerned questions related to the protection of unborn children, mothers and embryos on Irish territory with a view to preventing transactions or services which in Ireland were designed to achieve the contrary by promoting operations abroad, for which preparations were made in Ireland. In the Government's opinion, these activities constituted the preparation in Ireland of an abortion carried out abroad. Under Irish law the constitutional obligation is to protect such life while the future mother is in Ireland, which in turn necessitates the adoption of measures that can be implemented on Irish territory; it in no way concerns sexual morality.

It is well known in Ireland that abortions are possible subject to various conditions in other countries and the State has not tried to conceal this information. It is important to remember that in several member States abortion remains in principle a criminal offence, albeit with numerous exceptions and derogations. What is at issue for the Irish State is the setting up in Ireland of links between private clients and clinics carrying out abortions and the doctors at such clinics in the United Kingdom. These links are established with the aim of performing an act which is contrary to the Constitution and to the decisions of the Irish courts which must conform thereto.

Had it been a question of providing persons consulting the organisations concerned with advice on important health matters, the Irish medical and hospital services could have answered the patients' queries and catered for their needs.

The majority accept that the restriction was "prescribed by law" and that it pursued the "legitimate aim" of protecting morals, an aspect of which was the protection in Ireland of the unborn child's right to life. They also accept that the latter protection, recognised under Irish law, is based on moral values relating to the nature of life which are reflected in the attitude adopted by the majority of the Irish people.

It was merely considerations relating to the necessity and the proportionality of the injunctions concerning the activity of the applicant

agencies which led the majority to conclude that there had been a violation of Article 10 (art. 10) of the Convention; in other words they reached the conclusion that the restraints imposed are too broad and disproportionate.

In our view, the restrictions were justified and, in any event, did not overstep the bounds of what was permissible. It was by any standards a minimal interference with the right to freedom of expression - concerning the aspect of that freedom relating to the communication and receipt of information - aimed at securing the primacy of values such as the right to life of the unborn child in accordance with the principles of the Irish legal system, which cannot be criticised on the basis of different principles applied in other legal systems.

The fact that Ireland cannot effectively prevent the circulation of reviews or of English telephone directories containing information on clinics in the United Kingdom, so that anyone can obtain information on abortion clinics in that country and the possibility of having an abortion in such clinics, can only, in our view, confirm the necessity of a specific measure such as that taken by the Irish courts. Such reviews, the directories and the persons possessing information on abortion clinics in the United Kingdom are "passive" factors, which require a personal and spontaneous attitude on the part of the person seeking advice. The activity of agencies which organise trips and provide special services for their clients, thereby influencing the decisions of those clients, is something entirely different.

The partial ineffectiveness of a law or a principle of case-law is not a reason for deciding not to take specific measures designed to prevent the activities of organisations committed to seeking means of obtaining results which do not conform to the interests and values of the legal system.

Moreover the fragmentary nature of legislation is well known, particularly in the field of criminal law, which aims to ensure that values protected by the law are fully respected.

The fact that the Irish legal system opts not to punish certain criminal behaviour where it occurs abroad does not mean that such conduct is no longer unlawful. Such a policy is simply a limit imposed on extra-territorial jurisdiction because of the difficulties of obtaining the necessary evidence.

In other words, the absence of an objective condition for imposing sanctions does not affect the unlawful nature of the act carried out outside the territorial jurisdiction of the criminal law.

Finally, the doctrine of la fraude à la loi (evasion of the law) may be invoked. This notion provides a legal system with a valid justification for taking legitimate measures in order to prevent results which are undesirable according to its fundamental legal standards and principles (the doctrine of fraus legis commented on by, among others, Mr Santoro Passarelli in his general theory of civil law).

It follows that the right of the authorities of a country to adopt appropriate measures to forestall the perpetration of the act calculated to evade the law and the effects of that act cannot be contested.

In conclusion, we consider that the decisions of the Irish courts did not violate Article 10 (art. 10) of the Convention.

SEPARATE OPINION OF JUDGE DE MEYER

(Translation)

I. The merits

1. The fundamental aim of the injunction in issue was to prohibit the applicant associations from helping pregnant women within the jurisdiction of the Irish State to travel outside Ireland to have abortions; the very terms of the injunction made this clear[1].

The injunction clarified its scope by citing expressly three ways of providing the prohibited assistance. These were: referring the pregnant women to a clinic, making travel arrangements for them and informing them of the identity and location of and the method of communication with a specified clinic or clinics. Such methods were, however, only examples, since the prohibition also covered any assistance provided "otherwise".

2. As the Court points out, the applicants would seem to have confined their complaint to that part of the injunction which concerned the provision of information[2].

In this respect I take the view, like the majority of my colleagues but on different grounds, that there has been a violation of the freedom of expression. I reached this conclusion for the reasons set out in the separate opinion that I and several other judges submitted in the Observer and Guardian case with regard to the prior restraints which were in issue in that case[3].

3. Clearly the present case is not one involving the press like the Observer and Guardian case. However, the freedom of expression also exists for those who exercise it otherwise than through the press.

4. It is true, equally, that the applicant associations were restrained from communicating information only in so far as such information was intended to help pregnant women obtain abortions outside Ireland, and thus evade the restrictions resulting from the prohibition and punishment of abortion in Ireland itself and, in particular, violate the right of unborn children to be born.

In this context, it is indeed essentially that right which is at stake, much more so than the protection of morals, and this therefore also raises serious problems from the point of view of Articles 2, 17 and 60 (art. 2, art. 17, art. 60) of the Convention.

There could thus be very good reasons justifying the adoption of criminal provisions punishing the communication of information of this type, but I do not think that they could warrant a derogation from the, in my view

[1] See paragraph 20 of the judgment.
[2] See paragraphs 53 and 66 of the judgment.
[3] Judgment of 26 November 1991, Series A no. 216, p. 46.

essential, principle that the imposition of prior restraints on the exercise of the freedom of expression, even where they take the form of judicial injunctions, cannot be permitted[4].

5. There was, of course, nothing to preclude the imposition of restrictions of this nature in respect of the activities by which the applicant associations helped, otherwise than by the communication of information or ideas, pregnant women to obtain abortions.

II. Application of article 50 (Art. 50)

As regards the damage which Dublin Well Woman claims to have sustained, I consider that, in the circumstances of the case and in particular in view of the fact that the communication of information represented only one of the aspects of this association's activity, it is not entitled to compensation.

I subscribe to the conclusions set out in the judgment concerning the costs and expenses.

[4] Unless such restraints are rendered strictly necessary by situations of the kind envisaged in Article 15 (art. 15) of the Convention, which was manifestly not the case in this instance.

CONCURRING OPINION OF JUDGE MORENILLA

1. I agree with the conclusions of the majority in the present case but not with the reasoning leading to the finding of a violation of Article 10 (art. 10) of the Convention. In my opinion the interference resulting from the injunction of the Supreme Court of Ireland prohibiting the dissemination of information to pregnant women concerning abortion services in the United Kingdom was not "prescribed by law" as required by paragraph 2 of this Article (art. 10-2), having regard to the interpretation given by the Court to Articles 8 to 11 (art. 8, art. 9, art. 10, art. 11) of the Convention and Article 2 paras. 3 and 4 of Protocol No. 4 (P4-2-3, P4-2-4), where the same condition can be found. In consequence, I cannot accept paragraphs 59 and 60 of the judgment.

Having found that the interference did not satisfy this requirement, I do not think it necessary to follow the majority in its further examination of the question whether the restriction was justified under paragraph 2 of Article 10 (art. 10-2). Consequently, I cannot share the opinion of the majority as expressed in paragraphs 61 to 77 of the judgment.

2. In my view, the concept "prescribed by law" refers to the requirement of legality under the rule of law to impose restrictions on fundamental rights or freedoms. According to the jurisprudence of this Court this condition implies that there must be a measure of protection in national law against arbitrary interferences with the rights safeguarded by paragraph 1 (see, inter alia, the Silver and Others v. the United Kingdom judgment of 25 March 1983, Series A no. 61, p. 33, para. 88; the Malone v. the United Kingdom judgment of 2 August 1984, Series A no. 82, pp. 32-33, paras. 67-68; and the Kruslin and Huvig v. France judgments of 24 April 1990, Series A no. 176-A, pp. 22-23, para. 30, and no. 176-B, pp. 54-55, para. 29); and it "does not merely refer back to domestic law but also relates to the quality of law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble of the Convention" (see the above-mentioned Malone judgment, ibid.). The Court had also declared that not only "the interference in question must have some basis in domestic law", but "firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequence which a given action may entail" (Sunday Times v. the United kingdom judgment of 26 April 1979, Series A no. 30, p. 31, para. 49). In the Groppera Radio AG and Others v. Switzerland judgment of 28 March 1990 (Series A no. 173, p. 26, para. 68) the Court determined that "the scope of the concepts of foreseeability and accessibility depends to a considerable degree on the

content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed".

3. This Court has also consistently declared since the Handyside v. the United Kingdom judgment of 7 December 1976 (Series A no. 24, p. 23, paras. 48-49) that Article 10 para. 2 (art. 10-2) does not give the Contracting States an unlimited margin of appreciation when interpreting and applying the domestic laws in force, the Court being empowered to give a final ruling on whether the restriction is reconcilable with freedom of expression as protected by Article 10 (art. 10) and that the European supervision "covers not only the basic legislation but also the decision applying it, even one given by an independent court" (ibid., p. 23, para. 49; see also the Sunday Times judgment, ibid., p. 36, para. 59). Therefore the power of the national authorities to interpret and apply the internal law when imposing a restriction on the freedom to receive and to impart information and ideas "goes hand in hand with the European supervision" (see the above-mentioned Handyside judgment, p. 23, para. 59). Consequently the supervision at a European level may result in a more extensive protection of the individual than at State level because the law must be restrictively interpreted in order to secure the observance of the international engagement undertaken by the States under Articles 1 and 19 (art. 1, art. 19) of the Convention.

4. The injunction granted by the High Court on 19 December 1986 and upheld by the Supreme Court of Ireland (judgment of 16 March 1988) was based on Article 40.3.3^{o} of the Irish Constitution (see paragraph 28 of the judgment).

5. On reading this provision it seems to impose primarily obligations upon the State, including the enactment of a law defining the scope of the protection of the right to life of the unborn - acknowledged, according to the provision, "with due regard to the equal right to life of the mother", both rights to be defended and vindicated by the State "as far as practicable". As Mr Justice Niall McCarthy said in a recent judgment delivered by the Supreme Court of Ireland on 5 March 1992 in the Attorney General v. X and Others case (judgment of 5 March 1992):

> "I think it reasonable, however to hold that the People when enacting the Amendment were entitled to believe that legislation would be introduced as to regulate the manner in which the right to life of the mother could be reconciled ... the failure by the legislature to enact the appropriate legislation is no longer just unfortunate; it is inexcusable."

6. In my view, in the absence of specific legislation, the new constitutional provision did not provide a clear basis for the individual to foresee that imparting reliable information about abortion clinics in Great Britain would be unlawful: the penal, administrative or civil legislation on abortion then in force (paragraphs 29-32 of the judgment) or the case-law of the Irish courts presented in this case relating to the protection of the right to

life of the unborn before the Eighth Amendment (see paragraphs 33-35 of the judgment) did not give sufficient ground for such an assertion; moreover, until the present case, the Supreme Court did not have the opportunity to interpret this Amendment.

7. The above situation may explain why the two corporate applicants were peaceably imparting this information for several years before and after the introduction of the Eighth Amendment until the commencement of the proceedings at issue on 28 June 1985, as a private action, to be converted by the Attorney General into a relator action fourteen months later. It also explains why British and other foreign magazines containing such information were circulating freely in Ireland (see paragraph 23 of the judgment), and that no prosecution or any civil action was instituted in Ireland against Irish women who had abortions abroad, as well as the Government's statement (paragraph 25 of the judgment) that in certain circumstances, under Irish law, persons could be entitled to have appropriate access to such information.

8. In these circumstances, de jure and de facto, my conclusion is that the relevant domestic law restricting freedom of expression, in an area of information so important for a large sector of Irish women, lacked the necessary definition and certainty. Accordingly, the injunction imposed on the two applicant corporations and their counsellors was not justified under Article 10 para. 2 (art. 10-2) of the Convention.

9. Taking into account the vague and uncertain relationship between the information given by the corporate applicants and protection of the unborn (see paragraph 75), I also consider that none of the applicants could reasonably have foreseen that these activities were unlawful and that their freedom to impart and receive reliable information about abortion services in Great Britain could be restricted under the domestic law prevailing prior to the Supreme Court judgment in this case.

In consequence, the above-mentioned legal uncertainties could not have been clarified by "appropriate legal advice"; nor could the exercise of the right to receive such important confidential information have been elucidated by a previous consultation as to its lawfulness. The vagueness of both the constitutional provision and Irish case-law previous to the present case was, in itself, inconsistent with the legality of the measure required, under the rule of law, to justify the interference with freedom of expression under paragraph 2 of the Convention.

PARTLY DISSENTING OPINION OF JUDGE BAKA

While I fully agree with the Court in holding that the restriction was prescribed by law, I regret that I cannot follow the majority as far as the question of the necessity in a democratic society is concerned. I am also unable to accept that Mrs X and Ms Geraghty can be considered as "victims" in the present case.

In my view the scope of the injunction granted by the domestic courts involved more than the restraint of information; it restricted various kinds of activities which were considered to be unlawful. The injunction granted by the High Court stated that "the Defendants ... be perpetually restrained from counselling or assisting pregnant women within the jurisdiction of this Court to obtain further advice or to obtain abortion". Similarly, the Supreme Court ordered that the Defendants "... be perpetually restrained from assisting pregnant women within the jurisdiction to travel abroad to obtain abortions by referral to a clinic, by the making for them of travel arrangements, or by informing them of the identity and location of and the method of communication with a specified clinic or clinics or otherwise".

While we are only concerned with the freedom of information in this case, we have to take into account the fact that providing (and receiving) information had been only one - albeit vitally important - feature of the applicants' services. The main concern of the domestic courts was not so much to stop the dissemination of information but rather to terminate an illegal activity which inevitably gave rise to certain restrictions on freedom of information as well. Unlike the majority, I do not perceive this restriction to be "absolute" since, in reality, the information was readily available "... from other sources in Ireland such as magazines, telephone directories or by persons with contacts in Great Britain" (judgment, paragraph 76).

Examining the proportionality of the restriction against this background, I consider that it was unavoidable, subsidiary and limited in nature and has been not only necessary to protect the constitutionally enshrined right to life of the unborn, but also to maintain and safeguard the integrity of the Irish legal system. In my opinion therefore the injunction was proportionate and necessary in a democratic society. Consequently, there has been no breach of Article 10 (art. 10) of the Convention.

Nor can I follow the majority view which accepts that Mrs X and Ms Gerahty are "victims" in this case. The above-mentioned domestic judgments refer only to the corporate applicants, their servants and agents. It is obvious that the clients of these companies would have been affected as well. On the one hand, it is undeniable that society as a whole is potentially a victim of an interference with freedom of information. On the other hand, an applicant should be required to show that there is a direct and immediate interference, or at least a possible risk of a direct, immediate interference

with his or her individual rights before he or she can be considered to be a "victim" before the Court.

In my view, the rights of these individual applicants were not endangered by imposing restrictions on the activities of Open Door and Dublin Well Woman which counselled pregnant women only (see judgment, paragraph 13). They were not stated to be either pregnant or clients of the corporate applicants. Since their rights were not directly affected by the injunction, they could not therefore claim to be "victims" within the meaning of Article 25 para. 1 (art. 25-1) of the Convention. Their application falls into the category of actio popularis.

DISSENTING OPINION OF JUDGE BLAYNEY

I am unable to agree with two of the decisions of the majority of the Court:

Firstly, that there was a breach of Article 10 (art. 10), and secondly, that Mrs X and Ms Geraghty were victims. In this opinion I propose to deal solely with Article 10 (art. 10). As regards Mrs X and Ms Geraghty, I agree with the reasoning in the dissenting opinion of Judge Baka.

In my opinion the Supreme Court injunction was not disproportionate to the aims which it pursued. Having found that the activities of the applicants were unlawful having regard to Article 40.3.3° of the Constitution, and having made a declaration to that effect, the injunction followed as a logical consequence. The source of the injunction was to be found in the Constitution itself. In granting it, the Court was simply fulfilling its obligation to uphold the Constitution and to defend the rights of the unborn guaranteed by the Article in question. It was not a case of the Court granting an injunction in exercise of a discretionary jurisdiction. Once the Court had found that the activities of the applicants were unlawful having regard to Article 40.3.3°, the injunction followed as a necessary consequence. It was not open to the Court to adopt any lesser measure.

In the circumstances, the injunction could not in my opinion be said to be disproportionate. It was the only measure possible to uphold Article 40.3.3°. There was no other course that the Court could have taken. It was inconceivable that it should refuse to grant an injunction since this would have amounted to an abdication of its duty to protect the rights of the unborn and would have fatally undermined the moral values enshrined in Article 40.3.3°.

I am also of the opinion that our Court is precluded by Article 60 (art. 60) of the Convention from finding that there has been a breach of Article 10 (art. 10).

Article 60 (art. 60) provides as follows:

> "Nothing in [the] Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."

The right of the unborn to be born is clearly a human right and it is guaranteed in Ireland by Article 40.3.3° of the Constitution. Under Article 60 (art. 60) nothing in the Convention is to be construed as limiting or derogating from that right. If Article 10 (art. 10) is to be construed as entitling the applicants to give information to pregnant women so as to assist them to have abortions in England, then in my opinion it is being construed so as to derogate from the human rights of the unborn. In his judgment in the Supreme Court in the case of The Attorney General at the relation of the Society for the Protection of Unborn Children (Ireland)

Limited v. Open Door Counselling Limited and Dublin Well Woman Centre Limited ([1988] Irish Reports, p. 593, Finlay CJ said at page 624:

> "I am satisfied beyond doubt that having regard to the admitted facts the Defendants were assisting in the ultimate destruction of the life of the unborn by abortion in that they were helping the pregnant woman who had decided upon that option to get in touch with a clinic in Great Britain which would provide the service of abortion."

The decision that the injunction constituted a breach of Article 10 (art. 10) amounts to interpreting that Article as permitting information to be given which clearly derogates from the rights of the unborn since it assists in their destruction. In my opinion Article 60 (art. 60) precludes such a construction.

The applicants in their submissions placed reliance on the fact that the information provided by them was available elsewhere, and that the injunction did not prevent Irish women from continuing to have abortions abroad. In my opinion neither of these matters has any relevance to whether or not Article 60 (art. 60) applies. The sole issue is whether a finding that the injunction constitutes a breach of Article 10 (art. 10) amounts to interpreting that Article as derogating from the human rights of the unborn as guaranteed by the Constitution, and in my opinion it does. For this reason also, I consider that it is not possible to conclude that there has been a breach of Article 10 (art. 10).

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

CASE OF VO v. FRANCE

(Application no. 53924/00)

JUDGMENT

STRASBOURG

8 July 2004

In the case of Vo v. France,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr L. CAFLISCH,
Mrs V. STRÁŽNICKÁ,
Mr P. LORENZEN
Mr K. JUNGWIERT,
Mr M. FISCHBACH,
Mr J. HEDIGAN,
Mrs W. THOMASSEN,
Mr A.B. BAKA,
Mr K. TRAJA,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI,
Mr K. HAJIYEV, *judges*,
and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 10 December 2003 and 2 June 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 53924/00) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mrs Thi-Nho Vo ("the applicant"), on 20 December 1999.

2. The applicant was represented by Mr B. Le Griel, of the Paris Bar. The French Government ("the Government") were represented by their Agent, Mr R. Abraham, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, a violation of Article 2 of the Convention on the ground that the conduct of a doctor who was responsible for the death of her child *in utero* was not classified as unintentional homicide.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber to

which the case had been assigned decided on 22 May 2003 to relinquish jurisdiction in favour of the Grand Chamber with immediate effect, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

6. The applicant and the Government each filed observations on the admissibility and merits of the case. In addition, observations were also received from the Center for Reproductive Rights and the Family Planning Association, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

7. A hearing on the admissibility and merits of the case took place in public in the Human Rights Building, Strasbourg, on 10 December 2003 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr F. ALABRUNE, Deputy Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mr G. DUTERTRE, Drafting Secretary,
Human Rights Section,
Legal Affairs Department,
Ministry of Foreign Affairs,
Mrs J. VAILHE, Drafting Secretary,
European and International Affairs Department,
Ministry of Justice,
Mr P. PRACHE, Department of Criminal Affairs and Pardons,
Ministry of Justice,
Mr H. BLONDET, judge of the Court of Cassation,
Mrs V. SAGANT, European and International Affairs Department,
Ministry of Justice, *Counsel*;

(b) *for the applicant*
Mr B. LE GRIEL, of the Paris Bar, *Counsel*.

The Court heard addresses by Mr Le Griel and Mr Alabrune.

8. In accordance with the provisions of Article 29 § 3 of the Convention and Rule 54A § 3, the Court decided to examine the issue of admissibility of the application with the merits.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1967 and lives in Bourg-en-Bresse.

10. On 27 November 1991 the applicant, Mrs Thi-Nho Vo, who is of Vietnamese origin, attended Lyons General Hospital for a medical examination scheduled during the sixth month of pregnancy.

11. On the same day another woman, Mrs Thi Thanh Van Vo, was due to have a contraceptive coil removed at the same hospital. When Dr G., who was to remove the coil, called out the name "Mrs Vo" in the waiting-room, it was the applicant who answered.

After a brief interview, the doctor noted that the applicant had difficulty in understanding French. Having consulted the medical file, he sought to remove the coil without examining her beforehand. In so doing, he pierced the amniotic sac causing the loss of a substantial amount of amniotic fluid.

After finding on clinical examination that the uterus was enlarged, the doctor ordered a scan. He then discovered that one had just been performed and realised that there had been a case of mistaken identity. The applicant was immediately admitted to hospital.

Dr G. then attempted to remove the coil from Mrs Thi Thanh Van Vo, but was unsuccessful and so prescribed an operation under general anaesthetic for the following morning. A further error was then made when the applicant was taken to the operating theatre instead of Mrs Thi Thanh Van Vo, and only escaped the surgery intended for her namesake after she protested and was recognised by an anaesthetist.

12. The applicant left the hospital on 29 November 1991. She returned on 4 December 1991 for further tests. The doctors found that the amniotic fluid had not been replaced and that the pregnancy could not continue further. The pregnancy was terminated on health grounds on 5 December 1991.

13. On 11 December 1991 the applicant and her partner lodged a criminal complaint, together with an application to join the proceedings as civil parties, alleging unintentional injury to the applicant entailing total unfitness for work for a period not exceeding three months and unintentional homicide of her child. Three expert reports were subsequently filed.

14. The first, which was filed on 16 January 1992, concluded that the foetus, a baby girl, was between 20 and 21 weeks old, weighed 375 grams, was 28 centimetres long, had a cranial perimeter of 17 centimetres and had not breathed after delivery. The expert also concluded that there was no indication that the foetus had been subjected to violence or was malformed and no evidence that the death was attributable to a morphological cause or

to damage to an organ. Further, the autopsy performed after the abortion and an anatomico-pathological examination of the body indicated that the foetal lung was 20 to 24 weeks old.

15. On 3 August 1992 a second report was filed concerning the applicant's injuries:

> "(a) There is a period of temporary total unfitness for work from 27 November 1991 to 13 December 1991, when the patient was admitted to the Tonkin Clinic with an entirely unconnected pathology (appendectomy)
>
> (b) the date of stabilisation can be put at 13 December 1991
>
> (c) there is no loss of amenity
>
> (d) there is no aesthetic damage
>
> (e) there is no occupational damage
>
> (f) there is no partial permanent unfitness for work
>
> Damage in terms of pain and suffering resulting from this incident still has to be assessed. The assessment should be carried out with a doctor of Vietnamese extraction specialising in psychiatry or psychology."

16. The third report, which was issued on 29 September 1992, referred to the malfunctioning of the hospital department concerned and to negligence on the part of the doctor:

> "1. The manner in which appointments in the departments run by Professors [T.] and [R.] at Lyons General Hospital are organised is not beyond reproach, in particular in that namesakes are common among patients of foreign origin and create a risk of confusion, a risk that is undoubtedly increased by the patients' unfamiliarity with or limited understanding of our language.
>
> 2. The fact that patients were not given precise directions and the consulting rooms and names of the doctors holding surgeries in them were not marked sufficiently clearly increased the likelihood of confusion between patients with similar surnames and explains why, after Dr [G.] had acquainted himself with Mrs Thi Thanh Van Vo's medical file, it was [the applicant] who came forward in response to his call.
>
> 3. The doctor acted negligently, by omission, and relied solely on the paraclinical examinations. He did not examine his patient and by an unfortunate error ruptured the amniotic sac, causing the pregnancy to terminate at five months. He is accountable for that error, although there are mitigating circumstances."

17. On 25 January 1993, and also following supplemental submissions by the prosecution on 26 April 1994, Dr G. was charged with causing unintentional injury at Lyons on 27 November 1991 by:

(i) through his inadvertence, negligent act or inattention, perforating the amniotic sac in which the applicant's live and viable foetus was developing, thereby unintentionally causing the child's death (a criminal offence under

Article 319 of the former Criminal Code – which was applicable at the material time – now Article 221-6 of the Criminal Code);

(ii) through his inadvertence, negligent act, inattention, negligent omission or breach of a statutory or regulatory duty of protection or care, causing the applicant bodily injury that resulted in her total unfitness for work for a period not exceeding three months (a criminal offence under Article R. 40, sub-paragraph 4, of the former Criminal Code – which was applicable at the material time – now Articles R. 625-2 and R. 625-4 of the Criminal Code).

18. By an order of 31 August 1995, Dr G. was committed to stand trial in the Lyons Criminal Court on counts of unintentional homicide and unintentionally causing injuries.

19. By a judgment of 3 June 1996, the Criminal Court found that the accused was entitled as of right to an amnesty under the Amnesty Law of 3 August 1995 in respect of the offence of unintentionally causing injuries entailing temporary unfitness for work of less than three months. As to the offence of unintentional homicide of the foetus, it held:

> "The issue before the Court is whether the offence of unintentional homicide or the unintentional taking of the foetus's life is made out when the life concerned is that of a foetus – if a 20 to 21 week-old foetus is a human person ('another' within the meaning of Article 221-6 of the Criminal Code).
>
> ...
>
> The expert evidence must be accepted. The foetus was between 20 and 21 weeks old.
>
> At what stage of maturity can an embryo be considered a human person?
>
> The Voluntary Termination of Pregnancy Act of 17 January 1975 provides: 'The law guarantees respect of every human being from the beginning of life.'
>
> The Law of 29 July 1994 (Article 16 of the Civil Code) provides: 'The law secures the primacy of the person, prohibits any assault on human dignity and guarantees the respect of every human being from the beginning of its life'.
>
> The laws of 29 July 1994 expressly employed the terms 'embryo' and 'human embryo' for the first time. However, the term 'human embryo' is not defined in any of them.
>
> When doing the preparatory work for the legislation on bioethics, a number of parliamentarians (both members of the National Assembly and senators) sought to define 'embryo'. Charles de Courson proposed the following definition: 'Every human being shall be respected from the start of life; the human embryo is a human being.' Jean-François Mattéi stated: 'The embryo is in any event merely the morphological expression of one and the same life that begins with impregnation and continues till death after passing through various stages. It is not yet known with precision when the zygote becomes an embryo and the embryo a foetus, the only indisputable fact being that the life process starts with impregnation.'

It thus appears that there is no legal rule to determine the position of the foetus in law either when it is formed or during its development. In view of this lack of a legal definition it is necessary to return to the known scientific facts. It has been established that a foetus is viable at 6 months and on no account, on present knowledge, at 20 or 21 weeks.

The Court must have regard to that fact (viability at 6 months) and cannot create law on an issue which the legislators have not yet succeeded in defining.

The Court thus notes that a foetus becomes viable at the age of 6 months; a 20 to 21 week-old foetus is not viable and is not a 'human person' or 'another' within the meaning of former Article 319 and Article 221-6 of the Criminal Code.

The offence of unintentional homicide or of unintentionally taking the life of a 20 to 21 week-old foetus has not been made out, since the foetus was not a 'human person' or 'another'...

Acquits Dr G. on the charge without penalty or costs ..."

20. On 10 June 1996 the applicant appealed against that judgment. She argued that Dr G. had been guilty of personal negligence severable from the functioning of the public service and sought 1,000,000 French francs (FRF) in damages, comprising FRF 900,000 for the death of the child and FRF 100,000 for the injury she had sustained. The public prosecutor's office, as second appellant, submitted that the acquittal should be overturned. It observed: "By failing to carry out a clinical examination, the accused was guilty of negligence that caused the death of the foetus, which at the time of the offence was between 20 and 24 weeks old and following, normally and inexorably, the path of life on which it had embarked, there being no medical doubt over its future."

21. In a judgment of 13 March 1997, the Lyons Court of Appeal upheld the judgment in so far as it had declared the prosecution of the offence of unintentionally causing injuries time-barred but overturned the remainder of the judgment and found the doctor guilty of unintentional homicide. It imposed a six-month suspended prison sentence and a fine of FRF 10,000, holding:

"... In the instant case Dr [G.]'s negligence is characterised in particular by the fact that the patient's knowledge of French was insufficient to enable her to explain her condition to him, to answer his questions or to give him the date of her last period, circumstances that should have further impressed upon him the need for a thorough clinical examination. The assertion that he was entitled to rely on the medical records alone shows that, though an able scientist, this young doctor was nonetheless unaware of one of the essential skills of the practice of medicine: listening to, getting to know and examining the patient. Indeed, before this Court Dr [G.] said that the accident had impressed upon him how vital it was to take precautions before operating.

There is a clear causal link between this negligent act and omission and the death of the child Mrs Vo was carrying. The accused has himself acknowledged, with

commendable honesty, that a clinical examination would have alerted him to the fact that the patient was pregnant and had been mistaken for another patient.

As regards the classification of the offence as unintentional homicide, it is first necessary to reiterate the legal principles governing this sphere.

Various provisions of international treaties, such as Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 of the International Covenant on Civil and Political Rights and Article 6 of the Convention on the Rights of the Child signed in New York on 26 January 1990, recognise a right to life protected by law for everyone, and notably children.

Under domestic law, section 1 of the Voluntary Termination of Pregnancy Act (Law no. 75-17 of 17 January 1975) specifies: 'The law guarantees respect of every human being from the beginning of life ... this principle may only be derogated from in the event of necessity and in accordance with the conditions set out in this statute.'

Further, Law no. 94-653 of 29 July 1994 on the respect of the human body lays down in Article 16 of the Civil Code: 'The law secures the primacy of the person, prohibits any assault on human dignity and guarantees the respect of every human being from the beginning of its life.'

These statutory provisions cannot be regarded as mere statements of intent, devoid of any legal effect, since Article 16-9 of the Civil Code indicates that the provisions of Article 16 are mandatory.

For its part the Criminal Division of the Court of Cassation applied these rules of international and domestic law in two judgments it delivered on 27 November 1996, specifying that the Act of 17 January 1975 only permits derogation from the rule stated in section 1 thereof that every human being is entitled to respect from the beginning of life in cases of necessity and subject to the conditions and limitations set out in it.

The Court of Cassation added that, having regard to the conditions laid down by the legislature, the provisions of that statute and of the law of 31 December 1979 on the voluntary termination of pregnancy, taken as a whole, were not incompatible with the aforementioned treaty provisions.

In a different case, moreover, the Court of Cassation pointed out that on signing the Convention on the Rights of the Child in New York on 26 January 1990, France made a declaration concerning interpretation in which it stated that the convention could not be interpreted as constituting any obstacle to the implementation of the provisions of French legislation on the voluntary termination of pregnancy. That reservation shows, by converse implication, that that convention could concern a foetus aged less than 10 weeks, the statutory maximum foetal age in France for a voluntary termination of pregnancy.

It follows that, subject to the provisions on the voluntary termination of pregnancies and therapeutic abortions, the right to respect for every human being from the beginning of life is guaranteed by law, without any requirement that the child be born as a viable human being, provided it was alive when the injury occurred.

Indeed, viability is a scientifically indefinite and uncertain concept, as the accused, who is currently studying in the United States, himself acknowledged, informing the

Court that foetuses born between 23 and 24 weeks after conception could now be kept alive, a situation that was inconceivable a few years ago. In the opinion prepared by Professor [T.] and adduced in evidence by Dr [G.], reference is made to a report by Professor Mattéi in which it is indicated that the embryo is merely the morphological expression of one and the same life that begins with impregnation and continues till death after passing through various stages. It is not yet known with precision when the zygote becomes an embryo and the embryo a foetus, the only indisputable fact being that the life process starts with impregnation. ...

Thus the issue of viability at birth, a notion that is uncertain scientifically, is in addition devoid of all legal effect, as the law makes no distinction on that basis.

In the instant case it has been established that when the scan was performed on 27 November 1991 – before the amniotic fluid was lost later that day – the [applicant's] pregnancy had been proceeding normally and the child she was carrying was alive. When the therapeutic abortion was performed on 5 December 1991, it was noted that a comparison of the child's measurements with published tables suggested that the foetus was between 20 and 21 weeks old and possibly older, as it is not certain that the tables take into account the specific morphology of children of Vietnamese origin. Dr [G.], when questioned on this point at the hearing, was unable to provide any further information. The conclusion from the anatomo-pathological examination was that the foetal lung indicated an age of between 20 and 24 weeks, its measurements suggesting that an age at the lower end of that range was the most likely. In any event, as Dr [G.] said in evidence, the age of the foetus was very close to that of certain foetuses that have managed to survive in the United States. The photographs at page D 32 of the trial bundle show a perfectly formed child whose life was cut short by the accused's negligence.

As the Douai Court of Appeal observed in its judgment of 2 June 1987, had the assault on the child concerned inflicted a non-fatal wound, it would have been classified without any hesitation as an offence of unintentionally causing injuries. *A fortiori*, an assault leading to the child's death must be classified as unintentional homicide.

Thus, the strict application of the legal principles, established scientific fact and elementary common sense all dictate that a negligent act or omission causing the death of a 20 to 24 week-old foetus in perfect health should be classified as unintentional homicide.

Consequently, the impugned judgment must be overturned ...

While [the applicant's] civil action is admissible, if only to corroborate the prosecution case, this Court has no jurisdiction to hear the claim for reparation. This is because despite the serious nature of the negligent act and omission of Dr [G.], a doctor in a public hospital, they do not constitute personal misconduct of such exceptional gravity entailing a total disregard for the most elementary principles and duties inherent in his function as to make them severable from public service.

Nonetheless, it is appropriate to order Dr [G.] to pay to this civil party compensation in the sum of 5,000 francs under Article 475-1 of the Code of Criminal Procedure on account of costs which she has incurred, but which have not been paid by the State.

..."

22. On 30 June 1999, on an appeal on points of law by the doctor, the Court of Cassation reversed the judgment of the Lyons Court of Appeal and ruled that there was no reason to remit the case for retrial:

> "Having regard to Article 111-4 of the Criminal Code:
>
> Criminal-law provisions must be strictly construed.
>
> ...
>
> In convicting [the doctor] of unintentional homicide, the appellate court noted that Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 6 of the International Covenant on Civil and Political Rights recognise the existence for all persons of a right to life protected by law. The appellate court stated that the Voluntary Termination of Pregnancy Act of 17 January 1975 establishes the rule that the life of every human being must be respected from the beginning of life. That rule is now restated in Article 16 of the Civil Code as worded following the amendment made by the Law of 29 July 1994. The appellate court went on to state that, by operating without performing a prior clinical examination, the doctor was guilty of a negligent act or omission that had a definite causal link with the death of the child the patient was carrying.
>
> However, by so holding, when the matters of which the defendant was accused did not come within the definition of the offences set out in former Article 319 and Article 221-6 of the Criminal Code, the Court of Appeal misinterpreted the aforementioned provisions.
>
> ..."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Criminal Code

23. The provision dealing with the unintentional taking of life at the material time and until 1 March 1994 was Article 319 of the Criminal Code, which read as follows:

> "Anyone who through his or her inadvertence, negligent act, inattention, negligent omission or breach of regulation unintentionally commits homicide or unintentionally causes death, shall be liable to imprisonment of between three months and two years and a fine of between 1,000 and 30,000 francs."

24. Since 1 March 1994, the relevant provision has been Article 221-6 of the Criminal Code (as amended by Law no. 2000-647 of 10 July 2000 and Order no. 2000-916 of 19 September 2000), which is to be found in Section II ("Unintentional taking of life") of Chapter I ("Offences against the life of the person") of Part II ("Offences against the human person") of

Book II ("Serious crimes (*crimes*) and other major offences (*délits*) against the person"). Article 221-6 provides:

> "It shall be an offence of unintentional homicide punishable by three years' imprisonment and a fine of 45,000 euros to cause the death of another in the conditions and in accordance with the distinctions set out in Article 121-3 by inadvertence, negligent act, inattention, negligent omission or breach of a statutory or regulatory duty of safety or care.
>
> In the event of a manifestly deliberate breach of a special statutory or regulatory duty of safety or care, the maximum sentences shall be increased to five years' imprisonment and a fine of 75,000 euros."

25. Article 223-10 of the Criminal Code, which concerns the voluntary termination of pregnancy by a third party without the mother's consent, is to be found in Section V under the heading "Unlawful termination of pregnancy" of Chapter III, entitled "Endangering the person", in Part II of Book II. It reads as follows:

> "It shall be an offence punishable by five years' imprisonment and a fine of 75,000 euros to terminate a pregnancy without the mother's consent."

26. Section III entitled "Protection of the human embryo" of Chapter I ("Offences against biomedical ethics") of Part I ("Public-health offences") of Book V ("Other serious crimes (*crimes*) and other major offences (*délits*)") prohibits various types of conduct on grounds of medical ethics (Articles 511-15 to 511-25), including the conception of human embryos *in vitro* for research or experimental purposes (Article 511-18).

B. The Public Health Code

27. At the material time the limitation period for an action in damages in the administrative courts was four years, while the period in which a pregnancy could be voluntarily terminated lawfully was ten weeks following conception.

28. The provisions of the Public Health Code as worded since the Patients' Rights and Quality of the Health Service Act (Law no. 2002-303 of 4 March 2002) came into force read as follows:

Article L. 1142-1

> "Save where they incur liability as a result of a defect in a health product, the medical practitioners mentioned in Part IV of this Code and all hospitals, clinics, departments and organisations in which preventive medicine, diagnosis or treatment is performed on individuals shall only be liable for damage caused by preventive medicine, diagnosis or treatment if they have been at fault.
>
> ..."

Article L. 1142-2

"Private medical practitioners, the hospitals, clinics, health services and organisations mentioned in Article L. 1142-1 and any other legal entity other than the State that is engaged in preventive medicine, diagnosis or treatment and the producers and suppliers of and dealers in health products in the form of finished goods mentioned in Article L. 5311-1 with the exception of sub-paragraph 5 thereof, subject to the provisions of Article L. 1222-9, and sub-paragraphs 11, 14 and 15, that are used in connection with such activities shall be under a duty to take out insurance in respect of any third-party or administrative liability they may incur for damage sustained by third parties as a result of an assault against the person in the course of that activity taken as a whole.

..."

Article L. 1142-28

"The limitation period for actions against medical practitioners and public or private hospitals or clinics in respect of preventive medicine, diagnosis or treatment shall be ten years from the date the condition stabilises."

Article L. 2211-1

"As stated in Article 16 of the Civil Code as hereafter reproduced: '

'The law secures the primacy of the person, prohibits any assault on human dignity and guarantees the respect of every human being from the beginning of its life.' "

Article L. 2211-2

"The principle referred to in Article L. 2211-1 may only be derogated from in the event of necessity and in accordance with the conditions set out in this Part. It shall be the nation's duty to educate society on this principle and its consequences, [to provide] information on life's problems and on national and international demography, to inculcate a sense of responsibility, to receive children into society and to uphold family life. The State, aided by the local and regional authorities, shall perform these obligations and support initiatives that assist it to do so."

Article L. 2212-1

"A pregnant woman whose condition causes her distress may ask a doctor to terminate her pregnancy. The pregnancy may only be terminated within the first twelve weeks."

Article L. 2213-1

"A pregnancy may be voluntarily terminated at any time if two doctors from a pluridisciplinary team certify, after the team has issued a consultative opinion, that either the woman's continued pregnancy puts her health at serious risk or that it is

highly likely that the unborn child is suffering from a particularly serious affection which is recognised as incurable at the time of diagnosis.

..."

C. The position taken by the Court of Cassation

29. The Court of Cassation has followed its decision in the instant case (see paragraph 22 above) on two occasions (in its judgments of 29 June 2001 (full court), *Bulletin* no. 165, and of 25 June 2002 (Criminal Division), *Bulletin* no. 144), despite submissions from the advocates-general concerned to the contrary.

1. Judgment of the full court of 29 June 2001

"As regards the two grounds of appeal of the public prosecutor at the Metz Court of Appeal and of Mrs X which have been joined together ... :

On 29 July 1995 a vehicle being driven by Mr Z collided with a vehicle being driven by Mrs X, who was six months pregnant. She was injured and as a result of the impact lost the foetus she was carrying. In the impugned judgment (Metz Court of Appeal, 3 September 1998), Mr Z was convicted of unintentionally injuring Mrs X, aggravated by the fact that he was under the influence of drink. However, he was acquitted of the unintentional killing of the unborn child.

The grounds of appeal against that decision are, firstly, that Article 221-6 of the Criminal Code, which makes it an offence to cause the death of another, does not exclude from its scope a viable unborn child and that, by holding that this provision applied only to a child whose heart was beating at birth and who was breathing, the Court of Appeal had added a condition that was not contained in the statute, and, secondly, unintentionally causing the death of an unborn child constituted the offence of unintentional homicide if the unborn child was viable at the material time, irrespective of whether or not it breathed when it was separated from the mother, with the result that there had been a violation of Articles 111-3, 111-4 and 221-6 of the Criminal Code and Article 593 of the Code of Criminal Procedure.

The rule that offences and punishment must be defined by law, which requires that criminal statutes be construed strictly, pleads against extending the scope of Article 221-6 of the Criminal Code, which makes unintentional homicide an offence, to cover unborn children whose status in law is governed by special provisions concerning embryos and foetuses.

..."

2. Judgment of the Criminal Division of 25 June 2002

"...

Having regard to former Article 319, Article 221-6 and Article 111-4 of the Criminal Code:

The rule that offences and punishment must be defined by law, which requires that criminal statutes be construed strictly, pleads against a charge of unintentional homicide lying in the case of a child that is not born alive.

The impugned judgment established that Z, whose pregnancy under the supervision of X came to term on 10 November 1991, attended the clinic in order to give birth on 17 November. She was placed under observation at about 8.30 p.m. and drew the attention of the midwife, Y, to an anomaly in the child's cardiac rhythm. Y refused to call the doctor. A further test carried out at 7 a.m. the following morning showed a like anomaly and subsequently that the heart had stopped beating altogether. At about 8 a.m., X pronounced the baby dead. In the evening he proceeded to extract the stillborn child by caesarean section. According to the autopsy report, the child did not present any malformation but had suffered from anoxia.

In finding Y guilty of unintentional homicide and X, who was acquitted by the Criminal Court, liable for the civil consequences of that offence, the Court of Appeal held that the child's death was a result of the negligent acts and omissions of both the doctor in failing to place the patient, who was beyond term, under closer observation and of the midwife in failing to notify an unequivocal anomaly noted when the child's cardiac rhythm was recorded.

After noting that the stillborn child did not present any organic lesion capable of explaining its death, the Court of Appeal stated: 'This child had reached term several days previously and, but for the fault that has been found, would have been capable of independent survival, with a human existence separate from its mother's.'

However, by so holding, the Court of Appeal misapplied the provisions referred to above and the aforementioned principles.

It follows that this appeal on points of law is allowed. The case will not be remitted, as the facts are not capable of coming within the definition of any criminal offence.

..."

30. The Criminal Division of the Court of Cassation has held that a court of appeal gave valid reasons for finding a defendant guilty of the unintentional homicide of a child who died an hour after its birth on the day of a road traffic accident in which its mother, who was eight months' pregnant, was seriously injured, when it held that, by failing to control his vehicle, the driver had caused the child's death an hour after birth as a result of irreversible lesions to vital organs sustained at the moment of impact (Court of Cassation, Criminal Division, 2 December 2003).

31. An article entitled “Unintentional violence on pregnant women and the offence of unintentional homicide” (*Recueil Dalloz* 2004, p. 449) notes that in twenty-eight out of a total of thirty-four articles commenting on the Criminal Division of the Court of Cassation’s judgment of 2 December 2003 (see paragraph 30 above) the authors are critical of the Court of Cassation’s case-law (see paragraph 29 above).

The criticism includes: the laconic reasoning of the Court of Cassation’s judgments and incoherence of the protection afforded, as a person causing unintentional injury is liable to criminal prosecution while a person who unintentionally causes the death of the foetus goes unpunished; the fact that a child who has lived for a few minutes is recognised as having standing as a victim, whereas a child that dies *in utero* is ignored by the law; and the fact that freedom to procreate is less well protected than freedom to have an abortion.

D. The Garraud amendment

32. On 27 November 2003 the National Assembly adopted on its second reading a bill to adapt the criminal justice system to changes in criminality. The bill included the Garraud amendment, so named after the member of parliament who introduced it, which created an offence of involuntary termination of pregnancy (ITP).

33. The adoption of this amendment gave rise to fierce controversy and, after a week of consultations, the Minister of Justice, Mr Perben, declared on 5 December 2003 that the member’s proposal “caused more problems than it solved” and that he was in favour of abandoning it. On 23 January 2004 the Senate unanimously deleted the amendment. This was the second time the senators had rejected such a proposal, as they had already opposed it in April 2003 when examining the Reinforcement of Protection against Road Violence Act, passed on 12 June 2003.

E. The laws on bioethics

34. On 11 December 2003 the National Assembly adopted on its second reading a bill on bioethics with a view to reforming the 1994 laws on the donation and use of parts and products of the human body, medically assisted procreation and prenatal diagnosis, as envisaged by the legislature at the time, in order to take into account subsequent scientific and medical progress and new issues with which society was confronted. In view of the speed with which technological advances are made, the bill reinforces the guarantees on the provision of information and on seeking and obtaining consent, prohibits certain practices that are technically feasible (reproductive cloning) and provides a framework for those with a proven medical interest (research on embryos *in vitro*). It establishes a regulatory

and supervisory body (the Procreation, Embryology and Human Genetics Agency) whose functions also include acting as a watchdog and providing support and expert guidance in these spheres (http://www.assemblee-nationale.fr/dossiers/bioethique.asp).

III. EUROPEAN LAW

A. The Oviedo Convention on Human Rights and Biomedicine

35. The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, also known as the Convention on Human Rights and Biomedicine, which was opened for signature on 4 April 1997 in Oviedo, came into force on 1 December 1999. In this convention, the member States of the Council of Europe, the other States and the European Community signatories to it,

> "...
>
> Resolving to take such measures as are necessary to safeguard human dignity and the fundamental rights and freedoms of the individual with regard to the application of biology and medicine,
>
> ... agreed as follows:
>
> **Chapter I – General provisions**
>
> **Article 1 – Purpose and object**
>
> Parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine.
>
> Each Party shall take in its internal law the necessary measures to give effect to the provisions of this Convention.
>
> **Article 2 – Primacy of the human being**
>
> The interests and welfare of the human being shall prevail over the sole interest of society or science.
>
> ...

Chapter V – Scientific research

...

Article 18 – Research on embryos *in vitro*

1. Where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo.

2. The creation of human embryos for research purposes is prohibited.

...

Chapter XI – Interpretation and follow-up of the Convention

Article 29 – Interpretation of the Convention

The European Court of Human Rights may give, without direct reference to any specific proceedings pending in a court, advisory opinions on legal questions concerning the interpretation of the present Convention at the request of:

– the Government of a Party, after having informed the other Parties;

– the Committee set up by Article 32, with membership restricted to the Representatives of the Parties to this Convention, by a decision adopted by a two-thirds majority of votes cast.

..."

36. The commentary on Article 1 (see paragraphs 16 to 19 of the explanatory report on the convention) states:

Article 1 – Purpose and object

"16. This Article defines the Convention's scope and purpose.

17. The aim of the Convention is to guarantee everyone's rights and fundamental freedoms and, in particular, their integrity and to secure the dignity and identity of human beings in this sphere.

18. The Convention does not define the term 'everyone' (in French '*toute personne*'). These two terms are equivalent and found in the English and French versions of the European Convention on Human Rights, which however does not define them. In the absence of a unanimous agreement on the definition of these terms among member States of the Council of Europe, it was decided to allow domestic law to define them for the purposes of the application of the present Convention.

19. The Convention also uses the expression ‘human being’ to state the necessity to protect the dignity and identity of all human beings. It was acknowledged that it was a generally accepted principle that human dignity and the identity of the human being had to be respected as soon as life began.

...”

B. Additional Protocol to the Convention on Human Rights and Biomedicine, on the Prohibition of Cloning Human Beings (12 January 1998)

37. Article 1 of the Protocol provides:

“1. Any intervention seeking to create a human being genetically identical to another human being, whether living or dead, is prohibited.

2. For the purpose of this Article, the term human being ‘genetically identical’ to another human being means a human being sharing with another the same nuclear gene set.”

C. Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research

38. The draft Protocol was approved by the Steering Committee on Bioethics on 20 June 2003. It was submitted for approval to the Committee of Ministers of the Council of Europe, which sought a consultative opinion from the Parliamentary Assembly. On 30 April 2004 the Assembly issued an opinion (no. 252 (2004)) in which it declared itself in favour of the draft Protocol. On 30 June 2004 the Committee of Ministers adopted the text.

Article 1 – Object and purpose

“Parties to this Protocol shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to any research involving interventions on human beings in the field of biomedicine.”

Article 2 – Scope

“1. This Protocol covers the full range of research activities in the health field involving interventions on human beings.

2. This Protocol does not apply to research on embryos *in vitro*. It does apply to research on foetuses and embryos *in vivo*.

...”

Article 3 – Primacy of the human being

"The interests and welfare of the human being participating in research shall prevail over the sole interest of society or science."

Article 18 – Research during pregnancy or breastfeeding

"1. Research on a pregnant woman which does not have the potential to produce results of direct benefit to her health, or to that of her embryo, foetus or child after birth, may only be undertaken if the following additional conditions are met:

(i) the research has the aim of contributing to the ultimate attainment of results capable of conferring benefit to other women in relation to reproduction or to other embryos, foetuses or children;

..."

The explanatory report repeats the terms of the explanatory report on the convention.

D. The Working Party on the Protection of the Human Embryo and Foetus: protection of the human embryo *in vitro* (2003)

39. The Working Party on the Protection of the Human Embryo and Foetus set up by the Steering Committee on Bioethics reached the following conclusion in a report drawn up in 2003:

"This report aimed at giving an overview of current positions found in Europe regarding the protection of the human embryo *in vitro* and the arguments supporting them.

It shows a broad consensus on the need for the protection of the embryo *in vitro*. However, the definition of the status of the embryo remains an area where fundamental differences are encountered, based on strong arguments. These differences largely form the basis of most divergences around the other issues related to the protection of the embryo *in vitro*.

Nevertheless, even if agreement cannot be reached on the status of the embryo, the possibility of re-examining certain issues in the light of the latest developments in the biomedical field and related potential therapeutic advances could be considered. In this context, while acknowledging and respecting the fundamental choices made by the different countries, it seems possible and desirable with regard to the need to protect the embryo *in vitro* on which all countries have agreed, that common approaches be identified to ensure proper conditions for the application of procedures involving the creation and use of embryos *in vitro*. The purpose of this report is to aid reflection towards that objective."

E. The European Group on Ethics in Science and New Technologies at the European Commission

40. The Group has issued, *inter alia*, the following opinion on the ethical aspects of research involving the use of human embryos in the context of the 5th Framework Programme (23 November 1998):

"...

Legal background

Controversies on the concept of beginning of life and 'personhood'

Existing legislation in the Member States differs considerably from one another regarding the question of when life begins and about the definition of 'personhood'. As a result, no consensual definition, neither scientifically nor legally, of when life begins exists.

Two main views about the moral status of the embryo and thus regarding the legal protection afforded to them with respect to scientific research exist:

(i) human embryos are not considered as human beings and consequently have a relative worth of protection;

(ii) human embryos have the same moral status as human beings and consequently are equally worthy of protection.

The discussion of common rules on embryo research is continuing. Recently many European countries, when discussing and signing the Council of Europe Convention on Human Rights and Biomedicine, failed to reach a consensus concerning the definition of the embryo, and, therefore, were unable to find common ground on which to place the admissibility of human embryo research within the Convention. Hence, it is up to the Member States to legislate in this area. Yet, nevertheless, Article 18.1 of the Convention stipulates 'where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo'.

...

Different approaches regarding the definition of the human embryo

In most Member States there is presently no legal definition of the human embryo (Belgium, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal and Sweden). Among those Member States which define the embryo in their legislation, the existing definitions vary considerably from one country to another (Austria, Germany, Spain and the United Kingdom) ...

...

Different scope of national legislation

Among the Member States with legal provisions on embryo research, there are many differences regarding the activities allowed and prohibited.

There are countries where embryo research is allowed only for the benefit of the particular embryo (Austria, Germany). There are Member States where embryo research is exceptionally allowed (France, Sweden), or allowed under strict conditions (Denmark, Finland, Spain, United Kingdom).

...

Diversity of views

The diversity of views regarding the question whether or not research on human embryos *in vitro* is morally acceptable, depends on differences in ethical approaches, philosophical theories and national traditions, which are deeply rooted in European culture. Two contrasting approaches exist: a deontological approach, in which duties and principles control the ends and consequences of our actions; and utilitarian or consequentialist approaches in which human actions are evaluated in terms of means and ends or consequences.

...

The group submits the following opinion

In the preamble it appeared crucial to recall that the progress of knowledge of life sciences, which in itself has an ethical value, cannot, in any case, prevail over fundamental human rights and the respect which is due to all the members of the human family.

The human embryo, whatever the moral or legal status conferred upon it in the different European cultures and ethical approaches, deserves legal protection. Even if taking into account the continuity of human life, this protection ought to be reinforced as the embryo and the foetus develop.

The Treaty on European Union, which does not foresee legislative competence in the fields of research and medicine, implies that such protection falls within the competence of national legislation (as is the case for medically assisted procreation and voluntary interruption of pregnancy). However, Community authorities should be concerned with ethical questions resulting from medical practice or research dealing with early human development.

However, when doing so, the said Community authorities have to address these ethical questions taking into account the moral and philosophical differences, reflected by the extreme diversity of legal rules applicable to human embryo research, in the 15 Member States. It is not only legally difficult to seek harmonisation of national laws at Community level, but because of lack of consensus, it would be inappropriate to impose one exclusive moral code.

The respect for different philosophical, moral or legal approaches and for diverse national culture is essential to the building of Europe.

From an ethical point of view, the multicultural character of European society requires mutual tolerance to be shown by the citizens and political figures of the European Nation States that have chosen uniquely to tie their destiny together, while at the same time ensuring mutual respect for different historical traditions which are exceedingly strong.

From a legal point of view, this multiculturalism is based upon Article 6 of the Amsterdam Treaty (ex Article F of the Treaty on European Union) which recognises fundamental rights at Union level notably based on 'constitutional traditions common to the Member States'. It also declares that 'the Union shall respect the national identity of its Member States'.

It results from the aforementioned principles, that, in the scope of European research programmes, the question of research on the human embryo has to be approached, not only with regard to the respect for fundamental ethical principles, common to all Member States, but equally taking into consideration diverse philosophical and ethical conceptions, expressed through the practices and the national regulations in force in this field.

..."

IV. COMPARATIVE LAW

41. In the majority of the member States of the Council of Europe, the offence of unintentional homicide does not apply to the foetus. However, three countries have chosen to create specific offences. In Italy a person who negligently causes a pregnancy to terminate is liable to a prison sentence of between three months and two years under section 17 of the Abortion Act of 22 May 1978. In Spain Article 157 of the Criminal Code makes it a criminal offence to cause damage to the foetus and Article 146 an offence to cause an abortion through gross negligence. In Turkey Article 456 of the Criminal Code lays down that a person who causes damage to another shall be liable to a prison sentence of between six months and one year; if the victim is a pregnant woman and the damage results in premature birth, the Criminal Code prescribes a sentence of between two and five years' imprisonment.

THE LAW

I. ADMISSIBILITY OF THE APPLICATION

42. The Government's main submission was that the application was incompatible *ratione materiae* with the provisions of the Convention in that Article 2 did not apply to the unborn child. They further submitted that the

applicant had had a legal remedy capable of redressing her complaint, namely an action for damages against the hospital in the administrative courts. Accordingly, she had not exhausted domestic remedies as required by Article 35 § 1 of the Convention. In the alternative, they considered that the application should be rejected as being manifestly ill-founded.

43. The applicant complained of the lack of protection of the unborn child under French criminal law and argued that the State had failed to discharge its obligations under Article 2 of the Convention by not allowing the offence of unintentional homicide to cover injury to an unborn child. She further submitted that the remedy available in the administrative courts was ineffective as it was incapable of securing judicial acknowledgment of the homicide of her child as such. Lastly, the applicant asserted that she had had a choice between instituting criminal and administrative proceedings and that, while her recourse to the criminal courts had, unforeseeably, proved unsuccessful, the possibility of applying to the administrative courts had in the meantime become statute-barred.

44. The Court observes that an examination of the application raises the issue whether Article 2 of the Convention is applicable to the involuntary termination of pregnancy and, if so, whether that provision required a criminal remedy to be available in the circumstances of the case or whether its requirements were satisfied by the possibility of an action for damages in the administrative courts. Considered in those terms, the objections that the application is incompatible *ratione materiae* with the provisions of the Convention and that the applicant failed to exhaust domestic remedies are very closely linked to the substance of the applicant's complaint under Article 2. Consequently, the Court considers it appropriate to join them to the merits (see, among other authorities, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 11, § 19).

45. The application cannot therefore be declared inadmissible either as being incompatible *ratione materiae* with the provisions of the Convention or for failure to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention. The Court further considers that the application raises issues of fact and law which require examination of the merits. It accordingly concludes that the application is not manifestly ill-founded. Having also established that no other obstacle to its admissibility exists, the Court declares it admissible.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

46. The applicant complained of the authorities' refusal to classify the taking of her unborn child's life as unintentional homicide. She argued that the absence of criminal legislation to prevent and punish such an act breached Article 2 of the Convention, which provides:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. The parties' submissions

1. The applicant

47. The applicant asserted that the point at which life began had a universal meaning and definition. Even though that was in the nature of things, it was now scientifically proven that all life began at fertilisation. That was an experimental finding. A child that had been conceived but not yet born was neither a cluster of cells nor an object, but a person. Otherwise, it would have to be concluded that in the instant case she had not lost anything. Such an argument was unacceptable for a pregnant woman. Accordingly, the term "everyone" ("*toute personne*") in Article 2 of the Convention was to be taken to mean human beings rather than individuals with the attributes of legal personality. Indeed, that had been the position taken by the *Conseil d'Etat* and the Court of Cassation, which, having agreed to review the compatibility of the Termination of Pregnancy Act with Article 2, had been compelled to accept that, from the first moments of its life in the womb, the unborn child came within the scope of that provision (*Conseil d'Etat* (full court), 21 December 1990, *Recueil Lebon*, p. 368; Court of Cassation (Criminal Division), 27 November 1996, *Bulletin criminel* no. 431).

48. In the applicant's submission, French law guaranteed all human beings the right to life from conception, subject to certain exceptions provided for by law in the case of abortion. In that connection, she added that all forms of abortion, with the exception of therapeutic abortion, were incompatible with Article 2 of the Convention on account of the interference with the right to life of the conceived child. Even if it were accepted that, subject to certain conditions, States could allow women to have an abortion if they requested one, the Contracting States were not at liberty to exclude the unborn child from the protection of Article 2. A

distinction should be made between the rule and the exception. Section 1 of the Voluntary Termination of Pregnancy Act of 1975 (reproduced in Article 16 of the Civil Code and Article L. 2211-1 of the Public Health Code – see paragraph 28 above) laid down the rule, namely respect for every human being from the beginning of its life, and subsequently provided for an exception in case of necessity and in accordance with conditions defined by law. The legislature had also implicitly accepted that life began at the moment of conception by laying down a number of rules protecting the embryo *in vitro* in the laws on bioethics of 29 July 1994 (see paragraph 34 above). Accordingly, although death could in exceptional cases prevail over life, life remained the fundamental value protected by the Convention. The exception should not rule out the possibility of punishing a third party who, through negligence, caused an unborn child to die. The mother's wishes could not be equated with negligence on the part of a third party. The Court could therefore validly hold that the Contracting Parties' legislation should ensure the protection of the conceived child by making unintentional homicide of the latter a criminal offence, even if their legislation also permitted abortion.

49. The applicant pointed out that, as the Court had held, States had "a primary duty ... to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions" (see *Kılıç v. Turkey*, no. 22492/93, § 62, ECHR 2000-III, and *Mahmut Kaya v. Turkey*, no. 22535/93, § 85, ECHR 2000-III). In her submission, the new line of case-law adopted by the Court in *Calvelli and Ciglio v. Italy* ([GC], no. 32967/96, § 51, ECHR 2002-I), to the effect that where the right to life had been infringed unintentionally the judicial system did not necessarily require the provision of a criminal-law remedy, could not be followed in the instant case, because a civil remedy did not "satisfy the requirement of expressing public disapproval of a serious offence, such as the taking of life" (see the partly dissenting opinion of Judge Rozakis joined by Judges Bonello and Strážnická in the above-mentioned case). That would amount to debasing the right to life protected by Article 2. The applicant therefore considered that creating the offence of involuntary termination of pregnancy would fill the vacuum created by the Court of Cassation and would compensate for the State's failure to fulfil its duty to protect the human being at the earliest stages of its development (see paragraph 32 above).

50. The applicant argued that she had had the option of instituting criminal or administrative proceedings and had been able to choose between the two types of court. She explained that she had chosen to bring criminal proceedings because, firstly, they were the only remedy capable of securing judicial acknowledgment of the unintentional homicide of her child as such and, secondly, because a criminal investigation aided in the task of

establishing responsibility. In her submission, there had been nothing to suggest that the criminal proceedings were bound to fail, as the position adopted by the Court of Cassation in her case in 1999 and subsequently confirmed in 2001 and 2002 had by no means been definitively established, in view of the resistance shown in decisions by courts of appeal and the virtually unanimous criticism by legal writers (see paragraph 31 above). For example, in a judgment of 3 February 2000 (Reims Court of Appeal, *Dalloz* 2000, case-law, p. 873), the Court of Appeal had convicted a motorist of unintentional homicide for driving into another vehicle, seriously injuring the driver, who was eight months' pregnant, and subsequently causing the death of the baby (see also Versailles Court of Appeal, 19 January 2000, unreported). The applicant submitted in conclusion that, on the face of it, she had had no reason to apply to the administrative courts and contended that she could not have known whether to do so until Dr G. had been acquitted by the Criminal Court. However, by that time an action against the administrative authorities had already become statute-barred. The remedy in the administrative courts could not therefore be regarded as effective within the meaning of Article 35 § 1 of the Convention.

2. The Government

51. After emphasising that neither metaphysics nor medicine had given a definitive answer to the question whether and from what moment a foetus was a human being, the Government asserted that from a legal standpoint Article 2 of the Convention did not protect the foetus's right to life as a person. The use of the term "everyone" ("*toute personne*") in Article 2 and in Articles 5, 6, 8 to 11 and 13 of the Convention was such that it could apply only postnatally (see *X v. the United Kingdom*, no. 8416/79, Commission decision of 13 May 1980, Decisions and Reports (DR) 19, p. 244). The same observation applied to Article 2 taken separately, as all the restrictions on "everyone's" right to life provided for in paragraph 2 concerned, by their very nature, persons who had already been born.

52. Nor could the "right to life" referred to in the same Article be construed as applying to the foetus; it concerned only the life of persons who had already been born alive, since it would be neither consistent nor justified to detach that right from the entity in which it was vested, namely the person. Whereas, by contrast, Article 4 § 1 of the 1969 American Convention on Human Rights provided: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception", the signatories to the Convention would not have envisaged such an extension of Article 2 of the Convention since by 1950 virtually all the Contracting Parties had already authorised abortion in certain circumstances. To acknowledge that the foetus had the right to life within the meaning of Article 2 would place the mother's life and that of the foetus on an equal footing. Furthermore, prioritising the protection of the

foetus's life or restricting it solely in the event of a severe, immediate and insurmountable risk to the mother's life would constitute a step backwards historically and socially and would call into question the legislation in force in many States Parties to the Convention.

53. The Government pointed out that the Commission had considered whether it was appropriate to recognise the foetus as having the right to life subject to certain restrictions relating to the protection of the mother's life and health (see *X. v. the United Kingdom*, cited above). They submitted that such a limitation would not allow recourse to abortion for therapeutic, moral or social reasons, which at the time when the text of the Convention was being negotiated had nonetheless already been authorised by the legislation of a number of countries. It would amount to penalising States that had opted for the right to abortion as an expression and application of a woman's autonomy over her own body and her right to control her maternity. The States Parties had not intended to confer on the expression "right to life" a meaning that extended to the foetus and was manifestly contrary to their domestic legislation.

54. Having regard to the foregoing, the Government considered that the Convention was not designed to cover the foetus and that if the European States wished to ensure effective protection of the foetus's right to life, a provision separate from Article 2 would have to be drawn up. To construe Article 2 as allowing implicit exceptions to the right to life would be at variance with both the letter and the spirit of that Article. Firstly, the permissible exceptions formed an exhaustive list, there being no other option where such a fundamental right was concerned; here, the Government referred to the *Pretty* case in which the Court had stated: "[Article 2] sets out the limited circumstances when deprivation of life may be justified" (see *Pretty v. the United Kingdom*, no. 2346/02, § 37, ECHR 2002-III). Secondly, the exceptions were to be understood and construed strictly (see *Öcalan v. Turkey*, no. 46221/99, § 201, 12 March 2003).

55. The Government observed that in the instant case the applicant had undergone a therapeutic abortion as a result of acts carried out by the doctor outside the statutory period within which abortion was permitted, which had been ten weeks at the time and was now twelve weeks (see paragraphs 27-28 above). However, if the Court were to take the view that that factor rendered Article 2 applicable, and that the foetus should therefore be regarded as a person protected by that provision, they pointed out that in several European States the statutory period for abortion was more than twenty weeks, for example in the Netherlands or in England (where abortions could be carried out at up to twenty-four weeks). Unless domestic legislation and the national authorities' margin of appreciation in this sphere were to be called into question, Article 2 could consequently not apply to the unborn child. That also meant, in the Government's submission, that the issue of the viability of the foetus was irrelevant in the instant case. It would

be paradoxical for States to have a margin of appreciation allowing them to exclude the foetus from protection under Article 2 where a pregnancy was terminated intentionally with the mother's consent – and sometimes on that condition alone – if they were not granted the same margin of appreciation in excluding the foetus from the scope of that provision where a pregnancy was interrupted on account of unintentional negligence.

56. In the alternative, the Government pointed out that in French law the foetus was protected indirectly through the pregnant woman's body, of which it was an extension. That was the case where abortion was carried out intentionally but not in one of the cases exhaustively listed in the relevant legislation (Article 223-10 of the Criminal Code – see paragraph 25 above), or in the event of an accident. In the latter case, the ordinary remedies for establishing civil liability could be used, and the mother could be awarded compensation for personal, pecuniary and non-pecuniary damage, her pregnant state being necessarily taken into account. Furthermore, under the criminal law, anyone who through inadvertence caused a pregnancy to be terminated could be prosecuted for causing unintentional injury, the destruction of the foetus being regarded as damage to the woman's organs.

57. The Government argued that the applicant could have sought damages from the hospital for the doctor's negligence within the four-year limitation period for actions for damages in the administrative courts. They explained that victims of damage caused by public servants had two distinct remedies available. If the damage resulted from personal negligence on the part of the public servant, not intrinsically connected with the performance of his or her duties, the victim could obtain compensation by suing the person concerned in the ordinary courts, whereas if the damage resulted from negligence that disclosed failings on the part of the authority in question, the matter would be classified as official negligence and come within the jurisdiction of the administrative courts. The Government submitted that in *Epoux V.* (judgment of 10 April 1992) the *Conseil d'Etat* had abandoned its position that a hospital department could incur liability only in cases of gross negligence**.** Furthermore, an exception to the rule that the hospital was liable in the event of medical negligence occurred where negligence was deemed to be severable from the public service, either because it was purely personal and thus wholly unrelated to the performance of official duties – which had not been the case in this instance – or because it was intentional or exceptionally serious, amounting to inexcusable professional misconduct of such gravity that it ceased to be regarded as indissociable from the performance of the official duties in question. The Government explained that personal and official negligence were in fact usually interlinked, particularly in cases of unintentional injury or homicide. For that reason, the *Conseil d'Etat* had accepted long ago that the personal liability of a public servant did not exclude the liability of the authority to which he or she was attached (*Epoux Lemonnier*, 1918). The Government

therefore considered that the applicant had had the possibility of seeking redress in the administrative courts as soon as the damage had occurred, without having to wait for the criminal proceedings to end. Such an action would have been all the more likely to succeed as, for the hospital to be held liable, only ordinary negligence had to be made out, and the expert reports ordered by the courts had referred precisely to the hospital department's organisational problems. The administrative courts could therefore legitimately have been expected to reach the same conclusion.

58. The Government asserted that that remedy had been effective and adequate in terms of the positive obligations under Article 2 of the Convention (see *Calvelli and Ciglio*, cited above) and that the applicant had, through her own inaction or negligence, deprived herself of a remedy which had nonetheless been available to her for four years from the time when the damage had occurred, and in respect of which she could have received advice from her lawyers. In *Calvelli and Ciglio* there had been no doubt that Article 2 of the Convention was applicable to a newborn child. In the instant case, in which the applicability of Article 2 was questionable, there were therefore additional reasons for considering that the possibility of using civil or administrative remedies to establish liability was sufficient. In the Government's submission, such an action for damages could have been based on the taking of the life of the child the applicant was carrying, since the relevant case-law of the administrative courts did not appear thus far to preclude the possibility of affording embryos protection under Article 2 of the Convention (*Conseil d'Etat* (full court), *Confédération nationale des associations familiales catholiques et autres*, judgment of 21 December 1990 – see paragraph 47 above). At the material time, in any event, the issue had not been clearly resolved by the *Conseil d'Etat*.

59. In conclusion, the Government considered that, even supposing that Article 2 was applicable in the instant case, that provision did not require the life of the foetus to be protected by the criminal law in the event of unintentional negligence, as was the position in many European countries.

B. Third-party interventions

1. Center for Reproductive Rights

60. The Center for Reproductive Rights (CRR) submitted that unborn foetuses could not be treated as persons under the law and hence covered by Article 2 of the Convention because there was no legal basis for such an approach (i), and because granting them that status would interfere with women's basic human rights (ii). Lastly, they argued that it would be inadvisable to extend rights to the foetus because the loss of a wanted foetus constituted an injury to the expectant mother (iii).

61. (i) The assertion that a foetus was a person ran counter to the case-law of the Convention institutions, the legislation of the member States of the Council of Europe, international standards and the case-law of courts throughout the world. Relying on the decisions in *X v. the United Kingdom* (Commission decision cited above), *H. v. Norway* (no. 17004/90, Commission decision of 19 May 1992, DR 73, p. 155) and, most recently, *Boso v. Italy* (no. 50490/99, ECHR 2002-VII), in which the Commission and the Court had held that granting a foetus the same rights as a person would place unreasonable limitations on the Article 2 rights of persons already born, the CRR saw no reason to depart from that conclusion unless the right to abortion in all Council of Europe member States were to be called into question.

62. The foetus was not recognised as a person in European domestic legislation or by the national courts interpreting it. The CRR drew attention to the Court of Cassation's settled position (see paragraph 29 above), which was consistent with the distinction made in French law between the concepts of "human being" and "person", the former being a biological concept and the latter a legal term attached to a legal category whose rights took effect and were perfected at birth, although in certain circumstances the rights acquired at birth were retroactive to conception. The national courts had also addressed the issue of the legal status of the person in the context of abortion. For example, the Austrian and Netherlands Constitutional Courts had held that Article 2 should not be interpreted as protecting the unborn child, and the French Constitutional Council had found no conflict between legislation on the voluntary termination of pregnancy and the constitutional protection of the child's right to health (decision no. 74-54 of 15 January 1975). That reading was consistent with the relevant legislation throughout Europe: thirty-nine member States of the Council of Europe – the exceptions being Andorra, Ireland, Liechtenstein, Malta, Poland and San Marino, which had maintained severe restrictions on abortion (with only very narrow therapeutic exceptions) – permitted a woman to terminate a pregnancy without restriction during the first trimester or on very broad therapeutic grounds.

63. With regard to international and regional standards, the CRR observed that the International Covenant on Civil and Political Rights provided no indication that the right to life applied to a foetus. It added that the Human Rights Committee had routinely emphasised the threat to women's lives posed by illegal abortions. The same was true of the Convention on the Rights of the Child and the interpretation by the Committee on the Rights of the Child of Article 6, which provided: "Every child has the inherent right to life." On several occasions the Committee had stated its concern about the difficulties of adolescent girls in having their pregnancies terminated in safe conditions and had expressed its fears as to the impact of punitive legislation on maternal mortality rates. The case-law

of the Inter-American regional system, notwithstanding Article 4 of the American Convention on Human Rights (see paragraph 52 above), did not provide absolute protection to a foetus before birth. The Inter-American Commission on Human Rights had held in *Baby Boy* (1981) that Article 4 did not preclude liberal national-level abortion legislation. Furthermore, the Organisation of African Unity had adopted the Protocol on the Rights of Women on 11 July 2003 to supplement the African Charter on Human and Peoples' Rights of 27 June 1981, broadening the protection of the right of women to terminate a pregnancy.

64. Lastly, with regard to non-European States, the CRR noted that the Supreme Courts of Canada and the United States had declined to treat unborn foetuses as persons under the law (in *Winnipeg Child Family Services v. G.* (1997) and *Roe v. Wade* (1973)). The United States Supreme Court had reaffirmed that position in a recent case in 2000 (*Stenberg v. Carhart*), in which it had declared unconstitutional a State law prohibiting certain methods of abortion and providing no protection for women's health. Similarly, in South Africa, ruling on a constitutional challenge to the recently enacted Choice on Termination of Pregnancy Act, which permitted abortion without restriction during the first trimester and on broad grounds at later stages of pregnancy, the High Court had considered that the foetus was not a legal person (*Christian Lawyers Association of South Africa and Others v. Minister of Health and Others*, 1998).

65. (ii) In the CRR's submission, recognition of the foetus's rights interfered, in particular, with women's fundamental right to a private life. In *Brüggemann and Scheuten v. Germany* (no. 6959/75, Commission's report of 12 July 1977, DR 10, p. 100), the Commission had implicitly accepted that an absolute prohibition on abortion would be an impermissible interference with privacy rights under Article 8 of the Convention. Subsequently, while rejecting the suggestion that Article 2 protected the right to life of foetuses, the Convention institutions had further recognised that the right to respect for the private life of the pregnant woman, as the person primarily concerned by the pregnancy and its continuation or termination, prevailed over the father's rights (see paragraph 61 above). In addition to respect for private life, the preservation of the pregnant woman's life and health took precedence. In holding that restrictions on the exchange of information on abortion created a risk to the health of women whose pregnancies posed a threat to their lives, the Court had ruled that the injunction in question had been "disproportionate to the aims pursued" and that, consequently, a woman's health interest prevailed over a State's declared moral interest in protecting the rights of a foetus (see *Open Door and Dublin Well Woman v. Ireland*, judgment of 29 October 1992, Series A no. 246-A).

66. (iii) In the CRR's submission, declining to recognise the foetus as a person under Article 2 did not preclude a remedy for injuries such as the one

that had given rise to the instant case. The loss of a wanted foetus was an injury suffered by the expectant mother. Consequently, the rights that were entitled to protection in the instant case were those of the applicant and not those of the foetus she had lost. It was within the power of the legislature of every Council of Europe member State to recognise both civil and criminal offences committed by individuals who injured a woman by causing the termination of a wanted pregnancy.

2. Family Planning Association

67. The Family Planning Association (FPA) set out primarily to argue that the right to life enshrined in Article 2 of the Convention should not be interpreted as extending to the unborn (i). In support of that argument, the FPA provided the Court with information on the current legal position on abortion in the member States of the Council of Europe (ii), and a summary of the legal status of the unborn in United Kingdom law (iii).

68. (i) The FPA pointed out that Article 2 was drafted in such a way as to allow only very limited exceptions to the prohibition it imposed on intentional deprivation of life. Voluntary termination of pregnancy was not one of those exceptions; nor could any of the exceptions be interpreted to include that practice. Recent evidence showed that voluntary termination of pregnancy on request in the first trimester was now widely accepted across Europe, as was termination on certain grounds in the second trimester. If Article 2 were interpreted as applying to the unborn from the moment of conception, as contended by the applicant, the Court would be calling into question the laws on abortion enacted in most Contracting States. Furthermore, that would render illegal the majority of methods of contraception currently in use throughout Europe, since they acted or could act after conception to prevent implantation. There would therefore be devastating implications in terms of both individual choices and lives and social policy. The English High Court had recently acknowledged that that would be the undesirable consequence if it were to accept the argument of the Society for the Protection of Unborn Children that emergency hormonal contraceptives were abortifacients because pregnancy began at conception (see *Society for the Protection of Unborn Children v. Secretary of State for Health* [2002] High Court, Administrative Court (England and Wales)).

69. The possibility that Article 2 applied to the foetus but with certain implied limitations, for example only after a critical point in time (viability or some other gestational stage) should likewise be rejected. Recent evidence showed that, beyond the broad consensus identified above, there was a complete lack of any generally accepted standard in relation to the gestational limit on the availability of abortion, the grounds on which termination was available after that point in time, or the conditions that had to be satisfied.

70. (ii) Recent survey information was available (*Abortion Legislation in Europe*, International Planned Parenthood Federation (IPPF) European Network, July 2002, and *Abortion Policies: a Global Review*, United Nations Population Division, June 2002) in relation to the legal position on abortion in the Council of Europe member States with the exception of Serbia and Montenegro. The surveys showed that four States essentially prohibited abortion, except where the pregnant woman's life was endangered (Andorra, Liechtenstein, San Marino and Ireland), whereas the great majority of member States provided for much wider access to abortion services. Such evidence of the availability of abortion across Europe was in keeping with the general trend towards the liberalisation of abortion laws. No general consensus emerged from the practice of the member States as to the period during which abortion was permitted after the first trimester or the conditions that had to be satisfied for abortion to be available in the later stages of pregnancy. Furthermore, the grounds on which abortion was permitted without a time-limit were many and varied. The FPA accordingly contended that if Article 2 were interpreted as applying to the unborn from some particular point in time, that would call into question the legal position in a number of States where termination was available on certain grounds at a later stage than that determined by the Court.

71. (iii) It was now a settled general principle of the common law that in the United Kingdom legal personality crystallised upon birth. Up until that point, the unborn had no legal personality independent of the pregnant woman. However, despite that lack of legal personality, the interests of the unborn were often protected while they were in the womb, even though those interests could not be realised as enforceable rights until the attainment of legal personality on birth.

72. In the civil law, that specifically meant that prior to birth the unborn had no standing to bring proceedings for compensation or other judicial remedies in relation to any harm done or injury sustained while in the womb, and that no claim could be made on their behalf (see *Paton v. British Pregnancy Advisory Service Trustees* [1979] Queen's Bench Reports 276). Efforts had been made to persuade the courts dealing with such cases that according to the law of succession, the unborn could be deemed to be "born" or "persons in being" whenever their interests so demanded. However, *Burton* confirmed that that principle was also subject to the live birth of a child ([1993] Queen's Bench Reports 204, 227).

73. In the criminal law, it was well established that the unborn were not treated as legal persons for the purpose of the common-law rules of murder or manslaughter. In *Attorney-General's Reference* (no. 3, 1994), the House of Lords had concluded that injury of the unborn without a live birth could not lead to a conviction for murder, manslaughter or any other violent crime. The rights of the unborn were further protected by the criminal law on abortion. Sections 58 and 59 of the Offences against the Person Act 1861

had introduced the statutory offences of procuring abortion and procuring the means to cause abortion. Similarly, by section 1 of the Infant Life (Preservation) Act 1929 the destruction of the unborn, where capable of live birth, was a serious offence. Those Acts were still in force. Abortion and child destruction remained illegal, subject to the application of the Abortion Act 1967.

C. The Court's assessment

74. The applicant complained that she had been unable to secure the conviction of the doctor whose medical negligence had caused her to have to undergo a therapeutic abortion. It has not been disputed that she intended to carry her pregnancy to full term and that her child was in good health. Following the material events, the applicant and her partner lodged a criminal complaint, together with an application to join the proceedings as civil parties, alleging unintentional injury to the applicant and unintentional homicide of the child she was carrying. The courts held that the prosecution of the offence of unintentional injury to the applicant was statute-barred and, quashing the Court of Appeal's judgment on the second point, the Court of Cassation held that, regard being had to the principle that the criminal law was to be strictly construed, a foetus could not be the victim of unintentional homicide. The central question raised by the application is whether the absence of a criminal remedy within the French legal system to punish the unintentional destruction of a foetus constituted a failure on the part of the State to protect by law the right to life within the meaning of Article 2 of the Convention.

1. Existing case-law

75. Unlike Article 4 of the American Convention on Human Rights, which provides that the right to life must be protected "in general, from the moment of conception", Article 2 of the Convention is silent as to the temporal limitations of the right to life and, in particular, does not define "everyone" ("*toute personne*") whose "life" is protected by the Convention. The Court has yet to determine the issue of the "beginning" of "everyone's right to life" within the meaning of this provision and whether the unborn child has such a right.

To date it has been raised solely in connection with laws on abortion. Abortion does not constitute one of the exceptions expressly listed in paragraph 2 of Article 2, but the Commission has expressed the opinion that it is compatible with the first sentence of Article 2 § 1 in the interests of protecting the mother's life and health because "if one assumes that this provision applies at the initial stage of the pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the

woman at that stage, of the 'right to life' of the foetus" (see *X v. the United Kingdom*, Commission decision cited above, p. 253).

76. Having initially refused to examine *in abstracto* the compatibility of abortion laws with Article 2 of the Convention (see *X v. Norway*, no. 867/60, Commission decision of 29 May 1961, Collection of Decisions, vol. 6, p. 34, and *X v. Austria*, no. 7045/75, Commission decision of 10 December 1976, DR 7, p. 87), the Commission acknowledged in *Brüggemann and Scheuten* (cited above) that women complaining under Article 8 of the Convention about the Constitutional Court's decision restricting the availability of abortions had standing as victims. It stated on that occasion: "... pregnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant her private life becomes closely connected with the developing foetus" (ibid., p. 116, § 59). However, the Commission did not find it "necessary to decide, in this context, whether the unborn child is to be considered as 'life' in the sense of Article 2 of the Convention, or whether it could be regarded as an entity which under Article 8 § 2 could justify an interference 'for the protection of others' " (ibid., p. 116, § 60). It expressed the opinion that there had been no violation of Article 8 of the Convention because "not every regulation of the termination of unwanted pregnancies constitutes an interference with the right to respect for the private life of the mother" (ibid., pp. 116-17, § 61), while emphasising: "There is no evidence that it was the intention of the Parties to the Convention to bind themselves in favour of any particular solution" (ibid., pp. 117-18, § 64).

77. In *X v. the United Kingdom* (cited above), the Commission considered an application by a man complaining that his wife had been allowed to have an abortion on health grounds. While it accepted that the potential father could be regarded as the "victim" of a violation of the right to life, it considered that the term "everyone" in several Articles of the Convention could not apply prenatally, but observed that "such application in a rare case – e.g. under Article 6, paragraph 1 – cannot be excluded" (p. 249, § 7; for such an application in connection with access to a court, see *Reeve v. the United Kingdom*, no. 24844/94, Commission decision of 30 November 1994, DR 79-A, p. 146). The Commission added that the general usage of the term "everyone" ("*toute personne*") and the context in which it was used in Article 2 of the Convention did not include the unborn. As to the term "life" and, in particular, the beginning of life, the Commission noted a "divergence of thinking on the question of where life begins" and added: "While some believe that it starts already with conception, others tend to focus upon the moment of nidation, upon the point that the foetus becomes 'viable', or upon live birth" (*X v. the United Kingdom*, p. 250, § 12).

The Commission went on to examine whether Article 2 was "to be interpreted: as not covering the foetus at all; as recognising a 'right to life'

of the foetus with certain implied limitations; or as recognising an absolute 'right to life' of the foetus" (ibid. p. 251, § 17). Although it did not express an opinion on the first two options, it categorically ruled out the third interpretation, having regard to the need to protect the mother's life, which was indissociable from that of the unborn child: "The 'life' of the foetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman. If Article 2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the 'unborn life' of the foetus would be regarded as being of a higher value than the life of the pregnant woman" (ibid., p. 252, § 19). The Commission adopted that solution, noting that by 1950 practically all the Contracting Parties had "permitted abortion when necessary to save the life of the mother" and that in the meantime the national law on termination of pregnancy had "shown a tendency towards further liberalisation" (ibid., p. 252, § 20).

78. In *H. v. Norway* (cited above), concerning an abortion carried out on non-medical grounds against the father's wishes, the Commission added that Article 2 required the State not only to refrain from taking a person's life intentionally but also to take appropriate steps to safeguard life (p. 167). It considered that it did not have to decide "whether the foetus may enjoy a certain protection under Article 2, first sentence", but did not exclude the possibility that "in certain circumstances this may be the case notwithstanding that there is in the Contracting States a considerable divergence of views on whether or to what extent Article 2 protects the unborn life" (ibid.). It further noted that in such a delicate area the Contracting States had to have a certain discretion, and concluded that the mother's decision, taken in accordance with Norwegian legislation, had not exceeded that discretion (p. 168).

79. The Court has only rarely had occasion to consider the application of Article 2 to the foetus. In *Open Door and Dublin Well Woman* (cited above), the Irish Government relied on the protection of the life of the unborn child to justify their legislation prohibiting the provision of information concerning abortion facilities abroad. The only issue that was resolved was whether the restrictions on the freedom to receive and impart the information in question had been necessary in a democratic society, within the meaning of paragraph 2 of Article 10 of the Convention, to pursue the "legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect" (pp. 27-28, § 63), since the Court did not consider it relevant to determine "whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2" (p. 28, § 66). Recently, in circumstances similar to those in *H. v. Norway*

(cited above), where a woman had decided to terminate her pregnancy against the father's wishes, the Court held that it was not required to determine "whether the foetus may qualify for protection under the first sentence of Article 2 as interpreted [in the case-law relating to the positive obligation to protect life]", and continued: "Even supposing that, in certain circumstances, the foetus might be considered to have rights protected by Article 2 of the Convention, ... in the instant case ... [the] pregnancy was terminated in conformity with section 5 of Law no. 194 of 1978" – a law which struck a fair balance between the woman's interests and the need to ensure protection of the foetus (see *Boso*, cited above).

80. It follows from this recapitulation of the case-law that in the circumstances examined to date by the Convention institutions – that is, in the various laws on abortion – the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention and that if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests. The Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child. That is what appears to have been contemplated by the Commission in considering that "Article 8 § 1 cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother" (see *Brüggemann and Scheuten*, cited above, pp. 116-17, § 61) and by the Court in the above-mentioned *Boso* decision. It is also clear from an examination of these cases that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a woman, a mother or a father in relation to one another or *vis-à-vis* an unborn child.

2. Approach in the instant case

81. The special nature of the instant case raises a new issue. The Court is faced with a woman who intended to carry her pregnancy to term and whose unborn child was expected to be viable, at the very least in good health. Her pregnancy had to be terminated as a result of an error by a doctor and she therefore had to have a therapeutic abortion on account of negligence by a third party. The issue is consequently whether, apart from cases where the mother has requested an abortion, harming a foetus should be treated as a criminal offence in the light of Article 2 of the Convention, with a view to protecting the foetus under that Article. This requires a preliminary examination of whether it is advisable for the Court to intervene in the debate as to who is a person and when life begins, in so far as Article 2 provides that the law must protect "everyone's right to life".

82. As is apparent from the above recapitulation of the case-law, the interpretation of Article 2 in this connection has been informed by a clear desire to strike a balance, and the Convention institutions' position in relation to the legal, medical, philosophical, ethical or religious dimensions

of defining the human being has taken into account the various approaches to the matter at national level. This has been reflected in the consideration given to the diversity of views on the point at which life begins, of legal cultures and of national standards of protection, and the State has been left with considerable discretion in the matter, as the opinion of the European Group on Ethics in Science and New Technologies at the European Commission appositely puts it: "the ... Community authorities have to address these ethical questions taking into account the moral and philosophical differences, reflected by the extreme diversity of legal rules applicable to human embryo research ... It is not only legally difficult to seek harmonisation of national laws at Community level, but because of lack of consensus, it would be inappropriate to impose one exclusive moral code" (see paragraph 40 above).

It follows that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a "living instrument which must be interpreted in the light of present-day conditions" (see *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, pp. 15-16, § 31, and subsequent case-law). The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate (see paragraph 83 below) and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life (see paragraph 84 below).

83. The Court observes that the French Court of Cassation, in three successive judgments delivered in 1999, 2001 and 2002 (see paragraphs 22 and 29 above), considered that the rule that offences and punishment must be defined by law, which required criminal statutes to be construed strictly, excluded acts causing a fatal injury to a foetus from the scope of Article 221-6 of the Criminal Code, under which unintentional homicide of "another" is an offence. However, if, as a result of unintentional negligence, the mother gives birth to a live child who dies shortly after being born, the person responsible may be convicted of the unintentional homicide of the child (see paragraph 30 above). The first-mentioned approach, which conflicts with that of several courts of appeal (see paragraphs 21 and 50 above), was interpreted as an invitation to the legislature to fill a legal vacuum. That was also the position of the Criminal Court in the instant case: "The court ... cannot create law on an issue which [the legislature has] not yet succeeded in defining." The French parliament attempted such a definition in proposing to create the offence of involuntary termination of pregnancy (see paragraph 32 above), but the bill containing that proposal was lost, on account of the fears and uncertainties that the creation of the offence might arouse as to the determination of when life began, and the

disadvantages of the proposal, which were thought to outweigh its advantages (see paragraph 33 above). The Court further notes that alongside the Court of Cassation's repeated rulings that Article 221-6 of the Criminal Code does not apply to foetuses, the French parliament is currently revising the 1994 laws on bioethics, which added provisions to the Criminal Code on the protection of the human embryo (see paragraph 25 above) and required re-examination in the light of scientific and technological progress (see paragraph 34 above). It is clear from this overview that in France the nature and legal status of the embryo and/or foetus are currently not defined and that the manner in which it is to be protected will be determined by very varied forces within French society.

84. At European level, the Court observes that there is no consensus on the nature and status of the embryo and/or foetus (see paragraphs 39-40 above), although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom (see paragraph 72 above) – require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Article 2. The Oviedo Convention on Human Rights and Biomedicine, indeed, is careful not to give a definition of the term "everyone", and its explanatory report indicates that, in the absence of a unanimous agreement on the definition, the member States decided to allow domestic law to provide clarification for the purposes of the application of that Convention (see paragraph 36 above). The same is true of the Additional Protocol on the Prohibition of Cloning Human Beings and the Additional Protocol on Biomedical Research, which do not define the concept of "human being" (see paragraphs 37-38 above). It is worth noting that the Court may be requested under Article 29 of the Oviedo Convention to give advisory opinions on the interpretation of that instrument.

85. Having regard to the foregoing, the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention ("*personne*" in the French text). As to the instant case, it considers it unnecessary to examine whether the abrupt end to the applicant's pregnancy falls within the scope of Article 2, seeing that, even assuming that that provision was applicable, there was no failure on the part of the respondent State to comply with the requirements relating to the preservation of life in the public-health sphere. With regard to that issue, the Court has considered whether the legal protection afforded the applicant

by France in respect of the loss of the unborn child she was carrying satisfied the procedural requirements inherent in Article 2 of the Convention.

86. In that connection, it observes that the unborn child's lack of a clear legal status does not necessarily deprive it of all protection under French law. However, in the circumstances of the present case, the life of the foetus was intimately connected with that of the mother and could be protected through her, especially as there was no conflict between the rights of the mother and the father or of the unborn child and the parents, the loss of the foetus having been caused by the unintentional negligence of a third party.

87. In *Boso*, cited above, the Court said that even supposing that the foetus might be considered to have rights protected by Article 2 of the Convention (see paragraph 79 above), Italian law on the voluntary termination of pregnancy struck a fair balance between the woman's interests and the need to ensure protection of the unborn child. In the present case, the dispute concerns the involuntary killing of an unborn child against the mother's wishes, causing her particular suffering. The interests of the mother and the child clearly coincided. The Court must therefore examine, from the standpoint of the effectiveness of existing remedies, the protection which the applicant was afforded in seeking to establish the liability of the doctor concerned for the loss of her child *in utero* and to obtain compensation for the abortion she had to undergo. The applicant argued that only a criminal remedy would have been capable of satisfying the requirements of Article 2 of the Convention. The Court does not share that view, for the following reasons.

88. The Court reiterates that the first sentence of Article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the Council of Europe (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, § 147), requires the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see, for example, *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36).

89. Those principles apply in the public-health sphere too. The positive obligations require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V, and *Calvelli and Ciglio*, cited above, § 49).

90. Although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently (see *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I), the Court has stated on a number of occasions that an effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence, "the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged" (see *Calvelli and Ciglio*, cited above, § 51; *Lazzarini and Ghiacci v. Italy* (dec.), no. 53749/00, 7 November 2002; and *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII).

91. In the instant case, in addition to the criminal proceedings which the applicant instituted against the doctor for unintentionally causing her injury – which, admittedly, were terminated because the offence was covered by an amnesty, a fact that did not give rise to any complaint on her part – she had the possibility of bringing an action for damages against the authorities on account of the doctor's alleged negligence (see *Kress v. France* [GC], no. 39594/98, §§ 14 et seq., ECHR 2001-VI). Had she done so, the applicant would have been entitled to have an adversarial hearing on her allegations of negligence (see *Powell*, cited above) and to obtain redress for any damage sustained. A claim for compensation in the administrative courts would have had fair prospects of success and the applicant could have obtained damages from the hospital. That is apparent from the findings clearly set out in the expert reports (see paragraph 16 above) in 1992 – before the action had become statute-barred – concerning the poor organisation of the hospital department in question and the serious negligence on the doctor's part, which nonetheless, in the Court of Appeal's opinion (see paragraph 21 above), did not reflect a total disregard for the most fundamental principles and duties of his profession such as to render him personally liable.

92. The applicant's submission concerning the fact that the action for damages in the administrative courts was statute-barred cannot succeed in the Court's view. In this connection, it refers to its case-law to the effect that the "right to a court", of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain

margin of appreciation in this regard (see, among other authorities, *Brualla Gómez de la Torre v. Spain*, judgment of 19 December 1997, *Reports* 1997-VIII, p. 2955, § 33). These legitimate restrictions include the imposition of statutory limitation periods, which, as the Court has held in personal injury cases, "serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time" (see *Stubbings and Others v. the United Kingdom*, judgment of 22 October 1996, *Reports* 1996-IV, pp. 1502-03, § 51).

93. In the instant case, a four-year limitation period does not in itself seem unduly short, particularly in view of the seriousness of the damage suffered by the applicant and her immediate desire to prosecute the doctor. However, the evidence indicates that the applicant deliberately turned to the criminal courts, apparently without ever being informed of the possibility of applying to the administrative courts. Admittedly, the French parliament recently extended the time allowed to ten years under the Law of 4 March 2002 (see paragraph 28 above). It did so with a view to standardising limitation periods for actions for damages in all courts, whether administrative or ordinary. This enables the general emergence of a system increasingly favourable to victims of medical negligence to be taken into account, an area in which the administrative courts appear capable of striking an appropriate balance between consideration of the damage to be redressed and the excessive "judicialisation" of the responsibilities of the medical profession. The Court does not consider, however, that these new rules can be said to imply that the previous period of four years was too short.

94. In conclusion, the Court considers that in the circumstances of the case an action for damages in the administrative courts could be regarded as an effective remedy that was available to the applicant. Such an action, which she failed to use, would have enabled her to prove the medical negligence she alleged and to obtain full redress for the damage resulting from the doctor's negligence, and there was therefore no need to institute criminal proceedings in the instant case.

95. The Court accordingly concludes that, even assuming that Article 2 was applicable in the instant case (see paragraph 85 above), there has been no violation of Article 2 of the Convention.

FOR THESE REASONS, THE COURT

1. *Joins to the merits* unanimously the Government's preliminary objections of the application's incompatibility *ratione materiae* with the provisions of the Convention and of failure to exhaust domestic remedies, and *dismisses* them;

2. *Declares* unanimously the application admissible;

3. *Holds* by fourteen votes to three that there has been no violation of Article 2 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 2004.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) separate opinion of Mr Rozakis joined by Mr Caflisch, Mr Fischbach, Mr Lorenzen and Mrs Thomassen;
(b) separate opinion of Mr Costa joined by Mr Traja;
(c) dissenting opinion of Mr Ress;
(d) dissenting opinion of Mrs Mularoni joined by Mrs Strážnická.

L.W.
P.J.M.

SEPARATE OPINION OF JUDGE ROZAKIS JOINED BY JUDGES CAFLISCH, FISCHBACH, LORENZEN AND THOMASSEN

I have voted, together with the majority of the Grand Chamber, in favour of finding that there has been no violation of Article 2 of the Convention in the instant case. Yet, my approach differs in certain respects from that of the majority and I would therefore like to append to the judgment this separate opinion setting out the points on which my assessment of the law is at variance with that of the majority.

The Court in this case correctly stresses that research into French domestic law shows that the nature and legal status of the embryo and/or foetus are currently not defined in France and that the manner in which it is to be protected will ultimately be determined by very varied forces within French society (see paragraph 83 *in fine* of the judgment). It also stresses (and this was a forceful argument in the eyes of the Court) that at European level there is no consensus on the nature and status of the embryo and/or foetus and, at best, "it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom – require protection in the name of human dignity, without making it a 'person' with the 'right to life' for the purposes of Article 2" (see paragraph 84 of the judgment).

Despite these findings, with which I readily agree, the Court refuses to draw the relevant conclusions, namely that in the present state of development of science, law and morals, both in France and across Europe, the right to life of the unborn child has yet to be secured. Even if one accepts that life begins before birth, that does not automatically and unconditionally confer on this form of human life a right to life equivalent to the corresponding right of a child after its birth. This does not mean that the unborn child does not enjoy any protection by human society, since – as the relevant legislation of European States, and European agreements and relevant documents show – the unborn life is already considered to be worthy of protection. But as I read the relevant legal instruments, this protection, though afforded to a being considered worthy of it, is, as stated above, distinct from that given to a child after birth, and far narrower in scope. It consequently transpires from the present stage of development of the law and morals in Europe that the life of the unborn child, although protected in some of its attributes, cannot be equated to postnatal life, and, therefore, does not enjoy a right in the sense of "a right to life", as protected by Article 2 of the Convention. Hence, there is a problem of applicability of Article 2 in the circumstances of the case.

Instead of reaching that unavoidable conclusion, as the very reasoning of the judgment dictated, the majority of the Grand Chamber opted for a neutral stance, declaring: "the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention" (see paragraph 85 of the judgment).

What also seems problematic with the majority's reasoning is that, despite their obvious doubts or, at any rate, their reluctance to accept that Article 2 was applicable in this case, the majority ended up abandoning their neutral stance and based their finding of no violation on the argument that the procedural guarantees inherent in the protection of Article 2 had been satisfied in the circumstances of the case. By using the "even assuming" formula as to the applicability of Article 2, and by linking the life of the foetus to the life of the mother ("the life of the foetus was intimately connected with that of the mother and could be protected through her ..." – see paragraph 86 of the judgment), the majority surreptitiously brought Article 2 of the Convention to the fore of the case. Yet, it is obvious from the case-law that reliance on the procedural guarantees of Article 2 to determine whether or not there has been a violation presupposes the prima facie applicability of that Article (and using the "even assuming" formula does not alter the position if, in the end, the only real ground for the Court's findings is the hypothesis referred to in the formula); and in the circumstances of the case there was not even the remotest threat to the mother's right of life such as would justify bringing the procedural guarantees of Article 2 of the Convention into play.

For the reasons explained above, I am unable to agree with the reasoning of the majority and conclude that, as matters presently stand, Article 2 is inapplicable in this case.

SEPARATE OPINION OF JUDGE COSTA JOINED BY JUDGE TRAJA

(*Translation*)

1. In this case, in which a doctor's negligence caused a pregnancy to be terminated after almost six months against the wishes of the woman carrying the unborn child, the Court has found no violation of Article 2 of the Convention.

2. Its reasoning, however, is cautious: the Court decided that it was unnecessary to determine whether Article 2 was applicable, holding that even assuming it was, there has been no violation on the facts.

3. I voted in favour of finding no violation of Article 2, but would have preferred the Court to hold that Article 2 was applicable, even if such a conclusion is not self-evident. As I will attempt to demonstrate, such a decision would perhaps have been clearer with only minimal inconvenience as regards the scope of the judgment.

4. It seems to me, firstly, that it is not the Court's role *as a collegiate body* to consider cases from a primarily ethical or philosophical standpoint (and, in my view, it has successfully avoided this pitfall in this judgment). The Court must endeavour to remain within its own – legal – sphere of competence, although I accept that law does not exist in a vacuum and is not a chemically pure substance detached from moral or societal considerations. Whether or not they choose to express their personal opinions as Article 45 of the Convention entitles (but does not oblige) them to do, individual judges are not, in my opinion, subject to the same constraints. The present case enters into the realm of deep personal convictions and for my part I thought it necessary and perhaps helpful to set out my views. As the reader will have understood, they differ slightly from those of the majority.

5. From the ethical standpoint, the most natural way to attempt to interpret Article 2 of the Convention ("[e]veryone's right to life shall be protected by law" – "*le droit de toute personne à la vie est protégé par la loi*" in the French text) is to ask what is meant by "everyone" ("*toute personne*") and when life begins. It is very difficult to obtain unanimity or agreement here, as ethics are too heavily dependent on individual ideology. In France, the National Advisory Committee, which has been doing a remarkable job for the past twenty years and has issued a number of opinions on the human embryo (a term it generally prefers to "foetus" at all stages of development), has not been able to come up with a definitive answer to these questions. This is only to be expected, particularly bearing in mind the Committee's composition, which President Mitterrand decided at its inception should be pluralist. To say (as the Committee has done since issuing its first opinion in 1984) that "the embryo must be *recognised as* a *potential* human person" does not solve the problem because a being that is

recognised as potential is not necessarily a being and may in fact, by converse implication, not be one. As to life and, therefore, the point at which life begins, everybody has his or her own conception (see the Committee's fifth opinion, issued in 1985). All this shows is that there perhaps exists a right for a potential person to a potential life; for lawyers, however, there is a world of difference between the potential and the actual.

6. What is true for the ethical bodies of States such as the respondent State is also true internationally. The judgment rightly notes that the Oviedo Convention on Human Rights and Biomedicine (a Council of Europe sponsored instrument signed in 1997) does not define what is meant by "everyone". Nor does it provide any definition of "human being", despite the importance it attaches to the dignity, identity, primacy, interests and welfare of human beings. Nor is there any reference to the beginning of life.

7. Does the present inability of ethics to reach a consensus on what is a person and who is entitled to the right to life prevent the law from defining these terms? I think not. It is the task of lawyers, and in particular judges, especially human rights judges, to identify the *notions* – which may, if necessary, be the autonomous notions the Court has always been prepared to use – that correspond to the words or expressions in the relevant legal instruments (in the Court's case, the Convention and its Protocols). Why should the Court not deal with the terms "everyone" and the "right to life" (which the European Convention on Human Rights does not define) in the same way it has done from its inception with the terms "civil rights and obligations", "criminal charges" and "tribunals", even if we are here concerned with philosophical, not technical, concepts?

8. Indeed, the Court has already embarked upon this course in the sphere of Article 2, at least as regards the right to life, for instance, by imposing positive obligations on States to protect human life, or holding that in exceptional circumstances the use of potentially lethal force by State agents may lead to a finding of a violation of Article 2. Through its case-law, therefore, the Court has broadened the notions of the right to life and unlawful killing, if not the notion of life itself.

9. Conversely, I do not believe that it is possible to take the convenient way out by saying that Mrs Vo, a "person", had a right to life (of her unborn child). It is true that the notion of who constitutes a victim has been enlarged by the case-law: a complaint by a nephew alleging a violation of Article 2 on account of his uncle's murder has thus been declared admissible (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI). However, in the instant case, the Court is concerned with a pleaded right to life of the unborn child and this type of decision can only apply to the applicant's case if it is accepted that the unborn child itself has a right to life, since, in order to be a victim within the meaning of Article 34 of the Convention, Mrs Vo must also be a victim of a violation that is recognised by the Convention, *quod est demonstrandum*.

10. Indeed, it seems to me that the Commission and the Court have already worked on the assumption that Article 2 is applicable to the unborn child (without, however, affirming that the unborn child *is* a person). In a number of cases they have held that, even if they did not have to decide the question of applicability, there was in any event no violation of Article 2 on the facts, for instance in the case of a termination of pregnancy in accordance with legislation "which struck a fair balance between the woman's interests and the need to ensure protection of the foetus" (see *Boso v. Italy* (dec.), no. 50490/99, ECHR 2002-VII, which is cited in the judgment; but also, in less forthright terms, the Commission's decision of 19 May 1992 in another cited case, *H. v. Norway*, no. 17004/90, Decisions and Reports 73). Had Article 2 been considered to be entirely inapplicable, there would have been no point – and this applies to the present case also – in examining the question of foetal protection and the possible violation of Article 2, or in using this reasoning to find that there had been no violation of that provision.

11. It is possible to turn to the law of the respondent State, not because it is a model to be imposed on others, but because it is directly in issue in the present case. As far back as 1990, the *Conseil d'Etat* held that the French Voluntary Termination of Pregnancy Act (which the Constitutional Council had declared in its decision no. 74-54 DC of 15 January 1975 was not unconstitutional, while at the same time declining jurisdiction to examine its compatibility with the Convention) was not incompatible with Article 2 of the Convention or Article 6 of the International Covenant on Civil and Political Rights (which provides: "Every human being has the inherent right to life. This right shall be protected by law ..."). Above all, the *Conseil d'Etat* thereby recognised unambiguously, albeit implicitly, that that Act came within the scope of Article 2 (see its decision of 21 December 1990, *Confédération nationale des associations familiales catholiques*, *Recueil Lebon*, p. 369, and the submissions of Mr Bernard Stirn, which clarify it).

12. To my mind, this judgment of the highest French administrative court demonstrates that a decision by the European Court of Human Rights in which it is plainly stated that the "end of life" of an unborn child is within the scope of Article 2 of the Convention would not threaten – at least not in essence – the domestic legislation of a large number of European countries that makes the voluntary termination of pregnancy lawful, subject, of course, to compliance with certain conditions. In a number of European States, such legislation has been held to be consistent with the domestic Constitution and even with Article 2 of the Convention. The Norwegian Supreme Court so found in 1983. The German Federal Constitutional Court and the Spanish Constitutional Court have also accepted that the right to life, as protected by Article 2 of the Convention, can apply to the embryo or the foetus (the question whether that right is *absolute* being a separate issue). These are examples of decisions in which the highest courts of

individual countries have recognised that the right to life, whether set out in Article 2 of the European Convention on Human Rights or enshrined in domestic constitutional principles of like content and scope, *applies* to the foetus, without being absolute. Is there any reason why the Court, which aspires to the role of a constitutional court within the European human rights order, should be less bold?

13. Obviously, were the Court to rule that Article 2 was applicable, either on its wording or in substance, it would have to examine *in any event* (and not just on the facts of the individual case as here) whether or not it had been complied with. This, though, should not be of concern to it either. In the aforementioned *Boso* decision, it applied the "fair balance" test to the impugned statute, so that it would have had to reach the opposite conclusion had the legislation been different and not struck a fair balance between the protection of the foetus and the mother's interests. Potentially, therefore, the Court reviews compliance with Article 2 in all cases in which the "life" of the foetus is destroyed.

14. Similarly, it might be contended that, since Article 15 of the Convention states that no derogation may be made from Article 2, it would be preposterous for the Court to find that Article 2 is not absolute, or is subject to implied exceptions other than those exhaustively set out in the second paragraph thereof. This would militate in favour of holding that Article 2 does not apply to the unborn child (as the unborn child is not one of the exceptions set out in the second paragraph). However, I am not persuaded by either of these two arguments. The non-derogation rule only prohibits States Parties that derogate from the Convention in time of war or other public emergency, as they are entitled to do by Article 15, from infringing Article 2. However, quite clearly situations and exceptional circumstances of this kind are quite unrelated to the killing of an unborn child. More disconcerting from a logical perspective is an argument based on the actual wording of Article 2. However, not only has the Court already decided the point (as it indisputably did in *Boso*), Article 2 cannot be conclusively construed as clearly prohibiting all voluntary terminations of pregnancy, if only because a number of Contracting States have ratified the Convention without any apparent problem, despite already possessing legislation permitting voluntary termination in certain circumstances. Even more persuasive when it comes to an evolutive interpretation of Article 2 is the fact that a large number of European countries passed legislation in the 1970s permitting the voluntary termination of pregnancy within a strict framework.

15. As regards the potential effects of finding Article 2 applicable, it could perhaps be objected, conversely, that the present case can be distinguished from the voluntary termination of pregnancy cases and that the destruction of a foetus as a result of medical error, or any other negligent act or omission, is different from termination at the request of the mother in

distress herself. In other words, those who, in the name of women's freedom of choice, defend the principle of voluntary termination of pregnancy might fear that such legislation would indirectly be at risk if Article 2 were found to be applicable. It is true that the "Garraud amendment", which is mentioned in the judgment and was finally withdrawn from Parliament, was fiercely opposed by sections of French society, in particular (but not only) supporters of the Voluntary Termination of Pregnancy Act, precisely for this reason (as it was intended to create an offence of involuntary termination of pregnancy).

16. However, I do not believe that such fears are legitimately justified, if only because a woman who loses her unborn child against her wishes and sees her hopes of maternity dashed is in an entirely different situation from a woman resigned – albeit likewise in circumstances of suffering and bereavement – to ask for her pregnancy to be brought to an end. In any event, it is not a judicial decision (on the applicability or otherwise of Article 2 of the Convention) which will resolve this ethical debate, still less justify society's policy choices. In addition, since *Vo v. France* does not require States to afford *criminal-law* protection against the risk of the loss of the foetus (and on that I agree), it does not, in any event, plead in favour of making the involuntary termination of pregnancy a criminal offence.

17. In sum, I see no good legal reason or decisive policy consideration for not applying Article 2 in the present case. On a general level, I believe (as do many senior judicial bodies in Europe) that there is life before birth, within the meaning of Article 2, that the law must therefore protect such life, and that if a national legislature considers that such protection cannot be absolute, then it should only derogate from it, particularly as regards the voluntary termination of pregnancy, within a regulated framework that limits the scope of the derogation. The actual circumstances of Mrs Vo's case made it all the more appropriate to find that Article 2 was applicable: she was six months' pregnant (compare this – purely for illustration purposes – with the German Federal Constitutional Court's view that life begins after fourteen days' gestation), there was every prospect that the foetus would be born viable and, lastly, the pregnancy was clearly ended by an act of negligence, against the applicant's wishes.

18. I have nothing further to add, since, with minor differences, I agree with what the judgment has to say in finding that there has been no violation of Article 2.

DISSENTING OPINION OF JUDGE RESS

(*Translation*)

1. France's positive obligation to protect unborn children against unintentional homicide, that is to say against negligent acts that could cause a child's death, can only be discharged if French law has effective procedures in place to prevent the recurrence of such acts. On this point, I am unable to agree with the opinion expressed by the majority that an action in damages in the administrative courts (on account of the hospital doctor's alleged negligence) afforded the unborn child adequate and effective protection against medical negligence. As Judge Rozakis, joined by Judges Bonello and Strážnická, pointed out in his partly dissenting opinion in *Calvelli and Ciglio v. Italy* ([GC], no. 32967/96, ECHR 2002-I), an action in pecuniary and even non-pecuniary damages will not in all circumstances be capable of protecting against the unintentional taking of life, especially in a case such as the present one in which a mother lost her child as a result of a doctor's negligence. Even though I accepted the outcome in *Calvelli and Ciglio*, which was based on the fact that the applicants had agreed to compensation under a friendly settlement, criminal proceedings were commenced in that case (although they were not continued because prosecution of the offence became time-barred).

It is not retribution that makes protection by the criminal law desirable, but deterrence. In general, it is through the criminal law that society most clearly and strictly conveys messages to its members and identifies values that are most in need of protection. Life, which is one of the values, if not the main value, protected by the Convention (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, §§ 92-94, ECHR 2001-II, and *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, § 147), will in principle require the protection of the criminal law if it is to be adequately safeguarded and defended. Financial liability to pay compensation is only a secondary form of protection. In addition, hospitals and doctors are usually insured against such risks, so that the "pressure" on them is reduced.

2. One might consider that imposing a disciplinary penalty on a doctor could be regarded as equivalent to imposing a criminal penalty in certain circumstances. Disciplinary measures were viewed as an alternative means of discouraging negligence in *Calvelli and Ciglio* (cited above, § 51). However, it is equally clear that, as unpleasant as the consequences may be professionally, a disciplinary penalty does not amount to general condemnation (*Unwerturteil*). Disciplinary penalties depend on conditions that are entirely specific to the profession concerned (the bodies being self-regulating) and in general do not afford the deterrence necessary to protect such an important value as life. Nevertheless, the question has to be asked

whether in the present case a disciplinary penalty for such a serious error could have provided sufficient deterrence. Here, though, is where the problem lies, as the authorities at no stage brought disciplinary proceedings against the doctor. For an error as serious as that committed by Dr G., such disciplinary proceedings accompanied by an adequate measure could at least have sent an appropriate signal to the medical profession to prevent the recurrence of such tragic events. I do not think it necessary to say that France requires criminal legislation. However, it does need to take strict disciplinary action in order to meet its obligation to afford effective protection of the life of the unborn child. In my opinion, therefore, there was no effective protection.

3. In order to reach that conclusion, it seems necessary to find out whether Article 2 applies to the unborn child. I am prepared to accept that there may be acceptable differences in the level of protection afforded to an embryo and to a child after birth. Nevertheless, that does not justify the conclusion (see paragraph 85 of the judgment) that it is not possible to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention. All the Court's case-law and the Commission's decisions (see paragraphs 75-80) are based on the "assuming that" argument (*in eventu*). Yet the failure to give a clear answer can no longer be justified by reasons of procedural economy. Nor can the problem of protecting the embryo through the Convention be solved solely through the protection of the mother's life. As this case illustrates, the embryo and the mother, as two separate "human beings", need separate protection.

4. The Vienna Convention on the Law of Treaties (Article 31 § 1) requires treaties to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose. The ordinary meaning can only be established from the text as a whole. Historically, lawyers have understood the notion of "everyone" ("*toute personne*") as including the human being before birth and, above all, the notion of "life" as covering all human life commencing with conception, that is to say from the moment an *independent existence* develops until it ends with death, birth being but a stage in that development.

The structure of Article 2 and, above all, the exceptions set out in paragraph 2 thereof, appear to indicate that persons are only entitled to protection thereunder once they have been born and that it is only after birth that they are regarded as having rights under the Convention. In view of the "aim" of the Convention to provide extended protection, this does not appear to be a conclusive argument. Firstly, a foetus may enjoy protection, especially within the framework of Article 8 § 2 (see *Odièvre v. France* [GC], no. 42326/98, § 45, ECHR 2003-III). In addition, the decisions of the Commission and the Court contain indications that Article 2 is applicable to

the unborn child. In all the cases in which that issue has been considered, the Commission and the Court have developed a concept of an implied limitation or of a fair balance between the interests of society and the interests of the individual, that is to say the mother or the unborn child. Admittedly, these concepts were developed in connection with legislation on the voluntary, but not the involuntary, termination of pregnancy. However, it is clear that they would not have been necessary if the Convention institutions had considered at the outset that Article 2 could not apply to the unborn child. Even though the Commission and the Court have left the question open formally, such a legal structure proves that both institutions were inclined to adopt the ordinary meaning of "human life" and "everyone" rather than the other meaning.

Similarly, the practice of the Contracting States, virtually all of which had constitutional problems with their laws on abortion (voluntary termination of pregnancy), clearly shows that the protection of life also extends in principle to the foetus. Specific laws on voluntary abortion would not have been necessary if the foetus did not have a life to protect and was fully dependent till birth on the unrestricted wishes of the pregnant mother. Nearly all the Contracting States have had problems because, in principle, the protection of life under their constitutional law also extends to the prenatal stage.

5. It is obvious that the premise of the debate on genetic safeguards in a number of recent conventions and the prohibition on the reproductive cloning of "human beings" in the Charter of Fundamental Rights of the European Union (Article 3 § 2, final sub-paragraph) is that the protection of life extends to the initial phase of human life. The Convention, which was conceived as a living instrument to be interpreted in the light of present-day conditions in society, must take such a development into account in order to confirm the "ordinary meaning", in accordance with Article 32 of the Vienna Convention.

Even if it is assumed that the ordinary meaning of "human life" in Article 2 of the Convention is not entirely clear and can be interpreted in different ways, the obligation to protect human life requires more extensive protection, particularly in view of the techniques available for genetic manipulation and the unlimited production of embryos for various purposes. The manner in which Article 2 is interpreted must evolve in accordance with these developments and constraints and confront the real dangers now facing human life. Any restriction on such a dynamic interpretation must take into account the relationship between the life of a person who has been born and the unborn life, which means that protecting the foetus to the mother's detriment would be unacceptable.

6. The fact that various provisions of the Convention contain guarantees which by their nature cannot extend to the unborn cannot alter that position. If, by their very nature, the scope of such provisions can only extend to

natural persons or legal entities, or to persons who have been born or are adults, that does not preclude the conclusion that other provisions such as the first sentence of Article 2 incorporate protection for the lives of human beings in the initial stage of their development.

7. It should be noted that the present case is wholly unrelated to laws on the voluntary termination of pregnancy. That is a separate issue which is fundamentally different from interference, against the mother's wishes, in the life and welfare of her child. The present case concerns wrongdoing by a third party resulting in the loss of a foetus, if not the death of the mother, whereas voluntary abortion is solely concerned with the relationship between the mother and the child and the question of their protection by the State. Although holding that Article 2 applies to human life before birth may have repercussions on the laws regulating the voluntary termination of pregnancy, that is not a reason for saying that Article 2 is not applicable. Quite the opposite.

Furthermore, it is not necessary in the instant case to decide when life begins. It was noted that the 21-week-old foetus was viable, although I believe that the notion of viability cannot limit the States' positive obligation to protect the unborn child against interference and negligence by doctors.

8. There can be no margin of appreciation on the issue of the applicability of Article 2. A margin of appreciation may, in my opinion, exist to determine the measures that should be taken to discharge the positive obligation that arises because Article 2 is applicable, but it is not possible to restrict the applicability of Article 2 by reference to a margin of appreciation. The question of the interpretation or applicability of Article 2 (an absolute right) cannot depend on a margin of appreciation. If Article 2 is applicable, any margin of appreciation will be confined to the effect thereof.

9. Since I consider that Article 2 applies to human beings even before they are born, an interpretation which seems to me to be consistent with the approach of the Charter of Fundamental Rights of the European Union, and since France does not afford sufficient protection to the foetus against the negligent acts of third parties, I find that there has been a violation of Article 2 of the Convention. As regards the specific measures necessary to discharge that positive obligation, that is a matter for the respondent State, which should either take strict disciplinary measures or afford the protection of the criminal law (against unintentional homicide).

DISSENTING OPINION OF JUDGE MULARONI JOINED BY JUDGE STRÁŽNICKÁ

(*Translation*)

I am unable to concur with the majority's finding that there has been no violation of Article 2 of the Convention because the applicant could have brought an action in negligence in the administrative courts for the damage caused by the hospital doctor (see paragraph 91 of the judgment). According to the majority, since the applicant did not bring such an action, there was no violation of Article 2.

I agree with the majority that it is necessary to consider "whether the legal protection afforded the applicant by France in respect of the loss of the unborn child she was carrying satisfied the procedural requirements inherent in Article 2 of the Convention" (see paragraph 85 of the judgment) and that "the first sentence of Article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the Council of Europe (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, § 147), requires the State not only to refrain from the 'intentional' taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see, among other authorities, *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36)" (see paragraph 88 of the judgment).

However, I come to entirely different conclusions.

I note that in December 1991, when the applicant and her partner lodged a criminal complaint, together with an application to join the proceedings as civil parties, alleging unintentional injury to the applicant entailing total unfitness for work for a period not exceeding three months and unintentional homicide of her child, the *Conseil d'Etat* had not yet abandoned its position that a hospital department could incur liability only in cases of gross negligence (see paragraph 57 of the judgment – the Government's submissions).

It is true that, as the majority note, the applicant could have tried to bring an action in damages against the authorities before it became time-barred. However, it seems to me that the Court may be demanding too much of this applicant when it is recalled that the position taken by the Court of Cassation in its judgment of 30 June 1999, and which it subsequently followed in its judgments of 29 June 2001 (sitting as a full court) and 25 June 2002 (see paragraph 29 of the judgment), was far from established, as witnessed by the court of appeal decisions to the contrary, the submissions of the advocates-general at the Court of Cassation and, lastly, the almost universal criticism it attracted from legal commentators (see paragraph 31 of the judgment). Since it was doubtful that she would be

successful in an action in the administrative courts, the applicant brought criminal proceedings under the only two provisions of the Criminal Code that were open to her. She told the Court that she chose that course of action because a criminal investigation would aid in the task of establishing responsibility (see paragraph 50 of the judgment). That explanation is entirely logical: it is precisely what most victims of crime do in countries that offer a choice between proceedings in the criminal courts or in the civil or administrative courts.

It could be argued that the French legal system did not afford the applicant any "effective" remedy when these sad events took place.

Nevertheless, let us assume that the applicant had a choice between criminal and administrative remedies. Since a victim cannot claim compensation for his or her damage twice over, it would to my mind be disproportionate to criticise the applicant for not having exercised both remedies simultaneously. It would also represent a departure from the Court's case-law.

Under the case-law of the Convention institutions, where there is a choice of remedies open to the applicant, Article 35 must be applied to reflect the practical realities of the applicant's position in order to ensure the effective protection of the rights and freedoms guaranteed by the Convention (see *Allgemeine Gold- und Silberscheideanstalt A.G. v. the United Kingdom*, no. 9118/80, Commission decision of 9 March 1983, Decisions and Reports (DR) 32, p. 165). The applicant must have made normal use of domestic remedies which are likely to be effective and sufficient. When a remedy has been attempted, use of another remedy which has essentially the same objective is not required (see *Wójcik v. Poland*, no. 26757/95, Commission decision of 7 July 1997, DR 90-A, p. 28; *Günaydin v. Turkey* (dec.), no. 27526/95, 25 April 2002; and *Anagnostopoulos v. Greece*, no. 54589/00, § 32, 3 April 2003). Furthermore, the applicant is only required to have recourse to such remedies as are both available and sufficient, that is to say capable of providing redress for his or her complaints (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 11, § 19, and *Deweer v. Belgium*, judgment of 27 February 1980, Series A no. 35, p. 16, § 29).

I would also note that the amount at stake in *Anagnostopoulos* (cited above) was 15,000 drachmas (approximately 44 euros), whereas in the present case we are dealing with an unborn child.

The majority make a number of references to *Calvelli and Ciglio v. Italy* ([GC], no. 32967/96, ECHR 2002-I), in which the Court stated (in paragraph 51): "[I]f the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by

Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy." It added: "In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged."

I consider that the differences between the solutions afforded by the two domestic legal systems must outweigh the similarities. In *Calvelli and Ciglio*, the applicants – the father and mother of a newborn child who died two days after birth – had brought criminal proceedings which ended when the offence of involuntary manslaughter with which the obstetrician was charged became time-barred. However, the applicants were able to summon the doctor to appear in the civil courts after he was convicted at first instance in the criminal courts almost seven years after the death of the child and, with the civil proceedings still pending, they reached a settlement with the doctor's and clinic's insurers in respect of the damage they had sustained. The Court recognised that the Italian legal system afforded the applicants an effective alternative to criminal proceedings (*Calvelli and Ciglio*, cited above, §§ 54-55) that enabled the respondent State to discharge its positive obligations under Article 2 of the Convention. In my opinion, the same cannot be said of its French counterpart in the present case.

I must confess that, had I been sitting in *Calvelli and Ciglio*, I would undoubtedly have concurred with the partly dissenting opinion of Judges Rozakis, Bonello and Strážnická. However, even if I had agreed with the majority, it does not seem to me that their conclusion in *Calvelli and Ciglio* can be transposed to the present case, in which the limitation period for an action in the administrative courts, which at the time was four years from the date of stabilisation of the damage, had expired by the time the criminal proceedings ended. The applicant received no reparation for her loss, not even for the offence of unintentionally causing injuries, for which the doctor was given an amnesty by the law of 3 August 1995.

I conclude that, in the light of the loss of the child she was carrying, the legal protection France afforded the applicant did not satisfy the procedural requirements inherent in Article 2 of the Convention.

Obviously, since I do not accept the reasoning that led the majority to hold that there had been no violation of Article 2 on procedural grounds and that it was therefore unnecessary to determine whether Article 2 was applicable, I must explain why I consider that that provision is applicable and has been violated.

Until now, while the Convention institutions have refrained from deciding whether or not Article 2 applies to unborn children (see paragraphs 75-80 of the judgment), they have not excluded the possibility

that the foetus may enjoy a certain protection under Article 2, first sentence (see *H. v. Norway*, no. 17004/90, Commission decision of 19 May 1992, DR 73, p. 167, and *Boso v. Italy* (dec.), no. 50490/99, ECHR 2002-VII).

Firstly, I think it necessary to bear in mind that the task of the national and international judge is not always easy, especially when a text may be construed in ways that are diametrically opposed.

The *travaux préparatoires* on the Convention are silent on the scope of the words "everyone" and "life" and as to whether Article 2 is applicable prior to birth.

Yet, since the 1950s, considerable advances have been made in science, biology and medicine, including at the prenatal stage.

The political community is engaged at both national and international level in trying to identify the most suitable means of protecting, even prenatally, human rights and the dignity of the human being against certain biological and medical applications.

I consider that it is not possible to ignore the major debate that has taken place within national parliaments in recent years on the subject of bioethics and the desirability of introducing or reforming legislation on medically assisted procreation and prenatal diagnosis, in order to reinforce guarantees, prohibit techniques such as the reproductive cloning of human beings and provide a strict framework for techniques with a proven medical interest.

The aim of the Convention on Human Rights and Biomedicine, which was opened for signature on 4 April 1997 in Oviedo and came into force on 1 December 1999, is to protect the dignity and identity of human beings and to guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine. It protects the dignity of everyone, including the unborn, and its main concern is to ensure that no research or intervention may be carried out that would undermine respect for the dignity and identity of the human being. Although this convention is very recent, it does not define the terms "everyone" and "human being" either, although it affirms their primacy in Article 2 in these terms: "The interests and welfare of the human being shall prevail over the sole interests of society or science." As to the problem of defining the term "everyone", the explanatory report produced by the Directorate General of Legal Affairs at the Council of Europe states, in paragraph 18: "In the absence of a unanimous agreement on the definition of these terms among member States of the Council of Europe, it was decided to allow domestic law to define them for the purposes of the application of the present Convention."

Furthermore, I note that this convention unquestionably contains provisions on the prenatal phase (see, for instance, Chapter IV – Human Genome). Requests may be made to the European Court of Human Rights under Article 29 of the convention for advisory opinions on its interpretation. The Contracting States did not impose any restriction on the

scope of such referrals confining the Court's jurisdiction to questions arising postnatally.

Although the texts are either silent or full of cross-references, the applicant is nevertheless entitled to an answer.

Secondly, I would stress that the Court must deliver a decision on the concrete case before it. The application concerns the termination of a pregnancy as a result of medical negligence that caused the loss of a foetus aged between 20 and 24 weeks, against the mother's wishes.

In that connection, I consider that one should not overlook the fact that the foetus in the instant case was almost as old as foetuses that have survived and that scientific advances now make it possible to know virtually everything about a foetus of that age: its weight, sex, exact measurements, and whether it has any deformities or problems. Although it does not yet have any independent existence from that of its mother (though having said that, in the first years of its life, a child cannot survive alone without someone to look after it either), I believe that it is a being separate from its mother.

Although legal personality is only acquired at birth, this does not to my mind mean that there must be no recognition or protection of "everyone's right to life" before birth. Indeed, this seems to me to be a principle that is shared by all the member States of the Council of Europe, as domestic legislation permitting the voluntary termination of pregnancy would not have been necessary if the foetus was not regarded as having a life that should be protected. Abortion therefore constitutes an exception to the rule that the right to life should be protected, even before birth.

In any event, this case is wholly unconcerned with the States' domestic abortion laws, which have long been the subject matter of applications to the Convention institutions and have been found to be consistent with the Convention (see paragraphs 75-80 of the judgment).

I consider that, as with other Convention provisions, Article 2 must be interpreted in an evolutive manner so that the great dangers currently facing human life can be confronted. This is made necessary by the potential that exists for genetic manipulation and the risk that scientific results will be used for a purpose that undermines the dignity and identity of the human being. The Court has, moreover, often stated that the Convention is a living instrument, to be interpreted in the light of present-day conditions (see, among other authorities, *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, pp. 15-16, § 31; *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, p. 26, § 71; and *Mazurek v. France*, no. 34406/97, § 49, ECHR 2000-II).

I therefore find that Article 2 of the Convention is applicable in the present case and has been violated, as the right to life has not been protected by the law of the respondent State.

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

COURT (CHAMBER)

CASE OF OTTO-PREMINGER-INSTITUT v. AUSTRIA

(Application no. 13470/87)

JUDGMENT

STRASBOURG

20 September 1994

In the case of Otto-Preminger-Institut v. Austria[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, President,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr B. WALSH,
Mr R. MACDONALD,
Mrs E. PALM,
Mr R. PEKKANEN,
Mr J. MAKARCZYK,
Mr D. GOTCHEV,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 25 November 1993 and on 20 April and 23 August 1994,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 7 April 1993 and by the Government of the Austrian Republic ("the Government") on 14 May 1993, within the three-month time-limit laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 13470/87) against Austria lodged with the Commission under Article 25 (art. 25) on 6 October 1987 by a private association with legal personality under Austrian law, Otto-Preminger-Institut für audiovisuelle Mediengestaltung (OPI).

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 44 and 48 (art. 44, art. 48). The object of the request and

[*] Note by the Registrar. The case is numbered 11/1993/406/485. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant association stated that it wished to take part in the proceedings and designated the lawyer who would represent it (Rule 30).

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 23 April 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr B. Walsh, Mr R. Macdonald, Mrs E. Palm, Mr R. Pekkanen, Mr J. Makarczyk and Mr D. Gotchev (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant association's representative and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Registrar received the Government's memorial on 24 September 1993 and the applicant's memorial on 1 October 1993. The Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 2 September 1993 the President granted leave to two non-governmental organisations, "Article 19" and Interights, to submit written observations on specific aspects of the case (Rule 37 para. 1). Their observations were received at the registry on 15 October.

6. On 14 October 1993 the Commission produced certain documents which the Registrar had sought from it on the President's instructions.

7. On 27 October 1993 the Chamber decided under Rule 41 para. 1 to view the film Das Liebeskonzil, as requested by the applicant. A private showing was held on 23 November 1993.

8. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 November.

There appeared before the Court:

- for the Government

Mr W. OKRESEK, Head of the International Affairs Division,
Department of the Constitution, Federal Chancellery,
Agent,

Mr C. MAYERHOFER, Federal Ministry of Justice,
Mr M. SCHMIDT, Federal Ministry of Foreign Affairs, *Advisers*;

- for the Commission

Mr M.P. PELLONPÄÄ, *Delegate*;

- for the applicant association

Mr F. HÖPFEL, Professor of Law
at the University of Innsbruck, Verteidiger in Strafsachen,
Counsel.

The Court heard their addresses as well as replies to its questions.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

9. The applicant, Otto-Preminger-Institut für audiovisuelle Mediengestaltung (OPI), is a private association under Austrian law established in Innsbruck. According to its articles of association, it is a non-profit-making organisation, its general aim being to promote creativity, communication and entertainment through the audiovisual media. Its activities include operating a cinema called "Cinematograph" in Innsbruck.

10. The applicant association announced a series of six showings, which would be accessible to the general public, of the film Das Liebeskonzil ("Council in Heaven") by Werner Schroeter (see paragraph 22 below). The first of these showings was scheduled for 13 May 1985. All were to take place at 10.00 p.m. except for one matinée performance on 19 May at 4 p.m.

This announcement was made in an information bulletin distributed by OPI to its 2,700 members and in various display windows in Innsbruck including that of the Cinematograph itself. It was worded as follows:

> "Oskar Panizza's satirical tragedy set in Heaven was filmed by Schroeter from a performance by the Teatro Belli in Rome and set in the context of a reconstruction of the writer's trial and conviction in 1895 for blasphemy. Panizza starts from the assumption that syphilis was God's punishment for man's fornication and sinfulness at the time of the Renaissance, especially at the court of the Borgia Pope Alexander VI. In Schroeter's film, God's representatives on Earth carrying the insignia of worldly power closely resemble the heavenly protagonists.
>
> Trivial imagery and absurdities of the Christian creed are targeted in a caricatural mode and the relationship between religious beliefs and worldly mechanisms of oppression is investigated."

In addition, the information bulletin carried a statement to the effect that, in accordance with the Tyrolean Cinemas Act (Tiroler Lichtspielgesetz), persons under seventeen years of age were prohibited from seeing the film.

A regional newspaper also announced the title of the film and the date and place of the showing without giving any particulars as to its contents.

11. At the request of the Innsbruck diocese of the Roman Catholic Church, the public prosecutor instituted criminal proceedings against OPI's manager, Mr Dietmar Zingl, on 10 May 1985. The charge was "disparaging

religious doctrines" (Herabwürdigung religiöser Lehren), an act prohibited by section 188 of the Penal Code (Strafgesetzbuch - see paragraph 25 below).

12. On 12 May 1985, after the film had been shown at a private session in the presence of a duty judge (Journalrichter), the public prosecutor made an application for its seizure under section 36 of the Media Act (Mediengesetz - see paragraph 29 below). This application was granted by the Innsbruck Regional Court (Landesgericht) the same day. As a result, the public showings announced by OPI, the first of which had been scheduled for the next day, could not take place.

Those who attended at the time set for the first showing were treated to a reading of the script and a discussion instead.

As Mr Zingl had returned the film to the distributor, the "Czerny" company in Vienna, it was in fact seized at the latter's premises on 11 June 1985.

13. An appeal by Mr Zingl against the seizure order, filed with the Innsbruck Court of Appeal (Oberlandesgericht), was dismissed on 30 July 1985. The Court of Appeal considered that artistic freedom was necessarily limited by the rights of others to freedom of religion and by the duty of the State to safeguard a society based on order and tolerance. It further held that indignation was "justified" for the purposes of section 188 of the Penal Code only if its object was such as to offend the religious feelings of an average person with normal religious sensitivity. That condition was fulfilled in the instant case and forfeiture of the film could be ordered in principle, at least in "objective proceedings" (see paragraph 28 below). The wholesale derision of religious feeling outweighed any interest the general public might have in information or the financial interests of persons wishing to show the film.

14. On 24 October 1985 the criminal prosecution against Mr Zingl was discontinued and the case was pursued in the form of "objective proceedings" under section 33 para. 2 of the Media Act aimed at suppression of the film.

15. On 10 October 1986 a trial took place before the Innsbruck Regional Court. The film was again shown in closed session; its contents were described in detail in the official record of the hearing.

Mr Zingl appears in the official record of the hearing as a witness. He stated that he had sent the film back to the distributor following the seizure order because he wanted nothing more to do with the matter.

It appears from the judgment - which was delivered the same day - that Mr Zingl was considered to be a "potentially liable interested party" (Haftungsbeteiligter).

The Regional Court found it to be established that the distributor of the film had waived its right to be heard and had agreed to the destruction of its copy of the film.

16. In its judgment the Regional Court ordered the forfeiture of the film. It held:

> "The public projection scheduled for 13 May 1985 of the film Das Liebeskonzil, in which God the Father is presented both in image and in text as a senile, impotent idiot, Christ as a cretin and Mary Mother of God as a wanton lady with a corresponding manner of expression and in which the Eucharist is ridiculed, came within the definition of the criminal offence of disparaging religious precepts as laid down in section 188 of the Penal Code."

The court's reasoning included the following:

> "The conditions of section 188 of the Penal Code are objectively fulfilled by this portrayal of the divine persons - God the Father, Mary Mother of God and Jesus Christ are the central figures in Roman Catholic religious doctrine and practice, being of the most essential importance, also for the religious understanding of the believers - as well as by the above-mentioned expressions concerning the Eucharist, which is one of the most important mysteries of the Roman Catholic religion, the more so in view of the general character of the film as an attack on Christian religions ...
>
> ... Article 17a of the Basic Law (Staatsgrundgesetz) guarantees the freedom of artistic creation and the publication and teaching of art. The scope of artistic freedom was broadened (by the introduction of that article) to the extent that every form of artistic expression is protected and limitations of artistic freedom are no longer possible by way of an express legal provision but may only follow from the limitations inherent in this freedom ... . Artistic freedom cannot be unlimited. The limitations on artistic freedom are to be found, firstly, in other basic rights and freedoms guaranteed by the Constitution (such as the freedom of religion and conscience), secondly, in the need for an ordered form of human coexistence based on tolerance, and finally in flagrant and extreme violations of other interests protected by law (Verletzung anderer rechtlich geschützter Güter), the specific circumstances having to be weighed up against each other in each case, taking due account of all relevant considerations ...
>
> The fact that the conditions of section 188 of the Penal Code are fulfilled does not automatically mean that the limit of the artistic freedom guaranteed by Article 17a of the Basic Law has been reached. However, in view of the above considerations and the particular gravity in the instant case - which concerned a film primarily intended to be provocative and aimed at the Church - of the multiple and sustained violation of legally protected interests, the basic right of artistic freedom will in the instant case have to come second.
>
> ..."

17. Mr Zingl appealed against the judgment of the Regional Court, submitting a declaration signed by some 350 persons who protested that they had been prevented from having free access to a work of art, and claiming that section 188 of the Penal Code had not been interpreted in line with the guarantee of freedom of art laid down by Article 17a of the Basic Law.

The Innsbruck Court of Appeal declared the appeal inadmissible on 25 March 1987. It found that Mr Zingl had no standing, as he was not the

owner of the copyright of the film. The judgment was notified to OPI on 7 April 1987.

18. Prompted by the applicant association's lawyer, the then Minister for Education, Arts and Sports, Dr Hilde Hawlicek, wrote a private letter to the Attorney General (Generalprokurator) suggesting the filing of a plea of nullity for safeguarding the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes) with the Supreme Court (Oberster Gerichtshof). The letter was dated 18 May 1987 and mentioned, inter alia, Article 10 (art. 10) of the Convention.

The Attorney General decided on 26 July 1988 that there were no grounds for filing such a plea of nullity. The decision mentioned, inter alia, that the Attorney General's Department (Generalprokuratur) had long held the view that artistic freedom was limited by other basic rights and referred to the ruling of the Supreme Court in the case concerning the film Das Gespenst ("The Ghost" - see paragraph 26 below); in the Attorney General's opinion, in that case the Supreme Court had "at least not disapproved" of that view ("Diese Auffassung ... wurde vom Obersten Gerichtshof ... zumindest nicht mißbilligt").

19. There have been theatre performances of the original play in Austria since then: in Vienna in November 1991, and in Innsbruck in October 1992. In Vienna the prosecuting authorities took no action. In Innsbruck several criminal complaints (Strafanzeigen) were laid by private persons; preliminary investigations were conducted, following which the prosecuting authorities decided to discontinue the proceedings.

II. THE FILM "DAS LIEBESKONZIL"

20. The play on which the film is based was written by Oskar Panizza and published in 1894. In 1895 Panizza was found guilty by the Munich Assize Court (Schwurgericht) of "crimes against religion" and sentenced to a term of imprisonment. The play was banned in Germany although it continued in print elsewhere.

21. The play portrays God the Father as old, infirm and ineffective, Jesus Christ as a "mummy's boy" of low intelligence and the Virgin Mary, who is obviously in charge, as an unprincipled wanton. Together they decide that mankind must be punished for its immorality. They reject the possibility of outright destruction in favour of a form of punishment which will leave it both "in need of salvation" and "capable of redemption". Being unable to think of such a punishment by themselves, they decide to call on the Devil for help.

The Devil suggests the idea of a sexually transmitted affliction, so that men and women will infect one another without realising it; he procreates with Salome to produce a daughter who will spread it among mankind. The symptoms as described by the Devil are those of syphilis.

As his reward, the Devil claims freedom of thought; Mary says that she will "think about it". The Devil then dispatches his daughter to do her work, first among those who represent worldly power, then to the court of the Pope, to the bishops, to the convents and monasteries and finally to the common people.

22. The film, directed by Werner Schroeter, was released in 1981. It begins and ends with scenes purporting to be taken from the trial of Panizza in 1895. In between, it shows a performance of the play by the Teatro Belli in Rome. The film portrays the God of the Jewish religion, the Christian religion and the Islamic religion as an apparently senile old man prostrating himself before the Devil with whom he exchanges a deep kiss and calling the Devil his friend. He is also portrayed as swearing by the Devil. Other scenes show the Virgin Mary permitting an obscene story to be read to her and the manifestation of a degree of erotic tension between the Virgin Mary and the Devil. The adult Jesus Christ is portrayed as a low grade mental defective and in one scene is shown lasciviously attempting to fondle and kiss his mother’s breasts, which she is shown as permitting. God, the Virgin Mary and Christ are shown in the film applauding the Devil.

III. RELEVANT DOMESTIC LAW AND PRACTICE

23. Religious freedom is guaranteed by Article 14 of the Basic Law, which reads:

> "(1) Complete freedom of beliefs and conscience is guaranteed to everyone.
>
> (2) Enjoyment of civil and political rights shall be independent of religious confessions; however, a religious confession may not stand in the way of civic duties.
>
> (3) No one shall be compelled to take any church-related action or to participate in any church-related celebration, except in pursuance of a power conferred by law on another person to whose authority he is subject."

24. Artistic freedom is guaranteed by Article 17a of the Basic Law, which provides:

> "There shall be freedom of artistic creation and of the publication and teaching of art."

25. Section 188 of the Penal Code reads as follows:

> "Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates."

26. The leading judgment of the Supreme Court on the relationship between the above two provisions was delivered after a plea of nullity for

safeguarding the law filed by the Attorney General in a case concerning forfeiture of the film Das Gespenst ("The Ghost") by Herbert Achternbusch. Although the plea was dismissed on purely formal grounds without any decision on the merits, it appeared obliquely from the judgment that if a work of art impinges on the freedom of religious worship guaranteed by Article 14 of the Basic Law, that may constitute an abuse of the freedom of artistic expression and therefore be contrary to the law (judgment of 19 December 1985, Medien und Recht (Media and Law) 1986, no. 2, p. 15).

27. A media offence (Medieninhaltsdelikt) is defined as "[a]n act entailing liability to a judicial penalty, committed through the content of a publication medium, consisting in a communication or performance aimed at a relatively large number of persons" (section 1 para. 12 of the Media Act). Criminal liability for such offences is determined according to the general penal law, in so far as it is not derogated from or added to by special provisions of the Media Act (section 28 of the Media Act).

28. A specific sanction provided for by the Media Act is forfeiture (Einziehung) of the publication concerned (section 33). Forfeiture may be ordered in addition to any normal sanction under the Penal Code (section 33 para. 1).

If prosecution or conviction of any person for a criminal offence is not possible, forfeiture can also be ordered in separate so-called "objective" proceedings for the suppression of a publication, as provided for under section 33 para. 2 of the Media Act, by virtue of which:

> "Forfeiture shall be ordered in separate proceedings at the request of the public prosecutor if a publication in the media satisfies the objective definition of a criminal offence and if the prosecution of a particular person cannot be secured or if conviction of such person is impossible on grounds precluding punishment ..."

29. The seizure (Beschlagnahme) of a publication pending the decision on forfeiture may be effected pursuant to section 36 of the Media Act, which reads:

> "1. The court may order the seizure of the copies intended for distribution to the public of a work published through the media if it can be assumed that forfeiture will be ordered under section 33 and if the adverse consequences of such seizure are not disproportionate to the legitimate interests served thereby. Seizure may not be effected in any case if such legitimate interests can also be served by publication of a notice concerning the criminal proceedings instituted.
>
> 2. Seizure presupposes the prior or simultaneous institution of criminal proceedings or objective proceedings concerning a media offence and an express application to that effect by the public prosecutor or the complainant in separate proceedings.
>
> 3. The decision ordering seizure shall mention the passage or part of the published work and the suspected offence having prompted the seizure ...
>
> 4-5. ..."

30. The general law of criminal procedure applies to the prosecution of media offences and to objective proceedings. Although in objective proceedings the owner or publisher of the published work does not stand accused of any criminal offence, he is treated as a full party, by virtue of section 41 para. 5, which reads:

> "[In criminal proceedings or objective proceedings concerning a media offence] the media owner (publisher) shall be summoned to the hearing. He shall have the rights of the accused; in particular, he shall be entitled to the same defences as the accused and to appeal against the judgment on the merits ..."

PROCEEDINGS BEFORE THE COMMISSION

31. The applicant association applied to the Commission on 6 October 1987. It alleged violations of Article 10 (art. 10) of the Convention.

32. On 12 April 1991 the Commission declared the application (no. 13470/87) admissible.

In its report adopted on 14 January 1993 (Article 31) (art. 31), the Commission expressed the opinion that there had been a violation of Article 10 (art. 10):

(a) as regards the seizure of the film (nine votes to five);

(b) as regards the forfeiture of the film (thirteen votes to one).

The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS TO THE COURT

33. The Government, in their memorial, requested the Court

> "to reject the application as inadmissible under Article 27 para. 3 (art. 27-3) of the Convention for failure to observe the six-month rule in Article 26 (art. 26) of the Convention, or alternatively, to state that there has been no violation of Article 10 (art. 10) of the Convention in connection with the seizure and subsequent forfeiture of the film".

34. At the hearing, the applicant asked the Court to

> "decide in favour of the applicant association and find that the seizure and forfeiture of the film were in breach of the Republic of Austria's obligations arising from Article 10 (art. 10) of the Convention, and that just satisfaction as specified be afforded to the applicant association".

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[*] Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 295-A of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

35. The Government maintained that the application, which was introduced on 6 October 1987 (see paragraph 31 above), had been lodged with the Commission after the expiry of the six-month time-limit laid down in Article 26 (art. 26) of the Convention, which reads:

> "The Commission may only deal with the matter ... within a period of six months from the date on which the final decision was taken."

In the first place, they argued that the applicant association (OPI) was a "party" only in the proceedings as to the seizure of the film, not its forfeiture. The final domestic decision was therefore that of the Innsbruck Court of Appeal confirming the seizure order (30 July 1985).

In the alternative, the Government pointed out that the distributor of the film, the "Czerny" company, being the sole holder of the rights to the only copy of the film, had consented to its destruction before the first hearing in the "objective proceedings" by the Innsbruck Regional Court. That court had in fact ordered the forfeiture of the film on 10 October 1986. The "Czerny" company not having appealed against that order, the Government argued that it should be counted the final domestic decision.

Acceptance of either position would mean that the application was out of time.

A. Whether the Government is estopped from relying on its alternative submission

36. The Delegate of the Commission suggested that the Government should be considered estopped from invoking its alternative plea, which had not been raised before the Commission at the admissibility stage. In his view, the fact that the Government had pleaded an objection based on the time-limit of six months laid down in Article 26 (art. 26) should not be regarded as sufficient, since the argument made then was based on facts different from those now relied on.

37. The Court takes cognisance of objections of this kind if and in so far as the respondent State has already raised them sufficiently clearly before the Commission to the extent that their nature and the circumstances permitted. This should normally be done at the stage of the initial examination of admissibility (see, among many other authorities, the Bricmont v. Belgium judgment of 7 July 1989, Series A no. 158, p. 27, para. 73).

Although the Government did invoke the six-month rule before the Commission, they relied only on the judgment of the Innsbruck Court of Appeal of 30 July 1985. There was nothing to prevent them from raising their alternative argument at the same time. It follows that they are estopped from doing so before the Court (see, as the most recent authority, the Papamichalopoulos and Others v. Greece judgment of 24 June 1993, Series A no. 260-B, p. 68, para. 36).

B. Whether the Government's principal plea is well-founded

38. The Government's argument is in effect that OPI is not a "victim" of the forfeiture of the film, as opposed to its seizure.

39. A person can properly claim to be a "victim" of an interference with the exercise of his rights under the Convention if he has been directly affected by the matters allegedly constituting the interference (see, inter alia and mutatis mutandis, the Norris v. Ireland judgment of 26 October 1988, Series A no. 142, pp. 15-16, para. 31, and the Open Door and Dublin Well Woman v. Ireland judgment of 29 October 1992, Series A no. 246, p. 22, para. 43).

40. Although the applicant association was not the owner of either the copyright or the forfeited copy of the film, it was directly affected by the decision on forfeiture, which had the effect of making it impossible for it ever to show the film in its cinema in Innsbruck or, indeed, anywhere in Austria. In addition, the seizure was a provisional measure the legality of which was confirmed by the decision on forfeiture; the two cannot be separated. Finally, it is not without significance that the applicant association's manager appears in the Regional Court's judgment of 10 October 1986 in the forfeiture proceedings as a "potentially liable interested party" (see paragraph 15 above).

The applicant association can therefore validly claim to be a "victim" of the forfeiture of the film as well as its seizure.

41. It follows from the foregoing that the "final decision" for the purpose of Article 26 (art. 26) was the judgment given by the Innsbruck Court of Appeal on 25 March 1987 and notified to OPI on 7 April (see paragraph 17 above). In accordance with its usual practice, the Commission decided that the application, which had been lodged within six months of the latter date, had been filed within the requisite time-limit. The Government's preliminary objection must accordingly be rejected.

II. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

42. The applicant association submitted that the seizure and subsequent forfeiture of the film Das Liebeskonzil gave rise to violations of its right to

freedom of expression as guaranteed by Article 10 (art. 10) of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Whether there have been "interferences" with the applicant association's freedom of expression

43. Although before the Commission the Government had conceded the existence of an interference with the exercise by the applicant association of its right to freedom of expression only with respect to the seizure of the film and although the same point was made in their preliminary objection (see paragraph 35 above), before the Court it was no longer in dispute that if the preliminary objection were rejected both the seizure and the forfeiture constituted such interferences.

Such interferences will entail violation of Article 10 (art. 10) if they do not satisfy the requirements of paragraph 2 (art. 10-2). The Court must therefore examine in turn whether the interferences were "prescribed by law", whether they pursued an aim that was legitimate under that paragraph (art. 10-2) and whether they were "necessary in a democratic society" for the achievement of that aim.

B. Whether the interferences were "prescribed by law"

44. The applicant association denied that the interferences were "prescribed by law", claiming that section 188 of the Austrian Penal Code had been wrongly applied. Firstly, it was in its view doubtful whether a work of art dealing in a satirical way with persons or objects of religious veneration could ever be regarded as "disparaging or insulting". Secondly, indignation could not be "justified" in persons who consented of their own free will to see the film or decided not to. Thirdly, the right to artistic freedom, as guaranteed by Article 17a of the Basic Law, had been given insufficient weight.

45. The Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply national law (see, as the most recent authority, the Chorherr v. Austria judgment of 25 August 1993, Series A no. 266-B, p. 36, para. 25).

The Innsbruck courts had to strike a balance between the right to artistic freedom and the right to respect for religious beliefs as guaranteed by Article 14 of the Basic Law. The Court, like the Commission, finds that no grounds have been adduced before it for holding that Austrian law was wrongly applied.

C. Whether the interferences had a "legitimate aim"

46. The Government maintained that the seizure and forfeiture of the film were aimed at "the protection of the rights of others", particularly the right to respect for one's religious feelings, and at "the prevention of disorder".

47. As the Court pointed out in its judgment in the case of Kokkinakis v. Greece of 25 May 1993 (Series A no. 260-A, p. 17, para. 31), freedom of thought, conscience and religion, which is safeguarded under Article 9 (art. 9) of the Convention, is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life.

Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 (art. 9) to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.

In the Kokkinakis judgment the Court held, in the context of Article 9 (art. 9), that a State may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with the respect for the freedom of thought, conscience and religion of others (ibid., p. 21, para. 48). The respect for the religious feelings of believers as guaranteed in Article 9 (art. 9) can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be

a feature of democratic society. The Convention is to be read as a whole and therefore the interpretation and application of Article 10 (art. 10) in the present case must be in harmony with the logic of the Convention (see, mutatis mutandis, the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 31, para. 68).

48. The measures complained of were based on section 188 of the Austrian Penal Code, which is intended to suppress behaviour directed against objects of religious veneration that is likely to cause "justified indignation". It follows that their purpose was to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons. Considering also the terms in which the decisions of the Austrian courts were phrased, the Court accepts that the impugned measures pursued a legitimate aim under Article 10 para. 2 (art. 10-2), namely "the protection of the rights of others".

D. Whether the seizure and the forfeiture were "necessary in a democratic society"

1. General principles

49. As the Court has consistently held, freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of everyone. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, particularly, the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 23, para. 49).

However, as is borne out by the wording itself of Article 10 para. 2 (art. 10-2), whoever exercises the rights and freedoms enshrined in the first paragraph of that Article (art. 10-1) undertakes "duties and responsibilities". Amongst them - in the context of religious opinions and beliefs - may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.

This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any "formality", "condition", "restriction" or "penalty" imposed be proportionate to the

legitimate aim pursued (see the Handyside judgment referred to above, ibid.).

50. As in the case of "morals" it is not possible to discern throughout Europe a uniform conception of the significance of religion in society (see the Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133, p. 20, para. 30, and p. 22, para. 35); even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference.

The authorities' margin of appreciation, however, is not unlimited. It goes hand in hand with Convention supervision, the scope of which will vary according to the circumstances. In cases such as the present one, where there has been an interference with the exercise of the freedoms guaranteed in paragraph 1 of Article 10 (art. 10-1), the supervision must be strict because of the importance of the freedoms in question. The necessity for any restriction must be convincingly established (see, as the most recent authority, the Informationsverein Lentia and Others v. Austria judgment of 24 November 1993, Series A no. 276, p. 15, para. 35).

2. Application of the above principles

51. The film which was seized and forfeited by judgments of the Austrian courts was based on a theatre play, but the Court is concerned only with the film production in question.

(a) The seizure

52. The Government defended the seizure of the film in view of its character as an attack on the Christian religion, especially Roman Catholicism. They maintained that the placing of the original play in the setting of its author's trial in 1895 actually served to reinforce the anti-religious nature of the film, which ended with a violent and abusive denunciation of what was presented as Catholic morality.

Furthermore, they stressed the role of religion in the everyday life of the people of Tyrol. The proportion of Roman Catholic believers among the Austrian population as a whole was already considerable - 78% - but among Tyroleans it was as high as 87%.

Consequently, at the material time at least, there was a pressing social need for the preservation of religious peace; it had been necessary to protect public order against the film and the Innsbruck courts had not overstepped their margin of appreciation in this regard.

53. The applicant association claimed to have acted in a responsible way aimed at preventing unwarranted offence. It noted that it had planned to

show the film in its cinema, which was accessible to members of the public only after a fee had been paid; furthermore, its public consisted on the whole of persons with an interest in progressive culture. Finally, pursuant to the relevant Tyrolean legislation in force, persons under seventeen years of age were not to be admitted to the film. There was therefore no real danger of anyone being exposed to objectionable material against their wishes.

The Commission agreed with this position in substance.

54. The Court notes first of all that although access to the cinema to see the film itself was subject to payment of an admission fee and an age-limit, the film was widely advertised. There was sufficient public knowledge of the subject-matter and basic contents of the film to give a clear indication of its nature; for these reasons, the proposed screening of the film must be considered to have been an expression sufficiently "public" to cause offence.

55. The issue before the Court involves weighing up the conflicting interests of the exercise of two fundamental freedoms guaranteed under the Convention, namely the right of the applicant association to impart to the public controversial views and, by implication, the right of interested persons to take cognisance of such views, on the one hand, and the right of other persons to proper respect for their freedom of thought, conscience and religion, on the other hand. In so doing, regard must be had to the margin of appreciation left to the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole.

56. The Austrian courts, ordering the seizure and subsequently the forfeiture of the film, held it to be an abusive attack on the Roman Catholic religion according to the conception of the Tyrolean public. Their judgments show that they had due regard to the freedom of artistic expression, which is guaranteed under Article 10 (art. 10) of the Convention (see the Müller and Others judgment referred to above, p. 22, para. 33) and for which Article 17a of the Austrian Basic Law provides specific protection. They did not consider that its merit as a work of art or as a contribution to public debate in Austrian society outweighed those features which made it essentially offensive to the general public within their jurisdiction. The trial courts, after viewing the film, noted the provocative portrayal of God the Father, the Virgin Mary and Jesus Christ (see paragraph 16 above). The content of the film (see paragraph 22 above) cannot be said to be incapable of grounding the conclusions arrived at by the Austrian courts.

The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for

the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time. In all the circumstances of the present case, the Court does not consider that the Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect.

No violation of Article 10 (art. 10) can therefore be found as far as the seizure is concerned.

(b) The forfeiture

57. The foregoing reasoning also applies to the forfeiture, which determined the ultimate legality of the seizure and under Austrian law was the normal sequel thereto.

Article 10 (art. 10) cannot be interpreted as prohibiting the forfeiture in the public interest of items whose use has lawfully been adjudged illicit (see the Handyside judgment referred to above, p. 30, para. 63). Although the forfeiture made it permanently impossible to show the film anywhere in Austria, the Court considers that the means employed were not disproportionate to the legitimate aim pursued and that therefore the national authorities did not exceed their margin of appreciation in this respect.

There has accordingly been no violation of Article 10 (art. 10) as regards the forfeiture either.

FOR THESE REASONS, THE COURT

1. Holds, unanimously, that the Government are estopped from relying on their alternative preliminary objection;

2. Rejects, unanimously, the Government's primary preliminary objection;

3. Holds, by six votes to three, that there has been no violation of Article 10 (art. 10) of the Convention as regards either the seizure or the forfeiture of the film.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 September 1994.

Rolv RYSSDAL
President

Herbert PETZOLD
Acting Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the joint dissenting opinion of Mrs Palm, Mr Pekkanen and Mr Makarczyk is annexed to the judgment.

R. R.
H. P.

JOINT DISSENTING OPINION OF JUDGES PALM, PEKKANEN AND MAKARCZYK

1. We regret that we are unable to agree with the majority that there has been no violation of Article 10 (art. 10).

2. The Court is here faced with the necessity of balancing two apparently conflicting Convention rights against each other. In the instant case, of course, the rights to be weighed up against each other are the right to freedom of religion (Article 9) (art. 9), relied on by the Government, and the right to freedom of expression (Article 10) (art. 10), relied on by the applicant association. Since the case concerns restrictions on the latter right, our discussion will centre on whether these were "necessary in a democratic society" and therefore permitted by the second paragraph of Article 10 (art. 10-2).

3. As the majority correctly state, echoing the famous passage in the Handyside v. the United Kingdom judgment (7 December 1976, Series A no. 24), freedom of expression is a fundamental feature of a "democratic society"; it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but particularly to those that shock, offend or disturb the State or any sector of the population. There is no point in guaranteeing this freedom only as long as it is used in accordance with accepted opinion.

It follows that the terms of Article 10 para. 2 (art. 10-2), within which an interference with the right to freedom of expression may exceptionally be permitted, must be narrowly interpreted; the State’s margin of appreciation in this field cannot be a wide one.

In particular, it should not be open to the authorities of the State to decide whether a particular statement is capable of "contributing to any form of public debate capable of furthering progress in human affairs"; such a decision cannot but be tainted by the authorities’ idea of "progress".

4. The necessity of a particular interference for achieving a legitimate aim must be convincingly established (see, as the most recent authority, the Informationsverein Lentia and Others v. Austria judgment of 24 November 1993, Series A no. 276, p. 15, para. 35). This is all the more true in cases such as the present, where the interference as regards the seizure takes the form of prior restraint (see, mutatis mutandis, the Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, p. 30, para. 60). There is a danger that if applied to protect the perceived interests of a powerful group in society, such prior restraint could be detrimental to that tolerance on which pluralist democracy depends.

5. The Court has rightly held that those who create, perform, distribute or exhibit works of art contribute to exchange of ideas and opinions and to the personal fulfilment of individuals, which is essential for a democratic society, and that therefore the State is under an obligation not to encroach

unduly on their freedom of expression (see the Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133, p. 22, para. 33). We also accept that, whether or not any material can be generally considered a work of art, those who make it available to the public are not for that reason exempt from their attendant "duties and responsibilities"; the scope and nature of these depend on the situation and on the means used (see the Müller and Others judgment referred to above, p. 22, para. 34).

6. The Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others.

Nevertheless, it must be accepted that it may be "legitimate" for the purpose of Article 10 (art. 10) to protect the religious feelings of certain members of society against criticism and abuse to some extent; tolerance works both ways and the democratic character of a society will be affected if violent and abusive attacks on the reputation of a religious group are allowed. Consequently, it must also be accepted that it may be "necessary in a democratic society" to set limits to the public expression of such criticism or abuse. To this extent, but no further, we can agree with the majority.

7. The duty and the responsibility of a person seeking to avail himself of his freedom of expression should be to limit, as far as he can reasonably be expected to, the offence that his statement may cause to others. Only if he fails to take necessary action, or if such action is shown to be insufficient, may the State step in.

Even if the need for repressive action is demonstrated, the measures concerned must be "proportionate to the legitimate aim pursued"; according to the case-law of the Court, which we endorse, this will generally not be the case if another, less restrictive solution was available (see, as the most recent authority, the Informationsverein Lentia and Others judgment referred to above, p. 16, para. 39).

The need for repressive action amounting to complete prevention of the exercise of freedom of expression can only be accepted if the behaviour concerned reaches so high a level of abuse, and comes so close to a denial of the freedom of religion of others, as to forfeit for itself the right to be tolerated by society.

8. As regards the need for any State action at all in this case, we would stress the distinctions between the present case and that of Müller and Others, in which no violation of Article 10 (art. 10) was found. Mr Müller’s paintings were accessible without restriction to the public at large, so that they could be - and in fact were - viewed by persons for whom they were unsuitable.

9. Unlike the paintings by Mr Müller, the film was to have been shown to a paying audience in an "art cinema" which catered for a relatively small

public with a taste for experimental films. It is therefore unlikely that the audience would have included persons not specifically interested in the film.

This audience, moreover, had sufficient opportunity of being warned beforehand about the nature of the film. Unlike the majority, we consider that the announcement put out by the applicant association was intended to provide information about the critical way in which the film dealt with the Roman Catholic religion; in fact, it did so sufficiently clearly to enable the religiously sensitive to make an informed decision to stay away.

It thus appears that there was little likelihood in the instant case of anyone being confronted with objectionable material unwittingly.

We therefore conclude that the applicant association acted responsibly in such a way as to limit, as far as it could reasonably have been expected to, the possible harmful effects of showing the film.

10. Finally, as was stated by the applicant association and not denied by the Government, it was illegal under Tyrolean law for the film to be seen by persons under seventeen years of age and the announcement put out by the applicant association carried a notice to that effect.

Under these circumstances, the danger of the film being seen by persons for whom it was not suitable by reason of their age can be discounted.

The Austrian authorities thus had available to them, and actually made use of, a possibility less restrictive than seizure of the film to prevent any unwarranted offence.

11. We do not deny that the showing of the film might have offended the religious feelings of certain segments of the population in Tyrol. However, taking into account the measures actually taken by the applicant association in order to protect those who might be offended and the protection offered by Austrian legislation to those under seventeen years of age, we are, on balance, of the opinion that the seizure and forfeiture of the film in question were not proportionate to the legitimate aim pursued.

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

FIRST SECTION

CASE OF PEDERSEN AND BAADSGAARD v. DENMARK

(Application no. 49017/99)

JUDGMENT

STRASBOURG

19 June 2003

THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
17 December 2004

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Pedersen and Baadsgaard v. Denmark,

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

Mr C.L. ROZAKIS, *President*,
Mr P. LORENZEN,
Mr G. BONELLO,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs E. STEINER, *judges*,
and Mr S. Nielsen, *Deputy Section Registrar*,

Having deliberated in private on 27 May 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 49017/99) against the Kingdom of Denmark lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Jørgen Pedersen and Mr Sten Kristian Baadsgaard, both Danish nationals, on 30 December 1998. In the summer of 1999 the second applicant died. His daughter and sole heir, Trine Baadsgaard, decided to pursue the application.

2. The applicants complained about the length of the criminal proceedings against them, and alleged that their right to freedom of expression had been violated in that the Supreme Court judgment of 28 October 1998 disproportionately interfered with their right as journalists to play a vital role as "public watchdog" in a democratic society.

3. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 1 November 2001 the Court changed the composition of its Sections. This case was assigned to the newly composed First Section. Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

4. The applicants and the Government each filed observations on the admissibility and merits (Rule 54 § 2 (b)). The parties replied in writing to each other's observations. Third-party comments were received from the Danish Union of Journalists, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3). The parties replied to those comments.

5. A hearing on admissibility and the merits took place in public in the Human Rights Building, Strasbourg, on 27 June 2002 (Rule 54 § 3).

There appeared before the Court:

(a) *for the Government*

Mr	H. KLINGENBERG,	*Agent,*
Ms	N. HOLST-CHRISTENSEN,	*Co-Agent,*
Mr	J. F. KJØLBRO,	
Ms	K. M. BECKVARD,	
Ms	A. FODE,	*Advisers;*

(b) *for the applicants*

Mr	T. TRIER,	
Mr	J. JACOBSEN,	*Counsel,*
Mr	P. WILHJELM,	
Ms	M. ECKHARDT,	*Advisers,*
Mr	J. PEDERSEN	*Applicant.*

The Court heard addresses by Mr Klingenberg, Mr Trier and Mr Jacobsen, and the replies of Mr Klingenberg and Mr Trier to questions from two judges.

6. By a decision of 27 June 2002, the Court declared the application admissible.

7. The parties filed no further observations on the merits of the application.

8. On 24 September 2002 the applicants filed claims for just satisfaction under Article 41 of the Convention, on which the Government submitted comments.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The television programmes produced by the applicants

9. The applicants (the second of whom died in 1999) were at the relevant time employed by one of the two national TV stations in Denmark, *Danmarks Radio*. They produced two television programmes which were broadcast on 17 September 1990 at 8 p.m. and 22 April 1991 at 8 p.m.

respectively. The programmes were called "Convicted of Murder" (*dømt for mord*) and "The Blind Eye of the Police" (*Politiets blinde øje*) respectively and dealt with a murder trial in which the High Court of Western Denmark (*Vestre Landsret*) had convicted a person, henceforth called X, on 12 November 1982 of murdering his wife. X was sentenced to 12 years' imprisonment. The Supreme Court (*Højesteret*) upheld the sentence in 1983. Subsequent to X's release on probation, he requested the Special Court of Revision (*Den Særlige Klageret*), on 13 September 1990, to reopen the case.

10. At the outset of both programmes it was stated that they had been produced on to the following premise:

> "In the programme we shall provide evidence by way of a series of specific examples that there was no legal basis for X's conviction and that by imposing its sentence, the High Court of Western Denmark set aside one of the fundamental tenets of the law in Denmark, namely that the accused should be given the benefit of the doubt.
>
> We shall show that a scandalously bad police investigation, in which the question of guilt had been prejudged right from the start, and which ignored significant witnesses and concentrated on dubious ones, led to X being sentenced to 12 years' imprisonment for the murder of his wife.
>
> The programme will show that X could not have committed the crime of which he was convicted on 12 November 1982".

11. At an early stage in the first programme, "Convicted of Murder", there is the following comment:

> "In the case against X, police inquiries involved about 900 people. More than 4,000 pages of reports were written – and 30 witnesses appeared before the High Court of Western Denmark.
>
> We will try to establish what actually happened on the day of the murder, 12 December 1981. We shall critically review the police's investigations and evaluate the witnesses' statements regarding the time of X's wife's disappearance."

As part of the preparation of this first programme, the applicants had invited the police in the district of Frederikshavn, who were responsible for the investigation of the murder case, to take part in the programme. As certain conditions for giving interview were not complied with, *inter alia* that the questions be send in writing in advance, by letter of 19 April 1990 the Chief of Police informed the applicants that the police could not participate in the programme.

12. In the introduction to the second programme, "The Blind Eye of the Police", there is the following comment:

> "It was the police in the district of Frederikshavn who were responsible at that time for the investigations which led to the conviction of X. Did the police assume right from the start that X was the killer and did they therefore fail to investigate all the leads in the case, as otherwise required by the law?

We have investigated whether there is substance in X's serious allegations against the police in the district of Frederikshavn."

13. Shortly afterwards in the programme the second applicant is interviewing a taxi driver. She explains to the applicant that a few days after the disappearance of X's wife, she was interviewed by two police officers and that during this interview she mentioned two observations she had made on 12 December 1981; she had seen a Peugeot taxi (which was later shown to have no relevance to the murder), but before that she had seen X and his son at about 5-10 minutes past noon. She had driven behind them for about one kilometre. The reason why she could remember the date and time so exactly was because she had had to attend her grandmother's funeral on that date at 1 p.m.

14. The following comment is then made:

Commentator: So in December 1981, shortly after X's wife disappears and X is in prison, the Frederikshavn Police is in possession of the taxi driver's statement in which she reports that shortly after 12 o'clock that Saturday she drives behind X and his son for about a kilometre...So X and his son were in Mølleparken [residential area] twice, and the police knew it in 1981.

15. The interview went on:

"Second applicant: What did the police officers say about the information you provided?

Taxi driver: Well, one of them said that it couldn't be true that X's son was in the car, but in fact I am 100% certain it was him because I also know the son because I have driven him to day-care.

Second applicant: Why did he say that to you?

Taxi driver: Well, he just said that it couldn't be true that the son was there.

Second applicant: That it couldn't be true that you saw what you saw.

Taxi driver: No, that is, he didn't say that I hadn't seen X, it just couldn't be true that the son was with him.

Second applicant: These were the two police officers who questioned the taxi driver in 1981 and it was they who wrote the police report.

We showed the taxi driver her statement from 1981, which she had never seen before.

Taxi driver: It's missing the bit about – there was only ...about the Peugeot, there was nothing about the rest, unless you have another one.

Second applicant: There is only this one.

Taxi driver: But it obviously cannot have been important.

Second applicant: What do you think about that?

Taxi driver: Well it says, I don't know, well I think when you make a statement, it should be written down in any case, otherwise I can't see any point in it, and especially not in a murder case.

Commentator: So the taxi driver claims that already in 1981 she had told two police officers that she had seen X and his son. Not a word of this is mentioned in this report.

Second applicant: Why are you so sure that you told the police this, which at that time was 1981.

Taxi driver: Well I am 100% sure of it and also, my husband sat beside me in the living room as a witness so ..., so that is why I am 100% certain that I told them.

Second applicant: And he was there throughout the entire interview?

Taxi driver: Yes, he was.

Second applicant: Not just part of the interview?

Taxi driver: No, he was there all the time.

Commentator: It was not until 1990, nine years later, that the taxi driver heard of the matter again, shortly after the "Convicted of Murder" programme had been shown; even though the taxi driver's report had been filed as a so called 0-report, she was 'phoned by a Chief Inspector of the Flying Squad (*Rejseholdet*) who had been asked by the Public Prosecutor to do a couple of further interviews.

Taxi driver: The Chief Inspector of the Flying Squad called me and asked whether I knew if any of my colleagues knew anything they had not reported, or whether I had happened to think of something, and I then told him on the 'phone what I said the first time about the Peugeot and that I had driven behind X and his son up to Ryets Street, and then he said that if he found out about anything which, otherwise ... or if there was anything, then he would ... then he would get in touch with me again, which he didn't do, not until a while afterwards when he called me and asked whether I would come for another interview.

Second applicant: When you told the Chief Inspector of the Flying Squad in your telephone call that you followed X and his son was in the car, what did he say about that?

Taxi driver: Well, he didn't say anything.

Second applicant: He did not say that you had never reported this?

Taxi driver: No, he didn't."

16. Then the second applicant has a short interview with X's new counsel:

"Second applicant: Have you any comment on the explanation the taxi driver has given now?

X's new counsel: I have no comment to make at this time.

Second applicant: Why not?

X's new counsel: I have agreed with the public prosecutor, and the President of the Special Court of Revision, that statements to the press in this matter will in future only be issued by the Special Court of Revision.

Commentator: Even though X's new counsel does not wish to speak about the case, we know from other sources that it was he who, in February this year, asked for the taxi driver to be interviewed again. So in March she was interviewed at Frederikshavn police station in the presence of the Chief Superintendent, which is clearly at odds with what the Public Prosecutor previously stated in public, namely that the Frederikshavn police would not get the opportunity to be involved in the new inquiries."

17. The interview with the taxi driver goes on:

"Second applicant: And what happened at the interview?

Taxi driver: What happened was that I was shown into the Chief Inspector of the Flying Squad and the Chief Superintendent was there too.

Second applicant: Was there any explanation given about why he was present?

Taxi driver: No.

Second applicant: So what did you say in this interview?

Taxi driver: I gave the same explanations as I had done the first time when I was interviewed at home.

Second applicant: 10 years before, that is.

Taxi driver: Yes.

Second applicant: And that was?

Taxi driver: Well, that I had driven behind X and his son up to Ryets Street.

Second applicant: What did they say about that?

Taxi driver: They didn't say anything.

Second applicant: The report, which was made in 1981, did you see it?

Taxi driver: No.

Second applicant: Was it there in the room?

Taxi driver: There was a report there when I was being interviewed, but I wasn't allowed to see it.

Second applicant: Did you expressly ask whether you could see the old report?

Taxi driver: I asked whether I could see it but the Chief Inspector of the Flying Squad said I couldn't ...”

18. After the interview with the taxi driver the commentator asks:

“Now we are left with all the questions: why did the vital part of the taxi driver's explanation disappear – and who in the police or public prosecutor's office should carry the responsibility for this?

Was it the two police officers who failed to write a report about it?

Hardly, sources in the police tell us, they would not dare.

Was it [the named Chief Superintendent] who decided that the report should not be included in the case? Or did he and the Chief Inspector of the Flying Squad conceal the witness's statement from the defence, the judges and the jury? ...”

Pictures of the two police officers, the named Chief Superintendent and the Chief Inspector of the Flying Squad were shown on the screen simultaneously parallel with the above questions. The questions went on:

“Why did the Chief Inspector of the Flying Squad 'phone the taxi driver shortly after the TV-programme 'Convicted of Murder'? After all, the police had taken the view that the taxi driver had no importance as a witness and had filed her statement amongst the O-reports.

Why did the Chief Inspector of the Flying Squad not call her in for an interview when she repeated her original explanation on the telephone?

Why was the taxi driver interviewed at the Frederikshavn police station in the presence of the Chief Superintendent, which was completely at odds with the Public Prosecutor's public statement?

On 20 September last year [a named] Chief Constable stated to [a regional daily]: 'all the information connected to the case has been submitted to the defendants, the prosecution and the judges' Did the Chief Constable know about the taxi driver's statement, when he made this statement? Did the State Prosecutor know already in 1981 that there was a statement from a witness confirming that twice X had been in Mølleparken, and that X's son had been with him both times? Neither of them have wished to make any statement at all about the case.”

19. In the meantime, at the request of X's new counsel, the taxi driver was interviewed by the police again on 11 March 1991. She stated that on 12 December 1981 she had attended her grandmother's funeral at 1 p.m. and that on her way to the funeral around five or ten past noon she had driven behind X and his son. She arrived at the funeral at the last minute before

1 p.m. She also explained that she had told the police about this when first interviewed in 1981. Later on 11 March 1991 the police made an enquiry which revealed that the funeral of the taxi driver's grandmother had indeed taken place on 12 December 1981, but at 2 p.m.

Thereafter, the police held three interviews with the taxi driver during which she changed her explanation, *inter alia*, as follows.

On 24 April 1991 she maintained having seen X shortly after noon but agreed that the funeral had taken place at 2 p.m. On her way to the funeral she realised she had forgotten a wreath. Thus, she had had to return to her home and had consequently arrived at the funeral just before 2 p.m.

On 25 April 1991 she stated that she was not sure about the date or the time when she had seen X and his son. Moreover, she was uncertain whether, shortly after the murder, she had told the police about having seen X. In addition, she explained that during the shooting of her interview, which took place on 4 April 1991, the applicant Baadsgaard had suggested that she say something like “where is the other report” when he was to show her the report of 1981.

On 27 April 1991 she initially stated that she would exclude having seen X and his son on 12 December 1981. She had never before connected this episode to the funeral. She also admitted having made up the story about the forgotten wreath, but had wanted “things to fit”. Later during the interview she maintained having seen X and his son on 12 December 1981, but at around 1 p.m.

B. The criminal proceedings against the applicants

20. On 23 May 1991 the Chief Superintendent reported the applicants and the TV station to the police for defamation. It appears, however, that the prosecution's decision as to whether or not to charge the applicants was adjourned pending the decision whether to reopen X's case.

21. This was decided in the affirmative by the Special Court of Revision on 29 November 1991 after two hearings and the examination of ten witnesses, including the taxi driver. Two judges (out of five) in the Special Court of Revision found that new testimonial evidence had been produced on which X might have been acquitted, had it been available at the trial. Two other judges found that no new testimonial evidence had been produced on which X might have been acquitted, had it been available at the trial. The fifth judge agreed with the latter, but found that in other respects special circumstances existed which made it overwhelmingly likely that the available evidence had not been judged correctly. Accordingly, the court granted a retrial.

22. In the meantime, following the television programmes, an inquiry had commenced into the police investigation of X's case. It appeared that the Police in Frederikshavn had not complied with section 751, subsection 2

of the Administration of Justice Act (*Retsplejeloven*), which was introduced on 1 October 1978 and which provides that a witness shall be given the opportunity to read his or her statement. Consequently, on 20 December 1991 the Prosecutor General (*Rigsadvokaten*) stated in a letter to the Ministry of Justice, that it was unfortunate and open to criticism that the police in Frederikshavn had not implemented the above provision as part of their usual routine and informed the Ministry that he had made an agreement with the State Police Academy that he would produce a wider set of guidelines concerning the questioning of witnesses, which could be integrated into the Police Academy's educational material.

23. X's retrial ended with his acquittal on 13 April 1992.

24. On 10 July 1992 the applicants became aware of the fact that they had been reported to the police. On their request, however, they were informed that no decision had yet been taken as to possible charges against them.

25. On 19 January 1993 the Chief Constable in Gladsaxe informed the applicants that they were charged with defamation against the Chief Superintendent. On 28 January 1993 the applicants were questioned by the police in Gladaxe.

26. A request of 11 February 1993 from the prosecution to seize the applicants' research material was examined at a hearing in the City Court of Gladsaxe (*Retten i Gladsaxe)* on 30 March 1993 during which the applicants' counsel, claiming that the case concerned a political offence, requested that a jury in the High Court - instead of the City Court - try the case. Both requests were refused by the City Court of Gladsaxe (*retten i Gladsaxe*) on 28 May 1993. In June 1993 the prosecution appealed against the decision on seizure and the applicants appealed against the decision on venue. At the request of one of the applicants' counsel, an oral hearing was scheduled to take place in the High Court of Eastern Denmark (*Østre Landsret*) on 15 November 1993. However, on 7 October 1993 counsel challenged one of the judges in the High Court alleging disqualification and requested an oral hearing on the issue. The High Court decided on 15 October 1993 to refuse an oral hearing and on 11 November 1993 that the judge in question was not disqualified. It appears that counsel requested leave to appeal against this decision to the Supreme Court (*Højesteret*), but to no avail. As to the appeal against non-seizure and the question of venue, hearings were held in the High Court on 6 January and 7 March 1994, and by a decision of 21 March 1994 the High Court upheld the City Court's decisions. The applicants' request for leave to appeal to the Supreme Court was refused on 28 June 1994.

27. On 5 July 1994 the prosecution submitted an indictment to the City Court, and a preliminary hearing was held on 10 November 1994 during which it was agreed that the case would be tried over six days in mid-June 1995. However, as counsel for one of the parties was ill the final hearings

were re-scheduled to take place on 21, 24, 28 and 30 August and 8 September 1995.

28. On 15 September 1995 the City Court of Gladsaxe delivered a 68- page judgment finding that the questions put in the TV programme concerning the named Chief Superintendent amounted to defamatory allegations, which should be declared null and void. However, the court refrained from sentencing the applicants as it found that the applicants had reason to believe that the allegations were true. Also, the applicants were acquitted of a compensation claim raised by the widow of the named Chief Superintendent, as he had deceased before the trial. The judgment was appealed against by the applicants immediately and by the prosecution on 27 September 1995.

29. On 15 April 1996 the prosecutor sent a notice of appeal to the High Court, and on 30 April 1996 he invited counsel for the applicants and the attorney for the widow of the Chief Superintendent to a meeting concerning the proceedings. Counsel for one of the parties stated that he was unable to attend before 17 June 1996, and accordingly the meeting was held on 25 June 1996. The High Court received the minutes of the meeting from which it appeared that counsel for one of the parties was unable to attend the trial before November 1996, and that he preferred the hearings to take place in early 1997. On 16 August 1996 the High Court scheduled the hearings for 24, 26 and 28 February and 3 and 4 March 1997.

30. On 6 March 1997 the High Court gave judgment convicting the applicants of violating the personal honour of the Chief Superintendent by making and spreading allegations of an act likely to disparage him in the esteem of his fellow citizens, under Article 267, subsection 1 of the Penal Code. The allegations were declared null and void. The applicants were each sentenced to 20 day-fines of 400 Danish kroner (DKK) (or in the alternative 20 days' imprisonment) and ordered to pay compensation to the estate of the deceased Chief Superintendent of DKK 75,000.

31. On 6, 16 and 25 March 1997 the applicants sought leave from the Leave to Appeal Board (*Procesbevillingsnævnet*) to appeal to the Supreme Court. Before deciding, the Board requested an opinion from the prosecuting authorities, namely the Chief of Police, the State Prosecutor and the Prosecutor General. On 27 June 1997 their joint opinion was submitted opposing leave to appeal. However, in the meantime it appears that a lawyer representing the TV station, *Danmarks Radio*, contacted the State Prosecutor, proposing that the public prosecution assist in bringing the case before the Supreme Court as, according to the TV station, the High Court's judgment was incompatible with the Media Responsibility Act (*Medieansvarsloven*). Consequently, the public prosecutors initiated a renewed round of consultation on this question, and their joint opinion was forwarded to the Board on 3 September 1997. Having heard the applicants'

counsel on the prosecution's submissions, on 29 September 1997 the Board granted the applicants leave to appeal to the Supreme Court.

32. The Prosecutor General submitted a notice of appeal and the case file to the Supreme Court on 3 October and 6 November 1997 respectively.

33. As counsel wanted to engage yet another counsel, on 20 November 1997 they asked the Supreme Court whether costs in this respect would be considered legal costs. Moreover, they stated that their pleadings could not be submitted until early January 1998. On 17 March 1998 the Supreme Court decided on the question of costs, and on 19 March 1998 scheduled the trial for 12 and 13 October 1998.

34. By a judgment of 28 October 1998, the High Court's judgment was upheld, though the compensation payable to the estate was increased to DKK 100,000. The majority of five judges held:

> "In the programme 'The Blind Eye of the Police' the applicants not only repeated a statement by the taxi driver that she had already explained to the police during their inquiries in 1981 that shortly after 12 p.m. on 12 December 1981 she had driven behind X for about one kilometre, but also, in accordance with the common premise for the programmes 'Convicted of Murder' and 'The Blind Eye of the Police', took a stand on the truth of the taxi driver's statement and presented the matters in such a way that viewers, even before the final sequence of questions, were given the impression that it was a fact that the taxi driver had given the explanation as she alleged to have done in 1981 and that the police were therefore in possession of this explanation in 1981. This impression was strengthened by the first of the concluding questions: '... why did the vital part of the taxi driver's explanation disappear and who, in the police or public prosecutor's office, should carry the responsibility for this?'. In connection with the scenes about the two police officers they pose two questions in the commentator's narrative, to which the indictment relates; irrespective of the kind of question, viewers undoubtedly received a clear impression that a report had been made about the taxi driver's statement that she had seen X at the relevant time on 12 December 1981; that this report had subsequently been suppressed; and that such suppression had been decided upon either by the named Chief Superintendent alone or by him and the Chief Inspector of the Flying Squad jointly. The subsequent questions in the commentator's narrative do not weaken this impression, and neither does the question as to whether the Chief Constable or the Public Prosecutor were aware of the taxi driver's statement. On this basis we find that in the programme 'The Blind Eye of the Police' the applicants made allegations against the named Superintendent which were intended to discredit him in the eyes of his peers, as described in Article 267, subsection 1 of the Penal Code (*Straffeloven*). We find further that it must have been clear to the applicants that they were, by way of their presentation, making such allegations.
>
> The applicants have not endeavoured to provide any justification but have claimed that there is no cause of action by virtue of Article 269, subsection 1 of the Penal Code – that a party who in good faith justifiably makes an allegation which is clearly in the general public interest or in the interest of other parties...
>
> As laid down in the Thorgeirson v. Iceland judgment (25 June 1992) there is a very extensive right to public criticism of the police. As in that decision there is, however, a difference between passing on and making allegations, just as there is a difference between criticism being directed at the police as such and at individual named officers

in the police force. Even though being in the public eye is a natural part of a police officer's duties, consideration should also be given to his good name and reputation.

As stated, the two applicants did not limit themselves in the programme to referring to the taxi driver's statement or to making value judgments on this basis about the quality of the police's investigations and the Chief Superintendent's leadership thereof. Neither did the applicants limit themselves to making allegations against the police as such for having suppressed the taxi driver's explanation, but made an allegation against the named Chief Superintendent for having committed a criminal offence by way of suppressing a vital fact.

When the applicants were producing the programme, they knew that an application had been made to the Special Court of Revision for the case against X to be reopened and that as part of the Court of Revision's proceedings in dealing with the said application, the taxi driver had been interviewed by the police on 11 March 1991 at the request of X's defence as part of the proceedings to reopen the case. In consequence of the ongoing proceedings for reopening the case, the applicants could not count on the Chief Superintendent and the two police officers, who had interviewed the taxi driver in 1981, being prepared to participate in the programme and hence possibly anticipate proceedings in the Court of Revision. Making the allegations cannot accordingly be justified by lack of police participation in the programme.

The applicants' intentions, in the programme, of undertaking a critical assessment of the police's investigation were proper as part of the role of the media in acting as a public watchdog, but this does not apply to every charge. The applicants had no basis for making such a serious charge against a named police officer and the applicants' opportunities for satisfying the purposes of the programme in no way required the questions upon which the charges are based to be included.

On this basis, and even though the exemptions provided in Article 10 § 2 of the Convention must be narrowly interpreted, and even though Article 10 protects not only the content of utterances but also the manner in which they are made, we concur that the charges made are not excluded by Article 269, subsection 1 of the Penal Code. Indeed, as a result of the seriousness of the charges, we concur that there is no basis for charges to be dropped in accordance with Article 269, subsection 2 of the Penal Code. We agree further that there are no grounds for an acquittal under Article 272.

We also concur with the findings on defamation.

We agree with the High Court that the fact that the charges were made in a television programme on the national TV station '*Danmarks radio'* and hence could be expected to get – as indeed they did – widespread publicity, must be regarded as an aggravating factor, as described in Article 267, subsection 3. Considering that it is more than seven years since the programme was shown, we do not find, however, that there are sufficient grounds for increasing the sentence.

For the reasons given by the High Court we find that the applicants must pay damages in compensation in damages to the heir of the Chief Superintendent. In this, it should be noted that it cannot be regarded as essential that the nature of the claim for damages in compensation was not stated in the writ of 23 May 1991 since the Chief Superintendent's claim for financial compensation could not relate to anything other than damages in compensation. Due to the seriousness of the allegation and the

manner of its presentation, we find that the compensation should be increased to DKK 100,000."

35. The minority of two judges who wanted to acquit the applicants held, *inter alia*:

"We agree that the statements covered by the indictment, irrespective of their having been phrased as questions, have to be regarded as indictable under Article 267, subsection 1 of the Penal Code and that the applicants had the requisite intentions.

As stated by the majority, the question of culpability must be decided in accordance with Article 269, subsection 1, taken together with Article 267, subsection 1, interpreted in the light of Article 10 of the European Convention on Human Rights and the European Court of Human Right's restrictive interpretation of the exemptions under Article 10 § 2.

In reaching a decision, consideration must be given to the basis on which the applicants made their allegations, their formulation and the circumstances under which the allegations were made, as well as the applicants' intentions in the programme.

... We find that the applicants had cause to suppose that the taxi driver's statement that she had seen X on 12 December 1981 shortly past noon was true. We further find ...that the applicants had reason to assume that the taxi driver, when interviewed in 1981, had told the two police officers of having seen X ...We accordingly attach weight to the fact that it is natural for such an observation to be reported to the police; that it is also apparent from her explanation in the police report of 11 March 1991 that she had already told the police about her observations in 1981; and that her explanation about the reaction of the police to her information that X's son had been in the car strengthened the likelihood of her having reported the observation at the interview in 1981.

...It is apparent from the TV programme that the applicants were aware that the Frederikshavn police had not at that time complied with the requirement to offer a person interviewed an opportunity to see the records of his or her statements. The applicants may accordingly have had some grounds for supposing that the report of December did not contain the taxi driver's full statement or that there was another report thereon...

We consider that the applicants, in putting the questions covered by the indictment, did not exceed the limits of freedom of expression which a case, such as the present one, relating to serious matters of considerable public interest, should be available to the media. We also attach some weight to the fact that the programme was instrumental in the Court of Revision's decision to hear witnesses and we attach some weight to X's subsequent acquittal.

Overall, we accordingly find that [the allegations] are not punishable by virtue of Article 269, subsection 1 of the Penal Code...

[We agree that] the allegation should be declared null and void since its veracity has not been proved.."

II. RELEVANT DOMESTIC LAW

36. The relevant provisions of the Danish Penal Code read as follows at the relevant time:

Article 154

If a person, while carrying out a public office or function, has been guilty of false accusation, an offence relating to evidence .. or breach of trust, the penalty prescribed for the particular offence may be increased by not more than one-half.

Article 164

1. Any person who gives false evidence before a public authority with the intention that an innocent person shall thereby be charged with, convicted of, or subject to a legal consequence of, a punishable act, shall be liable to mitigated detention (*hæfte*) or to imprisonment for a term not exceeding six years.

2. Similar punishment shall apply to any person who destroys, distorts or removes evidence or furnishes false evidence with the intention that any person shall thereby be charged with, or convicted of, a criminal act...

Article 267

1. Any person who violates the personal honour of another by offensive words or conduct or by making or spreading allegations of an act likely to disparage him in the esteem of his fellow citizens shall be liable to a fine or to mitigated detention.

2...

3. When imposing the sentence it shall be considered an aggravating circumstance if the insult was made in printed documents or in any other way likely to give it wider circulation, or in such places or at such times as greatly to aggravate the offensive character of the act.

Article 268

If an allegation has been maliciously made or disseminated, or if the author has no reasonable ground to regard it as true, he shall be guilty of defamation and liable to mitigated detention or to imprisonment for a term not exceeding two years. If the allegation has not been made or disseminated publicly, the punishment may, in mitigating circumstances, be reduced to a fine.

Article 269

1. An allegation shall not be punishable if its truth has been established or if the author of the allegation has in good faith been under an obligation to speak or has acted in lawful protection of an obvious public interest or of the personal interest of himself or of others.

2. The punishment may be remitted where evidence is produced which justifies the grounds for regarding the allegations as true.

Article 272

The penalty prescribed in Article 267 of the Penal Code may be remitted if the act has been provoked by improper behaviour on the part of the injured person or if he is guilty of retaliation.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

37. Complaining of the length of the criminal proceedings, the applicants relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

A. Period to be taken into consideration

38. The applicants submitted that the period from May 1991, when the Chief Superintendent reported the applicants to the police until January 1993, when the applicants were formally charged, should be included in the Court's assessment of the overall length of the proceedings.

The Government contended that the period relevant for the assessment of the issue under Article 6 § 1 began on 19 January 1993, when the Chief Constable in Gladsaxe informed the applicants that they were charged with defamation against the Chief Superintendent.

39. The Court reiterates that according to its case-law, the period to be taken into consideration under Article 6 § 1 of the Convention must be determined autonomously. It begins at the time when formal charges are brought against a person or when that person has otherwise been substantially affected by actions taken by the prosecuting authorities as a result of a suspicion against him (cf. e.g. the *Hozee v. the Netherlands* judgment of 22 May 1998, *Reports of Judgments and Decisions* 1998-III, p. 1100, § 43).

The applicants became aware on 10 July 1992 that they had been reported to the police, however, on their request they were informed that no decision had yet been taken as to possible charges against them. Further, no enforcement measures of criminal procedure were taken against the

applicants before 19 January 1993, when the applicants were notified that they were charged with defamation against the Chief Superintendent.

In these circumstances the Court considers that the applicants were charged, for the purpose of Article 6 § 1 of the Convention, on 19 January 1993 and the "time" referred to in this provision began to run from that date.

It is common ground that the proceedings ended on 28 October 1998, when the Supreme Court gave its judgment. Thus, the total length of the proceedings, which the Court must assess under Article 6 § 1 of the Convention was 5 years, 9 months and 9 days.

B. Reasonableness of the length of the proceedings

40. The Court reiterates that the reasonableness of the length of the proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and that of the authorities before which the case was brought (cf. *Pélissier and Sassi v. France* [GC], no. 25444/94, ECHR 1999-II, § 67).

1. The parties' submissions

41. The applicants maintained that the case did not involve complex factual or legal issues that could explain the excessive length of the proceedings.

As regards their conduct, the applicants submitted that it could not be held against them that they had used the remedies available under Danish law.

With regard to the conduct of the authorities, the applicants found that the case laid dormant from the City Court's judgment on 15 September 1995 until the case was heard by the High Court in March 1997. The applicants pointed out that the prosecution sent a notice of appeal to the High Court on 15 April 1996, seven months after the applicants had appealed against the judgment. Thus, they maintained, the duration of the trial had been unreasonable and the responsibility therefore lay with the Government, which were responsible for the conduct of the prosecuting authorities and the handling of the court system as such.

42. The Government maintained that the criminal proceedings had been very comprehensive and thus time-consuming, involving the two TV-programmes produced by the applicants, the proceedings before the Special Court of Revision and the proceedings before the High Court, which eventually led to X's acquittal. Moreover, the case had presented several procedural problems, which had had to be clarified before the case could be sent to the City Court for trial.

The Government submitted that to a very great extent, the applicants' conduct had been the cause of the length of the proceedings, notably prior to the proceedings before the City Court and the High Court.

Furthermore, the Government contended that the case had contained no periods of inactivity for which the Government could be blamed. Accordingly, in the Government's opinion, the duration of the proceedings amounting to just over five years and nine months in a complicated criminal case heard at three levels of jurisdiction and by the Leave to Appeal Board had been in full compliance with the "reasonable time" requirement of the Convention.

2. The Court's assessment

(a) Complexity of the case

43. The Court considers that certain features of the case were complex and time-consuming.

(b) Conduct of the applicant

44. The Court reiterates that only delays attributable to the State may justify a finding of failure to comply with the "reasonable time" requirement (e.g. *Humen v. Poland*, no. 26614/95, § 66, 15 October 1999). It notes that the applicants do not appear to have been very much involved in the procedural disputes during the proceedings concerned. However, it follows from the case-law that they are nevertheless to be held responsible for the possible delays caused by their representatives (e.g. the *Capuano v. Italy* judgment of 25 June 1987, Series A no. 119, p. 12, § 28).

In the present case the Court finds that although the applicants' use of remedies available could not be regarded as hindering the progress of the proceedings, it did prolong them. Moreover, the applicants never objected to any adjournment. On the contrary, it appears that in general the preparation of the proceedings, including the scheduling of the final hearing before the High Court and the Supreme Court, was made in agreement with counsel for the applicants.

In these circumstances, the Court finds that the applicants' conduct contributed to some extent to the length of the proceedings.

(c) Conduct of the national authorities

45. The Court reiterates that the period of investigation by the police and the legal preparation by the prosecution came to an end on 5 July 1994 when the case was sent to the City Court for adjudication. During this period, lasting one year, five months and sixteen days, numerous preliminary court hearings were held and decisions taken. The Court finds that this period cannot be criticised.

The trial before the City Court was terminated by a judgment of 15 September 1995, thus one year, two months and ten days after its commencement. Noting especially that the scheduling of hearing was determined in agreement with the applicants' counsel, the Court find this period reasonable.

The proceedings before the High Court lasted from 15 September 1995 until 6 March 1997, thus one year, five months and eighteen days. The Court recalls that at the meeting on 25 June 1996 counsel for one of the applicants expressed his wish not to commence the hearings before the High Court until the beginning of 1997. It is true, though, that it took seven months for the prosecuting authorities to prepare the case before a notice of appeal was sent to the High Court on 15 April 1996. However, in the light of the complexity of the case, the Court finds it unsubstantiated that this period constitutes a failure to make progress in the proceedings and it is not in itself sufficiently long for finding a violation.

On 6 March 1997 the applicants requested leave to appeal to the Supreme Court, which was granted by the Leave to Appeal Board on 29 September 1997. The length of these proceedings, which accordingly lasted six months and twenty-three days, cannot be criticised.

Finally, the proceedings before the Supreme Court, which commenced on 3 October 1997 and ended on 28 October 1998, thereby lasting one year and twenty-five days, did not disclose any periods of unacceptable inactivity.

3. Conclusion

46. Therefore, making an overall assessment of the complexity of the case, the conduct of all concerned as well as the total length of the proceedings, the latter did not, in the Court's view, go beyond what may be considered reasonable in this particular case. Accordingly, there has been no violation of Article 6 § 1 of the Convention in respect of the length of the proceedings.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

47. The applicants complained further that the judgment of the Danish Supreme Court amounted to a disproportionate interference with their right to freedom of expression safeguarded in Article 10 of the Convention, which reads as follows:

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

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

48. The Court notes that it was common ground between the parties that the judgment of the Danish Supreme Court constituted an interference with the applicant's right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention. Furthermore, there was no dispute that the interference was prescribed by law and pursued a legitimate aim, namely the protection of the reputation or rights of others, within the meaning of Article 10 § 2. The Court endorses this assessment.

49. The dispute in the case relates to the question whether the interference was "necessary in a democratic society."

A. The parties' submissions

50. The applicants submitted that their questions in the programme "The Blind Eye of the Police" had merely implied a range of possibilities in the criticised handling of the investigation of the murder case from 1981-82, especially as regards the taxi driver's observations. The questions left it open to the viewers to decide, between various logical explanations, as to who was responsible for the failures in the handling of the murder case. The questions could not be seen as factual statements of which they could be required to prove the truthfulness. The questions neither stipulated that the Chief Superintendent was responsible nor that he had committed a violation of the Penal Code. However, he was the head of the police unit that performed the much-criticised investigation that led to the wrongful conviction of X.

51. The applicants contended that the programmes were serious, well-researched documentaries and that they had acted in good faith when relying on the taxi driver's account of the occurrences. Moreover, her testimony had been a crucial element in the reopening of the case by the Special Court of Revision and the later acquittal of X.

52. The applicants emphasised that the police had to accept a close scrutiny of their actions and omissions and that, like politicians, civil servants were subject to wider limits of acceptable criticism than private individuals. Furthermore, they maintained that the Chief Superintendent had not been precluded from participating in the programme.

53. The Government pointed out that the applicants had not been convicted for expressing very strong criticism of the police, but exclusively for having, on their own behalf, made very specific, unsubstantiated, extremely serious allegations of facts aimed at a named individual. They submitted that the Danish Supreme Court had fully recognised that the

present case involved a conflict between the right to impart ideas and the right to freedom of expression and the protection of the reputation of others, and that it had properly balanced the various interests involved in the case.

54. The Government also stressed that the case did not concern punishment of the applicants for dissemination of the statements made by the taxi driver, on the contrary, the applicants had made their allegation independently by alleging that a vital piece of evidence had been suppressed and that such suppression had been decided upon either by the Chief Superintendent alone or by him and the Chief Inspector of the Flying Squad jointly. Leaving the viewers with these two options was not, as claimed by the applicants, a range of possibilities, but an allegation that the Chief Superintendent had in either event taken part in the suppression, and thus committed a serious criminal offence.

55. The Government maintained that the Chief Superintendent had been precluded from participating in the programme "The Blind Eye of the Police" since at the time X's request for a re-opening of the murder trial had been pending before the Special Court of Revision.

56. In the Government's view the applicants' allegation was of such a direct and specific nature that it clearly went beyond the scope of value judgments. It had thus been fully legitimate to demand justification as a condition for non-punishment. The applicants had had the possibility of giving such justification, but had not done so. In this respect the Government referred to the unanimous findings of the Supreme Court that the applicants had had no basis for making the allegations and its consequent ruling, that the allegations were null and void.

57. The Government also reiterated that the applicants had based their allegation solely on the taxi driver's testimony, which had emerged over nine years after the events had taken place, and had failed to check simple facts such as whether the funeral of the taxi driver's grandmother had actually taken place at 1 p.m.

58. Finally, the Government submitted that the programme "The Blind Eye of the Police" had not had any influence on either the order to re-open the murder trial or the subsequent judgment acquitting X.

B. Submissions by the Danish Union of Journalists

59. In their comments submitted under Article 36 § 2 of the Convention and Rule 61 § 3 of the Rules of Court, the Danish Union of Journalists maintained that it was essential to the functioning of the press that restrictions on their freedom of expressions be construed as narrowly as possible, with self-censorship being the most appropriate form of limitation.

60. Moreover, when imparting information as to the functioning of the police and the judiciary, notably when deficiencies therein resulted in miscarriages of justice, the press should have both the right to investigate and present their findings with limited restrictions.

61. With regard to the present case, the Danish Union of Journalists contended that the applicants had researched the case very thoroughly. In this respect they had in fact been so successful that not merely had they raised a debate of serious public concern, they had also ultimately been able to change the course of justice.

62. Accordingly, in the view of the Danish Union of Journalists the Supreme Court judgment of 28 October 1998 amounted to an unjustified interference in the applicants' freedom of expression.

C. The Court's assessment

1. General principles

63. The Court reiterates its well-established case-law, whereby the test of necessity in a democratic society requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see *the Sunday Times (no. 1) v. the United Kingdom* judgment of 26 April 1979, Series A no. 30, p. 38, § 62). In assessing whether such a need exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10. Thus, the Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, Reports 1999-I).

64. One factor of particular importance for the Court's determination in the present case is the distinction between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see. e.g. *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103, p. 28, § 46 and *Oberschlick v. Austria* judgment of 23 May 1991, Series A, no. 204, p. 27, § 63). However, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (*Jerusalem v. Austria*, no. 26958/95, § 43, 27.2.2001).

65. Another factor of particular relevance to the present case is the essential function the press fulfils in a democratic society. Although the

press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see the *Thorgeir Thorgeirson v. Iceland* judgment of 25 June 1992, Series A no. 239, p. 27, § 63; the *Jersild v. Denmark* judgment of 23 September 1994, Series A no. 298, p. 23, § 31 and the *De Haes and Gijsels v. Belgium* judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 233-34, § 37). In addition, the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see the *Prager and Oberschlick v. Austria* judgment of 26 April 1995, Series A no. 313, p. 19, § 38). Thus, the national margin of appreciation is circumscribed by the interest of a democratic society in enabling the press to exercise its vital role of "public watchdog" in imparting information of serious public concern (see the *Goodwin v. the United Kingdom* judgment of 27 March 1996, *Reports* 1996-II, p. 500, § 39).

66. Finally, the court reiterates that limits of acceptable criticism in respect of civil servants exercising their powers may admittedly in some circumstances be wider than in relation to private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions. Moreover, civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty. Public prosecutors and superior police officers are civil servants whose task it is to contribute to the proper administration of justice. In this respect they form part of the judicial machinery in the broader sense of this term. It is in the general interest that they, like judicial officers, should enjoy public confidence. It may therefore be necessary for the State to protect them from accusations that are unfounded (see *Lesnik v. Slovakia*, no. 35640/97, §§ 53 and 54, 11 March 2003).

2. Application of the above principles to the instant case

67. In the instant case the Supreme Court unanimously found that the statements covered by the indictment, irrespective of their having been phrased as questions, had to be regarded as indictable under Article 267, subsection 1 of the Penal Code and that the applicants had the requisite intentions, that is violating the personal honour of another by offensive words or conduct or by making or spreading allegations of an act likely to disparage him in the esteem of his fellow citizens.

68. The applicants submitted that their questions in the programme "The Blind Eye of the Police" merely implied a range of possibilities in the criticised handling of the investigation of the murder case from 1981-82, especially as regards the taxi driver's observations. The questions left it open to the viewers to decide, between various logical explanations, as to who was responsible for the failures in the handling of the murder case. The questions neither stipulated that the Chief Superintendent was responsible nor that he had committed a violation of the Penal Code.

69. The Court finds, like the unanimous Supreme Court, that the applicants, by introducing their sequences of questions with the question "why did the vital part of the taxi driver's explanation disappear and who, in the police or public prosecutor's office, should carry the responsibility for this?" took a stand on the truth of the taxi driver's statement and presented the matters in such a way that viewers were given the impression that it was a fact that the taxi driver had given the explanation as she alleged to have done in 1981, that the police were therefore in possession of this explanation in 1981 and that this report had subsequently been suppressed. The Court notes in particular that the applicants did not leave it open, or at least included an appropriate question, whether the taxi driver in 1981 actually had given the explanation to the police that she nine years later alleged to have done.

70. By subsequently asking the questions "was it the two police officers who failed to write a report about it? Hardly, sources in the police tell us, they would not dare. Was it [the named Chief Superintendent] who decided that the report should not be included in the case? Or did he and the Chief Inspector of the Flying Squad conceal the witness's statement from the defence, the judges and the jury?" the Court agrees that the applicants left the viewers with only two options, namely that the suppression of the vital part of the taxi driver's statement in 1981 had been decided upon either by the Chief Superintendent alone or by him and the Chief Inspector of the Flying Squad jointly. In either case the named Chief Superintendent had taken part in the suppression, and thus committed a serious criminal offence.

71. In the view of the Court, such an accusation cannot, even with the most liberal interpretation, be understood as a value judgment. The Court therefore finds that the allegation consisted of a factual statement (cf., for instance, the *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103, p. 28, § 46 and *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, ECHR 1999-III).

72. The Court notes that the allegation emanated from the applicants themselves. It must therefore be examined whether they acted in good faith and complied with the ordinary obligation to verify a factual statement. In this respect the Court recalls that Article 10 of the Convention protects journalists' right to divulge information on issues of general interest

provided that they are acting in good faith and on accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism (see e.g. the *Fressoz and Roire* judgment § 54; the *Bladet Tromsø and Stensaas* judgment § 58, and the *Prager and Oberschlick* judgment § 37, all cited above). Accordingly, Article 10 of the Convention does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article the exercise of this freedom carries with it "duties and responsibilities", which also apply to the press. These "duties and responsibilities" are liable to assume significance when, as in the present case, there is a question of attacking the reputation of a named individual and infringing the "rights of others". Also of relevance for the balancing of competing interests which the Court must carry out is the fact that under Article 6 § 2 of the Convention individuals have a right to be presumed innocent of any criminal offence until proven guilty (see *inter alia Worm v. Austria*, judgment of 29 August 1997, *Reports* 1997-V, § 50 and *Du Roy and Malaurie v. France*, no. 34000/96, § 34, ECHR 2000-X).

73. The Court will thus consider the research carried out by the applicants, notably with regard to the sources relied on as reliable with respect to the specific allegation made in April 1991.

74. The Court notes firstly the unanimous findings of the Supreme Court that the veracity of the allegation has never been proven and its consequent decision to declare the allegation null and void.

75. The applicants submitted that they had acted in good faith in relying on the taxi driver's account of the occurrence, given that the police in Frederikshavn had not complied with section 751 of the Administration of Justice Act and the police report of 1981 did not contain the taxi driver's full statement. Moreover, they submitted that her testimony was a crucial element in the reopening of the case by the Special Court of Revision and the later acquittal of X.

76. The Court observes that following the television programmes, an inquiry was commenced into the police investigation of X's case, which revealed that the police in Frederikshavn had not in their usual routine implemented section 751, subsection 2 of the Administration of Justice Act, which provided that a witness shall be given the opportunity to read his or her statement. Consequently, on 20 December 1991, i.e. eight months after the broadcasting of the programme "The Blind Eye of the Police" the Prosecutor General found this non-compliance unfortunate and open to criticism. The said inquiry did not, however, indicate that anybody within the police in Frederikshavn had suppressed any evidence in X's case or in any other criminal case for that matter.

77. As part of the applicants' research, they had obtained a copy of the taxi driver's statement made in 1981. The report contained the taxi driver's sighting on 12 December 1981 of a Peugeot taxi (which had no relevance to

the murder). The report itself did not, however, show any indication that something might have been deleted from it. Nor was there any indication that another report had existed containing her statement of having seen X on the relevant day. Also, it is worth noting that during the programme the taxi driver did not specify that she had seen the two police officers writing down her alleged statement of having seen X on the relevant day. She merely claimed that she had told them about it at the interview in 1981.

78. The Court reiterates that in the original criminal trial against X, the police enquiries involved about 900 people, more than 4,000 pages of reports, and thirty witnesses in the High Court. With regard to the allegation at issue, the applicants relied on one witness, namely the taxi driver. The Court notes that this witness appeared over nine years after the events took place and that the applicants did not check whether there was an objective basis for her timing of events. This could easily have been done, as shown by the police's enquiry on 11 March 1991 in respect of her statement as to when the funeral of her grandmother had taken place.

79. The Court reiterates that on 13 September 1990 X requested that his case be re-opened, which was more than six months before the programme "The Blind Eye of the Police" was broadcast. When the retrial was granted by the Special Court of Revision on 29 November 1991, the court was divided. Only two judges out of five found that new testimonial evidence had been produced on which X might have been acquitted, had it been available at the trial. However, since one judge found that in other respects special circumstances existed which made it overwhelmingly likely that the available evidence had not been judged correctly, the trial was granted. Accordingly, it can not be concluded that the taxi driver's testimony was the decisive element in the re-opening of the case by the Special Court of Revision. Nor was there anything to suggest that the taxi driver's testimony was a crucial element in the later acquittal of X.

80. The Court recalls that the police in Frederikshavn were invited to participate in the first programme "Convicted of Murder", which was broadcast on 17 September 1990, four days after X had requested that the Special Court of Revision re-open his trial. However, the applicants have not substantiated that the police in Frederikshavn or the named Chief Superintendent were invited to participate in the second programme "The Blind Eye of the Police", which was broadcast on 22 April 1991. In any event, noting especially the statement by X's new counsel provided during the programme "The Blind Eye of the Police": "I have agreed with the public prosecutor and the president of the Special Court of Revision that statements to the press in this matter will in future only be issued by the Special Court of Revision", the Court is satisfied that the named Chief Superintendent was in fact precluded from commenting on the case while the case was pending before the Special Court of Revision.

81. The Court takes into consideration that the programme was broadcast at peak viewing time on a national TV station devoted to objectivity and pluralism and, accordingly, was seen by a wide public. It reiterates that the audio-visual media often have a much more immediate and powerful effect than the print media (see e.g. the *Jersild* judgment, cited above, p. 23, § 31).

82. In these circumstances the Court finds it doubtful, having regard to the nature and degree of the accusation, that the applicants' research was adequate or sufficient to substantiate their concluding allegation that the Chief Superintendent had deliberately suppressed a vital fact in a murder case.

83. Lastly, the Court considers that in assessing the necessity of the interference it is also of importance to examine the way in which the relevant domestic authorities dealt with the case and that their position was in conformity with Article 10 § 2 of the Convention. A perusal of the relevant Supreme Court judgment reveals that the court fully recognised that the present case involved a conflict between the right to impart information and the reputation or rights of others, a conflict they resolved by weighing the relevant considerations. The Supreme Court clearly recognised that the applicants' intentions, in the programme, of undertaking a critical assessment of the police's investigation was a proper part of the role of the media in acting as a public watchdog. However, having weighted the relevant considerations, it found no basis for the applicants to make such a serious charge against the named Chief Superintendent as they did, especially as the applicants' opportunities for satisfying the purposes of the programme in no way required the questions upon which the charges were based to be included.

84. In sum, the Court finds that the Supreme Court was entitled to consider that the injunction was “necessary in a democratic society” for the protection of the reputation and rights of others. Accordingly, there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT

1. *Holds* by 6 votes to 1 that there has been no violation of Article 6 of the Convention;

2. *Holds* by 4 votes to 3 that there has been no violation of Article 10 of the Convention;

Done in English, and notified in writing on 19 June 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN	Christos ROZAKIS
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Kovler and the partly dissenting opinion of Mr Rozakis joined by Mr Kovler and Mrs Steiner are annexed to this judgment.

C.L.
S.N.

DISSENTING OPINION OF JUDGE KOVLER

I regret to be unable to share the opinion of the majority that there has been no violation of Article 6§1 of the Convention in this case.

The fact that on 23 May 1991 the Chief Superintendent reported the applicants and the TV station to the police for defamation means that the criminal proceedings against the applicants commenced on this date, although the applicants were formally charged only in January 1993. Since the proceedings came to an end on 28 October 1998 this means, in my view, that the total length of the proceedings was seven years and five months. Neither the complexity of the case, nor the applicants' conduct could be regarded as necessitating such length of criminal proceedings which, by their very nature, caused distress, frustration and anxiety to the applicants. The City Court's judgment was not pronounced before 15 September 1995 and included periods of inactivity which could not be explained by any responsibility of the applicants as a cause of the length of the proceedings. In addition, the fact that the applicants appealed immediately against the City Court's judgment on 15 September 1995 whereas the prosecuting authorities did not send the notice of appeal to the High Court until 15 April 1996, i.e. seven months later, without any well-founded explanation, is sufficient for me to conclude that the length of the proceedings did not satisfy the “reasonable time” requirement.

PARTLY DISSENTING OPINION OF JUDGE ROZAKIS JOINED BY JUDGE KOVLER AND JUDGE STEINER

With regret I am not in a position to follow the majority's finding that in the circumstances of the case there has been no violation of Article 10 of the Convention. Such a finding weakens considerably, to my mind, the role that the press enjoys in a democratic society to exercise close and vigorous control over matters of public interest and concern.

It seems to me that the three elements which must be retained here when we assess the weigh of the various interests involved, under paragraph 2 of Article 10, are:

a) The already mentioned particular role of the press in a democratic society. As it has been consistently repeated, although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty (not simply its right) is to impart information and ideas on all matters of public interest, in a manner which sometimes may include a degree of exaggeration or even provocation. Thus, as the Court has stated, the national margin of appreciation is circumscribed by the interest of a democratic society in enabling the press to exercise its vital role of “public watchdog” in imparting information of serious public concern.

b) The subject-matter of the television programme in this case was undisputedly a serious issue of public concern: a person had been convicted to 12 years' imprisonment for the murder of his wife and passed almost 10 years of his life behind the bars, before he was acquitted in 1992, as a result of the reopening of his trial. A reopening which, by the way, was elicited by the impugned television programme of the applicants.

c) The target of the applicants' criticism was the conduct of the police, and of its heads who were formally in charge of the investigation conducted against the person suspected of having killed his wife. The police is a public institution and the physical persons who constitute it and give flesh to its activities are public figures who, by no means, are immune from the public scrutin and criticism. Because of their sensitive functions, which sometimes may be very crucial for the liberty, security and the well-being of the members of a society, as a whole, policemen are in the centre of the social tension which is determined by the exercise of the State power, on the one hand, and the rights of individuals on the other hand, to be protected by excesses in the use of their power. For this reason police officers are widely exposed to the public eye, a matter which has also been accepted by the European Court of Human Rights: in a notional scale, concerning permissible interference for the protection of the rights of others, politicians seem to be the less protected, because of their particular functions, but then

public officers and the police follow suit, as a result, again, of the sensitivity of their role in the society. Although, admittedly, the concern of the Court has always been to find an appropriate balance of interests, which may not end up in hindering the police and its agents to properly exercise their duties, still at no time such a concern has led to equate the police agents with private individuals who enjoy, in the eyes of the Court, an increased protection against intrusion of the media in their private life.

We are therefore, here, in a situation where the balancing of interests involved under paragraph 2 of Article 10 is determined by the seriousness of the public concern, by the specificity of the media as the "public watchdog", and by the wide margin of allowable criticism which is directed against the police and its agents.

Against this background, we have the factual situation: the applicants submitted that their questions in the programme "The Blind Eye of the Police" had merely implied a range of possibilities in the criticised handling of the investigation of the murder case from 1981-82, especially as regards the taxi driver's observations. The questions left it open to the viewers to decide, between various logical explanations, as to who was responsible for the failures in the handling of the murder case.

It should be observed that, in the programme "The Blind Eye of the Police" after the interview with the taxi driver, but before the pertinent questions at issue, the applicants made the following statement: "Now we are left with all the questions". This general statement was followed by the question: "why did the vital part of the taxi driver's explanation disappear – and who in the police or public prosecutor's office should carry the responsibility for this?". The applicants then proceeded with questions which cast doubt on the effectiveness or even the integrity of the actual persons:" Was it the two police officers who failed to write a report about it? Hardly, sources in the police tell us, they would not dare. Was it [the named Chief Superintendent] who decided that the report should not be included in the case? Or did he and the Chief Inspector of the Flying Squad conceal the witness's statement from the defence, the judges and the jury? "Why did the Chief Inspector of the Flying Squad 'phone the taxi driver shortly after the TV programme 'Convicted of Murder'? After all, the police had taken the view that the taxi driver had no importance as a witness and had filed her statement amongst the O-reports. Why did the Chief Inspector of the Flying Squad not call her in for an interview when she repeated her original explanation on the telephone? Why was the taxi driver interviewed at the Frederikshavn police station in the presence of the Chief Superintendent, which was completely at odds with the Public Prosecutor's public statement?..."

In my view, the above questions did not constitute a categorical conclusion that the Chief Superintendent had committed a serious criminal offence. The questions might have been interpreted as insinuations, but they

clearly emanated from either factual information or from implications presented during the programme by, *inter alia,* the taxi driver describing the events as she had experienced them. Looked at against this background, I find that the applicants' statement could hardly be regarded as a fact within the meaning of Article 10 of the Convention.

Reiterating that even a value judgment without any factual basis to support it may be excessive, I should proceed to examine whether there existed a sufficient factual basis for the impugned statement in order to assess whether the interference in dispute corresponded to a "pressing social need".

The applicants became aware before or during the production of their television programmes that the Frederikshavn police had not complied with section 751, subsection 2 of the Administration of Justice Act, which provides that a witness shall be given opportunity to read his or her statement. I should again underline that following the broadcast of "The Blind Eye of the Police" the Prosecutor General, in a letter of 20 December 1991 to the Ministry of Justice, found this non-compliance unfortunate and open to criticism and that consequently he made an agreement with the State Police Academy to produce a wider set of guidelines concerning the questioning of witnesses, which could be integrated into the Police Academy's educational material.

The applicants were in possession of a copy of the report produced by the Frederikshavn police as to the taxi driver's statement of 1981. Since it did not contain any information about her alleged observation as to having seen X and his son on 12 December 1981 about 5-10 minutes past noon, the applicants confronted the taxi driver with the report during the programme. Nevertheless, the taxi driver upheld her statement that she had already told the police about this observation in 1981.

Also, when the programme "The Blind Eye of the Police" was broadcast on 22 April 1991, the applicants were aware that the taxi driver had upheld her statement to the police on 11 March 1991 that she had already explained to the police in 1981 that she had seen X on 12 December 1981 shortly after noon.

Having regard to the foregoing, I consider that the applicants had grounds to rely on the taxi driver's statement and notably, that they had a sufficient factual basis to believe that the report of December 1981 did not contain her full statement or that there was another report.

In addition, I should note, as was not in fact disputed, that the topic raised in the programme "The Blind Eye of the Police" was being widely debated in Denmark and concerned a problem of general interest, a sphere in which restrictions on freedom of expressions are to be strictly construed. I attach some weight to the fact that the programme played a considerable role in the Special Court of Revision's decision to hear witnesses and to grant a re-opening of the case, and that X was finally acquitted.

Finally, I should reiterate that the police must necessarily accept a close scrutiny of their actions and omissions. The named Chief Superintendent was the head of the police unit that performed the investigation that led to the wrongful conviction of X. Thus, acting in an official capacity, he was, like civil servants and politicians, subject to wider limits of acceptable criticism than private individuals.

In the light of the foregoing, the grounds given for the applicants' conviction are, although relevant, not sufficient to satisfy me that the interference in the exercise of the applicants' right to freedom of expression was “necessary in a democratic society”. In particular, the means employed were disproportionate to the aim pursued: “the protection of the reputation or rights of others”. Consequently, in my view, the applicants' conviction infringed Article 10 of the Convention.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF PERNA v. ITALY

(Application no. 48898/99)

JUDGMENT

STRASBOURG

(25 July 2001)

THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
…

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Perna v. Italy,

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

Mr C.L. ROZAKIS, *President*,
Mr B. CONFORTI,
Mr G. BONELLO,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr E. LEVITS, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 14 December 2000 and on 10 July 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 48898/99) against Italy lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian national, Mr Giancarlo Perna ("the applicant"), on 22 March 1999.

2. The applicant was represented before the Court by Mr G.D. Caiazza, a lawyer practising in Rome. The Italian Government ("the Government") were represented by their Agent, Mr U. Leanza, Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs, assisted by Mr V. Esposito, Co-Agent.

3. The applicant alleged a violation of Article 6 §§ 1 and 3 (d) of the Convention on account of the Italian courts' refusal to admit the evidence he wished to adduce, and an infringement of his right to freedom of expression contrary, in his submission, to Article 10 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

5. By a decision of 14 December 2000, the Chamber declared the application admissible.

THE FACTS

6. On 21 November 1993 the applicant, who is a journalist, published in the Italian daily newspaper *Il Giornale*, in the "Lion's mouth" column (*La*

bocca del leone), an article about Mr G. Caselli, who was at that time the Public Prosecutor in Palermo. The article purported to be a "portrait" of Mr Caselli. It was entitled "Caselli, the judge with the white tuft" and bore the sub-title "Catholic schooling, communist militancy – like his friend Violante...".

7. In the article the applicant, after referring to the proceedings instituted by Mr Caselli against Mr G. Andreotti, a very well known Italian statesman accused of aiding and abetting a mafia-type organisation (*appoggio esterno alla mafia*), who had in the meantime been acquitted at first instance, expressed himself as follows:

> "... At university, [Caselli] moved towards the PCI [the Italian Communist Party], the party which exalts the frustrated. When he entered the State Legal Service he swore a threefold oath of obedience – to God, to the Law and to via Botteghe Oscure [formerly the headquarters of the PCI, now those of the PDS – the Democratic Party of the Left]. And [Caselli] became the judge he has remained for the last thirty years – pious, stern and partisan.
>
> But he cannot really be understood without a mention here of his *alter ego* Violante, his twin brother. Both from Turin; the same age – fifty-two; both raised by the Catholic teaching orders; both Communist militants; both judicial officers; and a deep understanding between them: when Violante, the head, calls, Caselli, the arm, responds.
>
> Luciano [Violante] has always been one step ahead of Giancarlo [Caselli]. In the mid-1970s he indicted for an attempted *coup d'état* Edgardo Sogno, a former member of the Resistance, but also an anticommunist. It was a typical political trial which led nowhere. Instead of facing a judicial inquiry, Violante found that his career began to take off. In 1979 he was elected as a Communist MP. And ever since then he has been the via Botteghe Oscure's shadow Minister of Justice...
>
> ... [Caselli] is a judge in the public eye. He is in the first line of the fight against terrorism. It was he who obtained the confession of Patrizio Peci, whose evidence as a witness for the prosecution was a disaster for the BR [the red Brigades].
>
> In the meantime, the PCI set in motion its strategy for gaining control of the public prosecutors' offices in various cities. That campaign is still going on, as the PDS has picked up the baton. ... The first idea was that if the Communists did not manage to gain power through the ballot box, they could do so by forcing the lock in the courts. There was no shortage of material. The Christian Democrats and the Socialists were nothing but thieves and it would be easy to catch them out. The second idea was more brilliant than the first: the opening of a judicial investigation was sufficient to shatter people's careers; there was no need to go to the trouble of a trial, it was sufficient to put someone in the pillory. And to do that it was necessary to control all the public prosecutors' offices.
>
> And that was the start of Tangentopoli. The Craxis, De Lorenzos and others were immediately caught with their hands in the till and destroyed. But Andreoti was needed to complete the picture...

> It was at that precise moment that Giancarlo [Caselli] was getting ready to leave the rain of Turin for the sun of Palermo...
>
> Once in Palermo his fate and Andreotti's became intertwined, whereas the two men had remained apart for years. Less than two years later the senator for life was suddenly accused of belonging to the mafia. The file was an implausible rag-bag...
>
> In April Caselli flew off to the United States, where he met Buscetta. He offered the informer eleven million lire a month to continue to co-operate. [Buscetta] could still be useful to him during the investigation, even if the outcome was no longer of much importance. The result sought had already been achieved.
>
> What will happen next is already predictable. In six to eight months' time the investigation will be closed. But Andreotti will not be able to resurrect his political career. What a stroke of luck. Caselli, on the other hand, will be portrayed as an objective judge. ..."

8. On 10 March 1994, acting on a complaint by Mr Caselli, the judge responsible for preliminary investigations committed the applicant and the manager of *Il Giornale* for trial in the Monza District Court. The applicant was accused of defamation through the medium of the press (*diffamazione a mezzo stampa*), aggravated by the fact that the offence had been committed in respect of a civil servant in the performance of his official duties.

9. During the first-instance proceedings the defence asked to take evidence from Mr Caselli as the complainant and civil party. It also asked for two press articles concerning the professional relations between Caselli and the criminal-turned-informer (*pentito*) Buscetta to be added to the file. The District Court refused both the above applications on the grounds that there was no point taking evidence from Caselli in view of the content of the article written by the applicant and that the documents in question would not have had any influence over the decision.

10. On 10 January 1996 the District Court found the accused guilty of defamation within the meaning of Articles 595 §§ 1 and 2 and 61 § 10 of the Criminal Code and section 13 of the Press Act (Law no. 47 of 8 February 1948). It sentenced the applicant to a fine of 1,500,000 Italian lire (ITL), payment of damages and costs in the sum of ITL 60,000,000 and publication of the judgment in *Il Giornale*. It held that the defamatory nature of the article was evidenced by the fact that it denied that Caselli performed his duties conscientiously, attributing to him a lack of impartiality, independence and objectivity which had allegedly led him to use his judicial activity for political ends. The applicant was not entitled to assert the right to report current events (*diritto di cronaca*) and comment on them (*diritto di critica*) as he had not adduced any evidence in corroboration of such serious accusations.

11. The applicant appealed. Relying on the freedom of the press and in particular the right to comment on current events, he submitted, among other arguments, that the reference to Caselli's political tendencies reflected

the truth and that the District Court could have tested whether this was so by agreeing to take evidence from the complainant himself, that Caselli and Violante actually were friends and that in the proceedings against Andreotti Caselli actually had made use of the assistance of the *pentito* Buscetta and had paid him sums of money as the representative of the State, since all the *pentiti* were in receipt of money from the Italian State. He further described himself as a commentator (*opinionista*), arguing that his intention had not been to present a biography of Caselli but to express his critical opinions, in a figurative and effective way, on the basis of true and uncontested facts. Lastly, he insisted that the complainant, together with journalists and other well-known personalities on the Italian political stage who, like Caselli, had been militant Communists, should be required to give evidence. In particular, he asked for evidence to be taken from Mr S. Vertone and Mr G. Ferrara, both political comrades of the complainant during the 1970s in Turin and demanded that the Court of Appeal add to the file press articles relating interviews in which they had confirmed the complainant's active political militancy. In particular, in an interview published in the daily newpaper *Corriere della Sera* on 11 December 1994, extracts from which were quoted in the applicant's appeal, Mr Vertone had declared, among other statements, that the complainant was a courageous man of great integrity but that he was influenced by the Communist cultural and political model, that his links with the former Communist Party were very close and that Caselli had subsequently become all but a member of it. In an interview published by another daily newspaper, *La Stampa*, on 9 December 1994, also quoted in extract form in the applicant's appeal, Mr Ferrara had stated that in the 1970s he had participated in dozens of political meetings attended by Caselli and Violante, among others, held by the Turin federation of the former Communist Party. He had gone on to say that although Caselli, a man of integrity, had done good work in fighting terrorism and as a judicial officer, he was highly politicised and should therefore avoid making speeches like a tribune.

12. In a judgment of 28 October 1997 the Milan Court of Appeal gave judgment against the applicant. It held that he had attributed acts and conduct to Caselli in a clearly defamatory way.

13. The Court of Appeal gave separate rulings on the various key parts of the article.

14. It first examined the phrase concerning the "oath of obedience" (*giuramento di obbedienza*):

> "When he entered the State Legal Service he swore a threefold oath of obedience – to God, to the Law and to via Botteghe Oscure [formerly the headquarters of the PCI, now those of the PDS – the Democratic Party of the Left]. And [Caselli] became the judge he has remained for the last thirty years – pious, stern and partisan.

15. The Court of Appeal held that this sentence was defamatory because, while it had a symbolic value, it indicated dependence on the instructions of

a political party, which was inconceivable for persons who, on being admitted to judicial office, had to swear an oath of obedience (not a symbolic one but a real one) to the law and nothing but the law.

16. The Court of Appeal next examined the remainder of the article, particularly the allegations that

- Caselli, with the support of Violante, also a judicial officer (the relations between the two being described as relations between "the arm and the head"), had played a crucial role in the former Italian Communist Party's plan to gain control of the public prosecutors' offices in each Italian city in order to annihilate their political opponents;
- Caselli had accused Andreotti and used the *pentito* Buscetta in the full knowledge that he would eventually have to discontinue the proceedings for lack of evidence, which confirmed that the sole purpose of his actions had been to destroy Andreotti's political career.

17. The Court of Appeal ruled that these allegations were very serious and highly defamatory in that they were not backed up by any evidence.

18. As to the request for cross-examination of the complainant and other notable figures of Italian political life and for certain articles to be added to the file, the Court of Appeal held that this was unnecessary since the applicant's remarks about Caselli's political leanings, the friendship between Caselli and Violante and the use of Buscetta, a *pentito* paid by the State, in the proceedings against Andreotti, were not defamatory and therefore did not have to be proved.

19. In a judgment of 9 October 1998, deposited with the registry on 3 December 1998, the Court of Cassation upheld the Court of Appeal's decision. It held that it was a correct decision both in procedural terms and as regards the merits of the case. On the merits, it held that the offensive nature of the article for Caselli, both as an individual and as a judicial officer, could not be doubted, as the applicant had accused him of deeds which implied a lack of personality, dignity, autonomy of thought, coherence and moral integrity.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

20. The applicant complained above all of an infringement of his right to defend himself, as the Italian courts had refused throughout the proceedings to admit the evidence he had sought to adduce, including cross-examination of the complainant. He relied in that connection on Article 6 §§ 1 and 3 (d) of the Convention.

21. Paragraphs 1 and 3 (d) of Article 6 of the Convention provide:

> ""1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"

A. Arguments of the parties

1. The applicant

22. The applicant contested the Government's assertion that the courts which had tried him had based their decisions on the evidence considered at trial. In fact, it could be seen that the decisions in question had been based solely on the offending article, and therefore on Mr Caselli's complaint, since his own requests concerning the taking of evidence had all been refused.

23. According to the applicant, his judges had refused to admit the crucial evidence in any defamation trial, namely the complainant's witness evidence. As a result, he, the accused, had been denied the most elementary right of a defendant, namely the right to ask the complainant to say under oath whether or not the facts underlying the criticisms he had made were true. In other words, by finding him guilty on the basis of the offending article alone, the relevant Italian courts had in substance considered the trial itself to be superfluous.

24. The applicant contended that a journalist accused of defamation could defend himself only by proving his credibility, but he had been denied the opportunity to do so. Moreover, in the present case, he had not been allowed to adduce any evidence, this being symptomatic, in his submission, of the abnormal nature of the proceedings against him. In particular, he found it difficult to understand how witness statements about the complainant's political militancy at a time when he was already a judicial officer – which formed the basis of the criticisms the applicant had made concerning that officer's independence – could be deemed to have no bearing on the case.

2. The Government

25. The respondent Government emphasised above all that the admissibility of evidence was a matter for the domestic courts and that the applicant's criminal responsibility had been found to be established by courts at three levels of jurisdiction which had conducted an adversarial examination of the evidence adduced before them. They had held that the evidence the applicant had sought to adduce was not pertinent and there was nothing to indicate that the refusal to admit that evidence had breached Article 6. Moreover, according to the established case-law of the Convention institutions, the accused did not have an unlimited right to have witnesses summoned. He had to show that the evidence of the witnesses he wished to call was necessary to establish the facts, and the applicant, in the Government's submission, had not done so. In fact, none of the witness statements which the applicant had sought to have admitted in evidence would have had any bearing on the statements held to be defamatory.

B. The Court's assessment

26. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among many other authorities, the Van Mechelen and Others v. the Netherlands judgment of 23 April 1997, Reports of Judgments and Decisions 1997-III, § 50). In particular, "as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce... More specifically, Article 6 para. 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses" (see the Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, § 33). Consequently, it is not sufficient for an accused to complain that he was not permitted to examine certain witnesses; he must also support his request to call witnesses by explaining the importance of doing so and it must be necessary for the court to take evidence from the witnesses concerned in order to be able to establish the true facts (see Engel and others v. the Netherlands, 8 June 1976, Series A no. 22, § 91, and Bricmont v. Belgium, 7 July 1989, Series A no. 158, § 89, and Eur. Comm. HR, no. 29420/95, Dec. 13.1.1997, DR 88-B, p. 148 at pp. 158 and 159). That principle also applies to the complainant in a defamation case where, as in the present case, it is requested that he be called as a witness of the facts asserted in the allegedly defamatory statements.

27. In the present case the applicant complained that the Italian courts had refused to take evidence either from the witnesses he had asked them to call or from the complainant, and had not allowed certain press articles to be added to the file.

28. The Court notes that the applicant requested in particular that evidence be taken from Mr Vertone and Mr Ferrara, both political comrades of the complainant during the 1970s in Turin, concerning Mr Caselli's political militancy. But throughout the proceedings the Italian courts consistently held that his militancy had been established, and the same is true of the friendship between Caselli and Violante, Buscetta's co-operation with the judicial authorities and the fact that the latter, as a *pentito*, was paid by the State. In that connection, the Court attaches special importance to the fact that, in his appeal, the applicant mentioned above all the complainant's political militancy as a fact which could be corroborated by the witnesses he wished to call, whereas he did not name any other witness capable of giving evidence about the crucial facts alleged in his article, namely that there was a strategy of gaining control of the public prosecutors' offices in various cities and that Buscetta was being used to destroy Andreotti's political career. The Court therefore considers that the applicant has not explained how evidence from the witnesses he wished to call could have contributed any new information whatsoever to the proceedings. The same is true of the press articles which the applicant had asked to be added to the file and which also essentially referred to the complainant's political militancy.

29. As regards examination of the complainant, repeatedly requested by the applicant, the Court does not underestimate the relevance such an examination might have had in the context of a defamation trial. However, the relevance thus presumed *a priori* must be verified in the light of the actual circumstances of the case concerned. The applicant's article raised in substance two separate issues. Firstly, he questioned the complainant's independence and impartiality in general on account of his political militancy. Secondly, he accused him of the specific conduct mentioned above, that is the strategy of gaining control of the public prosecutors' offices and the use of the *pentito* Buscetta against Andreotti. The complainant's political militancy and his relations with Mr Buscetta, a *pentito* paid by the State, had been held by the Italian courts to have been established. A witness statement by the complainant would therefore have concerned mainly the allegations that he had participated in a plan to gain control of the public prosecutors' offices in various cities and that he had an ulterior motive for his use of Buscetta. These, however, were accusations which the complainant had contested in his complaint alleging defamation. Consequently, it is hard to see what evidence capable of helping the courts to establish the truth could have been provided by examination of the complainant, other than a repetition of his rejection of the allegations against him *en bloc*.

30. It would have been a different matter if the applicant had adduced witness statements or other evidence in support of these contested allegations because the complainant would then have been obliged to reply, not – or not only – to the applicant's allegations as such, but also and above all to the supporting evidence.

31. In conclusion, the Court considers that the applicant has not established the relevance of taking evidence from Mr Vertone, Mr Ferrara and the complainant or of adding certain press articles to the file. Accordingly, there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

32. Relying on Article 10 of the Convention, the applicant further complained of an infringement of his right to freedom of expression resulting both from the decision of the Italian courts on the merits and from their decisions on procedural matters, the latter having prevented him from proving that the offending article was covered by the right to report and comment on current events in the context of the freedom of the press.

33. Article 10 of the Convention provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The complaint under Article 10 prompted by the Italian courts' refusal to admit the evidence the applicant sought to adduce

34. The Court observes at the outset that in so far as it concerns the Italian courts' refusal to admit the evidence the applicant sought to adduce, the complaint under Article 10 in substance raises no issue distinct from the one it has already determined in relation to Article 6 §§ 1 and 3 (d) of the Convention. Consequently, the Court will examine this part of the

application purely from the standpoint of the substantive guarantees afforded by Article 10 as regards the applicant's conviction as such.

B. Arguments of the parties

1. The applicant

35. The applicant asserted that a judicial officer's political experience inevitably influenced him in the performance of his duties. One might disagree with that opinion, but it was not acceptable for it to be described as a very serious accusation and punished under the criminal law.

2. The Government

36. The Government submitted that the decisions complained of by the applicant were aimed at protecting the reputation of others, and specifically that of the Palermo Public Prosecutor and maintaining the authority of the judiciary; they therefore pursued legitimate aims for the purposes of the second paragraph of Article 10. The applicant's statements, far from concerning a debate of general interest, in fact contained personal insults against the judicial officer he named. Referring to the Court's case-law on the question, the Government emphasised that, regard being had to the specific position of the judiciary within society, it might become necessary to protect it against attacks devoid of all foundation, especially where the duty of discretion prevented the judicial officers criticised from replying.

37. In accusing the judicial officer concerned of breaking the law, or at least of failing to discharge his professional duties, the applicant had not only damaged Mr Caselli's reputation but had also undermined public confidence in the State Legal Service. As the Court of Appeal had found, the applicant had not expressed opinions but had attributed conduct to the judicial officer accused without making any attempt to check the facts and without producing any firm supporting evidence.

C. The Court's assessment

1. General principles

38. The Court reiterates the fundamental principles which emerge from its judgments relating to Article 10:

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend,

shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among others, the following judgments: Jersild v. Denmark, 23 September 1994, Series A no. 298, § 31; *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I; and *Nilsen and Johnsen v. Norway*, no. 23118/93, § 43, to be published in the official reports of the Court's judgments and decisions).

(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see *Janowski v. Poland*, cited above, § 30).

(iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see *Janowski v. Poland*, cited above, § 30, and the Barfod v. Denmark judgment of 22 February 1989, Series A no. 149, § 28). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see the above-mentioned Jersild v. Denmark judgment, § 31).

(iv) The truth of an opinion, by definition, is not susceptible of proof. It may, however, be excessive, in particular in the absence of any factual basis (see the De Haes and Gijsels v. Belgium judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, § 47).

(v) The matters of public interest on which the press has the right to impart information and ideas, in a way consistent with its duties and responsibilities, include questions concerning the functioning of the judiciary. However, the work of the courts, which are the guarantors of justice and which have a fundamental role in a State governed by the rule of law, needs to enjoy public confidence. It should therefore be protected against unfounded attacks, especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying (see the Prager and Oberschlick v. Austria judgment of 26 April 1995, Series A no. 313, § 34).

2. Application of the above principles in the present case

39. The Court notes in the first place that in convicting the applicant the Court of Appeal gave separate rulings on each of the crucial parts of the article complained of. In following that approach it first ruled on the sentence "When he entered the State Legal Service he swore a threefold oath of obedience..." (see paragraphs 14 and 15 above) and then on the content of the remainder of the article, concerning among other matters the alleged strategy of gaining control of the public prosecutors' offices in various cities in which the complainant was said to have taken part and the abusive and manipulative nature of the investigation of Mr Andreotti (see paragraphs 16 and 17 above). Consequently, the Court will examine separately, in the light of the requirements of Article 10 of the Convention, these two branches of the applicant's conviction.

(a) The sentence relating to the "oath of obedience"

40. The Court observes that a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof (see the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, § 46). The Court takes the view that the sentence in question was essentially symbolic in content and amounted to the expression of a critical opinion about Caselli's political militancy as a member of the former Communist Party. Moreover, the Court of Appeal itself accepted, in its judgment of 28 October 1997, that it was a sentence with a symbolic meaning. Admittedly, to repeat the terms used by the Court of Appeal, such an expression indicated dependence on the instructions of a political party. However, this was precisely the tenor of the criticism directed at the complainant. Consequently, the Court must verify whether such criticism, conveyed in a strongly-worded, symbolic form, was consistent with respect for the rules of the journalist's profession, to which exercise of the freedom of expression guaranteed by Article 10 is subject.

41. The Court notes that the criticism directed at the complainant had a factual basis which was not disputed, namely Caselli's political militancy as a member of the Communist Party. The Italian courts themselves consistently held that fact to have been established (see paragraph 28 above). While it is true that judicial officers must be protected against unfounded attacks, especially in view of the fact that they are subject to a duty of discretion that precludes them from replying (see the Prager and Oberschlick v. Austria judgment, cited above, § 34), the press nevertheless is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them (ibid.). By acting as a militant member of a political party, of whatever

tendency, a judicial officer imperils the image of impartiality and independence that justice must always show at all times (see, *mutatis mutandis*, *Buscemi v. Italy*, no. 29569/95, § 67, to be published in the official reports of the Court's judgments and decisions). Where a judicial officer is an active political militant, his unconditional protection against attacks in the press is scarcely justified by the need to maintain the public confidence which the judiciary needs in order to be able to function properly, seeing that it is precisely such political militancy which is likely to undermine that confidence. By such conduct, a judicial officer inevitably exposes himself to criticism in the press, which may rightly see the independence and impartiality of the State legal service as a major concern of public interest.

42. As to the terms chosen by the applicant, use of the symbolic image of the "oath of obedience" was admittedly hard-hitting, but the Court observes in that connection that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see the Prager and Oberschlick v. Austria judgment, cited above, § 38). Moreover, while the Court does not have to approve the polemical and even aggressive tone used by journalists, Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see the Jersild v. Denmark judgment, cited above, § 31). Regard should also be had to the open and even ostentatious nature of the complainant's political militancy (see paragraphs 11 and 18 above and, *mutatis mutandis*, *Lopes Gomes da Silva v. Portugal*, no. 37698/97, § 35, to be published in the official reports of the Court's judgments and decisions).

43. That being so, the applicant's critical comment on Mr Caselli's political militancy, which had a solid and uncontested factual basis, could not be considered excessive (see the De Haes and Gijsels v. Belgium judgment, cited above, § 47).

(b) The factual allegations made against the complainant

44. The Court considers that the applicant's assertions about the alleged strategy of gaining control of the public prosecutors' offices in a number of cities and the use of the *pentito* Buscetta in order to prosecute Mr Andreotti quite obviously amounted to the attribution of specific acts to the complainant. They are therefore not covered by the protection of Article 10 unless they have a factual basis, especially considering the seriousness of such accusations, since they were allegations of fact susceptible of proof (see *Nilsen and Johnsen v. Norway*, cited above, § 49).

45. The article in question did not mention any evidence or cite any source of information capable of corroborating these allegations. Furthermore, during the trial the applicant did not adduce any precise evidence in support of these assertions of fact and, as the Court found above, the evidence of the witnesses he wished to call concerned only the

complainant's political activism (see paragraph 28 above). Regard being had to the context, those assertions, which carried extremely serious accusations against a judicial officer, overstepped the limits of acceptable criticism in that they had no factual basis.

3. Conclusion

46. The Court has always emphasised the fundamental importance of freedom of expression in a democratic society, of which it is one of the essential foundations. Consequently, in reviewing the decisions given by domestic courts by virtue of their power of appreciation, it must ensure that sanctions against the press were strictly proportionate and prompted by assertions which did indeed overstep the limits of acceptable criticism, while safeguarding assertions which may and therefore must enjoy the protection of Article 10. Exercise of the freedom of expression is a complex and delicate matter and a sanction imposed on a journalist is justified only in so far as it penalises those parts of his writings which have overstepped the limits referred to above. The Court reiterates in that connection that exceptions to freedom of expression must be interpreted narrowly (see the Oberschlick v. Austria (no. 2) judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, pp. 1274-75, § 29, and, most recently, *Lopes Gomes da Silva v. Portugal*, cited above, § 30 (ii)).

47. Consequently, the applicant's conviction appears to have been founded on relevant and sufficient reasons with regard to the allegations concerning the complainant's participation in a plan to gain control of the public prosecutors' offices of several cities and the real reasons for using the *pentito* Buscetta, given that these were allegations of fact which had not been backed up and could not be founded on the complainant's political militancy alone (see, *mutatis mutandis*, *Nilsen and Johnsen v. Norway*, cited above, § 49). On the other hand, it does not appear to have been justified with regard to the sentence concerning the "oath of obedience", because that sentence constituted a critical opinion which, though couched in hard-hitting, provocative language, was nevertheless based on a solid factual basis, incontestably related to a matter of public interest, on account of the concern that a judicial officer's political militancy may prompt, and should therefore have enjoyed the protection of Article 10 with regard to the form of words used also.

48. There has accordingly been a violation of Article 10 in so far as the applicant was convicted partly on account of the sentence relating to the "oath of obedience".

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

50. In respect of pecuniary damage, the applicant referred to part of the sums he had been ordered to pay the complainant, namely 60,000,000 Italian lire (ITL) in reparation for non-pecuniary damage and ITL 11,000,000 in reimbursement of the complainant's costs. He acknowledged, however, that he had not paid these sums personally, as the company which owned the newspaper had borne the full cost.

51. That being so, the Court considers that the applicant did not sustain any damage which affected his financial position, and accordingly that no sum should be awarded to him under that head.

52. In respect of non-pecuniary damage, the applicant in substance left the matter to the Court's discretion, while making the following submissions. His conviction had caused him serious prejudice to his professional reputation, regard being had to the fact that at the material time he was a very famous journalist whose articles were published on the first and third pages, that is in the most prestigious positions in a daily newspaper. That prejudice had been aggravated by the celebrity of the complainant and by the delicate nature of the issues covered in the article. In addition, the applicant's conviction had considerably limited his subsequent activity on account of his fear of being prosecuted again for the content of his articles.

53. The respondent Government submitted that a finding of a violation would constitute sufficient reparation.

54. The Court considers, like the Government, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant (see *Nilsen and Johnsen v. Norway*, cited above, § 56), especially as the Court has found that the applicant's conviction for his allegations about the alleged strategy of gaining control of the public prosecutors' offices and the real reasons for using the *pentito* Buscetta was founded on relevant and sufficient reasons.

B. Costs and expenses

55. The applicant acknowledges that the costs incurred in the domestic courts were likewise borne by the company which owned the newspaper. The Court therefore considers that no award should be made to him under that head.

56. As to his costs before the Court, the applicant claimed the overall sum of ITL 27,754,689, which also included the sums chargeable in value-added tax and a contribution to the lawyers' insurance fund (the "CAP"). In that connection he produced a detailed bill of costs and disbursements.

57. The Government left the matter to the Court's discretion, while emphasising the simplicity of the case.

58. The Court considers that the case presented undeniable difficulties, but that account should also be taken of the fact that the finding of a violation concerns Article 10 only, and only in so far as the applicant's conviction was also based on his assertions about the "oath of obedience". Consequently, the Court considers it equitable to award one third (rounded down) of the sum claimed, namely ITL 9,000,000, plus any amount of value-added tax and CAP which may be chargeable.

C. Default interest

59. According to the information available to the Court, the statutory rate of interest applicable in Italy at the date of adoption of the present judgment is 3.5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention;

2. *Holds* that there has been a violation of Article 10 of the Convention on account of the applicant's conviction for alleging, in the form of a symbolic expression, that the complainant had taken an oath of obedience to the former Italian Communist Party, and that there has been no violation of Article 10 arising from the applicant's conviction on account of his allegations concerning participation by the complainant in an alleged plan to gain control of the public prosecutors' offices in a number of cities and the real reasons for using the criminal-turned-informer Buscetta;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, 9,000,000 (nine million) Italian lire for costs and expenses, together with any sum that may be chargeable in value-added tax and a contribution to the lawyers' insurance fund (the "CAP")

(b) that simple interest at an annual rate of 3.5% shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 25 July 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH	Christos ROZAKIS
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Conforti, joined by Mr Levits, is annexed to this judgment.

C.L.R.
E.F.

CONCURRING OPINION OF JUDGE CONFORTI, JOINED BY JUDGE LEVITS

(*Translation*)

I agree with the finding of a violation of Article 10 of the Convention, but for different reasons than those given in the judgment.

The majority clearly separated the applicant's complaint concerning the procedure before the Italian courts, which it considered exclusively under Article 6, from his complaint concerning the substantive guarantees of freedom of expression, which it examined from the standpoint of Article 10.

In my opinion, on the contrary, the issues raised in cases of this type are still Article 10 issues even where the procedure followed is concerned; and what can normally be tolerated from the point of view of due process according to the fair-trial rules laid down in Article 6 may not be acceptable when it is a matter of verifying whether an interference with freedom of expression is "necessary in a democratic society". In the present case the courts refused to hear evidence from the complainant, who could have been cross-examined by the applicant's counsel, and rejected all requests to adduce written evidence. In a trial for defamation by a journalist of a judicial officer in the public prosecution service, such conduct, whether intentional or not, gives the clear impression of intimidation, which cannot be tolerated in the light of the Court's case-law on restrictions of the freedom of the press. The Italian courts did indeed act very speedily in determining the charges against the applicant in less than four years, at three levels of jurisdiction. However, that circumstance too, although praiseworthy from the point of view of the reasonable length of judicial proceedings, cannot fail to reinforce – in a country condemned many times for the length of its proceedings – the impression I mentioned above.

That is why I accept the applicant's arguments, in which he insisted on the need to assess the procedure from the standpoint of Article 10, and I consider that there has been a violation of that provision.

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

CASE OF PERNA v. ITALY

(Application no. 48898/99)

JUDGMENT

STRASBOURG

6 May 2003

In the case of Perna v. Italy,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr B. CONFORTI,
Mrs E. PALM,
Mr I. CABRAL BARRETO,
Mr V. BUTKEVYCH,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mrs W. THOMASSEN,
Mr M. PELLONPÄÄ,
Mrs S. BOTOUCHAROVA,
Mr M. UGREKHELIDZE,
Mrs E. STEINER,
Mr S. PAVLOVSCHI,

and also of Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 25 September 2002 and 5 March 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 48898/99) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian national, Mr Giancarlo Perna ("the applicant"), on 22 March 1999.

2. The applicant was represented by Mr G.D. Caiazza, of the Rome Bar. The Italian Government ("the Government") were represented by their Agent, Mr U. Leanza, Head of the Diplomatic Disputes Department, Ministry of Foreign Affairs, assisted by Mr F. Crisafulli, Deputy Co-Agent.

3. The applicant alleged a violation of Article 6 §§ 1 and 3 (d) of the Convention on account of the Italian courts' refusal to admit the evidence he wished to adduce, and an infringement of his right to freedom of expression, guaranteed by Article 10 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that

would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. It was composed of the following judges: Mr C.L. Rozakis, President, Mr B. Conforti, Mr G. Bonello, Mrs V. Stráznická, Mr M. Fischbach, Mrs M. Tsatsa-Nikolovska, Mr E. Levits, and also of Mr E. Fribergh, Section Registrar.

5. In a decision of 14 December 2000 the Chamber declared the application admissible.

6. On 25 July 2001 the Chamber delivered a judgment in which it held unanimously:

> "1. ... that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention;
>
> 2. ... that there has been a violation of Article 10 of the Convention on account of the applicant's conviction for alleging, in the form of a symbolic expression, that the complainant had taken an oath of obedience to the former Italian Communist Party, and that there has been no violation of Article 10 arising from the applicant's conviction on account of his allegations concerning participation by the complainant in an alleged plan to gain control of the public prosecutors' offices in a number of cities and the real reasons for using the criminal-turned-informer Buscetta;
>
> 3. ... that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
>
> 4. ...
>
> (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, 9,000,000 (nine million) Italian lire for costs and expenses, together with any sum that may be chargeable in value-added tax and a contribution to the lawyers' insurance fund (the 'CAP');
>
> ..."

It dismissed the remainder of the claim for just satisfaction. The concurring opinion of Mr Conforti joined by Mr Levits was annexed to the judgment.

7. On 19 and 24 October 2001 the Government and the applicant requested that the case be referred to the Grand Chamber, in accordance with Article 43 of the Convention and Rule 73. The panel of the Grand Chamber accepted their requests on 12 December 2001.

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

9. The Government filed a memorial. In addition, observations were received from Mr G. Caselli, to whom the President had given leave to intervene as an interested party (Article 36 § 2 of the Convention and Rule 61 § 3).

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 25 September 2002 (Rule 59 § 2 [As in force prior to 1 October 2002]).

There appeared before the Court:

(a) *for the Government*
Mr F. CRISAFULLI, *Deputy Co-Agent*;

(b) *for the applicant*
Mr G.D. CAIAZZA, Lawyer, *Counsel*;

(c) *for the third-party intervener*
Mr G. CASELLI, *Third-party intervener*,
Mr G.C. SMURAGLIA, Lawyer, *Counsel.*

The Court heard addresses by them.

THE FACTS

11. The applicant was born in 1940 and lives in Rome.

12. He is a journalist by profession and on 21 November 1993 he published in the Italian daily newspaper *Il Giornale* an article about Mr G. Caselli, who was at that time the Principal Public Prosecutor in Palermo. The article was entitled "Caselli, the judge with the white quiff" and subtitled "Catholic schooling, communist militancy like his friend Violante – Are the charges against Andreotti the start of a new Sogno case?".

13. In the article the applicant, after referring to the proceedings brought by Mr Caselli against Mr G. Andreotti, a very well-known Italian statesman accused of aiding and abetting the Mafia (*appoggio esterno alla mafia*) who has in the meantime been acquitted at first instance, expressed himself as follows:

> "In the last few days Giulio Andreotti has told an Israeli newspaper that he fears he is to be eliminated.
>
> If I may be permitted to begin with a digression, I wonder why he was talking to a foreign paper rather than the Italian press. He's not the only one. It's getting to be an epidemic. During the same period the industrialist Carlo De Benedetti chose an English newspaper in which to say that Italy is his Siberia. Even Bettino Craxi, when he feels like uttering threats or complaints, generally does so via the Spanish papers. This might be a form of gratuitous snobbery. But it might also be a victimisation syndrome of the type 'We're foreigners in our own country and are obliged to raise our voices abroad in order to make ourselves heard at home.'

That's what Andreotti is suggesting when he adds that he feels like an exile and the victim of a plot, but he doesn't exactly know what kind of plot. Those who have seen him recently say that he's pale, his pointed ears are drooping and he's bent forward to the point of being hunchbacked. He's worried about his wife Lidia, who's been plunged in a kind of cataleptic trance since that fateful 27 March. That was the day when the official notification that he was under investigation – a document running to some 250 typewritten pages – turned the most well known Italian politician into the number one godfather of the Sicilian Mafia. Now Andreotti is bewildered. He tries to understand but he can't. He thinks there must have been some sort of spur-of-the-moment conspiracy.

But the antibody that's eating away at him has been there for some time. It's been cultured for years in precisely those religious environments that Andreotti likes best. While he was already dominating Rome in the 1950s Giancarlo Caselli, the Principal Public Prosecutor in Palermo, author of the 250 pages which have annihilated him, was learning his lessons at the school of the Salesian brothers in Turin.

Giancarlo was a fine, studious boy. Turin is full of people like that because it's a rainy city and the houses have no balconies to watch the street from, so there's nothing else for a boy to do but get his head down over his books. That's why the place specialises in the mass-production of intellectuals. From Bobbio to Conso, the Minister of Justice. It's a puritan brotherhood.

The more Giancarlo progressed towards self-knowledge the heavier his complex about his father weighed on him. The father was a very worthy man but only the chauffeur of a captain of industry. While driving he breathed in the air of the bourgeoisie and then he blew it out again over his son. The boy decided that when he grew up he would pass over to the other side of the fence. No longer subservient like dad, but keeping the upper hand.

At university, he drew close to the PCI [the Italian Communist Party], the party which exalts the frustrated. When he was admitted to the State legal service he swore a threefold oath of obedience – to God, to the Law and to via Botteghe Oscure [formerly the headquarters of the PCI, now those of the PDS – the Democratic Party of the Left]. And Giancarlo became the judge he has remained for the last thirty years – pious, stern and partisan.

But he cannot really be understood without a mention here of his alter ego Luciano Violante, Caselli's twin brother. Both from Turin; the same age – 52; both raised by the Catholic teaching orders; both communist militants; both judicial officers; and a deep understanding between them: when Violante, the head, calls, Caselli, the arm, responds.

Luciano has always been one step ahead of Giancarlo. In the mid-1970s he indicted for an attempted *coup d'état* Edgardo Sogno, a former member of the Resistance, but also an anti-communist. It was a typical political trial which led nowhere. Instead of facing a judicial inquiry, Violante found that his career began to take off. In 1979 he was elected as a Communist MP. And ever since then he has been the via Botteghe Oscure's shadow Minister of Justice. Today he's the chairman of Parliament's anti-Mafia committee, the great choreographer of the to-ing and fro-ing of the *pentiti* [criminals-turned-informers] and the PDS's strongman.

While Violante was climbing the ladder, Caselli had turned into a handsome figure with the shock of prematurely white hair he's so proud of. If he goes away anywhere, even on a short trip, he always takes his hairdryer with him. During breaks in proceedings he pats his quiff into place on his forehead and pushes his hair over his ears. Afterwards, as you will have noticed on TV, he moves his head the bare minimum, so as not to ruin his handiwork.

Vain – he's vain. When Giancarlo was a member of the National Council of the Judiciary, from 1986 to 1990, his colleagues used to make fun of him, saying 'Under his hair there's nothing there'. That's true up to a point, as a comment on his narcissism and his ideological blinkers. But it's not true as regards his intelligence, which cannot be faulted. So far, as can be seen, there's nothing to suggest that one day Caselli's and Andreotti's paths would cross.

Apart from his spell at the National Council of the Judiciary, Giancarlo continued to live in Turin. He was a judge in the public eye and in the first line of the battle against terrorism. It was he who obtained the confession of Patrizio Peci, whose evidence as a witness for the prosecution devastated the Red Brigades.

In the meantime, the PCI set in motion its strategy for gaining control of the public prosecutors' offices of every city in Italy. That campaign is still going on, as the PDS has picked up the baton. The whole thing was the product of two linked but very very simple ideas Violante had. The first idea was that if the Communists could not manage to gain power through the ballot box, they could do so through the courts. There was no shortage of material. The Christian Democrats and the Socialists were nothing but thieves and it would be easy to catch them out. The second idea was more brilliant than the first: the opening of a judicial investigation was sufficient to shatter people's careers; there was no need to go to the trouble of a trial, it was enough to put someone in the pillory. And to do that it was necessary to control the entire network of public prosecutors' offices.

And that was the start of Tangentopoli. The Craxis, De Lorenzos and others were immediately caught with their hands in the till and destroyed. But Andreotti was needed to complete the picture. More cunning than the rest, or not so greedy, the sly old Christian Democrat nearly always avoided getting caught up in corruption cases.

It was at that precise moment that Giancarlo was getting ready to leave the rain of Turin for the sun of Palermo. A campaign of unsubstantiated allegations saw off the incumbent public prosecutor Giammanco, who crept away with his tail between his legs. And at the start of this year the handsome judge was able to take Giammanco's place and finally place Violante's seal on the Palermo prosecution service.

Before he took up his new post Caselli was summoned to the Quirinale [the President's official residence]. President Scalfaro, knowing the type, was concerned. When he had Caselli in front of him he said: 'Do whatever you think is right, but be objective.'

Once in Palermo his fate and Andreotti's, which had remained separate for years, became intertwined. Less than two months later the senator-for-life was suddenly accused of belonging to the Mafia. The file was an implausible rag-bag containing statements by *pentiti*, old and new documents and information given by the same old Buscetta [a *pentito*] to Violante and the anti-Mafia committee, now used by Caselli as evidence in a kind of game of ping-pong between the two twins. To cut a long story

short, even the most long-lived brontosaurus in the Palazzo [i.e. Palazzo Madama – the Senate-House] was destroyed, thanks to the principle that an accusation is sufficient to destroy anyone.

In April Caselli flew off to the United States, where he met Buscetta. He offered the informer 11,000,000 lire a month to continue to cooperate. Buscetta could still be useful to him during the investigation, even if the outcome was no longer of much importance. The result sought had already been achieved.

What will happen next is already predictable. In six to eight months' time the investigation will be closed. But Andreotti will not be able to resurrect his political career. What a stroke of luck. Caselli, on the other hand, will be portrayed as an objective judge whose duty obliged him to prosecute but who realised he had been in the wrong. He will become a hero. And that, if there is a God, cries out for vengeance."

14. On 10 March 1994, acting on a complaint by Mr Caselli, the judge responsible for preliminary investigations committed the applicant and the manager of *Il Giornale* for trial in the Monza District Court. The applicant was accused of defamation through the medium of the press (*diffamazione a mezzo stampa*), aggravated by the fact that the offence had been committed to the detriment of a civil servant in the performance of his official duties.

15. At the trial on 10 January 1996 the civil party asked for the report on the evidence given by Buscetta to the New York judicial authorities and a copy of the Italian weekly newspaper *l'Espresso* in which that evidence had been published to be added to the file.

The defence asked for two press articles concerning Mr Caselli's professional relations with the *pentito* Buscetta to be added to the file and for the complainant to be required to give evidence. In an order made on the same day the District Court refused these requests on the grounds that the documents in question were not relevant to the object of the proceedings (defamation) and that there was no point taking evidence from Mr Caselli in view of the tenor of the article written by the applicant.

16. On the same day, applying Article 57, Article 595 §§ 1 and 2 and Article 61 § 10 of the Criminal Code and section 13 of the Press Act (Law no. 47 of 8 February 1948), the District Court sentenced the manager of *Il Giornale* and the applicant to fines of 1,000,000 and 1,500,000 Italian lire (ITL) respectively, payment of damages and costs in the sum of ITL 60,000,000, payment of the civil party's costs and publication of the judgment in *Il Giornale*. In its reasoning the District Court included the following considerations:

"...

The author of this article, taking as his theme the case against Senator Giulio Andreotti, gave a biography of the complainant in terms which emphasised his cultural background and above all his ideological leanings – allegedly close to the PCI (now the PDS) – contending that these leanings had decisively influenced [the complainant's] professional activity to the extent of making him the instrument of a

grand design of that party, namely to take control of the judicial organs, particularly the public prosecutors' offices.

Mr Perna stressed the long-standing friendship between the complainant and the MP Violante, asserting that the latter acted as the head in a strategy where Mr Caselli was the arm. He added to his summary biography phrases with a particularly striking literal meaning such as: 'When he was admitted to the State Legal Service he swore a threefold oath of obedience – to God, to the Law and to via Botteghe Oscure. And Giancarlo became the judge he has remained for the last thirty years – pious, stern and partisan.'

He accused Mr Caselli of having managed 'the Andreotti investigation' in furtherance of a grand political design hatched by Violante on behalf of the PCI/PDS, which was to break up by judicial process the dominant political class at the time, so that the favoured party could take power by non-electoral means.

He suggested that the charges against Mr Andreotti, the last politician of any standing not to have been laid low by the 'clean hands' [*mani pulite*] inquiries in progress, should be seen in the context of that exploitation of the investigation.

...

The defamatory nature of the article ... is absolutely manifest, given that the text categorically excluded the possibility that Mr Caselli might be faithful to the deontological obligations of his duties as an officer in the State legal service and denied that he possessed the qualities of impartiality, independence, objectivity and probity which characterise the exercise of judicial functions, an activity which the complainant was even alleged to have used for political ends, according to the author of the article.

In the present case exercise of the right to report current events cannot be pleaded as an extenuating circumstance, Mr Perna not having adduced the slightest evidence in support of his very serious allegations. Nor can he rely on exercise of the right to comment on them – a right which would certainly be enjoyed by a journalist who, in reporting court proceedings, criticises this or that measure – given that the offending assertions in the article amount to nothing more than an unjustified attack on the complainant, which foully besmirched his honour and reputation. ..."

17. The applicant appealed. Relying on the freedom of the press, and in particular the right to report and comment on current events, he contended, among other arguments, that what he had written about Mr Caselli's political leanings was true and that the court could have verified that by agreeing to take evidence from the complainant himself; that Caselli and Violante were indeed friends; and that it was likewise true that Caselli had used the help of the *pentito* Buscetta in the proceedings against Andreotti, and, as the representative of the State, had paid him sums of money, all *pentiti* being remunerated by the Italian State. Describing himself in addition as an opinion columnist (*opinionista*), he asserted that he had not intended to give a biography of Caselli but rather to express his critical opinions, in a figurative and forceful way. More precisely, he had made critical judgments, which were admittedly more or less well founded and

with which readers might or might not agree, but which were explicitly derived from the factual premise, namely Caselli's political activity. Lastly, he demanded that evidence be taken from the complainant and from certain journalists and figures in Italian politics who, like Mr Caselli, had been Communist Party militants. In particular, he asked for evidence to be taken from Mr S. Vertone and Mr G. Ferrara and for press articles on interviews in which the two men had confirmed the complainant's active political militancy to be added to the file. In particular, in an interview published in the daily newspaper *Corriere della Sera* on 11 December 1994, extracts from which were quoted in the applicant's appeal, Mr Vertone had stated, *inter alia*, that the complainant was a brave man of great integrity but that he was influenced by the cultural and political model of communism, that his relations with the former Communist Party had been very close and that he had later all but joined the party. In an interview given to another daily newspaper, *La Stampa*, which published it on 9 December 1994, Mr Ferrara had asserted that he had taken part in dozens of political meetings with Caselli and Violante among others during the 1970s in the Turin federation of the former Communist Party. He had gone on to say that although Caselli, a man of integrity, had done good work against terrorism as an officer of the State legal service, he was heavily politicised and should therefore avoid speaking like a tribune of the people.

18. In a judgment of 28 October 1997 the Milan Court of Appeal dismissed the applicant's appeal, ruling as follows:

> "... the statements noted in the charges ... are undeniably seriously damaging to the reputation of the injured party. They go further than casting doubt – as the charges say – on Mr Caselli's loyalty to the country's institutions, his faithfulness to the principle of legality, his objectivity and his independence; they categorically deny that he possesses those qualities and even attribute to him, among other accusations, instances of conduct which constitute disciplinary and criminal offences."

The Court of Appeal held that it was evident that the article essentially referred to facts, some of which were not in the least defamatory and were therefore not relevant to the decision to be taken.

> "In particular, the following elements are undeniably facts (not judgments), and one of the appeal pleadings (from lawyer D'A.) refers to them as such:
>
> (i) Giancarlo Caselli's political leanings;
>
> (ii) the friendship between Mr Caselli and MP Violante;
>
> (iii) the information that as public prosecutor in Palermo Mr Caselli used the statements of the criminal-turned-informer Buscetta in the investigation concerning Mr Andreotti, and the information that the same Buscetta, like other *pentiti*, is paid by the State.
>
> Those elements are facts and in itself merely stating them is not in the least defamatory; they are therefore not relevant to the decision this Court has to take. That

seems quite obvious as regards the last two pieces of information above, but is also true of the first (Giancarlo Caselli's political leanings), since the State guarantees not only freedom of thought and the freedom to express thoughts but also the freedom of association in political parties.

It is therefore not relevant to try to ascertain what political beliefs Giancarlo Caselli holds and whether or not he expressed them in specific circumstances (and at all events outside the judicial sphere and the performance of his duties) since that information could not in any case be considered defamatory in itself...

There is therefore no basis for the request that the proceedings be reopened, firstly so that Giancarlo Caselli can be heard as a witness, and secondly to obtain the production of the press articles of Saverio Vertone and Giuliano Ferrara, but also so that witness evidence can be taken from them, once again on the subject of [Caselli's] political militancy or at any rate of [his] ... political participation in the PCI/PDS. First of all, that information, as has already been said, is barely touched upon in the article, and in the second place it cannot in any event be regarded as damaging to the complainant's reputation and accordingly does not need to be verified."

19. Other facts imputed to the complainant were, on the contrary, undeniably defamatory. First of all, there was the oath of obedience, which, beyond its symbolic import, bore the precise accusation that Mr Caselli had given a personal and lasting undertaking to "obey", in the course of his duties, the law, his religious beliefs and "the instructions of the leaders" of a political party.

The Court of Appeal continued:

"The remainder of the article, which gives a highly defamatory account of Mr Caselli's alleged obedience to the Communist Party, confirms that the journalist was not expressing judgments or personal opinions but imputing specific conduct to Mr Caselli.

Further on the article asserts

(i) that Mr Caselli is Mr Violante's twin brother, ...

(ii) that the PCI ... set in motion a strategy of seizing control of all the public prosecutors' offices in Italy by applying two of the MP's ideas, the first being to gain power ... by using the judicial machine and the second to resort simply to opening a judicial investigation ... in order to destroy the careers [of political opponents] since there was no need to go to the trouble of a trial, it was enough to put someone in the pillory.

It is in that context that the journalist referred to two actions by Giancarlo Caselli: his request for a transfer to the Palermo public prosecutor's office and subsequent appointment to the post of public prosecutor there and his notification to Mr Andreotti that he faced prosecution for belonging to a Mafia-type organisation.

...

The journalist Perna did not therefore express opinions or judgments but attributed to the complainant Giancarlo Caselli in a highly defamatory manner conduct and acts

about which – and here we can only repeat what the District Court said – he did not adduce a scrap of evidence; he did not even seek to prove his case, as his lawyers argue that he was merely expressing opinions.

... The journalist [having] attributed specific acts to public prosecutor Giancarlo Caselli without verifying his assertions in any way and in a totally gratuitous manner, his conduct cannot be explained by errors or misunderstandings, but only as a deliberate act.

That is confirmed by the literal content of the whole article, in which the person of Giancarlo Caselli is constantly and subtly denigrated, even though a few positive remarks are skilfully mixed in with the attacks. ...

The content of the whole article shows that there was no unintentional fault on the defendant's part but that he was fully aware that he was damaging another's reputation and even that he intended to do so."

20. In a judgment of 9 October 1998, deposited with the registry on 3 December 1998, the Court of Cassation upheld the Court of Appeal's judgment, ruling that it was quite correct both as regards the merits and from the procedural point of view.

"...

Contrary to what has been alleged, the requests for leave to adduce evidence filed by the defence were interpreted in accordance with their exact significance and probative value and were rightly refused because they were totally devoid of relevance to the decision.

The appeal written and signed jointly by the defendant Perna and his lawyer Mr Caiazza contains a request for the proceedings to be reopened, with a view, firstly, to 'taking witness evidence from the civil party', in particular 'about the forms and modalities of his militancy, or at least of his political participation in the activities of the PCI/PDS during the period when he was already a public prosecutor, and about all the other points which offended the complainant'. The absolutely vague and irrelevant nature of the request is manifest in the light of the tenor of the phrases used by Mr Perna (in whose article the allusion to Mr Caselli's militancy is by no means limited, as Mr Caiazza argued in the grounds of appeal, to the assertion that Mr Caselli associated himself with the Communist Party while he was at university, an assertion which would, incidentally, not constitute an insult); the article set out to give a detailed account of the forms taken by that militancy by imputing certain acts to Mr Caselli with the aim of proving that his militancy existed. Consequently, either this point remains vague or the problem is resolved by trying to make the complainant admit the facts noted in the charges, with the result that the burden of proof is shifted away from [Mr Perna and Mr Montanelli]. ...

Moreover, the 'direct witnesses', Giuliano Ferrara and Saverio Vertone, are mentioned in connection with the above point [the forms taken by the complainant's militancy]; what has just been said about the vagueness and irrelevance of that point therefore applies equally to those persons. Furthermore, giving further details about facts of which they had direct knowledge would have had no bearing on the trial since these were assertions which the trial court did not consider offensive and to speak of this as exculpatory evidence is accordingly meaningless.

Lastly, Mr Caselli's militancy within the PCI has nothing to do with the specific facts attributed to him, and therefore with his alleged oath of obedience to via Botteghe Oscure (to which, however, this ground of appeal makes no allusion), with the relations between Caselli and Violante and above all with an alleged link with Buscetta.

Apart from the procedural aspect of the question, it should be stated at the outset that even the argument that the content of the article was not objectively offensive is absolutely devoid of foundation, as the judgment given by the trial court was justified in every respect as regards the offensive nature, for a man even more than for an officer of the State legal service, of imputations of specific facts implying a lack of personality, dignity, independent thought, coherence and moral honesty, and conduct signifying explicitly that there have been instances of dereliction of professional duty.
...

The trial court's reasoning on the extenuating circumstances of the right to report current events and the right to comment on them is also correct, as evidenced by an appropriate statement of the reasons which was free of mistakes in law and errors of logic.

No link can be established, and moreover no link was established by the Court of Appeal, between the personality [of Mr Caselli] and an alleged right to report current events exercised through the offensive imputation of facts which have not been proved to be true and play no informative role.

The essential point in the judgment is its categorical exclusion of the idea that the article expressed a critical judgment, hence the rejection of the plea that the right to freedom of expression constituted an extenuating circumstance. And in fact it is precisely by virtue of this comparative parameter and of its accessory powers of cognition that this court must repeat that the reasons given [by the Court of Appeal] are immune to criticism: the article is quite clearly a bare list of acts and conduct imputed to Mr Caselli in which there cannot be seen, even in veiled form, the slightest contribution to thought which might be regarded as a critical judgment, or even the attempt at irony which is said to be hidden in the elusive 'caustic phrases' referred to in the grounds of appeal. As the Court of Appeal concluded, this case was not about respect for the limits of formal propriety.

It follows from all of the foregoing considerations that, as it is impossible to speak of critical comment, there is no cause to expatiate about exercise of the right to comment, still less about the extenuating circumstance of gross negligence in the exercise of the right to comment or about the hypothetical exercise of that right.

..."

THE LAW

I. PRELIMINARY ISSUE: THE SCOPE OF THE CASE

21. In their request for the case to be referred to the Grand Chamber, and again at the hearing, the Government asserted that that part of the Court's judgment of 25 July 2001 which concerned the complaint under Article 6 §§ 1 and 3 (d) of the Convention would be final and would accordingly not fall within the scope of the present proceedings.

22. The applicant, on the other hand, asked the Court to hold that there had been violations of Articles 6 and 10 of the Convention.

23. The Court does not accept the Government's argument. As it has already had occasion to observe, the wording of Article 43 of the Convention makes it clear that, whilst the existence of "a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance" (paragraph 2) is a prerequisite for acceptance of a party's request, the consequence of acceptance is that the whole "case" is referred to the Grand Chamber to be decided afresh by means of a new judgment (paragraph 3). This being so, the "case" referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its judgment, the scope of its jurisdiction in the "case" being limited only by the Chamber's decision on admissibility. In sum, there is no basis for a merely partial referral of the case to the Grand Chamber (see *K. and T. v. Finland* [GC], no. 25702/94, §§ 139-41, ECHR 2001-VII, and *Göç v. Turkey* [GC], no. 36590/97, §§ 35-37, ECHR 2002-V).

24. The Court will therefore examine the two complaints under Articles 6 and 10 which were declared admissible by the Chamber and which were dealt with in its judgment.

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

25. The applicant alleged that his right to due process had been infringed on account of the Italian courts' refusal to admit the evidence he wished to adduce, including adversarial examination of the complainant. He asked the Court to find a violation of Article 6 §§ 1 and 3 (d), the relevant parts of which provide:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...

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

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

..."

26. The Government emphasised at the outset that the admissibility of evidence was a matter for the domestic courts and that the applicant's guilt had been confirmed by "courts at three levels of jurisdiction which examined the evidence adduced at the trial according to adversarial procedure". The domestic courts had thus taken the view that the evidence the applicant wished to adduce was not relevant to his trial and there was nothing to indicate that the refusal to admit that evidence had breached Article 6. Relying on the Court's established case-law, the Government observed that a defendant did not have an unlimited right to have witnesses called; he also had to show that the evidence of the witnesses he wished to have examined was necessary to establish the facts, which the applicant had not done in the instant case. None of the witness evidence he wished to adduce was relevant to the defamatory statements made in the offending article.

27. The applicant contested the Government's assertion that the domestic courts had convicted him on the basis of the evidence examined at his trial. In his submission, they had refused to admit the crucial evidence in any trial for defamation, namely examination of the complainant. The result had been that, as the defendant, he had been denied the most elementary of his rights, namely the right to ask the complainant to say, under oath, whether the facts which formed the basis of the criticisms in the article were true or false. Moreover, he had not been able to adduce any evidence at all, a fact which was symptomatic of the abnormal character of his trial. In particular, it was hard to understand how the courts could describe as irrelevant testimony about the complainant's political militancy at a time when he was already an officer in the State legal service, since that had been at the heart of the doubts he had expressed about Mr Caselli's independence. In basing his conviction on the impugned article alone, the relevant domestic courts had, in substance, regarded the trial itself as superfluous.

28. Mr Caselli, the third-party intervener, submitted that the evidence the applicant had sought to adduce was of no relevance to the object of the defamation proceedings.

29. The Court observes in the first place that the admissibility of evidence is primarily a matter for regulation by national law. The Court's task under the Convention is not to give a ruling as to whether statements of

witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among many other authorities, *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 711, § 50). In particular, "as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce ... Article 6 § 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses" (see *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 33). It is accordingly not sufficient for a defendant to complain that he has not been allowed to question certain witnesses; he must, in addition, support his request by explaining why it is important for the witnesses concerned to be heard and their evidence must be necessary for the establishment of the truth (see *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, pp. 38-39, § 91; and *Bricmont v. Belgium*, judgment of 7 July 1989, Series A no. 158, p. 31, § 89). That principle also applies where a defendant asks for the complainant in a defamation case to be examined.

30. The Court notes that at first instance the applicant asked for two press articles on Mr Caselli's professional relations with the criminal-turned-informer Mr Buscetta to be added to the file and for the former to be required to give evidence (see paragraph 15 above). On appeal, he repeated his request for the complainant to be examined and also asked for Mr Vertone and Mr Ferrara to be heard and for two further articles which had appeared in the press in December 1994 to be added to the file. These articles contained reports on interviews in which Mr Vertone and Mr Ferrara had stated that Mr Caselli had "all but joined the [Communist Party]" and was "heavily politicised" (see paragraph 17 above).

31. By those means the applicant sought to establish that Mr Caselli's political leanings, his friendship with Mr Violante and his professional relations with Mr Buscetta were facts. But the Italian courts which tried the merits of the case held that Mr Caselli's political convictions and any manifestation of them unconnected with the performance of his duties as State Counsel, the existence of ties of friendship between Mr Violante and Mr Caselli and the use of the statements made by Mr Buscetta, a criminal-turned-informer paid by the State, in the proceedings against Mr Andreotti were facts without any defamatory import. On the other hand, it was defamatory to say that the complainant had "managed the Andreotti investigation in furtherance of a grand political design hatched by Violante" in order to take power by non-electoral means, thus committing an abuse of authority for political ends. The offending article manifestly denied that Mr Caselli possessed "the qualities of impartiality, independence, objectivity and probity which characterise the exercise of judicial functions" by attributing to him conduct "signifying that there [had been] instances of

dereliction of professional duty" which "constituted disciplinary and criminal offences". As the Court of Cassation noted in its judgment of 9 October 1998, the applicant's requests for evidence to be admitted "were interpreted in accordance with their exact significance and probative value and were rightly refused because they were totally devoid of relevance to the decision" (see paragraph 20 above). The vague and irrelevant nature of the request for the proceedings to be reopened was, in the Court of Cassation's view, quite evident in the light of the tenor of the applicant's assertions: "the article set out to give a detailed account of the forms taken by [Mr Caselli's] militancy by imputing certain acts to Mr Caselli with the aim of proving that his militancy existed. Consequently, either this point remains vague or the problem is resolved by trying to make the complainant admit the facts noted in the charges, with the result that the burden of proof is shifted away from [Mr Perna and Mr Montanelli]. ..."

The Court agrees with the Italian courts that, even supposing that adding the two press articles to the file and taking evidence from Mr Caselli could have shed light on the latter's political leanings and his relations with third parties, those measures would not have been capable of establishing that he had failed to observe the principles of impartiality, independence and objectivity inherent in his duties. On that crucial aspect, at no time did the applicant try to prove the reality of the conduct alleged to be contrary to those principles. On the contrary, his defence was that these were critical judgments which there was no need to prove.

32. In the light of the above considerations, the Court considers that the decisions in which the national authorities refused the applicant's requests are not open to criticism under Article 6, as he had not established that his requests to produce documentary evidence and for evidence to be taken from the complainant and witnesses would have been helpful in proving that the specific conduct imputed to Mr Caselli had actually occurred. From that point of view, it cannot therefore be considered that the defamation proceedings brought by Mr Caselli against the applicant were unfair on account of the way the evidence was taken. The Court observes in passing, and although this is not decisive in the present case, that on 10 January 1996 the Monza District Court also ruled to be irrelevant the report on the evidence given by Mr Buscetta and the account of it given in a press article, documents which Mr Caselli's counsel had asked to be admitted in evidence in order to make clear what course the interview had taken (see paragraph 15 above).

In conclusion, there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

33. The applicant complained of an infringement of his right to freedom of expression, both because of the Italian courts' decisions on the merits and because of their procedural decisions, which had prevented him from proving that the offending article was an example of the right to report and comment on current events within the context of the freedom of the press. He relied on Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

34. As regards the second limb of that complaint, namely the Italian courts' refusal to admit the evidence the applicant wished to adduce, the Court considers that in substance it raises no issue separate from the one it has already determined in connection with Article 6 §§ 1 and 3 (d). Consequently, the Court will examine only the first limb, that is the applicant's conviction as such, from the standpoint of the substantive guarantees set forth in Article 10.

A. Arguments of the parties

1. The Government

35. Before the Court the Government submitted that the object of the decisions complained of by the applicant was to protect the reputation of others, namely the reputation of the Palermo public prosecutor, Mr Caselli, and to maintain the authority of the judiciary; they therefore pursued legitimate aims for the purposes of the second paragraph of Article 10. The applicant's assertions, far from concerning a matter of public debate, had been a personal affront to Mr Caselli. Referring to the Court's case-law on the question, the Government argued that, in view of the special place of the judiciary in society, it might prove necessary to protect it against unfounded attacks, especially where the duty of discretion prevented the targeted judges from reacting.

In accusing Mr Caselli of breaking the law, or at the very least of dereliction of his professional duties, the applicant had damaged not only his reputation but also public confidence in the State legal service. As the Milan Court of Appeal had observed, the applicant had not expressed opinions but had attributed conduct without checking his facts and without producing any concrete evidence to support his assertions.

36. In their request for the case to be referred to the Grand Chamber, and later at the hearing, the Government concentrated on the reasons which had led the Chamber to hold in its judgment of 25 July 2001 that there had been a violation of Article 10. In their submission, the finding of a violation had no factual basis: far from asserting that Mr Caselli's militancy was a matter of public knowledge, the Italian courts had held that the symbolic phrase about the oath of obedience was not defamatory, and that was why the request for evidence to be taken from the complainant had been refused as irrelevant.

2. The applicant

37. In the applicant's submission, a politically militant officer of the State legal service was inevitably influenced in the performance of his duties by his militancy. While it was possible to disagree with that opinion, it was not right to describe it as a very serious accusation and punish it with a criminal penalty without permitting the defence to adduce any evidence at all.

3. The third-party intervener

38. Mr Caselli submitted that the political militancy to which the Chamber had referred in its judgment of 25 July 2001 (paragraphs 28, 29, 41 and 42) was not stated as a fact in the decisions of the domestic courts. None of them had ever taken such militancy to have been established. In addition, Mr Caselli asserted that he had never hidden his beliefs (which should not be confused with militancy) and that he was a member of Magistratura Democratica, an association of officers of the State legal service represented within the National Council of the Judiciary.

B. The Court's assessment

1. General principles

39. The Court reiterates the following fundamental principles in this area:

(a) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is

applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among other authorities, *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, p. 23, § 31; *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I; *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII; and *Fuentes Bobo v. Spain*, no. 39293/98, § 43, 29 February 2000).

The press plays an essential role in a democratic society. Although it must not overstep certain bounds, regarding in particular protection of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest, including those relating to justice (see *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, pp. 233-34, § 37). Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, p. 27, § 63, and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III). Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, Series A no. 204, p. 25, § 57). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38, and *Thoma v. Luxembourg*, no. 38432/97, §§ 45 and 46, ECHR 2001-III).

(b) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see *Janowski*, cited above, § 30).

(c) In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the

reasons adduced by the national authorities to justify it are "relevant and sufficient" (see *Barfod v. Denmark*, judgment of 22 February 1989, Series A no. 149, p. 12, § 28, and *Janowski*, cited above, § 30). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see *Jersild*, cited above, p. 24, § 31; *Fuentes Bobo*, cited above, § 44; and *De Diego Nafría v. Spain*, no. 46833/99, § 34, 14 March 2002).

(d) The nature and severity of the penalty imposed are also factors to be taken into account when assessing the proportionality of the interference (see, for example, *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV, and *Tammer v. Estonia*, no. 41205/98, § 69, ECHR 2001-I).

2. Application of the above principles to the instant case

40. As the decisions of the domestic courts show, the applicant was committed for trial and later convicted for casting doubt on Mr Caselli's "faithfulness to the principle of legality, his objectivity and his independence" (see paragraph 18 above) by accusing him, among other allegations, of having carried on his profession improperly and acted illegally, particularly in connection with the prosecution of Mr Andreotti.

The courts took account of the following aggravating circumstances:

(i) the fact of having imputed to the injured party the acts mentioned (and even criminal acts as regards the criminal-turned-informer Buscetta);

(ii) the fact of having committed the act (defamation) to the detriment of a civil servant in the performance of his official duties.

The conviction at first instance was subsequently upheld by the Court of Appeal and the Court of Cassation (see paragraphs 18-20 above).

41. The conviction incontestably amounted to interference with the applicant's exercise of his right to freedom of expression. The question arises whether such interference can be justified under the second paragraph of Article 10. It therefore falls to be determined whether the interference was "prescribed by law", had a "legitimate aim" for the purposes of that paragraph and was "necessary in a democratic society" (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, pp. 24-25, §§ 34-37).

42. The Court notes that the competent courts based their decisions on Article 595 §§ 1 and 2 and Article 61 § 10 of the Criminal Code, and section 13 of the Press Act (Law no. 47 of 8 February 1948) (see paragraph 16 above) and that, as the Government submitted, the reasons for those decisions showed that they pursued a legitimate aim, namely protection of the reputation and rights of others, in this instance those of Mr Caselli, who was head of the Palermo public prosecutor's office at the time.

43. However, the Court must verify whether the interference was justified and necessary in a democratic society, and in particular whether it

was proportionate and whether the reasons given by the national authorities in justification for it were relevant and sufficient. It is thus essential to determine whether the national authorities made proper use of their power of appreciation in convicting the applicant of defamation.

44. The Monza District Court held that the defamatory nature of the article was "absolutely manifest", because the text excluded the possibility that Mr Caselli might be faithful to the deontological obligations of his duties as an officer in the State legal service and in addition denied that he possessed the qualities of impartiality, independence and objectivity which characterise the exercise of judicial functions. In short, the applicant's assertions amounted to nothing more than "an unjustified attack on the complainant, which foully besmirched his honour and reputation" (see paragraph 16 above).

45. The Court of Appeal held that some of the statements Mr Perna made about the complainant were not in the least defamatory. Others, on the contrary, which the applicant wrongly presented as judgments or opinions, had imputed conduct to Mr Caselli in a highly defamatory and gratuitous manner without any attempt to check the facts beforehand. The fact that the journalist had acted deliberately was fully confirmed by the content of the whole article, in which Mr Caselli had been "constantly and subtly denigrated". Its author had therefore indeed intended to damage another's reputation (see paragraphs 18 and 19 above).

46. Lastly, the Court of Cassation upheld the Court of Appeal's judgment, ruling that it was not open to criticism. It held that the factual statements made about Mr Caselli played no informative role and had not been proved to be true. The offensive nature of the article, for a man, even more than for an officer of the State legal service, was not in doubt, as the applicant had made imputations of specific facts implying a lack of personality, dignity, independent thought, coherence and moral honesty, and conduct signifying explicitly that there had been instances of dereliction of professional duty (see paragraph 20 above).

47. The Court observes that a finding of a violation of Article 10 cannot be excluded *a priori* where a defendant has been convicted by the domestic courts on the basis of a separate examination of the various assertions made in an article like the one in issue. In the present case, however, merely to scrutinise each of the statements taken into consideration by the national authorities in reaching their decision that the offence of defamation had been committed would be to lose sight of the article's overall content and its very essence. Mr Perna did not confine his remarks to the assertion that Mr Caselli harboured or had manifested political beliefs and that this justified doubts about his impartiality in the performance of his duties. It is quite apparent from the whole article – as the national authorities rightly noted – that the applicant sought to convey to the public the following clear and wholly unambiguous message: that Mr Caselli had knowingly

committed an abuse of authority, notably in precise circumstances connected with the indictment of Mr Andreotti, in furtherance of the alleged PCI strategy of gaining control of public prosecutors' offices in Italy. In that context, even phrases like the one relating to the "oath of obedience" take on a meaning which is anything but symbolic. The Court further observes that it has just found, in paragraph 31 of this judgment, that at no time did the applicant try to prove that the specific conduct imputed to Mr Caselli had actually occurred and that in his defence he argued, on the contrary, that he had expressed critical judgments which there was no need to prove.

48. Having regard to the foregoing, the Court considers that the applicant's conviction on account of his defamatory article and the sentence imposed on him (a fine of 1,500,000 Italian lire (ITL), payment of damages and costs in the sum of ITL 60,000,000, reimbursement of the civil party's costs and publication of the judgment) were not disproportionate to the legitimate aim pursued, and that the reasons given by the Italian courts in justification of those measures were relevant and sufficient. The interference with the applicant's exercise of his right to freedom of expression could therefore reasonably be regarded as necessary in a democratic society to protect the reputation of others within the meaning of Article 10 § 2.

There has accordingly been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention;

2. *Holds* by sixteen votes to one that there has been no violation of Article 10 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 6 May 2003.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Conforti is annexed to this judgment.

L.W.
P.J.M.

DISSENTING OPINION OF JUDGE CONFORTI

(*Translation*)

Annexed to the Chamber's judgment is a separate opinion in which I criticised the approach followed by the majority, particularly the fact that they considered the complaint about the procedural aspect separately from the complaint under Article 10. I would have preferred an overall approach focused on Article 10. The Grand Chamber has now endorsed the Chamber's approach and, like the Chamber, has held that the proceedings were not conducted in a manner incompatible with the principles laid down in Article 6. Moreover, it did not agree with the Chamber on the Article 10 issue, since it found that Article 10 had not been breached. For my part, I can only repeat the opinion I expressed in connection with the Chamber's judgment.

In my view, the issues raised in cases of this type are still Article 10 issues even where the procedure followed is concerned; and what can normally be tolerated from the point of view of due process according to the fair-trial rules laid down in Article 6 may not be acceptable when it is a matter of verifying whether an interference with freedom of expression is "necessary in a democratic society". In the present case the courts refused all requests for permission to adduce evidence and, what to my mind is exceptionally serious, refused to take evidence from the complainant, who could have and should have been examined by the applicant's counsel. It is not right to speculate beforehand about what the result of such an examination might be.

In the trial of a journalist for defamation of a judicial officer in the public prosecution service, the conduct of the domestic courts, whether intentional or not, gives the clear impression of intimidation, which cannot be tolerated in the light of the Court's case-law on restrictions of the freedom of the press. Indeed, the Italian courts acted very speedily in determining the charges against the applicant in less than four years, at three levels of jurisdiction. However, that circumstance too, although praiseworthy from the point of view of the reasonable length of judicial proceedings, cannot fail to reinforce – in a country condemned many times for the length of its proceedings – the impression I mentioned above.

That is why I consider that there has been a violation of Article 10.

In expressing my opinion, I do not need to emphasise the importance I attach to the freedom of the press. In that connection it is striking how many actions are brought by judicial officers against journalists in Italy and how large are the sums awarded by the Italian courts in damages, as the Press Association complained in 1999 (see *Ordine dei giornalisti, Tutela della reputazione e libertà di stampa, Contenuti e riflessioni sul Convegno di Roma Citazioni e miliardi*, Rome, 1999).

As freedom of the press is my only concern, I regret that I have had to express my opinion in a case which involves a judicial officer – the third-party intervener – whom every Italian citizen must admire for risking his life in the fight against the Mafia.

In the case of Prager and Oberschlick v. Austria (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr F. Gölcüklü,
Mr F. Matscher,
Mr L.-E. Pettiti,
Mr C. Russo,
Mr S.K. Martens,
Mr R. Pekkanen,
Mr F. Bigi,
Mr J. Makarczyk,

and also of Mr H. Petzold, Registrar,

Having deliberated in private on 24 November 1994 and 22 March 1995,

Delivers the following judgment, which was adopted on the last-mentioned date:

_____

Notes by the Registrar

1. The case is numbered 13/1994/460/541. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

_____

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 15 April 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 15974/90) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by two Austrian nationals, Mr Michael Prager and Mr Gerhard Oberschlick, on 21 December 1989.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 10 and 14

(art. 10, art. 14) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30). The President of the Court gave the lawyer in question leave to use the German language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 April 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr L.-E. Pettiti, Mr C. Russo, Mr S.K. Martens, Mr R. Pekkanen, Mr F. Bigi and Mr J. Makarczyk (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Austrian Government ("the Government"), the applicants' lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence the Registrar received the Government's memorial on 16 September 1994 and the applicants' memorial on 6 October. On 25 October the Commission produced various documents, as requested by the Registrar on the President's instructions. On 28 October the Secretary to the Commission informed the Registrar that the Delegate would make his submissions at the hearing.

5. On 25 August 1994 the President had authorised, under Rule 37 para. 2, two international human rights organisations, "Article 19" and "Interights", to submit written observations on specific aspects of the case. Their observations reached the registry on 10 October.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 November 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr W. Okresek, Head of the International
Affairs Division, Constitutional Service,
Federal Chancellery, Agent,
Mr S. Benner, prosecutor, Federal Ministry of
Justice,
Mrs E. Bertagnoli, Human Rights Division,
International Law Department,
Federal Ministry of Foreign Affairs, Advisers;

(b) for the Commission

Mr H.G. Schermers, Delegate;

(c) for the applicants

Mr G. Lansky, Rechtsanwalt, Counsel.

Mr Prager was also present.

The Court heard addresses by Mr Schermers, Mr Lansky, Mr Prager and Mr Okresek.

AS TO THE FACTS

I. Circumstances of the case

7. Mr Prager and Mr Oberschlick are journalists and live in Vienna. The latter is the publisher (Medieninhaber) of the periodical Forum.

A. The article in Forum

8. On 15 March 1987 Forum no. 397/398 published an article by Mr Prager entitled "Danger! Harsh judges!" (Achtung! Scharfe Richter!). The article, which was thirteen pages long, contained criticism of the judges sitting in the Austrian criminal courts. He gave as sources for his article, in addition to his own experience of attending a number of trials, statements of lawyers and legal correspondents and surveys carried out by university researchers.

After a short summary of his main contention, followed by a general introduction, he described in detail the attitude of nine members of the Vienna Regional Criminal Court (Landesgericht für Strafsachen), including that of Judge J.

1. The summary

9. The summary was worded as follows:

> "They treat each accused at the outset as if he had already been convicted. They have persons who have travelled from abroad arrested in court on the ground that there is a danger that they will abscond. They ask people who are unconscious after fainting whether they accept their sentence. Protestations of innocence are greeted on their part with a mere shrug of the shoulders and attract for their authors the heaviest sentence because they have not confessed. - Some Austrian criminal court judges are capable of anything; all of them are capable of a lot: there is a pattern to all this."

2. The general introduction

10. In the general introduction the journalist attacked in the first place the judges who, according to him, for years exercised absolute power "in the domain of their court", exploiting the smallest weaknesses or peculiarities in the accused. The susceptibility of judges was capable of turning the courtroom into a "battlefield"; a convicted person who caused even the slightest offence to the self-esteem of a judge risked, through the effect of the latter's so-called unfettered

discretion to assess the evidence, an extra year of imprisonment or losing the possibility of having his sentence suspended.

Mr Prager then criticised judges who acquitted only as a last resort, who handed down much heavier sentences than most of their colleagues, who treated lawyers like miscreants, who harassed and humiliated the accused to an excessive degree, who extended remand detention beyond the maximum duration of the sentence risked and who disregarded the jury's verdict when they did not agree with it. He maintained that their independence served only to inflate inordinately their self-importance and enabled them to apply the law in all its cruelty and irrationality, without any scruples and without anyone being able to oppose them.

Mr Prager continued by recounting his personal experiences from meeting judges and visiting courtrooms, referring in this connection to the "arrogant bullying" (menschenverachtende Schikanen) of Judge J.

3. The description of the judges

11. The article also gave a description of a number of individual judges. That of Judge J. read as follows:

> "Type: rabid ... [J.].
>
> ...
>
> [J.], addressing the Vienna lawyer [K.], counsel for the defence, some years ago: `Keep it short. I've already reached my decision.'
>
> [J.]: a judge who does not allow probation officers to sit down in his office. In fact he refuses to speak to them.
>
> [J.]: a judge who once laid a complaint against a prostitute because he had already paid her when she and her pimp vanished without anything having happened. She probably thought that her client was too drunk to notice the difference. [J.] however lay in wait and took down the car's registration number.
>
> [J.]'s complaint resulted in the prostitute's conviction - and disciplinary proceedings for himself, which proved really effective because the smutty story, which at least says a lot for [J.]'s pigheadedness, got into the newspapers.
>
> Despite all this he almost became a public prosecutor. But the press revealed a story in which his name cropped up again, this time in connection with criminal proceedings and the suspicion of having given legal advice without due authorisation (Winkelschreiberei). Two men, Mr L. and his son, were accused of having obtained money from people wishing to buy flats in old buildings, by means of fraudulent contracts. When it became clear that the contracts had been drawn up by [J.], the prosecution changed tactics:

suddenly it was no longer the contracts that were fraudulent, but the intention which lay behind their use.

[J.] remained a judge instead of becoming a public prosecutor. The editors of Kurier [an Austrian daily newspaper] now regret this because a public prosecutor is less dangerous.

In September Profil [an Austrian magazine] showed why. In his capacity as an investigating judge, [J.] had left a drug addict in detention on remand for over one year, although the remand prisoner's officially appointed defence counsel repeatedly told him that he was mistaken about the quantity of drugs involved and that the relevant sentence would be from four to six months' imprisonment.

Notwithstanding this, rather than forwarding the final plea of nullity to the Supreme Court, as he was required to do by the regulations, he transmitted it to the Court of Appeal and to the President of the Court of Appeal, who took a further three months to consider whether the man should be released from prison and whether any mistakes had been made by the investigating judge.

A photocopier would have spared the prisoner at least those three months. Released at the beginning of March by the new judge to whom the case-file had been forwarded by the Supreme Court judges, the case having at last been brought before them, the prisoner, who had spent thirteen months in prison, was finally sentenced to five months' imprisonment at the end of March.

The two defence lawyers appointed by the authorities to act for [J.]'s victim calculate that the lawyers' fees alone up to that date amounted to 85,000 schillings.

All this does not seem to have left Judge [J.] unscathed. The tall, bearded judge has a deep, resonant voice. Yet throughout the trial of Marianne O., the `holiday-thief', a persistent tick was to be seen on the face of Judge [S.]'s colleague on the Bench.

Then the jury's verdict was suspended and defence counsel [G.] found himself facing disciplinary proceedings."

B. The action for defamation

12. On 23 April 1987 Judge J. brought an action against Mr Prager for defamation (üble Nachrede, Article 111 of the Austrian Criminal Code - see paragraph 18 below). In addition to the seizure of the relevant Forum issue and the publication of extracts of the judgment, he sought, inter alia, damages from the publisher and an order imposing a fine on the latter jointly and severally with the author and requiring them to pay the legal costs (sections 33 to 36 of the Media Act - Mediengesetz, see paragraph 19 below).

13. On 11 May 1987 the applicants challenged the Vienna Regional Criminal Court and the Vienna Court of Appeal (Oberlandesgericht). On 5 August the Supreme Court (Oberster Gerichtshof) dismissed the challenge concerning the Court of Appeal. On 17 September it allowed that directed against the Vienna Regional Criminal Court and transferred the case to the Eisenstadt Regional Court.

1. At first instance

14. On 11 October 1988 the Eisenstadt Regional Court found Mr Prager guilty of having defamed Judge J. by passages in the impugned article, which were cited as follows:

(1) "They treat each accused at the outset as if he had already been convicted."

(2) "Some Austrian criminal court judges are capable of anything."

(3) "Nothing was comparable to ... Judge [J.]'s arrogant bullying."

(4) "Type: rabid ... [J.]."

(5) "Despite all this he almost became a public prosecutor. But the press revealed a story in which his name cropped up again, this time in connection with criminal proceedings and the suspicion of having given legal advice without due authorisation. Two men, Mr L. and his son, were accused of having obtained money from people wishing to buy flats in old buildings, by means of fraudulent contracts. When it became clear that the contracts had been drawn up by [J.], the prosecution changed tactics: suddenly it was no longer the contracts that were fraudulent, but the intention which lay behind their use.

[J.] remained a judge instead of becoming a public prosecutor. The editors of Kurier now regret this because a public prosecutor is less dangerous."

Applying Article 111 of the Criminal Code, the Regional Court sentenced Mr Prager to 120 day fines at the rate of 30 schillings (ATS) per day and to sixty days' imprisonment in the event of non-payment. Mr Oberschlick was ordered to pay Judge J. damages of ATS 30,000 and was declared jointly and severally liable with the first applicant in respect of the fine and the legal costs (sections 6 (1) and 35 of the Media Act). Finally, the court ordered the confiscation of the remaining stocks of the relevant issue of Forum and the publication of extracts from its judgment.

15. In the grounds of its judgment the Regional Court noted in the first place that the objective elements of the offence of defamation were made out. Of the contested passages, nos. 2 and 4 openly attributed to the plaintiff a despicable character or attitude (eine verächtliche Eigenschaft oder Gesinnung), while nos. 1, 3 and 5 accused him of conduct that was dishonourable and

dishonest and that could objectively expose him to contempt or denigrate him in the public eye (ein unehrenhaftes und gegen die guten Sitten verstoßendes Verhalten, das objektiv geeignet ist, ihn in der öffentlichen Meinung verächtlich zu machen oder herabzusetzen). In short, confronted with such wholesale criticism, an impartial reader had little choice but to suspect that the plaintiff had behaved basely (ehrloses Verhalten) and that he was of despicable character (verächtliche Charaktereigenschaften), and the author had, moreover, been perfectly well aware of this.

The Regional Court then examined Mr Prager's applications for the production of documents and testimony intended to establish the truth of his statements and the journalistic care that he had exercised in writing the article. The court took the view that only passages nos. 1, 3 and 5 were susceptible to this type of proof, as the other statements were value-judgments. After considering the matter, it decided that none of the evidence offered could sufficiently substantiate the allegations in issue.

Thus statement no. 1, according to which Judge J. treated every accused at the outset as if he had already been convicted, was not proved merely by the fact that the judge in question had, in a given case, asked defence counsel to be brief, as he had already made up his mind. Similarly, the three decisions of Judge J. reported by Mr Prager in support of statement no. 3 were not sufficient to bear out the allegation that the judge had adopted bullying tactics. None of these decisions disclosed the slightest intention to cause unnecessary suffering. Lastly, the accusations made in passage no. 5 had been definitively refuted by a disciplinary decision of the Vienna Court of Appeal of 6 December 1982. The two files whose production the applicant had requested could not alter the position, since the first contained no information on the personality of Judge J. and the second, relating to the judge's candidature for the office of public prosecutor, had to remain confidential.

In the court's view, Mr Prager had also failed to prove that he had written the article in issue with the care required of journalists by section 29 (1) of the Media Act (see paragraph 19 below). Not content with having denied Judge J. an opportunity to answer the accusations levelled against him, his research had been conducted in a very superficial manner; moreover, he had himself admitted that he had not attended any trials presided over by Judge J., that he had reproduced the content of old newspaper articles without checking their accuracy and had represented as true allegations based on hearsay.

2. On appeal

16. On 26 June 1989 the Vienna Court of Appeal upheld this judgment, but reduced the damages to ATS 20,000 (see paragraph 14 above). It held in particular that the Regional Court had in no way infringed the rights of the defence by dismissing as immaterial the evidence that Mr Prager had sought to adduce. This situation had arisen because of the way in which he had formulated his criticism. It had been so comprehensive and general that it had been impossible to specify evidence capable of establishing its accuracy. The case could, moreover,

be distinguished from the case of Lingens v. Austria (judgment of the European Court of Human Rights of 8 July 1986, Series A no. 103) in that it concerned the affirmation of various facts rather than the expression of value-judgments. As regards the care that journalists are required to exercise in pursuing their profession, it must obey the rule "audiatur et altera pars".

17. The remaining copies of the issue in question were never in fact seized (see paragraph 14 above).

II. Relevant domestic law

1. The Criminal Code

18. Article 111 of the Criminal Code provides:

> "1. Anyone who in such a way that it may be perceived by a third party accuses another of possessing a contemptible character or attitude or of behaviour contrary to honour or morality and of such a nature as to make him contemptible or otherwise lower him in public esteem shall be liable to imprisonment not exceeding six months or a fine ...
>
> 2. Anyone who commits this offence in a printed document, by broadcasting or otherwise in such a way as to make the defamation accessible to a broad section of the public shall be liable to imprisonment not exceeding one year or a fine ...
>
> 3. The person making the statement shall not be punished if it is proved to be true. As regards the offence defined in paragraph 1, he shall also not be liable if circumstances are established which gave him sufficient reason to assume that the statement was true."

Article 112 provides:

> "Evidence of the truth and of good faith shall not be admissible unless the person making the statement pleads the correctness of the statement or his good faith ..."

Under Article 114 para. 1 "conduct of the kind mentioned in Article 111 ... is justified if it constitutes the fulfilment of a legal duty or the exercise of a right". Under paragraph 2 of the same provision "a person who is forced for special reasons to make an allegation within the meaning of Article 111 ... in the particular form and manner in which it was made, shall not be guilty of an offence, unless that allegation is untrue and he could have realised this if he had exercised due care ...".

2. The Media Act

19. Section 6 of the Media Act provides for the strict liability of the publisher in cases of defamation; the victim can thus claim damages from him. Furthermore, the publisher may be declared to be liable jointly and severally with the person convicted of a media offence for the fines imposed and for the costs of the proceedings (section 35).

The person defamed may request the forfeiture of the publication by which a media offence has been committed (section 33). Under section 36 he may also request the immediate seizure of such a publication if section 33 is likely to be applied subsequently, unless the adverse consequences of seizure would be disproportionate to the legal interest to be protected by this measure. Seizure shall not be ordered if that interest can instead be protected by the publication of information that criminal proceedings have been instituted (section 37). Finally, the victim may request the publication of the judgment in so far as this appears necessary for the information of the public (section 34).

Section 29 (1) provides, inter alia, that publishers and journalists will avoid conviction of an offence in respect of information susceptible to proof as to its accuracy, not only if they provide such proof, but also if there was a major public interest in publishing the information and reasons which, in exercising proper journalistic care, justified giving credence to the statement in question.

PROCEEDINGS BEFORE THE COMMISSION

20. In their application (no. 15974/90) lodged with the Commission on 21 December 1989, Mr Prager and Mr Oberschlick complained that their convictions constituted a violation of their right to freedom of expression guaranteed under Article 10 (art. 10) of the Convention and that the order confiscating the remaining copies of the periodical amounted to discrimination prohibited under Article 14 taken in conjunction with Article 10 (art. 14+10). They also alleged a violation of Articles 6 and 13 (art. 6, art. 13) of the Convention.

21. On 29 March 1993 the Commission declared the complaints concerning Articles 10 and 14 (art. 10, art. 14) admissible and the remainder of the application inadmissible. In its report of 28 February 1994 (Article 31) (art. 31), the Commission expressed the opinion by fifteen votes to twelve that there had been no violation of Article 10 (art. 10) and unanimously that there had been no violation of Article 14 read in conjunction with Article 10 (art. 14+10).

The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment (1).

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1. Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 313 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS TO THE COURT

22. In their memorial the Government requested the Court:

(a) to declare inadmissible the complaints of the second applicant based on a violation of Articles 14 and 10 of the Convention taken together (art. 14+10) and Article 10 (art. 10) taken in isolation for respectively failure to exhaust

domestic remedies and lack of status of victim;

(b) to hold that the applicants have not been the victims of a breach of Article 10 (art. 10).

23. The applicants invited the Court to find a violation of Article 10 (art. 10).

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10) OF THE CONVENTION

24. The applicants complained of a violation of their right to freedom of expression as guaranteed under Article 10 (art. 10) of the Convention, which is worded as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The Government's preliminary objection

25. The Government contended, as they had done unsuccessfully before the Commission, that Mr Oberschlick could not claim to be a "victim" within the meaning of Article 25 para. 1 (art. 25-1) of the Convention. Inasmuch as he had simply published an article that he had not written himself, he could not be said to have exercised his own freedom of expression. In addition he had not sustained any pecuniary damage as a result of the proceedings brought against him: he had not had to pay anything, as joint debtor, in respect of the fine and the procedural costs and he could claim reimbursement from Mr Prager for any other expenditure incurred in connection with the convictions (see paragraphs 14-15 above).

26. By "victim" Article 25 (art. 25) means the person directly affected by the act or omission which is in issue, a violation being conceivable even in the absence of any detriment; the latter is relevant only to the application of Article 50 (art. 50) (see, inter alia, the Groppera Radio AG and Others v. Switzerland judgment of 28 March 1990, Series A no. 173, p. 20, para. 47).

27. Like the Commission and the applicants, the Court notes that the criminal proceedings initiated by Judge J.'s complaint were directed at both Mr Prager and Mr Oberschlick. The latter was personally convicted for having published an article in his periodical (see paragraph 14 above). He was therefore directly affected by the decisions of the Eisenstadt Regional Court and the Vienna Court of Appeal. He can, accordingly, claim to be a victim of the alleged violation.

In conclusion, the Government's preliminary objection falls to be dismissed.

B. Merits of the complaint

28. It is not in dispute that Mr Prager's conviction for defamation and the other measures of which the applicants complained amounted to an "interference" with the exercise by them of their freedom of expression.

That interference infringed Article 10 (art. 10) unless it was "prescribed by law", pursued one or more of the legitimate aims set out in paragraph 2 of Article 10 (art. 10-2) and was "necessary in a democratic society" to attain such aim or aims.

1. "Prescribed by law"

29. In the applicants' submission, Article 111 of the Austrian Criminal Code and section 29 of the Media Act could not be regarded as "law" within the meaning of the Convention. In so far as these provisions left it solely to the complainant to determine which passages of a text were to be the subject of the proceedings and prevented the accused from adducing evidence of material facts, their application did not afford a sufficient degree of foreseeability.

30. In several earlier cases, the Court found that Article 111 of the Criminal Code had the characteristics of "law" (see the following judgments: Lingens, cited above, p. 24, para. 36; Oberschlick v. Austria, 23 May 1991, Series A no. 204, p. 24, para. 54; Schwabe v. Austria, 28 August 1992, Series A no. 242-B, pp. 31-32, para. 25). Nor is there anything to warrant a different conclusion with regard to section 29 of the Media Act. The uncertainties linked to the application in this instance of these two provisions did not exceed what the applicants could expect, if need be after having sought appropriate advice (see, mutatis mutandis, the Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria judgment of 19 December 1994, Series A no. 302, pp. 18-19, para. 46).

2. Whether the aim pursued was legitimate

31. Like the Commission, the Court sees no reason to doubt that the decisions in issue were intended, as the Government affirmed, to protect the reputation of others, in this case Judge J., and to maintain the authority of the judiciary, which are legitimate aims for the purposes of Article 10 para. 2 (art. 10-2).

3. Necessity of the interference

32. The applicants argued that the convictions were in no way justified. By giving a brief character-sketch of various representative members of the Vienna Regional Criminal Court, Mr Prager had merely raised certain serious problems confronting the Austrian system of criminal justice. In this type of magazine, recourse to caricature and exaggeration was common practice as a means of attracting the readers' attention and increasing their awareness of the issue dealt with. The author had on no account abused this technique in this instance, especially in view of the fact that his article had appeared in a periodical for intellectuals capable of discernment. Moreover, of the nine judges described, only Judge J. had laid a complaint.

At the same time Mr Prager and Mr Oberschlick criticised the proceedings conducted against them. They had been denied adequate means to defend themselves. Judge J. had identified on his own, and without his choice being open to challenge, the passages of the article liable to give rise to a conviction; he had thus isolated various general sentences and expressions from their context - in particular passages nos. 1 and 2 (see paragraph 14 above) - and had incorrectly presented them as being directed against himself. The Regional Court had not only operated a flawed distinction between the allegations (passages nos. 1, 3 and 5) and the value-judgments (passages nos. 2 and 4), but it had also improperly denied the applicants the right to prove various events capable of establishing that the former were true and that the latter were fair comment (see paragraph 15 above). As regards the facts in respect of which the court had allowed evidence to be adduced, it had, in breach of the law, placed the onus of showing that they were true facts on the accused. This was an approach that would ultimately deter journalists from taking an interest in the system of justice.

Finally, it was incorrect to claim that Mr Prager had not exercised due journalistic care in writing his article. On the contrary, he had based his text on research conducted over a period of six months during which he had contacted lawyers, judges and academics. In addition, for three and a half months he had attended hearings in the Vienna Courthouse on a daily basis.

33. The Government maintained that, far from stimulating debate on the functioning of the Austrian system of justice, the relevant extracts of the article had only contained personal insults directed at Judge J., despite the fact that the latter had done nothing to provoke Mr Prager. They did not therefore merit the enhanced protection accorded to the expression of political opinions. The author had failed to prove the truth of his affirmations quite simply because they were unfounded. The opinions expressed by Mr Prager could not qualify for total immunity just because they were not susceptible to verification as to their accuracy. Penalties had been imposed in respect of those statements because they had overstepped the limits of acceptable criticism. Mr Prager could not plead good faith in his defence as he had neglected the most elementary rules of journalism, in particular those which require a journalist to verify personally the truth of information obtained and to give the persons concerned by such information the opportunity to comment on it.

34. The Court reiterates that the press plays a pre-eminent role in a State governed by the rule of law. Although it must not overstep certain bounds set, inter alia, for the protection of the reputation of others, it is nevertheless incumbent on it to impart - in a way consistent with its duties and responsibilities - information and ideas on political questions and on other matters of public interest (see, mutatis mutandis, the Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 23, para. 43).

This undoubtedly includes questions concerning the functioning of the system of justice, an institution that is essential for any democratic society. The press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them.

Regard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying.

35. The assessment of these factors falls in the first place to the national authorities, which enjoy a certain margin of appreciation in determining the existence and extent of the necessity of an interference with the freedom of expression. That assessment is, however, subject to a European supervision embracing both the legislation and the decisions applying it, even those given by an independent court (see, inter alia, the Barfod v. Denmark judgment of 22 February 1989, Series A no. 149, p. 12, para. 28).

36. In the Court's opinion the classification of the passages in issue as value-judgments and allegations of fact comes within the ambit of that margin of appreciation.

Of the accusations levelled by those allegations, some were extremely serious. It is therefore hardly surprising that their author should be expected to explain himself. By maintaining that the Viennese judges "treat each accused at the outset as if he had already been convicted", or in attributing to Judge J. an "arrogant" and "bullying" attitude in the performance of his duties, the applicant had, by implication, accused the persons concerned of having, as judges, broken the law or, at the very least, of having breached their professional obligations. He had thus not only damaged their reputation, but also undermined public confidence in the integrity of the judiciary as a whole.

37. The reason for Mr Prager's failure to establish that his allegations were true or that his value-judgments were fair comment lies not so much in the way in which the court applied the law as in their general character; indeed it is that aspect that seems to have been at the origin of the penalties imposed.

As the Commission pointed out, the evidence shows that the relevant decisions were not directed against the applicant's use as such of his freedom of expression in relation to the system of justice or even the fact that he had criticised certain judges whom he had identified by name, but rather the excessive breadth of the accusations, which, in the absence of a sufficient factual basis, appeared unnecessarily prejudicial. Thus the Eisenstadt Regional Court stated in its judgment that "confronted with such wholesale criticism, an impartial reader had little choice but to suspect that the plaintiff had behaved basely and that he was of despicable character" (see paragraph 15 above).

Nor, in the Court's view, could Mr Prager invoke his good faith or compliance with the ethics of journalism. The research that he had undertaken does not appear adequate to substantiate such serious allegations. In this connection it suffices to note that, on his own admission, the applicant had not attended a single criminal trial before Judge J. Furthermore he had not given the judge any opportunity to comment on the accusations levelled against him.

38. It is true that, subject to paragraph 2 of Article 10 (art. 10-2), freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the community (see, mutatis mutandis, the Castells judgment, cited above, p. 22, para. 42, and the Vereinigung demokratischer Soldaten Österreichs and Gubi judgment, cited above, p. 17, para. 36). In addition, the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.

However, regard being had to all the circumstances described above and to the margin of appreciation that is to be left to the Contracting States, the impugned interference does not appear to be disproportionate to the legitimate aim pursued. It may therefore be held to have been "necessary in a democratic society".

39. In conclusion no violation of Article 10 (art. 10) has been established.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 10 (art. 14+10)

40. In their application to the Commission, Mr Prager and Mr Oberschlick also alleged a violation of Article 14 of the Convention taken in conjunction with Article 10 (art. 14+10) (see paragraph 20 above). They did not, however, raise this complaint before the Court and the Court does not consider it necessary to examine this issue of its own motion.

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objection;

2. Holds by five votes to four that there has been no violation of Article 10 (art. 10) of the Convention;

3. Holds unanimously that it is not necessary to examine the complaint based on Article 14 of the Convention taken in conjunction with Article 10 (art. 14+10).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 April 1995.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr Pettiti;

(b) dissenting opinion of Mr Martens, joined by Mr Pekkanen and Mr Makarczyk.

Initialled: R. R.

Initialled: H. P.

DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I wish to express my agreement with Mr Martens's dissenting opinion.

I would cite in addition the following points as reasons for my opinion.

Journalistic investigation of the functioning of the system of justice is indispensable in ensuring verification of the protection of the rights of individuals in a democratic society. It represents the extension of the rule that proceedings must be public, an essential feature of the fair trial principle.

Judges, whose status carries with it immunity and who in most member States are shielded from civil litigation, must in return accept exposure to unrestricted criticism where it is made in good faith.

This is the trend internationally.

The situation in America is that judges holding office as elected members of the judiciary are subject to wholly unrestricted criticism. The American Bar Association journal publishes 250,000 copies of a table dealing with judges' conduct and the criticism is sometimes severe.

Clearly judges must be protected from defamation, but if they wish to institute proceedings it is preferable for them to

opt for the civil avenue rather than criminal proceedings. States that allow judicial proceedings to be televised accept by implication that the judge's conduct is exposed to the critical view of the public. The best way of ensuring that objective information is imparted to the public for its education is to secure fuller and franker co-operation between the judicial authorities and the press.

DISSENTING OPINION OF JUDGE MARTENS, JOINED BY JUDGES PEKKANEN AND MAKARCZYK

1. There is only one point of disagreement between me and the majority of the Court. Since its Barthold judgment (1) the Court has consistently held that, in view of the importance of the rights and freedoms guaranteed in paragraph 1 of Article 10 (art. 10-1), the Court's supervision must be strict, which means inter alia that the necessity for restricting them must be convincingly established (2). Although the wording used by the majority may give rise to doubt (3), it must be assumed that they did not wish to depart from this doctrine and that they are therefore of the opinion that it has been established convincingly that the impugned interference with the applicants' right to freedom of expression was "necessary in a democratic society". For the reasons set out below I have - eventually - come to the conclusion that I am unable to share that opinion.

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1. Judgment of 25 March 1985, Series A no. 90, p. 25, para. 55.

2. See, as the most recent authority, the Jersild v. Denmark judgment (Grand Chamber) of 23 September 1994, Series A no. 298, p. 26, para. 37. See for earlier judgments inter alia: the Autronic AG v. Switzerland judgment of 22 May 1990, Series A no. 178, pp. 26-27, para. 61, and the Informationsverein Lentia and Others v. Austria judgment of 24 November 1993, Series A no. 276, p. 15, para. 35.

3. See especially paragraph 38: "... the impugned interference does not appear to be disproportionate to the legitimate aim pursued. It may therefore be held to have been 'necessary in a democratic society'."

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2. "Eventually", for I must confess that a first reading of Mr Prager's article (4) left me with a rather unfavourable impression. This was, I felt, a case of a self-conscious, perhaps even self-righteous journalist, clearly without legal education or experience and, as clearly, with a strong bias against criminal justice, who was nevertheless convinced that he was entitled to publish a caustic article on the subject, pillorying nine judges. A journalist, moreover, who consistently preferred stylistic effects - and especially malicious effects - to clarity and moderation.

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4. It is a pity that a complete translation of the article is not available; the reader of the Court's judgment must be content with the Court's synopsis (paragraphs 8-11 of the judgment) which, although not incorrect, would seem in places to be somewhat coloured by the Court's overall assessment of the article and in any event cannot give a good idea of the original text of thirteen pages.

Such first, rather strong, negative impressions are dangerous for a judge. He must be conscious of them and remain vigilant against the bias they tend to create. One wonders whether the Austrian judges did so.

3. A second reading obliged me, however, to reappraise my first impressions. It convinced me that Mr Prager, after his curiosity had been aroused by academic literature, not only spent a lot of time and energy in verifying on the spot the reasons for the phenomena described by sociologists, but was honestly shocked by what he found.

The sociologists had noticed marked differences between the way criminal justice was dispensed within the jurisdiction of the Vienna Court of Appeal compared with the rest of Austria. Within the Vienna jurisdiction detention on remand was much more readily ordered and for much longer periods than elsewhere and sentences were nearly twice as severe (5).

5. It is to be noted that before the Court the Government did not even try to refute these findings.

Mr Prager went to the Vienna Regional Criminal Court to see whether he could find an explanation for these differences. After six months' personal fact finding (6) he evidently became convinced that, as far as that court was concerned, the explanation was to be found both in the personalities of the judges who formed that court and in their esprit de corps.

6. According to the applicant the fact finding took him six months; for at least three and a half months he visited the court on a daily basis.

As his article shows, he was not only shocked but filled to the brim with sincere indignation. There can be no doubt about that. However, before venting his feelings he thought things over, trying to explain what he had seen by reference to some specific features of the Austrian system of criminal justice. This is done in the introductory part of his article. There Mr Prager draws attention to the terrible power of a criminal judge and, against that background, to the dangers of his holding office for years, without being subject to any real supervision. Power corrupts, he suggests, also in criminal courts. Outside scrutiny is, therefore, indispensable. He certainly has a point there and it is a point that should be taken into account (7). On the other hand, when Lord Denning said that judges from the nature of their position cannot reply to criticism, he too made a point that has, to a certain extent, to be borne in mind (8).

7. See, as expressing the same idea, paragraph 34 of the Court's judgment.

8. I agree that public confidence in the judiciary is important (see paragraph 34 of the judgment), but rather doubt whether that confidence is to be maintained by resorting to criminal

proceedings to condemn criticism which the very same judiciary may happen to consider as "destructive".

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4. Before I take my analysis of the impugned article further, it is worth recalling that Judge J., one of the judges criticised, felt that Mr Prager's article was defamatory and started a private prosecution under Article 111 of the Austrian Criminal Code (9). No doubt some of the passages specifically referring to Judge J. (10) were indeed - objectively - defamatory. Under the Convention, however, Mr Prager could only have been convicted and sentenced for defamation if the national courts, having properly construed and assessed the impugned article as a whole, on balancing the demands of protection of free speech against those of the protection of the reputation of others, found that the latter carried greater weight in the circumstances of this case. The Court's review is not restricted to the second part of their findings: in cases where freedom of expression is at stake, the Court

> "will look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are relevant and sufficient".

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9. See paragraph 18 of the judgment.

10. See for a translation of the passages on which the private prosecution was based: paragraph 14 of the judgment.

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In other words: what the Court had to do was to scrutinise the persuasiveness of the reasons given for Mr Prager's conviction and sentence.

> "In doing so the Court has to satisfy itself that the national authorities did apply standards which were in conformity with the principles embodied in Article 10 (art. 10) and, moreover, that they based themselves on an acceptable assessment of the relevant facts" (11).

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11. The Court has said so several times, but the quotation comes, like the preceding one, from its above-mentioned Grand Chamber judgment in the case of Jersild, pp. 23-24, para. 31.

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Striking a fair balance between the right to freedom of expression and the need to protect the reputation of others is, obviously, only feasible when what has been expressed has been properly construed and assessed within its context. Consequently, in order to fulfil its task as the ultimate guarantor of the right to freedom of expression, the European Court of Human Rights cannot confine itself to reviewing the national courts' balancing exercise, but must necessarily also - and firstly - examine their interpretation and assessment of the statements in question. Only this double check enables the Court to satisfy itself that the right to freedom of expression has not been unduly curtailed (12).

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12. The first sub-paragraph of paragraph 36 of the judgment

suggests that to decide whether an impugned statement should be classified a statement of fact or a value-judgment is in principle for the national courts which should be left a margin of appreciation. In my opinion this suggestion is both incompatible with the rule that the Court has to satisfy itself that the national authorities did apply standards which were in conformity with the principles embodied in Article 10 (art. 10) and have based themselves on an acceptable assessment of the relevant facts (see in the text above); moreover it is a regrettable departure from such judgments as Lingens (Series A no. 103), Oberschlick (Series A no. 204) and Schwabe (Series A no. 242-B).

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5. I resume my analysis of the impugned article. After the aforementioned "theoretical" introduction (see paragraph 3 above) it relates and comments on Mr Prager's experiences during his three and a half months' personal fact finding at the Regional Court (the subtitle of his article is: "Lokalaugenschein", i.e. report of a visit of the locus in quo). The evident purpose of this (second) "chapter" is to illustrate the assertions made in the introduction and to convey his indignation to his readers.

This (second) "chapter" again starts with something like an introduction (general information; what he has heard beforehand from more than a dozen barristers and court reporters; some general impressions of the atmosphere at the court and of his first contacts with some of the judges; some derisive speculations on the proper degree of auto-censorship for a young reporter writing on the judiciary).

There follow nine more or less extensive "portraits" of judges. Each portrait is preceded by a specific heading, which not only summarises the kind of cases the judge (or judges) in question try, but also assigns each judge a "type". These nine portraits, including the labelling of the judges under the heading "type", are evidently intended to epitomise Mr Prager's criticism of the way criminal justice is dispensed by the Vienna Regional Court and to enhance its persuasiveness by giving that criticism names and faces.

6. It is, of course, a question of taste, but in my opinion some of the portraits of the other judges are more virulent than that of Judge J. Apparently, the Eisenstadt Regional Court judge thought so too. She even said in her judgment that all the judges who were criticised and who were identified by name could have brought an action for defamation. That may be true, but the fact is that they did not. That does not prove, of course, that their portraits were drawn correctly. Nevertheless, it is a factor that has to a certain extent to be taken into account when assessing the context of the impugned passages devoted to Judge J. For at least it has not been proved that the other portrayals were devoid of reality, nor, consequently, that the overall picture of the atmosphere at the court was wholly wrong.

7. Not only did the other judges not go to court, but before us the Government did not even argue, let alone prove, that Mr Prager's general proposition - namely that in Vienna, criminal justice at first instance is not only very severe, but unduly harsh - had no factual basis.

Consequently, Mr Prager's portrayal of Judge J. must be assessed against the background of Judge J. being a member of a criminal court which by its decisions and by its behaviour towards accused and their lawyers - in sum by its esprit de corps - at least justified public scrutiny by the press. Mr Prager's article must be regarded as concerning matters of considerable public interest. It was therefore fittingly published in a magazine (Forum) which was described to us as "a publication dedicated to promoting democratic principles, the rule of law and the interests of indigents" (memorial of the applicants) and "a typical magazine for intellectuals" ("ein typisches Blatt der intellektuellen Szene") (oral argument). Neither description was disputed by the Government.

Let me say at once that one will look in vain for such an assessment in the judgments of the Austrian courts: nowhere do they make it clear that they weighed up Judge J.'s right to protection of reputation against Mr Prager's (and Forum's) right under Article 10 (art. 10) to write as critically as he thought fit on a subject of considerable public interest!

8. The above analysis of Mr Prager's article (see paragraphs 3 and 5 above), the fact that it was published in a serious magazine for intellectual readers (see paragraph 7 above) - that is for readers who can judge for themselves - and the circumstance that it concerned a matter of considerable public concern - in the author's view a scandalous way of dispensing criminal justice -, all this must be taken into account not only when finally deciding the necessity issue, but already when interpreting the text of the five specific and isolated passages in the article to which Judge J. restricted his private prosecution (see paragraph 4 above: "in the light of the case as a whole").

9. Against this background there is much to be said for the proposition that all these passages - except the fifth - should be classified as value-judgments.

It is obvious - and was acknowledged by the Eisenstadt judge - that the fourth passage, that is the result of attributing a "type" to the judge concerned, is a value-judgment. This is especially true, since Mr Prager more than once attributed the same type to several judges. Thus he considered Judge J. to be a species of the type: "rabid", like one of his colleagues, Judge A.

As far as the first two passages are concerned, I note that they do not belong to the body of the article itself, but form part of a kind of a summary, which together with the title ("Danger! Harsh judges!") and the subtitle ("Report of a visit of the locus in quo") is placed in a frame (13). This is evidently meant - and indeed serves - as an eye-catcher. At any event, as part of this summary, the sentences in question clearly express the gist of Mr Prager's censure of the criminal court as such and find their main justification in that (collective) censure.

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13. See for the text of this summary: paragraph 9 of the judgment.

Under these circumstances it seems at least questionable whether it is acceptable to scrutinise these obviously generalising sentences exactly as if they formed part of (the body of) an article devoted to Judge J. only. But that is precisely what the Austrian courts did, without even bothering to give reasons for their approach (14).

14. I note in passing that as regards the second extract, the Austrian courts did not even take account of the whole passage: I refer to the full text in paragraph 9 of the Court's judgment. The full text reads:

> "Some Austrian criminal court judges are capable of anything; all of them are capable of a lot: there is a pattern to all this."

Without going into the meaning of this text as a whole, the Austrian courts assumed that "some Austrian criminal court judges are capable of anything" could be construed as defamatory of Judge J.

Similar considerations apply as far as the third "passage" is concerned. This passage is a remark made within the context of the introductory part of the second "chapter" (see paragraph 5 above). It is not easy to grasp the exact meaning of the section of which it forms a part. In my opinion the most plausible reading is that this section somehow continues the above-mentioned derisive speculations on the proper degree of auto-censorship (see paragraph 5). According to this interpretation, the remark means that Judge J.'s behaviour is too intolerable not to be denounced. That behaviour is then characterised as "menschenverachtende Schikane" which is rather difficult to translate (15), but is at any rate rather denigrating. A note in the text, however, makes it clear that the characterisation is intended as a summary of the detailed portrait which follows. As such it is, undoubtedly, a value-judgment. Moreover, if one considers it in the context of the article as a whole, it seems rather doubtful (to put it mildly) whether it is correct to assume - as the judge in the Eisenstadt Regional Court did - that "Schikane" means that Judge J. uses his function in order to harm the accused intentionally. It is true that, according to dictionaries, the word "Schikane" may have that connotation, but I think that in the context of the portrayal of the criminal court and the article as a whole it must rather be understood - and, at least, can reasonably be understood - as describing a very severe application of criminal law, regardless of the resulting human suffering. Here, as when construing the other passages, the Eisenstadt judge chose from two possible interpretations the one which was unfavourable to the accused and led to conviction, without even bothering to make it clear that she had considered the other interpretation or to state her reasons for rejecting it.

15. The translation proposed by the applicant has: "contemptuous chicanery"; the Court has opted for "arrogant bullying".

I stress this feature of her judgment since on this point I wholeheartedly agree with the German Constitutional Court. According to the established case-law of that court, a judge who convicts a speaker or author whose utterance is objectively open to different interpretations, without giving convincing reasons for choosing the very interpretation which leads to conviction, violates the right to freedom of expression.

10. The Austrian courts (16) opted for an essentially different approach. They strictly limited their examination to the five specific and isolated passages targeted by Judge J.'s private prosecution (17). It goes without saying that this fundamental difference of approach makes itself felt throughout. The Eisenstadt judge for instance refused even to consider the (undisputed) fact that Judge J. had once warned a defence lawyer to "keep it short" since he "had already reached his decision". Of course, that fact does not prove a "general bias", nor that Judge J. treated every accused at the outset as if he had already been convicted, but it could at least show that Judge J. also displayed the esprit de corps which Mr Prager had observed during his fact finding and, consequently, that there was some basis for his being included in the portrait gallery.

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16. In the present case the most important judgment is that of the Eisenstadt Regional Court judge. There was no appeal de novo; the Court of Appeal only examined the applicants' grounds of appeal; its review of the arguments of the Eisenstadt judge was rather summary; however, it approved them and dismissed the appeal.

17. I do not overlook the fact that the Eisenstadt judge, having interpreted the five contested passages as I have indicated, summed up her judgment on the question whether these five passages were - objectively - defamatory as follows:

> "Consequently, there can be no doubt that the five passages incriminated by the private prosecution, taken alone as well as considered within the context of the article, are defamatory within the meaning of Article 111 of the Criminal Code."

Having studied her judgment very carefully and after noting that this is the first and last time that the "context of the article" is mentioned, I cannot but regard the words that I have put into italics as paying pious lip-service to a principle that she had completely ignored de facto.

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11. This example appears to fit a pattern. One finds it repeated when one studies how the Eisenstadt judge reacted to Mr Prager's offer to adduce proof of the factual basis for his value-judgments. The judge first adopts - without giving proper reasons - the interpretation of the value-judgments in question which is most unfavourable to the defendant and then goes on to say that his offer is to be refused on the ground that it is clear straight away that it will be impossible to convince the court that Judge J. acted as he did with malicious intent to cause suffering (18).

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18. For the requirements of an offer to prove the exceptio veritatis, see paragraph 13 below.

The portrait of Judge J. (19) devotes rather a lot of attention to an affair where Judge J. obstinately - and unnecessarily - prolonged detention on remand and, moreover, did not forward a plea of nullity against his detention decision to the proper authorities. Judge J. did not chose to include this passage in his private prosecution, but it became relevant when Mr Prager contended that this very episode was at the root of his value-judgment "menschenverachtende Schikane" (see paragraph 9 above) and therefore wanted to prove it. His offer was refused by the Eisenstadt judge on the ground that she felt it to be completely unbelievable that Judge J. would have consciously and maliciously wanted to prolong the detention.

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19. See paragraph 11 of the judgment.

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12. I allow myself one more example of the same mechanism, this time with regard to the fifth passage selected by Judge J. This passage undoubtedly contains a statement of fact(s). One must, of course, first ascertain which facts. That would seem rather clear. Mr Prager states that - apparently some time ago - Judge J. was almost appointed a public prosecutor, but suggests that he had not obtained the post in question because his name had again (20) been mentioned in the press, inter alia in connection with the suspicion of involvement in dishonest practices (21). It was not denied that there had been such articles in the press nor that these articles had voiced this particular suspicion concerning Judge J. Nevertheless, the Eisenstadt judge - again without considering whether any other interpretation was possible - read into the passage the statement that such suspicions still existed at the time of publication of the impugned article. However, she goes on to say, there was a decision of the Vienna Court of Appeal some years back in which Judge J. was cleared of all suspicion in this respect. She might have explained how Mr Prager could have known about that decision. But that is not the point I am trying to make. What is important is that here again we see the same pattern observed in paragraphs 10 and 11 above: first a non-reasoned interpretation which is (to put it mildly) not the most obvious but certainly the most unfavourable and then, on that basis, a refusal of Mr Prager's offer to prove the exceptio veritatis.

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20. "Again" for, as Mr Prager also relates, it had already cropped up in connection with a rather unsavoury incident with a prostitute.

21. In order to avoid the impression that Mr Prager here suggested the possibility of Judge J. having been suspected of terrible things, I note that in the original text the unauthorised conduct in question is specified: "Winkelschreiberei", which - as was explained to us - means that Judge J. was suspected of having given legal advice for a consideration, which a judge is not allowed to do.

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13. It might perhaps be queried whether or to what extent

placing the burden of proof in cases like this on the journalist is compatible with Article 10 (art. 10) (22), but since this question has not been argued, I leave it open. What should be stressed, however, is that the judgment of the Court of Appeal makes it clear that Austrian law is unduly exacting in respect of an offer of proof of the exceptio veritatis. The accused has to indicate exactly which facts he wants to prove. Moreover, he must not only explain precisely why these facts justify what he has said or written, and how these facts may be proved by the evidence offered, but he must in addition convince the court, beforehand, that there is a likelihood that these facts will be proved.

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22. Under the case-law of the German Bundesgerichtshof, where the press has addressed questions of public interest and has shown that it has observed due journalistic care it is for the plaintiff to prove falsehood: see, for example, J. Soehring, "Die neue Rechtsprechung zum Presserecht", NJW 1994, pp. 16 et seq.

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14. Not only (with one exception) was Mr Prager not allowed to adduce the evidence he had offered in respect of the facts on which his value-judgments were based, he was also held not to have acted with due journalistic care.

That reproach is not unfounded to the extent that it is common ground that Mr Prager did not give Judge J. an opportunity to comment on the draft of the article. That indeed was a serious failure to exercise due care (23), whether or not - and that is a matter for speculation - Judge J. would have used the opportunity to make relevant comments.

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23. The argument of the Austrian Government that, as a consequence of this omission by Mr Prager, his article cannot be considered as a contribution to a critical discussion on a subject of considerable public interest is clearly a non sequitur.

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However, serious as this lack of care may be, it does not - in itself - justify the stricture of "glaring carelessness" which the Eisenstadt judge levelled at Mr Prager. It is true that she grounds this stricture on two additional arguments, but these are both flawed since they are based on the one-sided approach which has been analysed in the preceding paragraphs. The Eisenstadt judge disregarded the article as a whole and, moreover, treated the two isolated sentences from the summary referred to in paragraph 9 above as if they formed part of (the body of) an article devoted to Judge J. only.

The article as a whole makes it sufficiently clear that it is based on personal observations over a considerable period as well as on the questioning of such witnesses as could reasonably be regarded as having professional experience of this particular court and its members, such as criminal lawyers, court reporters and probation officers. The Eisenstadt judge suggests that such questioning only yields hearsay evidence which is suspect, but in my opinion the methods used by Mr Prager cannot per se be held to fall short of the standard of proper journalistic care.

The argument that Mr Prager had, by his own account, not visited a trial presided over by Judge J. is unconvincing since - unless one misconstrues the summary as statements of fact about Judge J. - Mr Prager's article nowhere criticises Judge J.'s way of presiding. Perhaps there is one exception, the anecdote about the admonition to keep it short (see paragraph 10 above), but I do not think that a journalist would be lacking in due care if he published that story on the hearsay evidence of the very lawyer thus addressed from the bench, particularly as it fitted perfectly the esprit de corps which he had himself observed and had been told about by numerous other witnesses.

15. This brings me to a further crucial criticism. The Eisenstadt judge found that it was "evident" that Mr Prager had acted with the (malicious) intent to defame Judge J. She even went so far as to describe Mr Prager's malicious intent as "intensive". Her only reasons are, however, that Mr Prager is better educated than the average and, moreover, an experienced reporter. Consequently, she goes on to say, Mr Prager must have realised that the five passages concerning Judge J. were very negative and would affect him accordingly.

Now, in my opinion this is a test that cannot be accepted. I will not deny that there are instances where the mere wording of an observation concerning a named person is sufficient to warrant the conclusion that it must have been made with malicious intent to defame. But it is incompatible with the right to freedom of expression to draw such an inference from the mere wording of five isolated passages of a long article in a serious magazine on a subject of general public interest. Quite apart from the one-sided interpretation of these five passages on which the impugned conclusion is based, it simply cannot be accepted that the mere wording of a critical comment on a subject of general public interest suffices for that comment to be classified as being made with malicious intent to defame. That would mean that the courts would totally disregard the author's purpose of initiating a public discussion; that would mean that, de facto, only the interests of the plaintiff would be taken into consideration and would curb freedom of expression to an intolerable degree. I recall that "Article 10 (art. 10) protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed" (24). For these reasons I think that at least where a critical comment on a subject of general interest is involved, even very exaggerated terms and caustic descriptions do not per se justify the conclusion that there was malicious intent to defame.

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24. This quotation too comes from the Jersild judgment (pp. 23-24, para. 31); see footnote 2 above. When the Government argued that Mr Prager could have couched his message in less aggressive terms, they apparently overlooked this doctrine of the Court which makes it, at least, necessary to reconsider the customary approach of national courts asking themselves whether the author could not have expressed his opinion in "more moderate" terms and finding against him if they feel that this question should be answered in the affirmative.

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The decisive test should be whether the impugned wording,

however impudent, curt or uncouth, may still be found to derive from an honest opinion on the subject - however excessive or contemptible that wording may seem - or whether the only possible conclusion is that the intention was only or mainly to insult a person.

Here again I find that the Austrian courts applied standards which are not in conformity with the principles embodied in Article 10 (art. 10) and here again I (at least) question whether, if they had applied the correct test, they would not have come to a different conclusion. As I have already indicated, I am persuaded that Mr Prager was honestly shocked by his experiences within the Vienna Regional Court. Not only shocked, but brimming over with sincere indignation, not to say wrath. He fully realised that he had expressed that wrath in unusually strong terms, but in his ire he felt that the only thing that mattered was to drive home his message, regardless of the feelings of the nine judges whom he had targeted. In his view they did not deserve leniency (25). That attitude may be morally and perhaps even legally reprehensible; in my opinion it does not amount to malicious intent.

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25. This is not a one-sided interpretation on my part. There is at least one remark in the article which explicitly corroborates my thesis. Mr Prager comments on the sentence in a case where a fatally-ill artist is found guilty of fiscal fraud. Apparently, he finds the sentence extremely severe. He imputes that sternness to a desire to avoid even an appearance that some people might be treated more leniently than others. That wish is, apparently, also despicable for he goes on to put the rhetorical question "whether judges, whether a judiciary, who act with such a degree of 'correct' lack of comprehension, are themselves entitled to understanding".

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16. I would sum up as follows:

(a) The Austrian courts only took into account five specific and isolated passages, ignoring their context. The Government have argued that they could not proceed otherwise since under Austrian criminal law they were bound by the terms of the private prosecution. I do not find that argument convincing: since Article 10 (art. 10) of the Convention requires that the context should be taken into account and since in Austria the Convention has the same rank as constitutional law (26), the Austrian courts should have disregarded those provisions of criminal procedure which made it impossible to consider the journalist's article as a whole.

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26. See, inter alia, M. Nowak in "The Implementation in National Law of the European Convention on Human Rights", Proceedings of the Fourth Copenhagen Conference on Human Rights, 28 and 29 October 1988, p. 33.

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(b) The Austrian courts interpreted these five passages very one-sidedly and at any event did not give reasons for choosing not to adopt other possible and more favourable interpretations.

(c) This one-sided interpretation and the unduly severe Austrian rules on the possibility of adducing proof of the exceptio veritatis resulted in Mr Prager being to all practical purposes precluded from adducing such proof (27).

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27. Consequently, I am rather surprised by the Court's suggestion (paragraph 37) that the applicant's conviction was justified inasmuch as "in the absence of a sufficient factual basis" his accusations appeared "unnecessarily prejudicial"!

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(d) The above defects also affected the Eisenstadt court's decision on the due journalistic care issue; moreover, the test applied in deciding that issue is partly unacceptable.

(e) The test applied in determining whether or not Mr Prager had the required malicious intent is unacceptable.

(f) The combined effect of all these defects is that, de facto, national courts failed completely to carry out the necessary balancing exercise between the requirements of the protection of reputation and those of free speech.

17. The conviction and sentence of Mr Prager constitute a serious interference with the right to freedom of expression of the press. The Eisenstadt judge said explicitly that she intended to teach Mr Prager and his brother journalists a lesson.

Such an - intentional - interference on the basis of an article on a subject of considerable public interest in a serious periodical must be very convincingly justified in order to be acceptable for the Court of Human Rights. For the reasons set out above and summarised in paragraph 16 I find that the Austrian judgments do not satisfy this test.

Accordingly, I find that the conviction and sentence of the applicants constitute a violation of Article 10 (art. 10) (28).

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28. To avoid misunderstanding I note that this conclusion does not necessarily imply that Mr Prager's article meets the requirements of that provision; it only means that the Austrian judgments did not meet those requirements. In other words: I do not say that any and every legal action based on the impugned article would have been bound to fail in so far as any finding in favour of the plaintiff would have violated Article 10 (art. 10); I am merely saying - and I am not required to say more - that the findings under review here have violated that Article (art. 10).

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CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF ROEMEN AND SCHMIT v. LUXEMBOURG

(Application no. 51772/99)

JUDGMENT

STRASBOURG

25 February 2003

FINAL

25/05/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.

In the case of Roemen and Schmit v. Luxembourg,

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

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mrs E. PALM,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mr S. PAVLOVSCHI, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 4 February 2003,

Delivers the following judgment which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 51772/99) against the Grand Duchy of Luxembourg lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Luxembourgish nationals, Mr Robert Roemen ("the first applicant") and Ms Anne-Marie Schmit ("the second applicant"), on 23 August 1999.

2. Before the Court, the applicants were represented by Mr D. Spielmann, of the Luxembourgish Bar. The Luxembourgish Government ("the Government") were represented by their Agent, Mr R. Nothar, of the Luxembourgish Bar.

3. The first applicant alleged, in particular, that his right, as a journalist, not to disclose his sources had been violated. The second applicant principally complained of an unjustified interference with her right to respect for her home.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 12 March 2002 the Chamber declared the application partly admissible.

6. The Court decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*) and the parties replied in writing to each other's observations on the merits.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants were born in 1945 in 1963 respectively and live in Luxembourg.

9. On 21 July 1998 the first applicant, acting in his capacity as a journalist, published an article in *Lëtzebuerger Journal*, a daily newspaper, under the headline "Minister W. convicted of tax fraud" (*Minister W. der Steuerhinterziehung überführt*). He alleged in the article that the minister had broken the Seventh, Eighth and Ninth Commandments by committing value-added tax (VAT) frauds. He went on to say that a politician from the right might have been expected to take the rules so carefully drawn up by Moses more seriously. He added that a fiscal fine of 100,000 Luxembourg francs had been imposed on the minister. He said in conclusion that the minister's conduct was particularly shameful in that it involved a public figure, who should have set an example.

10. The applicants produced documents showing that the fine had been imposed on the minister concerned on 16 July 1998 by the Director of the Registration and State-Property Department (*Administration de l'enregistrement et des domaines*), pursuant to section 77(2) of the VAT Act of 12 February 1979. The decision had been served on the minister on 20 July 1998. It also appears that on 27 July 1998 the minister appealed to the District Court against the fine. In a judgment of 3 March 1999, the District Court ruled that the fine was not justified as the offence under section 77(2) of the VAT Act of 12 February 1979 had not been made out. An appeal was lodged against that judgment to the Supreme Court of Justice. The parties have not furnished any further information regarding developments in those proceedings.

11. The decision of 16 July 1998 was the subject of comment in other newspapers, such as the daily *Le Républicain Lorrain* and the weekly *d'Lëtzebuerger Land*. A Liberal member of Parliament also tabled a parliamentary question on the matter.

12. Two sets of court proceedings were issued following the publication of the first applicant's article.

13. On 24 July 1998 the minister brought an action in damages in the District Court against the first applicant and *Lëtzebuerger Journal*, arguing that they had been at fault in publishing the information concerning the fiscal fine and making comments which he said constituted an attack on his honour. In a judgment of 31 March 1999, the District Court dismissed the minister's action on the ground that the article came within the sphere of freedom of the press. In a judgment of 27 February 2002, the Court of Appeal overturned the District Court's judgment.

14. On 4 August 1998 the minister lodged a criminal complaint.

15. On 21 August 1998 the public prosecutor requested the investigating judge to open an investigation into a suspected offence by the first applicant of handling information disclosed in breach of professional confidence, and by a person or persons unknown of breach of professional confidence. The public prosecutor stated in his submissions: "The investigation and inquiries should determine which civil servant or civil servants from the Registration and State-Property Department had any involvement in the case and access to the documents." The public prosecutor also requested the investigating judge to carry out or arrange for searches of the first applicant's home and any appurtenances, the offices of *Lëtzebuerger Journal* and the Registration and State-Property Department offices.

16. Various searches were then carried out.

A. The searches of the first applicant's home and workplace

17. On 19 October 1998 the investigating judge issued two warrants for searches to be made of the first applicant's home and workplace, the investigators being instructed to "search for and seize all objects, documents, effects and/or other items that [might] assist in establishing the truth with respect to the above offences or whose use [might] impede progress in the investigation". The first order specified that the places to be searched were "Robert Roemen's home and appurtenances, ..., any place in which he may be found and cars belonging to or used by him".

18. Both warrants were executed on 19 October 1998, but no evidence was found.

19. On 21 October 1998 the first applicant applied for orders setting aside the warrants issued on 9 October 1998 and all the investigative steps taken pursuant thereto, in particular the searches carried out on 19 October 1998. In addition to arguments based on domestic law, he alleged a violation of Article 10 of the Convention, emphasising that he was entitled to protect his journalistic sources.

20. The District Court, sitting in closed session, dismissed both applications in two orders of 9 December 1998. It noted that the minister had complained of a number of matters, including the unlawful disclosure of information to the first applicant by Registration and State-Property Department officials, which the first applicant had allegedly gone on to use in a calumnious and defamatory newspaper article. Those matters were capable of falling within the definition of various criminal offences, including breach of professional confidence, breach of fiscal confidentiality, theft, handling, calumny and criminal defamation. The District Court said that civil servants were prohibited by Article 11 of the Central and Local Government Service Code (*statut général des fonctionnaires*) from disclosing any information that was confidential by nature which they had

acquired in the course of their duties. It was a criminal offence under the General Tax Act to disclose confidential fiscal information and an offence under Article 458 of the Criminal Code for anyone receiving confidential information as part of their professional duties to divulge it. As to the handling offence, the District Court said that Article 505 of the Criminal Code applied to anyone who, by whatever means, knowingly benefited from the proceeds of a serious crime (*crime*) or other major offence (*délit*). According to legal commentators and the leading cases, handling could extend to intangible property, such as claims, but also manufacturing secrets or material covered by professional privilege. In that connection, the fact that the circumstances in which the property had been obtained had not been fully established was of little relevance if the alleged handler was aware of its unlawful origin; the classification of the primary offence was immaterial. The District Court found that the investigating judge in charge of the investigation had been entitled to order an investigative measure to obtain corroboration of the incriminating evidence already in his possession. It added that there had been no violation of Article 10 of the European Convention on Human Rights, since the searches – which had been ordered to assemble evidence of and establish the truth concerning possible criminal offences that may have led to or facilitated the publication of a newspaper article – had not infringed freedom of expression or freedom of the press.

21. By two judgments of 3 March 1999, the Court of Appeal, sitting in closed session, dismissed appeals that had been lodged against the orders of 9 December 1998.

B. The search of the second applicant's office

22. On 19 October 1998 the investigating judge issued a search warrant for immediate execution at the offices of the second applicant, who was the first applicant's lawyer in the domestic proceedings.

23. In the course of the search, the investigators seized a letter of 23 July 1998 from the Director of the Registration and State-Property Department to the Prime Minister bearing a handwritten note: "To the Heads of Division. Letter transmitted in confidence for your guidance." The applicants explained that the letter had been sent anonymously to the editorial staff of *Lëtzebuerger Journal* and the first applicant had immediately passed it on to his lawyer, the second applicant.

24. On 21 October 1998 an application was made to have the search warrant and all subsequent investigative steps set aside.

25. The District Court, sitting in closed session, granted that application on the ground that, in breach of section 35 of the Lawyers Act, the report of the police department that had executed the warrants on 19 October 1998 did not contain the observations of the Vice President of the Bar Council, who was present during the search and seizure operations. The District

Court ruled that the seizure carried out on 19 October 1998 was invalid and ordered the letter of 23 July 1998 to be returned to the second applicant.

26. The letter was returned on 11 January 1999.

27. However, on the same day the investigating judge issued a fresh search warrant with instructions to "search for and seize all objects, documents, effects and/or other items that might assist in establishing the truth with respect to the above offences or whose use might impede progress in the investigation and, in particular, the document dated 23 July 1998 bearing the manuscript note to the heads of division". The letter was seized once again later that day.

28. On 13 January 1999 the second applicant applied for an order setting the warrant aside, arguing, *inter alia*, that there had been a breach of the principle guaranteeing the inviolability of a lawyer's offices and of the privilege attaching to communications between lawyers and their clients. That application was dismissed by the District Court, sitting in closed session, on 9 March 1999. It noted, firstly, that investigating judges were empowered to carry out searches even at the homes or offices of persons whose professional duties required them to receive information in confidence and who were legally bound not to disclose it and, secondly, that the provisions of section 35 of the Lawyers Act of 10 August 1991 had been complied with. The search and seizure operations had been executed in the presence of an investigating judge, a representative of the public prosecutor's office and the President of the Bar Council. In addition, the presence of the President of the Bar Council and the observations he had considered it necessary to make regarding the protection of the professional confidence attaching to the documents to be seized had been recorded in the police department's report.

29. In a judgment of 20 May 1999, the Court of Appeal, sitting in closed session, dismissed an appeal against the order of 9 March 1999.

C. The period following the searches

30. In a letter of 23 July 1999, the first applicant enquired of the investigating judge as to progress in the case. He complained that no other steps had been taken and reminded the judge that he was not supposed to disregard the provisions of Article 6 of the Convention. He sent a similarly worded reminder on 27 September 2000.

31. On 3 October 2000 the applicants provided the Court with an article from the 29 September 2000 edition of the weekly newspaper *d'Lëtzebuerger Land*, containing the following extract:

> "... the inquiry in the W. case has thus just ended with a search of the home of a Registration and State-Property Department official, a member of the Socialist Party, and the logging of the incoming and outgoing telephone calls of at least two other members of the [Socialist Party] ..."

32. On 18 April 2001 the first applicant sent a further reminder to the investigating judge, who stated in a reply of 23 April 2001: “The judicial investigation is continuing.”

33. Following a letter from the first applicant dated 13 July 2001, the investigating judge informed him the same day that the police inquiries had finished and that the investigation file had just been sent to the public prosecutor for his submissions.

34. On 16 October 2001 the first applicant referred the public prosecutor to the terms of Article 6 of the Convention and reminded him that although the investigation in the case had taken three years, he had yet to be charged.

35. On 13 November 2001 the first applicant received a summons requiring him to attend for questioning on 30 November 2001 in connection with the offences referred to in the complaint. He was informed that he was entitled to have a lawyer present.

36. The first applicant was charged by the investigating judge on 30 November 2001 with “handling information received in breach of professional confidence”.

37. The applicants produced an article from the 9 January 2002 edition of the newspaper *Le Quotidien*, which revealed that the Prime Minister “considered that the methods employed by the investigating judge in the investigation into a breach of professional confidence were ‘disproportionate’ ”.

38. An order made on 1 July 2002 by the District Court, sitting in closed session, reveals that the charges against the first applicant were ruled to be null and void and that the case file was sent to the investigating judge with jurisdiction with instructions either to end or to continue the investigation.

39. On 14 January 2003 the applicant sent the Court a letter from the investigating judge dated 9 January 2003 informing him that “the judicial investigation [had] just ended”.

II. RELEVANT DOMESTIC LAW

A. General rules governing searches and seizures

40. Article 65 of the Criminal Investigation Code provides: “Searches shall be carried out in any place in which objects that would assist in establishing the truth may be found.”

41. Article 66 of that Code provides: “The investigating judge shall carry out the seizure of all objects, documents, effects and other items referred to in Article 31 § 3”. Article 31 § 3 provides that the following may be seized: “... and generally, anything which may assist in establishing the truth, whose use may impede progress in the investigation or which is liable to confiscation or restitution.”

B. Searches and seizures at lawyers' offices

42. Section 35(3) of the Lawyers Act of 10 August 1991 provides:

> "Lawyers' workplaces and all forms of communication between lawyers and their clients shall be inviolable. If in civil proceedings or a criminal investigation a measure is taken against or in respect of a lawyer in the circumstances defined by law, such measure shall not be implemented other than in the presence of the President of the Bar Council or his or her representative or after they have been duly convened.
>
> The President of the Bar Council or his or her representative may submit observations to the authorities which ordered the measures regarding the protection of professional confidence. A record of a seizure or search shall be null and void unless it contains a statement that the President of the Bar Council and his or her representative were present or had been duly convened and any observations they considered it necessary to make."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

43. The first applicant argued that his right as a journalist to refuse to reveal his sources had been violated by the various searches. In that connection, he relied on Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Submissions of the parties

1. The first applicant

44. The first applicant submitted that the searches constituted an interference with his rights guaranteed under Article 10 of the Convention.

They had been conducted in order to discover the identity of the person responsible for the alleged breach of professional confidence, in other words the journalist's source of information. The impugned measures had been disproportionate and were liable to deter journalists from performing their essential role as "watchdogs" to keep the public informed on matters of public interest. The identity of the person responsible for the breach of professional confidence could have been discovered by other means, for instance by questioning officials from the Registration and State-Property Department. In addition, ample proof that the searches had not been necessary for the prevention of disorder or crime was to be found in the investigating and prosecuting authorities' failure to take further action once the searches had been carried out.

2. The Government

45. The Government said that, on the contrary, the actions of the domestic authorities had not interfered with the first applicant's rights under Article 10. The searches had been unproductive, as the sole document seized was not one the first applicant had used as a source for his newspaper article. Any interference had, in any event, been prescribed by law, namely Article 65 of the Criminal Investigation Code, and pursued the legitimate aim of preventing disorder or crime. It had also been necessary in a democratic society and was proportionate to the aim pursued. The approach followed in *Goodwin v. the United Kingdom* (judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II) could not be applied in the instant case. Firstly, the first applicant had not been required to reveal his source on pain of a fine, but had merely been subjected to a search that had resulted in the seizure of a single document. Secondly, the aim pursued by the interference in the instant case was far more important than that of protecting the economic interests of a private undertaking, as in *Goodwin*. The investigation into an allegation of breach of professional confidence was of direct relevance to the proper functioning of public institutions. The prevention and punishment of that offence thus constituted a "pressing social need" that justified the interference.

B. The Court's assessment

1. General principles

46. Freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. The protection of journalistic sources is one of the cornerstones of freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public on matters of

public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society, an interference cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest. Limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court. The Court's task, in exercising its supervisory function, is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see *Goodwin*, cited above, pp. 500-01, §§ 39-40).

2. Application of the above principles

47. In the present case, the Court finds that the searches of the first applicant's home and workplace indisputably constituted an interference with his rights guaranteed by paragraph 1 of Article 10. The measures were intended to establish the identities of the Registration and State-Property Department officials who had worked on the file concerning the imposition of a fiscal fine on the minister. In that connection, the Court considers that the fact that the searches proved unproductive did not deprive them of their purpose, namely to establish the identity of the person responsible for the breach of professional confidence, in other words, the journalist's source.

48. The question is whether that interference can be justified under paragraph 2 of Article 10. It is therefore necessary to examine whether it was "prescribed by law", pursued a legitimate aim under that paragraph and was "necessary in a democratic society" (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, pp. 24-25, §§ 34-37).

49. The first applicant did not dispute the Government's assertion that the interference was "prescribed by law", in this instance Articles 65 and 66 of the Criminal Investigation Code. The Court accordingly sees no reason to reach a different view.

50. The Court considers that the interference pursued the "legitimate aim" of the prevention of disorder or crime.

51. The main issue is whether the impugned interference was "necessary in a democratic society" to achieve that aim. It must therefore be determined whether the interference met a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient.

52. The Court notes at the outset that the searches in the instant case were not carried out in order to seek evidence of an offence committed by

the first applicant other than in his capacity as a journalist. On the contrary, the aim was to identify those responsible for an alleged breach of professional confidence and any subsequent wrongdoing by the first applicant in the course of his duties. The measures thus undoubtedly came within the sphere of the protection of journalistic sources.

53. In dismissing the applicant's applications to have the searches set aside, the domestic courts held that there had been no violation of Article 10 of the Convention. They thus considered that the searches – which had been ordered to assemble evidence of and establish the truth concerning possible criminal offences that had led to and facilitated the publication of a newspaper article – had not infringed freedom of expression or freedom of the press.

54. The Court notes that in his newspaper article the applicant published an established fact concerning a fiscal fine that had been imposed on a minister by decision of the Director of the Registration and State-Property Department. There is, therefore, no doubt that he was commenting on a subject of general interest and that an interference "cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest" (see *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I).

55. The public prosecutor's submissions of 21 August 1998 indicate that investigations were started simultaneously into allegations against officials from the Registration and State-Property Department and the applicant in order to establish the identities of the person responsible for an alleged breach of professional confidence and of the recipient of the information so obtained. The searches of the applicant's home and workplace were carried out shortly after those submissions were made. However, no warrants were executed against officials from the Registration and State-Property Department until a later date.

56. The Court agrees with the applicant's submission – which the Government have not contested – that measures other than searches of the applicant's home and workplace (for instance, the questioning of Registration and State-Property Department officials) might have enabled the investigating judge to find the perpetrators of the offences referred to in the public prosecutor's submissions. The Government have entirely failed to show that the domestic authorities would not have been able to ascertain whether, in the first instance, there had been a breach of professional confidence and, subsequently, any handling of information thereby obtained without searching the applicant's home and workplace.

57. In the Court's opinion, there is a fundamental difference between this case and *Goodwin*. In the latter case, an order for discovery was served on the journalist requiring him to reveal the identity of his informant, whereas in the instant case searches were carried out at the first applicant's home and workplace. The Court considers that, even if unproductive, a

search conducted with a view to uncover a journalist's source is a more drastic measure than an order to divulge the source's identity. This is because investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist. The Court reiterates that "limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court" (see *Goodwin*, cited above, pp. 500-01, § 40). It thus considers that the searches of the first applicant's home and workplace undermined the protection of sources to an even greater extent than the measures in issue in *Goodwin*.

58. In the light of the foregoing, the Court reaches the conclusion that the Government have not shown that the balance between the competing interests, namely the protection of sources on the one hand and the prevention and punishment of offences on the other, was maintained. In that connection, the Court would reiterate that "the considerations to be taken into account by the Convention institutions for their review under paragraph 2 of Article 10 tip the balance of competing interests in favour of the interest of democratic society in securing a free press (ibid., p. 502, § 45).

59. The Court is thus of the opinion that while the reasons relied on by the domestic authorities may be regarded as "relevant", they were not "sufficient" to justify the searches of the first applicant's home and workplace.

60. It therefore finds that the impugned measures must be regarded as disproportionate and that they violated the first applicant's right to freedom of expression, as guaranteed by Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

61. The second applicant complained that the search carried out at her offices constituted an unjustified interference with her right to respect for her home. She also argued that the seizure of the letter had infringed the right to respect for "correspondence between a lawyer and his or her client". She relied on Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except as such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the well-being of the country, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Submissions of the parties

1. The second applicant

62. The second applicant said that the search and the seizure of a document that had been entrusted to her in connection with the first applicant's defence constituted an interference with her rights guaranteed by paragraph 1 of Article 8 of the Convention. That interference could not be regarded as being "in accordance with the law", since the Lawyers Act did not satisfy the qualitative requirements of Article 8. The second applicant said that in any event the interference had not been necessary. The search warrants had been drafted in particularly wide terms. In what was, after all, an ordinary – albeit highly politicised – case, the means employed by the domestic authorities at the beginning of the investigation had been disproportionate, particularly when the investigating judge's subsequent failure to act was taken into account.

2. The Government

63. The Government maintained that even supposing that the search amounted to an interference with the second applicant's rights under Article 8, it had been justified under paragraph 2 of that provision. The interference was in accordance with the law and pursued a legitimate aim, namely the prevention and punishment of criminal offences. Lastly, it had been necessary in a democratic society. The search warrants had been drafted in narrow terms covering only the search for and seizure of a single document. The offences that had triggered the search were serious ones, as they called into question the very functioning of the State institutions, a factor that justified the investigating judge's taking any measure which he considered would assist in establishing the truth.

B. The Court's assessment

64. The Court reiterates, firstly, that the protection afforded by Article 8 may extend, for instance, to the offices of a member of a profession (see *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, p. 34, § 30).

65. It accepts the second applicant's submission that the search of her law offices and seizure of a document relating to her client's file constituted an interference with her rights, as guaranteed under paragraph 1 of Article 8 of the Convention.

66. It finds that that interference was "in accordance with the law", since Articles 65 and 66 of the Criminal Investigation Code deal with searches and seizures in general, whereas section 35(3) of the Act of 10 August 1991 lays down the procedure to be followed for searches and seizures at a lawyer's office or home.

67. It also finds that the interference pursued a "legitimate aim", namely the prevention of disorder or crime.

68. As to the "necessity" for the interference, the Court reiterates that "the exceptions provided for in paragraph 2 of Article 8 are to be interpreted narrowly, and [that] the need for them in a given case must be convincingly established" (see *Crémieux v. France*, judgment of 25 February 1993, Series A no. 256-B, p. 62, § 38).

69. The Court notes that, unlike *Niemietz*, the search in the present case was accompanied by special procedural safeguards. The warrant was executed in the presence of an investigating judge, a representative of the public prosecutor and the President of the Bar Council. In addition, the President of the Bar Council's presence and the observations he considered it necessary to make on the question of the protection of professional confidence were recorded in the police department's report.

70. On the other hand, the Court is bound to note that the search warrant issued on 11 January 1999 was drafted in relatively wide terms. In it, the investigating judge instructed the investigators to "search for and seize all objects, documents, effects and/or other items that might assist in establishing the truth with respect to the above offences or whose use might impede progress in the investigation and, in particular, the document dated 23 July 1998 bearing the manuscript note to the heads of division". It thus granted them relatively wide powers (see *Crémieux*, cited above).

71. Above all, the ultimate purpose of the search was to establish the journalist's source through his lawyer. Thus, the search of the second applicant's offices had a bearing on the first applicant's rights under Article 10 of the Convention. Moreover, the search of the second applicant's offices was disproportionate to the intended aim, particularly as it was carried out at such an early stage of the proceedings.

72. In the light of the foregoing and for reasons analogous in part to those set out in Part I of this judgment, the Court holds that there has been a violation of the second applicant's rights under Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

73. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

74. The applicants each claimed 5,000 euros (EUR) for the non-pecuniary damage they had suffered. They said that the searches had proved a traumatic experience that had attracted considerable media attention and damaged their reputations.

75. The Government disputed the figures put forward by the applicants.

76. Ruling on an equitable basis, as required by Article 41, the Court awarded each of the applicants EUR 4,000 for non-pecuniary damage.

B. Costs and expenses

77. The first applicant claimed EUR 35,176.97 for costs and expenses. He produced two fee notes. The first, dated 17 January 2002 and containing a statement of the legal fees paid to Ms Schmit for the proceedings in the domestic courts, came to EUR 25,547.56. The second was dated 3 April 2002 and was for EUR 9,629.41 for fees incurred in the proceedings before the Court. The first applicant argued that he would also have to pay legal fees for the remainder of the proceedings before the Court and sought a payment on account of future costs and expenses in the sum of EUR 1,000.

78. The second applicant made no claim for costs or expenses.

79. The Government disputed the amounts claimed by the first applicant.

80. The Court reiterates that an applicant may recover his costs and expenses only in so far as they have been actually and necessarily incurred and are reasonable as to quantum (see *Bottazzi v. Italy* [GC], no. 34884/97, § 30, ECHR 1999-V). In the present case, on the basis of the information in its possession and the above-mentioned criteria, the Court considers the sum of EUR 11,629.41 to be reasonable and awards the first applicant that amount.

C. Default interest

81. The Court considers it appropriate to base the rate of the default interest to be paid on outstanding amounts on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention with respect to the first applicant;

2. *Holds* that there has been a violation of Article 8 of the Convention with respect to the second applicant;

3. *Holds*

(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:

(i) EUR 4,000 (four thousand euros) for non-pecuniary damage;

(ii) EUR 11,629.41 (eleven thousand six hundred and twenty-nine euros forty-one cents) for costs and expenses;

(b) that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 4,000 (four thousand euros) for non-pecuniary damage;

(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in French, and notified in writing on 25 February 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Sir Nicolas BRATZA
President

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

CASE OF SÜREK AND ÖZDEMIR v. TURKEY

(applications nos. 23927/94 and 24277/94)

JUDGMENT

STRASBOURG

8 July 1999

In the case of Sürek and Özdemir v. Turkey,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1] and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr A. PASTOR RIDRUEJO,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mr J.-P. COSTA,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mr K. TRAJA,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,

and also of Mr P.J. MAHONEY and Mrs M. DE BOER-BUQUICCHIO, *Deputy Registrars*,

Having deliberated in private on 3 March and 16 June 1999,

Delivers the following judgment, which was adopted on the last-mentioned date.

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") on 27 April 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in applications (nos. 23927/94 and 24277/94) against the Republic of Turkey lodged with the Commission under former Article 25 by two

Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

Turkish nationals, Mr Kamil Tekin Sürek and Mr Yücel Özdemir, on 25 February 1994 and 4 May 1994 respectively.

The Commission's request referred to former Articles 44 and 48 of the Convention and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the cases disclosed a breach by the respondent State of its obligations under Articles 6 § 1, 10 and 18 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of former Rules of Court A[1], the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30). Mr R. Bernhardt, President of the Court at the time, subsequently authorised the applicants' lawyer to use the Turkish language in the written procedure (Rule 27 § 3). At a later stage, Mr L. Wildhaber, President of the new Court, authorised the applicants' lawyer to use the Turkish language in the oral proceedings (Rule 36 § 5).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal in particular with procedural matters that might arise before the entry into force of Protocol No. 11, Mr Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicants' lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the Government's and the applicants' memorials on 16 September and 13 October 1998 respectively. On 29 September 1998 the Government filed with the Registry additional information in support of their memorial and on 14 October 1998 the applicants filed details of their claims for just satisfaction. On 26 February 1999 the first applicant, Mr Sürek, filed further details of his claims for just satisfaction. On 1 March 1999 the Government filed their observations in rely to both applicants' claims for just satisfaction.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. On 22 October 1998 Mr Wildhaber had decided that, in the interests of the proper administration of justice, a single Grand Chamber should be constituted to hear the instant case and twelve other cases against Turkey, namely: Karataş v. Turkey (application no. 23168/94); Arslan v. Turkey (no. 23462/94); Polat v. Turkey (no. 23500/94); Ceylan v. Turkey (no. 23556/94); Okçuoğlu v. Turkey (no. 24146/94);

1. *Note by the Registry*: Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States not bound by that Protocol.

Gerger v. Turkey (no. 24919/94); Erdoğdu and İnce v. Turkey (nos. 25067/94 and 25068/94); Sürek v. Turkey no. 1 (no. 26682/95), Başkaya and Okçuoğlu v. Turkey (nos. 23536/94 and 24408/94); Sürek v. Turkey no. 2 (no. 24122/94); Sürek v. Turkey no. 3 (no. 24735/94) and Sürek v. Turkey no. 4 (no. 24762/94).

5. The Grand Chamber constituted for that purpose included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr Wildhaber, the President of the Court, Mrs E. Palm Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mrs F. Tulkens, Mrs V. Strážnická, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr A.B. Baka, Mr R. Maruste, and Mrs S. Botoucharova (Rule 24 § 3 and Rule 100 § 4).

On 19 November 1998 Mr Wildhaber exempted Mr Türmen from sitting after his withdrawal from the case having regard to the decision of the Grand Chamber in the case of Oğur v. Turkey taken in accordance with Rule 28 § 4. On 16 December 1998 the Government notified the registry that Mr F. Gölcüklü had been appointed *ad hoc* judge (Rule 29 § 1).

Subsequently, Mr K. Traja replaced Mrs Botoucharova who was unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

6. Pursuant to the invitation of the Court (Rule 99), the Commission delegated one of its members, Mr D. Šváby, to take part in the consideration of the case before the Grand Chamber. The Commission subsequently informed the registry that the Commission would not be represented at the oral hearing. On 16 February 1999 the Delegate filed his written pleadings on the case with the registry.

7. In accordance with the President's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 3 March 1999, the case being heard simultaneously with the case of Sürek v. Turkey no. 2. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr D. TEZCAN, *Agent*,
Mrs D. AKÇAY, *Co-Agent*,
Mr B. ÇALIŞKAN,
Miss G. AKYÜZ,
Miss A. GÜNYAKTI,
Mr F. POLAT,
Miss A. EMÜLER,

Mrs I. BATMAZ KEREMOĞLU,
Mr B. YILDIZ,
Mr Y. ÖZBEK, *Advisers*;

(b) *for the applicants*
Mr S. MUTLU, of the Istanbul Bar, *Advocate*.

The Court heard addresses by Mr Mutlu and Mr Tezcan.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicants

8. At the material time, the first applicant, Mr Kamil Tekin Sürek was the major shareholder in *Deniz Basın Yayın Sanayi ve Ticaret Organizasyon*, a Turkish company which owns a weekly review entitled *Haberde Yorumda Gerçek* (The Truth of News and Comments), published in Istanbul. The second applicant, Mr Yücel Özdemir was the editor-in-chief of the review.

B. The impugned publications

9. In the 31 May 1992 and 7 June 1992 issues of the review, an interview with a leader of the Kurdistan Workers' Party ("the PKK"), an illegal organisation, was published in two parts. In the edition of 31 May 1992 a joint declaration by four socialist organisations was published.

10. The relevant parts of these publications read as follows (translation):

1. Interview with Mr C.B., the PKK second-in-command (Part 1)

"Q: What do you mean when you say [the elections present] dangers?

A: The US say: 'The Kurds are oppressed. Saddam is slaughtering them. We are protecting the Kurds against Saddam's massacres. Their survival is in our safekeeping.' But it is quite obvious that this is a big swindle. If they were really protecting the Kurds against massacre as they claim, they ought to be protecting them against the Turkish State, too. Since the massacre which the Turkish State is carrying out against our people in the North is as horrible as that of Saddam. In fact, there are practices which are much more extreme than those of Saddam. So the US ought to be doing the same thing against Turkey. The double standard is clear for all to see. The

US take action against Saddam, but support Turkey's massacres against the Kurdish people in both the North and the South. There have been many signs of this and our people are aware of it. They want to make the Kurds an instrument for gaining their own ends. Their aim in the elections is both to contain the positive developments in the South through the organisations they want to promote and to block the fight for independence and freedom which is developing in Kurdistan in general. They want to bring all the Kurdish movements under the control of those two organisations already controlled by them [the US]. So that is why they all present a danger for the Kurdish people.

Q: Laws will be enacted once a parliament has been established in Southern Kurdistan. Treaties will be signed, on the one hand with neighbours, i.e. Turkey and Iraq, and, on the other hand, with the US. Turkey can have only one demand from these countries, that the PKK be excluded. If Kurdish parties take part in such an environment, what would be the PKK's attitude?

A: It is a well-known fact that Turkey and/or imperialism wants to divert our people from its national identity and struggle. But we want to achieve our identity as a nation and have a fatherland. That is what we are fighting for. They want to uproot us and drive us out of our territory; they want to annihilate us or force us to change. But we fight to live in freedom in our own territory. If either the US or Turkey or any other power which claims to be acting in the name of Kurdish identity attempts to force us out of any part of our country, we will fight in order to stay where we are. That is what we are fighting for right now. The Turkish State wants to oust us from our territory. It is driving people out of their villages. It wants Kurdistan to become a totally uninhabited area. But we are resisting. No one can tell us or ask us to get out. We are not on anyone else's territory; we are on our own territory. No one can tell us to leave our own territory. We make no distinction between the North and the South; we are in Kurdistan. We are amongst our own people. If they want us to leave our territory, they must know that we will never agree to it. We are a people who have lost everything we had and who are fighting to regain what we have lost. That is the purpose of our action. We have nothing to lose. We shrink from nobody and are afraid of no one. All we can lose is our slavery. That is why we act without fear.

Q: It is said that broadcasting programmes in Kurdish on Turkish State television would be interpreted as making a concession to the PKK. Could that be true? It is also rumoured that the PKK is going to set up a TV station. Is that right?

A: It is not true that the PKK is going to broadcast on television. We have no such facilities. Television broadcasting either by satellite or through any other channel is not an issue for the PKK. It was Turgut Özal who brought up the issue of Kurdish TV in Turkey when he went to the US. That is what is being debated. A very small fraction of people say that Özal was right, but a very large proportion are against it. Those who are suggesting Kurdish TV are doing so deliberately. The aim is supposedly to influence and win over the masses and thus to isolate the PKK. That is what the idea is. But even if Kurdish TV became a reality, it would do them no service. That is why they are against it. The purpose of those who want to create Kurdish TV is to isolate the PKK. For there is no mention of any argument such as 'Here is a people who have their own language and we must broadcast in their language. There is need for respect for that people. It is wrong to ban a people's language, that also harms the Turkish people.' Far from it. The debate has revealed the real intentions: 'How can we wipe out the influence of the PKK? How can we isolate

the PKK? How can we pull the wool over the Kurdish people's eyes?' It is a tactical approach. It is a trick. But no matter what steps they take, they will be working to the advantage of the PKK. The Turkish State has now lost Kurdistan. That is a fact. Any move the State makes in Kurdistan after this will turn out to the advantage of the PKK and to the disadvantage of the Turkish State ... .The Turkish press has no principles. We consider that there is no longer any point in communicating with that unethical press. We shall not be satisfied with abstaining from any contact with the press; we shall endeavour to stop the press from entering Kurdistan.

Q: A different tactic was applied in the Uludere attack. Previously, attacks were always carried out at night. But this time, the attack was carried out during the day and the clashes continued throughout the day. It is said that this entails more risk for the guerrillas. What was the reason for it?

A: What they say is right. Our combat has reached a certain level. Tactics have to be developed which match that level, because it is a mistake to wage war with less developed tactics. Progress can be achieved in the war by using tactics in keeping with the level of warfare which has now been reached. That is why an action of that nature was planned. The idea was to attack in the morning and hold our ground, continuing the clashes throughout the day – and it was successful in the end. It was an experiment. From our point of view there are conclusions to be drawn from it. We are studying the matter. We shall benefit from that in the actions we carry out in the future."

2. Interview with Mr C.B., the PKK second-in-command (Part 2)

"Q: What do you think about the assassinations by unknown perpetrators in Kurdistan and the actions ascribed to the 'Hizbi-contra'?

A: It is true that there is an organisation known as Hizbullah. But it is a weak organisation. It is not that organisation which is carrying out the massacres, contrary to what is being said. Since the organisation is weak, the Republic of Turkey has captured its members in many places. Many massacres are carried out in the name of that organisation, but it is actually the Turkish State itself which is doing the killings. We say this to the members of Hizbullah: 'If you are really Muslims, [you should know that] the Islamic faith is against repression and injustice and advocates what is right and just.' It is a well-known fact that the Turkish State is repressive and carries out massacres and inhuman actions. They [the Hizbullah] must respect those who oppose these acts. If they want to wage war, they must join forces with them. That is what we are asking of them. We warn them as friends that they must throw out the contra-guerrillas who infiltrate their ranks. For unless they do that, they will come to grief. We have not, as yet, reacted more seriously, we have just warned them. We say that that phenomenon has served the Turkish State and we have received a favourable response from certain quarters. They have said that Hizbullah people or Muslims have not in fact been involved in that sort of action and that the acts have not been carried out by Hizbullah people. That is favourable as far as we are concerned. But it [the State] is still carrying out massacres in some places in Hizbullah's name...

Q: On what lines will the struggle be carried out from now on?

A: The climate does affect a war, although the effects are not decisive. The 1991-92 winter was very hard and that affected our movements, the capacity for combat and caused several difficulties – both for us and for the Turkish State. But they have the advantage of using technology and they used that advantage to the full. To no avail, however. They intended to deal us murderous blows last winter. They thought they would have overthrown us and ousted us by the spring. But they did not achieve what they wanted. Our capacity for movement was reduced by the hard winter conditions and, as a result, steps could only be taken late as compared to previous years. The season is gradually becoming more suitable, however. There is still snow on the ground in many places, but it is presenting less and less of an obstacle. 1992 will be more different compared to other years, but we never say: 'Let us improve our armed combat, let us expand it further.' If we continue the war, we do so because we have to. Because there is no possibility of achieving a different life and developing. All roads have been blocked for us. We are waging war because we are forced to. Any further expansion of the war will depend on the attitude of the Turkish State. The State is intensifying the war. So we have to extend the war to that degree. The war will escalate. Before the PKK, there was a one-sided war being waged in Kurdistan. In the last few years that war has begun to be a two-sided war. In the old days, the Turkish State used to achieve whatever ends it intended to achieve in the war it was waging, and the Kurdish people was being rapidly wiped out as a result. But the Kurdish people have begun to say 'Stop!'. They began to resist in order to avoid annihilation. It was the State which started the war and the ending of the war will also depend on the Turkish State. We did not start the war. We developed a defensive war against the war of annihilation that was being waged on us. This war will continue as long as the Turkish State refuses to accept the will of the people of Kurdistan: there will be not one single step backwards. The war will go on until there is only one single individual left on our side. …

The State colonialist authority has completely disappeared in some places … As the government of war we want the people's will, which makes itself increasingly known, to be able to express itself officially. We shall make our way towards that objective one step at a time. We shall reach it by destroying or weakening the sovereignty of the State different ways and in various forms, by setting up a popular regime in certain places and favouring a dualistic regime in others. That is what we call the power of the people, the government of war. …

The PKK encounters all kinds of problems and resolves them. No questions are put to the Turkish State. No one speaks to it. Everyone speaks to the ERNK Committee or the local ERNK official. The ERNK is considered competent. For the moment, we are in the process of electing the representatives of the people."

3. Call "to unite forces" – Joint Statement of TDKP, TKEP, TKKKÖ and TKP-ML Hareketi

"The Central Committees of the Revolutionary Communist Party of Turkey (TDKP), the Communist Labour Party of Turkey (TKEP), the Turkish Organisation for the Liberation of Northern Kurdistan (TKKKÖ) and the Communist Party/Marxist-Leninist Movement of Turkey (TKP/ML Hareketi) have called on all revolutionaries and democrats to unite forces.

'Let us unite against State terrorism, against the repression and oppression of the Kurdish people, against the massacres, the street killings, the dismissals and unemployment; let us unite and step up our efforts for freedom, democracy and socialism!' Such is the heading of the appeal in which it is stated that the only means of action for the ruling classes is that of force and violence. And the 'democratisation' initiatives of the DYP and SHP government are described as a manoeuvre, purely a means of concealing their attacks."

The appeal goes on to state the following views:

"Workers, labourers and young people of the Kurdish and Turkish nation!

It is possible and perfectly feasible for us to drive back the attacks levelled on us by imperialism and the collaborating ruling classes and to obtain our economic and political rights and freedoms. To do so we must rally our forces around our common demands and join battle. Aware of its historic revolutionary role, the working class must take action, must lead that action, must call the bluff of the trade union bosses of every camp and smash the barriers they have put up to curb our movement and must develop the fight and action.

- The Turkish army must withdraw from Kurdistan. Action must be taken to put an end to the double standards in the legal system and all Kurdish prisoners must be released.

- The Turkish parliament must end its authority over Kurdistan. Kurdish people must be free to determine their own destiny, including the establishment of a separate State.

- The State terrorism and street executions, carried out by MİT [State Intelligence Organisation] agents, contra-guerrillas and special squads, must stop immediately and they must be called upon to account for the massacres and murders.

- The servicing of external debts to imperialists must be stopped, and those resources must be used for the benefit of the proletariat.

- Dismissals must be stopped and sacked workers must be given their jobs back. All the obstacles which have been placed in the way of trade union organisation must be removed and the right to organise without restriction must be granted.

- Measures must be taken to prevent the State Economic Enterprises, which are the resources of the country and of the people, from being sold for a song to imperialists. Labour sub-contracting, which is a means of eliminating trade union coverage, must be stopped immediately.

- The strike bans must be lifted and lockout must be prohibited. The right to hold general strikes, political strikes, strikes to obtain rights and sympathy strikes must be recognised. And all the bans on freedom of assembly, freedom to demonstrate, freedom of opinion and of the press must be ended.

- Act no. 657 pertaining to civil servants must be repealed and all working people must be granted the right to join a trade union with the right to strike and to conclude collective agreements.

- All working people must have insurance coverage; all workers must be granted unemployment insurance and the facilities must be provided for free health services and health care for everyone.

- The discrimination based on sex which prevails in working and social life and the pressure exerted on working women must be ended.

- The YÖK [High Council for Education] must be done away with and young people in higher education must be allowed to have a say and to participate in decision-making in university administration. All the obstacles that have been placed on youth organisations must be removed and education and training must be free of charge at every level.

- Education boards must be given full autonomy; textbooks must meet contemporary requirements and must be re-written with democratic contents.

- All debts owed to the State by the peasantry must be cancelled and the rural population must be allowed to set the minimum prices of products."

C. The measures taken by the authorities

1. The seizure of the review

11. On 1 June 1992 the Istanbul National Security Court (*Istanbul Devlet Güvenlik Mahkemesi*) ordered the seizure of all copies of the 31 May 1992 issue of the review, since it allegedly contained a declaration by terrorist organisations and disseminated separatist propaganda.

2. The charges against the applicants

12. In an indictment dated 16 June 1992 the Public Prosecutor at the Istanbul National Security Court charged the applicants with having disseminated propaganda against the indivisibility of the State by publishing an interview with a PKK leader and a declaration made by four terrorist organisations. The charges were brought under sections 6 and 8 of the Prevention of Terrorism Act 1991 (hereinafter "the 1991 Act": see paragraph 23 below).

13. In another indictment dated 30 June 1992, the applicants were further charged on account of having published the second part of the interview in the issue of 7 June 1992 with disseminating propaganda against the indivisibility of the State. The charges were brought under section 8 of 1991 Act.

14. On 4 February 1993 the criminal proceedings were joined in view of the fact that the incriminated articles were considered to constitute a single interview published in two parts.

3. The proceedings before the Istanbul National Security Court

15. In the proceedings before the Istanbul National Security Court, the applicants denied the charges. They pleaded that the interview had been published with the aim of providing the public with information within the scope of journalism and the freedom of the press. As regards his freedom of expression, the first applicant referred to the Convention and the case-law of the Commission and the Court. He stated that pluralism of opinion was essential in a democratic society including opinions which shock or offend. He argued that the provisions of sections 6 and 8 of the 1991 Act restricted freedom of expression in contravention of the Turkish Constitution and the criteria laid down in the case-law of the Commission and the Court.

4. The applicants' conviction

16. In a judgment dated 27 May 1993 the Istanbul National Security Court found the applicants guilty of offences under sections 6 and 8 of the 1991 Act. The first applicant was sentenced under section 6 to a fine of 100,000,000 Turkish liras and under section 8 to a further fine of 200,000,000 Turkish liras. The second applicant was sentenced under section 6 to a fine of 50,000,000 Turkish liras and under section 8 to six months' imprisonment and a further fine of 100,000,000 Turkish liras.

17. In its reasoning, the court held that the interview with the PKK leader was published in the form of a news commentary. It further held that the interviewee had referred to a certain part of Turkish territory as "Kurdistan", had asserted that certain Turkish citizens who are of Kurdish origin form a separate society and that the Republic of Turkey expels Kurdish people from their villages and massacres them. The court further considered that the interviewee had praised Kurdish terrorist activities and had claimed that the Kurds should form a separate State. On these grounds, the court found that the interview, as a whole, disseminated propaganda against the indivisibility of the State. The court further held that another page of the review contained a declaration by terrorist organisations and its publication constituted a separate offence under section 6 of the 1991 Act.

5. The applicants' appeal

18. The applicants appealed against their conviction. In addition to the defence which they invoked before the Istanbul National Security Court, their legal representative emphasised that in a democratic society opinions must be freely expressed and debated. Noting that there had been no prosecutions for the publication of other interviews with the leaders of the PKK in other newspapers or magazines, the applicants' representative asserted that the applicants had not been convicted for having published the incriminated interview, but for publishing a Marxist review.

19. On 4 November 1993 the Court of Cassation dismissed the appeal. It upheld the Istanbul National Security Court's assessment of the evidence and its reasons for rejecting the applicants' defence.

6. Further developments

20. Following the amendments made by Law no. 4126 of 27 October 1995 to the 1991 Act (see paragraph 24 below) the Istanbul National Security Court *ex officio* re-examined the applicants' cases. The court confirmed the sentences imposed on them.

II. RELEVANT DOMESTIC LAW

A. The criminal law

21. The relevant provisions of the Criminal Code read as follows:

1. The Criminal Code (Law no. 765)

Article 2 § 2

"Where the legislative provisions in force at the time when a crime is committed are different from those of a later law, the provisions most favourable to the offender shall be applied."

Article 19

"The term 'heavy fine' shall mean payment to the Treasury of from twenty thousand to one hundred million Turkish liras, as the judge shall decide..."

Article 36 § 1

"In the event of conviction, the court shall order the seizure and confiscation of any object which has been used for the commission or preparation of the crime or offence…"

Article 142
(repealed by Law no. 3713 of 12 April 1991[1] on the Prevention of Terrorism)

"Harmful propaganda

1. A person who by any means whatsoever spreads propaganda with a view to establishing the domination of one social class over the others, annihilating a social class, overturning the fundamental social or economic order established in Turkey or

1. See paragraph 23 below.

the political or legal order of the State shall, on conviction, be liable to a term of imprisonment of from five to ten years.

2. A person who by any means whatsoever spreads propaganda in favour of the State's being governed by a single person or social group to the detriment of the underlying principles of the Republic and democracy shall, on conviction, be liable to a term of imprisonment of from five to ten years.

3. A person who, prompted by racial considerations, by any means whatsoever spreads propaganda aimed at abolishing in whole or in part public-law rights guaranteed by the Constitution or undermining or destroying patriotic sentiment shall, on conviction, be liable to a term of imprisonment of from five to ten years.

…"

Article 311 § 2

"Public incitement to commit an offence

Where incitement to commit an offence is done by means of mass communication, of whatever type – whether by tape recordings, gramophone records, newspapers, press publications or other published material – by the circulation or distribution of printed papers or by the placing of placards or posters in public places, the terms of imprisonment to which convicted persons are liable shall be doubled…"

Article 312[1]

"Non-public incitement to commit an offence

A person who expressly praises or condones an act punishable by law as an offence or incites the population to break the law shall, on conviction, be liable to between six months' and two years' imprisonment and a heavy fine of from six thousand to thirty thousand Turkish liras.

A person who incites the people to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions, shall, on conviction, be liable to between one and three years' imprisonment and a fine of from nine thousand to thirty-six thousand liras. If this incitement endangers public safety, the sentence shall be increased by one third to one half.

1. The conviction of a person pursuant to Article 312 § 2 entails further consequences, particularly with regard to the exercise of certain activities governed by special legislation. For example, persons convicted of an offence under that Article may not found associations (Law no. 2908, section 4(2)(b)) or trade unions, nor may they be members of the executive committee of a trade union (Law no. 2929, section 5). They are also forbidden to found or join political parties (Law no. 2820, section 11(5)) and may not stand for election to parliament (Law no. 2839, section 11(f3)). In addition, if the sentence imposed exceeds six months' imprisonment, the convicted person is debarred from entering the civil service, except where the offence has been committed unintentionally (Law no. 657, section 48(5)).

The penalties to be imposed on those who have committed the offences defined in the previous paragraph shall be doubled when they have done so by the means listed in Article 311 § 2."

2. The Press Act (Law no. 5680 of 15 July 1950)

22. The relevant provisions of the Press Act 1950 read as follows:

Section 3

"For the purposes of the present Law, the term 'periodicals' shall mean newspapers, press agency dispatches and any other printed matter published at regular intervals.

'Publication' shall mean the exposure, display, distribution, emission, sale or offer for sale of printed matter on premises to which the public have access where anyone may see it.

An offence shall not be deemed to have been committed through the medium of the press unless publication has taken place, except where the material in itself is unlawful."

Additional section 4(1)

"Where distribution of the printed matter whose distribution constitutes the offence is prevented … by a court injunction or, in an emergency, by order of the principal public prosecutor … the penalty imposed shall be reduced to one third of that laid down by law for the offence concerned."

3. The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991)[1]

23. The relevant provisions of the Prevention of Terrorism Act 1991 read as follows:

Section 6

"It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to announce, orally or in the form of a publication, that terrorist organisations will commit an offence against a specific person, whether or not that person's ... identity is divulged provided that it is done in such a manner that he or she may be identified, or to reveal the identity of civil servants who have participated in anti-terrorist operations or to designate any person as a target.

It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to print or publish declarations or leaflets emanating from terrorist organisations.

1. This law, promulgated with a view to preventing acts of terrorism, refers to a number of offences defined in the Criminal Code which it describes as "acts of terrorism" or "acts perpetrated for the purposes of terrorism" (sections 3 and 4) and to which it applies.

…

Where the offences contemplated in the above paragraphs are committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, or from the sales of the previous issue if the periodical appears monthly or less frequently, *or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed matter other than periodicals or if the periodical has just been launched*[1]. However, the fine may not be less than fifty million Turkish liras. The editor of the periodical shall be ordered to pay a sum equal to half the fine imposed on the publisher."

Section 8
(before amendment by Law no. 4126 of 27 October 1995)

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited, irrespective of the methods used and the intention. Any person who engages in such an activity shall be sentenced to not less than two and not more than five years' imprisonment and a fine of from fifty million to one hundred million Turkish liras.

Where the crime of propaganda contemplated in the above paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, *or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed matter other than periodicals or if the periodical has just been launched*[2]. However the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment."

Section 8
(as amended by Law no. 4126 of 27 October 1995)

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited. Any person who engages in such an activity shall be sentenced to not less than one and not more than three years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras. The penalty imposed on a re-offender may not be commuted to a fine.

1-2. The phrase in italics was deleted by a judgment of the Constitutional Court on 31 March 1992 and went out of force on 27 July 1993.

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly. However, the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment.

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of printed matter or by means of mass communication other than periodicals within the meaning of the second paragraph, those responsible and the owners of the means of mass communication shall be sentenced to not less than six months' and not more than two years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras…

…"

Section 13
(before amendment by Law no. 4126 of 27 October 1995)

"The penalties for the offences contemplated in the present law may not be commuted to a fine or any other measure, nor may they be accompanied by a reprieve."

Section 13
(as amended by Law no. 4126 of 27 October 1995)

"The penalties for the offences contemplated in the present Law may not be commuted to a fine or any other measure, nor may they be accompanied by a reprieve.

However, the provisions of this section shall not apply to convictions pursuant to section 8[1]."

Section 17

"Persons convicted of the offences contemplated in the present law who ... have been punished with a custodial sentence shall be granted automatic parole when they have served three-quarters of their sentence, provided they have been of good conduct.

…

The first and second paragraphs of section 19[2] … of the Execution of Sentence Act (Law no. 647) shall not apply to the convicted persons mentioned above."

1. See the relevant provision of Law no. 4126, reproduced below.
2. See paragraph 26 below.

4. Law no. 4126 of 27 October 1995 amending sections 8 and 13 of Law no. 3713

24. The following amendments were made to the Prevention of Terrorism Act 1991 following the enactment of Law no. 4126 of 27 October 1995:

Temporary provision relating to section 2

"In the month following the entry into force of the present Law, the court which has given judgment shall re-examine the case of a person convicted pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) and, in accordance with the amendment … to section 8 of Law no. 3713, shall reconsider the term of imprisonment imposed on that person and decide whether he should be allowed the benefit of sections 4^{1} and 6^{2} of Law no. 647 of 13 July 1965."

5. Law no. 4304 of 14 August 1997 on the deferment of judgment and of executions of sentences in respect of offences committed by editors before 12 July 1997

25. The following provisions are relevant to sentences in respect of offences under the Press Law:

Section 1

"The execution of sentences passed on those who were convicted under Press Law no. 5680 or other laws as editors for offences committed before 12 July 1997 shall be deferred.

The provision in the first paragraph shall also apply to editors who are already serving their sentences.

The institution of criminal proceedings or delivery of final judgments shall be deferred where no proceedings against the editor have not yet been brought, or where a preliminary investigation has been commenced but criminal proceedings have not been instituted, or where the final judicial investigation has been commenced but judgment has not yet been delivered, or where the judgment has still not become final."

Section 2

"If an editor who has benefited under the provisions of the first paragraph of section 1 is convicted as an editor for committing an intentional offence within three years of the date of deferment, he must serve the entirety of the suspended sentence.

1. This provision concerns substitute penalties and measures which may be ordered in connection with offences attracting a prison sentence.
2. This provision concerns reprieves.

The part of the postponed conviction which was served by the responsible editor until the date on which this Law enters into force shall be deducted from the sentence to be served as indicated in section 1. The provisions concerning conditional release are reserved.

Where there has been a deferment, criminal proceedings shall be instituted or judgment delivered if an editor is convicted as such for committing an intentional offence within three years of the date of deferment.

Any conviction as an editor for an offence committed before 12 July 1997 shall be deemed a nullity if the aforesaid period of three years expires without any further conviction for an intentional offence. Similarly, if no criminal proceedings have been instituted, it shall no longer be possible to bring any, and, if any have been instituted, they shall be discontinued."

6. The Execution of Sentences Act (Law no. 647 of 13 July 1965)

26. The Execution of Sentences Act provides *inter alia*:

Section 5

"The term 'fine' shall mean payment to the Treasury of a sum fixed within the statutory limits.

…

If, after service of the order to pay, the convicted person does not pay the fine within the time-limit, he shall be committed to prison for a term of one day for every ten thousand Turkish liras owed, by a decision of the public prosecutor.

…

The sentence of imprisonment thus substituted for the fine may not exceed three years…"

Section 19(1)

"… persons who ... have been ordered to serve a custodial sentence shall be granted automatic parole when they have served half of their sentence, provided they have been of good conduct..."

7. The Code of Criminal Procedure (Law no. 1412)

27. The Code of Criminal Procedure contains the following provisions:

Article 307

"An appeal on points of law may not concern any issue other than the lawfulness of the impugned judgment.

Non-application or erroneous application of a legal rule shall constitute unlawfulness[1]."

Article 308

"Unlawfulness is deemed to be manifest in the following cases:

1- where the court is not established in accordance with the law;

2- where one of the judges who have taken the decision was barred by statute from participating;

…"

B. Criminal law cases submitted by the Government

28. The Government supplied copies of several decisions given by the prosecutor attached to the Istanbul National Security Court withdrawing charges against persons suspected of inciting people to hatred or hostility, especially on religious grounds (Article 312 of the Criminal Code), or of disseminating separatist propaganda against the indivisible unity of the State (section 8 of Law no. 3713 – see paragraph 23 above). In the majority of cases where offences had been committed by means of publications the reasons given for the prosecutor's decision included such considerations as the fact that the proceedings were time-barred, that some of the constituent elements of the offence could not be made out or that there was insufficient evidence. Other grounds included the fact that the publications in issue had not been distributed, that there had been no unlawful intent, that no offence had been committed or that those responsible could not be identified.

29. Furthermore, the Government submitted a number of decisions of the National Security Courts as examples of cases in which defendants accused of the above-mentioned offences had been found not guilty. These were the following judgments: 19 November (no. 1996/428) and 27 December 1996 (no. 1996/519); 6 March (no. 1997/33), 3 June (no. 1997/102), 17 October (no. 1997/527), 24 October (no. 1997/541) and 23 December 1997 (no. 1997/606); 21 January (no. 1998/8), 3 February (no. 1998/14), 19 March (no. 1998/56), 21 April 1998 (no. 1998/87) and 17 June 1998 (no. 1998/133).

30. As regards more particularly proceedings against authors of works dealing with the Kurdish problem, the National Security Courts in these cases have reached their decisions on the basis of the absence of the element

1. On the question whether the judgment is unlawful, the Court of Cassation is not bound by the arguments submitted to it. Moreover, the term "legal rule" refers to any written source of law, to custom and to principles deduced from the spirit of the law.

of "propaganda", an element of the offence, or on account of the objective nature of the incriminated parts.

C. The National Security Courts[1]

1. The Constitution

31. The constitutional provisions governing judicial organisation of the National Security Courts are worded as follows:

Article 138 §§ 1 and 2

"In the performance of their duties, judges shall be independent; they shall give judgment, according to their personal conviction, in accordance with the Constitution, statute and the law.

No organ, authority, ... or ... person may give orders or instructions to courts or judges in the exercise of their judicial powers, or send them circulars or make recommendations or suggestions to them."

Article 139 § 1

"Judges … shall not be removed from office or compelled to retire without their consent before the age prescribed by the Constitution…"

Article 143 §§ 1-5

"National Security Courts shall be established to try offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free democratic system of government, and offences which directly affect the State's internal or external security.

1. The National Security Courts were created by Law no. 1773 of 11 July 1973, in accordance with Article 136 of the 1961 Constitution. That law was annulled by the Constitutional Court on 15 June 1976. The courts in question were later reintroduced into the Turkish judicial system by the 1982 Constitution. The relevant part of the statement of reasons contains the following passage:

"There may be acts affecting the existence and stability of a State such that when they are committed, special jurisdiction is required in order to give judgment expeditiously and appropriately. For such cases it is necessary to set up National Security Courts. According to a principle inherent in our Constitution, it is forbidden to create a special court to give judgment on a specific act after it has been committed. For that reason the National Security Courts have been provided for in our Constitution to try cases involving the above-mentioned offences. Given that the special provisions laying down their powers have been enacted in advance and that the courts have been created before the commission of any offence …, they may not be described as courts set up to deal with this or that offence after the commission of such an offence."

National Security Courts shall be composed of a president, two other regular members, two substitute members, a prosecutor and a sufficient number of assistant prosecutors.

The president, one of the regular members, one of the substitutes and the prosecutor, shall be appointed from among judges and public prosecutors of the first rank, according to procedures laid down in special legislation; one regular member and one substitute shall be appointed from among military judges of the first rank and the assistant prosecutors from among public prosecutors and military judges.

Presidents, regular members and substitute members ... of National Security Courts shall be appointed for a renewable period of four years.

Appeal against decisions of National Security Courts shall lie to the Court of Cassation.

..."

Article 145 § 4

"Military legal proceedings

The personal rights and obligations of military judges … shall be regulated by law in accordance with the principles of the independence of the courts, the safeguards enjoyed by the judiciary and the requirements of military service. Relations between military judges and the commanders under whom they serve in the performance of their non-judicial duties shall also be regulated by law..."

2. Law no. 2845 on the creation and rules of procedure of the National Security Courts[1]

32. Based on Article 143 of the Constitution, the relevant provisions of Law no. 2845 on the National Security Courts provide as follows:

Section 1

"In the capitals of the provinces of … National Security Courts shall be established to try persons accused of offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free, democratic system of government and offences directly affecting the State's internal or external security."

Section 3

"The National Security Courts shall be composed of a president, two other regular members and two substitute members."

1. These provisions are based on Article 143 of the Constitution, to the application of which they refer.

Section 5

"The president of a National Security Court, one of the [two] regular members and one of the [two] substitutes ... shall be civilian … judges, the other members, whether regular or substitute, military judges of the first rank…"

Section 6(2) and (6)

"The appointment of military judges to sit as regular members and substitutes shall be carried out according to the procedure laid down for that purpose in the Military Legal Service Act.

Except as provided in the present Law or other legislation, the president and the regular or substitute members of the National Security Courts … may not be appointed to another post or place, without their consent, within four years…

…

If, after an investigation concerning the president or a regular or substitute member of a National Security Court conducted according to the legislation concerning them, competent committees or authorities decide to change the duty station of the person concerned, the duty station of that judge or the duties themselves … may be changed in accordance with the procedure laid down in that legislation."

Section 9(1)(a)

"National Security Courts shall have jurisdiction to try persons charged with

(a) the offences contemplated in Article 312 § 2 … of the Turkish Criminal Code,

…

(d) offences having a connection with the events which made it necessary to declare a state of emergency, in regions where a state of emergency has been declared in accordance with Article 120 of the Constitution,

(e) offences committed against the Republic, whose constituent qualities are enunciated in the Constitution, against the indivisible unity of the State – meaning both the national territory and its people – or against the free, democratic system of government and offences directly affecting the State's internal or external security.

…"

Section 27(1)

"The Court of Cassation shall hear appeals against the judgments of the National Security Courts."

Section 34(1) and (2)

"The rules governing the rights and obligations of … military judges appointed to the National Security Courts and their supervision …, the institution of disciplinary proceedings against them, the imposition of disciplinary penalties on them and the investigation and prosecution of any offences they may commit in the performance of their duties ... shall be as laid down in the relevant provisions of the laws governing their profession…

The observations of the Court of Cassation on military judges, the assessment reports on them drawn up by Ministry of Justice assessors … and the files on any investigations conducted in respect of them … shall be transmitted to the Ministry of Justice."

Section 38

"A National Security Court may be transformed into a Martial Law Court, under the conditions set forth below, where a state of emergency has been declared in all or part of the territory in respect of which the National Security Court concerned has jurisdiction, provided that within that territory there is more than one National Security Court…"

3. The Military Legal Service Act (Law no. 357)

33. The relevant provisions of the Military Legal Service Act provide as follows:

Additional section 7

"The aptitude of military judges … appointed as regular or substitute members of the National Security Courts that is required for promotion or advancement in salary step, rank or seniority shall be determined on the basis of assessment reports drawn up according to the procedure laid down below, subject to the provisions of the present Law and the Turkish Armed Forces Personnel Act (Law no. 926).

(a) The first superior competent to carry out assessment and draw up assessment reports for military judges, whether regular or substitute members … shall be the Minister of State in the Ministry of Defence, followed by the Minister of Defence.

…"

Additional section 8

"Members … of the National Security Courts belonging to the Military Legal Service … shall be appointed by a committee composed of the personnel director and the legal adviser of the General Staff, the personnel director and the legal adviser attached to the staff of the arm in which the person concerned is serving and the Director of Military Judicial Affairs at the Ministry of Defence…"

Section 16(1) and (3)

"Military judges … shall be appointed by a decree issued jointly by the Minister of Defence and the Prime Minister and submitted to the President of the Republic for approval, in accordance with the provisions on the appointment and transfer of members of the armed forces…

…

The procedure for appointment as a military judge shall take into account the opinion of the Court of Cassation, the reports by Ministry of Justice assessors and the assessment reports drawn up by the superiors…"

Section 18(1)

"The rules governing the salary scales, salary increases and various personal rights of military judges … shall be as laid down in the provisions relating to officers."

Section 29

"The Minister of Defence may apply to military judges, after considering their defence submissions, the following disciplinary sanctions:

A. A warning, which consists in giving the person concerned notice in writing that he must exercise more care in the performance of his duties.

…

B. A reprimand, which consists in giving the person concerned notice in writing that a particular act or a particular attitude has been found to be blameworthy.

…

The said sanctions shall be final, mentioned in the assessment record of the person concerned and entered in his personal file…"

Section 38

"When military judges … sit in court they shall wear the special dress of their civilian counterparts…"

4. Article 112 of the Military Code (of 22 May 1930)

34. Article 112 of the Military Code of 22 May 1930 provides:

"It shall be an offence, punishable by up to five years' imprisonment, to abuse one's authority as a civil servant in order to influence the military courts."

5. Law no. 1602 of 4 July 1972 on the Supreme Military Administrative Court

35. Under section 22, the First Division of the Supreme Military Administrative Court has jurisdiction to hear applications for judicial review and claims for damages based on disputes relating to the personal status of officers, particularly those concerning their professional advancement.

PROCEEDINGS BEFORE THE COMMISSION

36. Mr Kamil Tekin Sürek, the first applicant, and Mr Yücel Özdemir, the second applicant, applied to the Commission on 25 February and 4 May 1994 respectively. The first applicant relied on Articles 10 and 6 § 1 of the Convention, arguing that his conviction resulting from the publication of material in his periodical unjustifiably interfered with his right to freedom of expression and that he had not received a fair hearing before an independent and impartial tribunal. He also complained about the length of the criminal proceedings brought against him. The second applicant also relied on Articles 10 and 6 § 1 of the Convention in respect of similar complaints. In addition he alleged that, contrary to Article 18 of the Convention, the restrictions imposed on his right to freedom of expression were inconsistent with the legitimate aims set out in Article 10 § 2.

37. The Commission declared the applications (nos. 23927/94 and 24277/94) admissible on 2 September 1996 with the exception of the complaints under Article 6 § 1 relating to the length of the criminal proceedings brought against the applicants. On the same date the Commission decided to join the applications. In its report of 13 January 1998 (former Article 31), it expressed the opinion that there had been a violation of Article 10 of the Convention (17 votes to 15); that no separate issue arose in regard to the second applicant's complaint under Article 18 of the Convention (unanimously); and that there had been a violation of Article 6 § 1 of the Convention (31 votes to 1). The full text of the Commission's opinion and of the separate opinions contained in the report is reproduced as an annex to this judgment[1].

1. *Note by the Registrar*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

FINAL SUBMISSIONS TO THE COURT

38. The applicants requested the Court to find the respondent State in breach of its obligations under Articles 6 § 1 and 10 of the Convention and to award them just satisfaction under Article 41.

39. The Government for their part requested the Court to reject the applicants' allegations.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

40. The applicants alleged that the authorities had unjustifiably interfered with their right to freedom of expression guaranteed under Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

41. The Government maintained that the interferences with the applicants' right to freedom of expression were justified under the provisions of the second paragraph of Article 10. The Commission on the other hand accepted the applicants' allegations.

A. Existence of an interference

42. The Court notes that it is clear, and this has not been disputed, that there has been an interference with the applicants' right to freedom of expression on account of their conviction and sentence under sections 6 and 8 of the Prevention of Terrorism Act 1991 (the "1991 Act").

B. Justification of the interference

43. The above-mentioned interferences contravened Article 10 unless they were "prescribed by law ", had one or more of the legitimate aims referred to in paragraph 2 of Article 10 and were "necessary in a democratic society" for achieving such aim or aims. The Court will examine each of these criteria in turn.

1. "Prescribed by law"

44. The applicants did not comment on whether there had been compliance with this requirement.

45. The Government pointed out that the measures taken against the applicants were based on sections 6 and 8 of the 1991 Act.

46. The Commission accepted the Government's view and concluded that the interferences were prescribed by law.

47. The Court, like the Commission, accepts that since the applicants' convictions were based on sections 6 and 8 of the 1991 Act, the resultant interferences with their right to freedom of expression could be regarded as "prescribed by law", all the more so given that the applicants have not disputed this.

2. Legitimate aim

48. The applicants did not make any submissions on this issue, other than disputing generally the lawfulness of the interferences with their right to freedom of expression.

49. The Government reiterated that the measures taken against the applicants were based on sections 6 and 8 of the 1991 Act. Those provisions were aimed at protecting interests such as territorial integrity, national unity, national security and the prevention of crime and disorder. The applicants were convicted in pursuance of these legitimate aims since they had disseminated separatist propaganda vindicating the acts of the PKK, a terrorist organisation, which threatened these interests.

50. The Commission concluded that the applicants' convictions were part of the authorities' efforts to combat illegal terrorist activities and to maintain national security and public safety, which are legitimate aims under Article 10 § 2.

51. The Court considers that, having regard to the sensitivity of the security situation in south-east Turkey (see the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, p. 2539, § 10) and to the need for the authorities to be alert to acts capable of fuelling additional violence, the measures taken against the applicants can be said to have been in furtherance of certain of the aims mentioned by the Government, namely the protection of national security and territorial integrity and the prevention of disorder and crime. This is certainly true where, as with the situation in

south-east Turkey at the time of the circumstances of this case, the separatist movement had recourse to methods which rely on the use of violence.

3. "Necessary in a democratic society"

(a) Arguments of those appearing before the Court

(i) The applicants

52. The applicants stressed that neither they nor the review had any links with the PKK. They contended that the impugned interviews did not praise that organisation or comment favourably on it. They were written and published with complete objectivity in accordance with the principles of objective journalism. The interviews were published in order to inform the public about the PKK, a topical subject, and the interviews neither promoted terrorism nor threatened public order.

53. The first applicant, Mr Sürek, pleaded that as the owner of the review he had no editorial responsibility for its content and on that account he should not have been convicted and fined heavily. The second applicant, Mr Özdemir, the editor-in-chief of the review, complained that he was given a six-month prison sentence and made to pay a substantial fine on account of his decision to carry the interviews in the review. Both applicants maintained that the measures taken against them amounted to a disproportionate interference with their Article 10 right.

(ii) The Government

54. The Government replied that the applicants were found guilty of disseminating separatist propaganda given that the impugned interview and joint statement encouraged violence against the State and overtly promoted the cause of a terrorist organisation. In support of their argument the Government highlighted several extracts from the interview with the senior PKK leader which, in their view, openly encouraged violence and provoked hostility and hatred among the different groups in Turkish society. As to the joint statement, the Government observed that it contained words designed to support the interview with the PKK leader which was published in the same edition. In their submission it was significant that, given the PKK's declared hostility to the press, the PKK leader volunteered an interview to the applicants' review.

55. Having regard to the PKK's history of terrorism, the Government argued that the applicants had been rightly convicted under sections 6 and 8 of 1991 Act and that the measures taken against them properly fell within

the authorities' margin of appreciation in this area. The interferences were accordingly justified under Article 10 § 2 of the Convention.

(iii) The Commission

56. The Commission found that the interferences with the applicants' right under Article 10 could not be justified with reference to the second paragraph of that Article. In reaching this conclusion, the Commission considered that the replies given by the PKK leader in the interview, as with the tone of the joint statement, could not be seen as inciting to further violence and that the elements of the interview identified by the Istanbul National Security Court did not justify the applicants' conviction (see paragraph 17 above). In the Commission's view the effect of the measures taken against the applicants was to deter public discussion on important political issues. For these reasons in particular the Commission found that there had been a violation of Article 10 of the Convention.

(b) The Court's assessment

57. The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out in, for example, its Zana v. Turkey judgment (cited above, pp. 2547-48, § 51) and in its Fressoz and Roire v. France judgment of 21 January 1999 (*Reports* 1999-, p. …, § 45).

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

(iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was

"proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

58. Since the applicants were convicted of publishing declarations of terrorist organisations and disseminating separatist propaganda through the medium of the review of which they were the owner and editor respectively (see paragraph 8 above), the impugned interferences must also be seen in the context of the essential role of the press in ensuring the proper functioning of political democracy (see, among many other authorities, the Lingens v. Austria judgment of 8 July 1986, Series A, no.103, p. 26, § 41; and the above-mentioned Fressoz and Roire judgment, p …., § 45). While the press must not overstep the bounds set, *inter alia*, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders (see the above-mentioned Lingens judgment, p. 26, §§ 41-42).

59. The Court notes that the review published two interviews with a senior figure in the PKK as well as a joint statement issued on behalf of four political organisations, which, like the PKK, were illegal under the law of the respondent State. In the interviews, the PKK figure criticised what he considered to be double standards on the part of the United States of America with respect to the position of the Kurdish people in south-east Turkey and condemned the policies of the authorities of the respondent State in that region, which he described as being directed at driving the Kurds out of their territory and breaking their resistance. He claimed in the second interview that the war being waged by the PKK on behalf of the Kurdish people will continue *"until there is only one single individual left on our side"* (see paragraph 10 above). As to the joint statement, the sponsors appeal to working class solidarity in the face of a range of perceived injustices. They plead, *inter alia*, in favour of recognising the right of the Kurdish people to self-determination and the withdrawal of the Turkish army from Kurdistan (see paragraph 10 above).

The Istanbul National Security Court found that the charges against both applicants brought under sections 6 and 8 of the 1991 Act were proven (see paragraphs 16 and 17 above). The court considered, *inter alia*, that the PKK official in the interviews had accused the authorities of massacres and expulsions of Kurds living in "Kurdistan", praised Kurdish terrorist

activities and had argued in favour of the creation of a separate State for the Kurdish people. Furthermore, the court found that the publication of the joint statement gave rise to a separate offence under section 6 of the 1991 Act.

60. In assessing the necessity of the interference in the light of the principles set out above (see paragraphs 57 and 58), the Court recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see the Wingrove v. the United Kingdom judgment of 25 November 1996, *Reports* 1996-V, p. 1957, § 58). Moreover, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Furthermore, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks (see the Incal v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, p. 1567, § 54). Finally, where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

61. The Court will have particular regard to the words used in the interviews and the joint statement and to the context in which they were published. In this latter respect it will take into account the background to cases submitted to it, particularly the problems linked to the prevention of terrorism (see the above-mentioned Incal v. Turkey judgment p. 1568, § 58).

It notes in the first place that the fact that the impugned interviews were given by a leading member of a proscribed organisation cannot in itself justify an interference with the applicants' right to freedom of expression; equally so the fact that the interviews contained hard-hitting criticism of official policy and communicated a one-sided view of the origin of and responsibility for the disturbances in south-east Turkey. While it is clear from the words used in the interviews that the message was one of intransigence and a refusal to compromise with the authorities as long as the objectives of the PKK had not been secured, the texts taken as a whole cannot be considered to incite to violence or hatred. The Court has had close regard to the passages of the interviews which, in the view of the Government, can be construed in this sense. For the Court, however,

expressions such as *" If they want us to leave our territory, they must know that we will never agree to it"*. or "*The war will go on until there is only one single individual left on our side*". or "*The Turkish State wants to oust us from our territory. It is driving people out of their villages*". or "*They want to annihilate us*". are a reflection of the resolve of the opposing side to pursue its goals and of the implacable attitudes of its leaders in this regard. Seen in this vein, the interviews had a newsworthy content which allowed the public both to have an insight into the psychology of those who are the driving force behind the opposition to official policy in south-east Turkey and to assess the stakes involved in the conflict. The Court is naturally aware of the concern of the authorities about words or deeds which have the potential to exacerbate the security situation in the region, where since approximately 1985 serious disturbances have raged between the security forces and the members of the PKK involving a very heavy loss of life and the imposition of emergency rule in much of the region (see the above-mentioned Zana judgment, p. 2539, § 10). However, it would appear to the Court that the domestic authorities in the instant case failed to have sufficient regard to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them. As noted previously, the views expressed in the interviews could not be read as an incitement to violence; nor could they be construed as liable to incite to violence. In the Court's view the reasons given by the Istanbul National Security Court for convicting and sentencing the applicants, although relevant, cannot be considered sufficient for justifying the interferences with their right to freedom of expression (see paragraph 17 above). This conclusion holds true for the applicants' separate conviction under section 6 of the 1991 Act in respect of the publication of the joint statement since it would appear to the Court that there are no elements in that text which could be construed as an incitement to violence.

62. The Court also observes that Mr Sürek was ordered to pay a substantial fine and Mr Özdemir was both fined and sentenced to a six-month term of imprisonment (see paragraph 16 above). Furthermore, the copies of the reviews in which the impugned publications appeared were seized by the authorities (see paragraph 11 above). The Court notes in this connection that the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of the interference.

63. The Court stresses that the "duties and responsibilities" which accompany the exercise of the right to freedom of expression by media professionals assume special significance in situations of conflict and tension. Particular caution is called for when consideration is being given to the publication of the views of representatives of organisations which resort

to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence. At the same time, where such views cannot be categorised as such, Contracting States cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.

64. Having regard to the above considerations, the Court concludes that the conviction and sentencing of the applicants were disproportionate to the aims pursued and therefore not "necessary in a democratic society". There has accordingly been a violation of Article 10 of the Convention in the particular circumstances of this case.

II. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

65. The Court notes that the Commission declared inadmissible the complaint of the second applicant, Mr Özdemir, under Article 18 of the Convention, finding that it raised no separate issue in relation to his complaint under Article 10. Article 18 provides:

> "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

66. The Court observes that the second applicant has not pursued this complaint in the proceedings before it, either in his memorial or at the oral hearing. In these circumstances the Court does not propose to examine the complaint of its own motion.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

67. The applicants submitted that they had been denied a fair hearing in breach of Article 6 § 1 of the Convention on account of the presence of a military judge on the bench of the Istanbul National Security Court which tried and convicted them. Article 6 § 1 provides as relevant:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law…"

68. The Government raised an objection to the admissibility of this complaint and contended in the alternative that there had been no breach of Article 6 § 1. The Commission agreed with the applicants' allegation.

A. The Government's preliminary objection – non-exhaustion of domestic remedies

69. The Government maintained that the applicants at no stage of the domestic proceedings claimed that their trial was unfair on account of the participation of a military judge in the proceedings. For this reason the applicants' complaint should be rejected for failure to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention. They relied on the Court's Sadık v. Greece judgment of 15 November 1996 in support of their contention (*Reports* 1996-V, p. 1638).

70. The Court observes that the Government did not raise this objection before the Commission, when the admissibility of the application was being considered. Their observations on this issue related solely to the fact that the applicants had not disputed the independence and impartiality of the Court of Cassation. The applicants' complaint on the other hand is that the Istanbul National Security Court lacked these very qualities. The Government are therefore estopped from raising their objection at this stage of the proceedings (see, among other authorities, the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, p. 2546, § 44; the Nikolova v. Bulgaria judgment of 25 March 1999, *Reports* 1999, p. …, § 44).

B. Merits

71. In the applicants' submission, the military judges appointed to the National Security Courts such as the Istanbul National Security Court were dependent on the executive, being appointed by the joint decree of the Minister of Defence and the Prime Minister, subject to the approval of the President of the Republic. Furthermore, their commanding officers were responsible for their professional assessment and promotion. The ties which bound them to the executive and to the army made it impossible for military judges to discharge their functions on the bench in an independent and impartial manner. The applicants further stressed that the independence and impartiality of military judges and hence of the courts on which they sat were compromised since these judges were unable to take a position against the will of their commanding officers in view of their dependence on the latter for their career.

72. The applicants stated that these considerations impaired the independence and impartiality of the Istanbul National Security Court and prevented them from receiving a fair trial, in violation of Article 6 § 1.

73. The Government replied that the rules governing the appointment of military judges to the National Security Courts and the guarantees which they enjoy in the performance of their judicial functions on the bench were such as to ensure that these courts fully complied with the requirements of

independence and impartiality within the meaning of Article 6 § 1. The Government disputed the applicants' argument that military judges were accountable to their superior officers. In the first place, it was an offence under Article 112 of the Military Code for a public official to attempt to influence the performance by a military judge of his judicial functions (see paragraph 34 above). Secondly, the assessment reports referred to by the applicants related only to conduct of a military judge's non-judicial duties. Military judges have access to their assessment reports and are able to challenge their content before the Supreme Military Administrative Court (see paragraph 35 above). When acting in a judicial capacity a military judge is assessed in exactly the same manner as a civilian judge.

74. The Government further averred that the fairness of the applicants' trial had not been prejudiced by reason of the presence of a military judge on the bench. They claimed that neither the military judge's hierarchical superiors nor the public authorities which had appointed him to the court had any interest in the proceedings or in the outcome of the case. Moreover, the applicants' convictions had been reviewed on appeal by the Court of Cassation, a court whose independence and impartiality have not been impugned by the applicants.

75. The Government also impressed upon the Court the need to have particular regard to the security context in which the decision to establish National Security Courts was taken pursuant to Article 143 of the Constitution. In view of the experience of the armed forces in the anti-terrorism campaign the authorities had considered it necessary to strengthen these courts by including a military judge in order to provide them with the necessary expertise and knowledge to deal with threats to the security and integrity of the State.

76. The Commission concluded that the Istanbul National Security Court could not be considered an independent and impartial tribunal for the purposes of Article 6 § 1 of the Convention. The Commission referred in this respect to its opinion in the Incal v. Turkey case in its Article 31 report adopted on 25 February 1997 and to the reasons supporting that opinion.

77. The Court recalls that in its Incal v. Turkey judgment of 9 June 1998 (*Reports* 1998-IV, p. 1547) and in its Çıraklar v. Turkey judgment of 28 October 1998 (*Reports* 1998-, p. …) the Court had to address arguments similar to those raised by the Government in their pleadings in the instant case. In those judgments the Court noted that the status of military judges sitting as members of National Security Courts did provide some guarantees of independence and impartiality (see the above Incal judgment, p. 1571, § 65). On the other hand, the Court found that certain aspects of these judges' status made their independence and impartiality questionable (*ibidem*, § 68): for example, the fact that they are servicemen who still belong to the army, which in turn takes its orders from the executive; the

fact that they remain subject to military discipline; and the fact that decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army (see paragraphs 32-35 above).

78. As in its Incal judgment the Court considers that its task is not to determine *in abstracto* the necessity for the establishment of National Security Courts in the light of the justifications advanced by the Government. Its task is to ascertain whether the manner in which the Istanbul National Security Court functioned infringed the applicants' right to a fair trial, in particular whether, viewed objectively, they had a legitimate reason to fear that the court which tried them lacked independence and impartiality (see the above-mentioned Incal judgment, p. 1572, § 70; and the above-mentioned Çıraklar judgment, p. …, § 38).

As to that question, the Court sees no reason to reach a conclusion different from that in the cases of Mr Incal and Mr Çıraklar, both of whom, like the present applicants, were civilians. It is understandable that the applicants – prosecuted in a National Security Court for disseminating propaganda aimed at undermining the territorial integrity of the State and national unity – should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service (see paragraph 33 above). On that account they could legitimately fear that the Istanbul National Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of their cases. In other words, the applicants' fears as to that court's lack of independence and impartiality can be regarded as objectively justified. The proceedings in the Court of Cassation were not able to dispel these fears since that court did not have full jurisdiction (see the above-mentioned Incal judgment, p.1573, § 72 *in fine*).

79. For these reasons the Court finds that there has been a breach of Article 6 § 1.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. The applicants claimed compensation for pecuniary and non-pecuniary damage as well as reimbursement of costs and expenses incurred in the domestic and Convention proceedings. Article 41 of the Convention stipulates in this respect:

> "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

81. Mr Sürek claimed the sum of 200,000 French francs (FRF) to compensate him for the fine which he had to pay. Mr Özdemir for his part claimed FRF 100,000 by way of compensation for the fine imposed on him.

The applicants stated that the amounts which they claimed in French francs were equivalent in today's terms to the fines imposed in 1992 and took account of the high rate of inflation in the respondent State since that date.

82. The Government maintained that the sums claimed by the applicants were exorbitant having regard to the amount of the fines in question. They added that Mr Sürek was allowed to pay off his fine in monthly instalments and since Mr Özdemir fled the jurisdiction before sentence was passed no sanction has ever been applied to him. Furthermore, according to Law no. 4304 the sentence imposed on Mr Özdemir is now taken to be suspended (see paragraph 25 above).

83. The Court considers that the first applicant, Mr Sürek, who alone paid the fine imposed on him, should be compensated. Deciding on an equitable basis, it awards him the sum of FRF 8,000.

B. Non-pecuniary damage

84. The applicants each claimed FRF 80,000 in compensation for moral damage without specifying its nature.

85. The Government contended that the claim should be rejected. In the alternative they argued that should the Court be minded to find a violation of any of the Articles invoked by the applicants that in itself would constitute sufficient just satisfaction.

86. The Court considers that the applicants can be considered to have suffered a certain amount of distress on account of the facts of the case. Making an assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards each of the applicants in compensation the sum of FRF 30,000 under this head.

C. Costs and expenses

87. The applicants claimed reimbursement of their legal costs and expenses, which they assessed at FRF 50,000 each, a total of FRF 100,000. Mr Sürek submitted to the Court in support of his claim the contract which he had drawn up with his lawyer for the payment of legal fees in connection with this and three other cases he had lodged with the Convention institutions.

88. The Government stated that the amounts claimed were exaggerated in comparison with fees earned by Turkish lawyers in the domestic courts and had not been properly justified. The case was simple and had not required much effort on the part of the applicants' lawyer who had dealt with it throughout the proceedings in his own language. They cautioned against the making of an award which would only constitute a source of unjust enrichment having regard to the socio-economic situation in the respondent State.

89. The Court notes that the applicants' lawyer has been associated with the preparation of other cases before the Court concerning complaints under Articles 6 and 10 of the Convention which are based on similar facts. Deciding on an equitable basis and according to the criteria laid down in its case-law (see, among many other authorities, the above-mentioned Nikolova v. Bulgaria judgment p. …, § 79), the Court awards each of the applicants the sum of FRF 15,000.

D. Default interest

90. The Court deems it appropriate to adopt the statutory rate of interest applicable in France at the date of adoption of the present judgment which, according to the information available to it, is 3.47 % per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by eleven votes to six that there has been a violation of Article 10 of the Convention;

2. *Holds* unanimously that it is not necessary to examine the second applicant's complaint under Article 18 of the Convention;

3. *Dismisses* unanimously the Government's preliminary objection under Article 6 § 1 of the Convention;

4. *Holds* by sixteen votes to one that there has been a violation of Article 6 § 1 of the Convention;

5. *Holds* by sixteen votes to one
   (a) that the respondent State is to pay the applicants, within three months, the following sums, to be converted into Turkish liras at the rate applicable on the date of settlement:

(i) 8,000 (eight thousand) French francs to the first applicant, Mr Sürek, in respect of pecuniary damage;
(ii) 30,000 (thirty thousand) French francs to each applicant in respect of non-pecuniary damage;
(iii) 15,000 (fifteen thousand) French francs to each applicant in respect of costs and expenses;

(b) that simple interest at an annual rate of 3.47% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

6. *Dismisses* unanimously the remainder of both applicants' claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 1999.

Signed: Luzius WILDHABER
President

Signed: PAUL MAHONEY
Deputy Registrar

A declaration by Mr Wildhaber and, in accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Mrs Palm, Mrs Tulkens, Mr Fischbach, Mr Casadevall and Mrs Greve;
(b) concurring opinion of Mr Bonello;
(c) joint partly dissenting opinion of Mr Wildhaber, Mr Kūris, Mrs Strážnická, Mr Baka and Mr Traja;
(d) dissenting opinion of Mr Gölcüklü.

Initialled: L. W.
Initialled: P.J. M.

DECLARATION BY JUDGE WILDHABER

Although I voted against the finding of a violation of Article 6 § 1 of the Convention in the case of Incal v. Turkey of 9 June 1998 (*Reports* 1998-IV, p. 1547), I now consider myself bound to adopt the view of the majority of the Court.

JOINT CONCURRING OPINION OF JUDGES PALM, TULKENS, FISCHBACH, CASADEVALL AND GREVE

We share the Court's conclusion that there has been a violation of Article 10 in the present case although we have reached the same result by a route which employs the more contextual approach as set out in Judge Palm's partly dissenting opinion in the case of Sürek v. Turkey (no. 1).

In our opinion the majority assessment of the Article 10 issue in this line of cases against the respondent State attaches too much weight to the form of words used in the publication and insufficient attention to the general context in which the words were used and their likely impact. Undoubtedly the language in question may be intemperate or even violent. But in a democracy, as our Court has emphasised, even "fighting" words may be protected by Article 10.

An approach which is more in keeping with the wide protection afforded to political speech in the Court's case-law is to focus less on the inflammatory nature of the words employed and more on the different elements of the contextual setting in which the speech was uttered. Was the language intended to inflame or incite to violence? Was there a real and genuine risk that it might actually do so? The answer to these questions in turn requires a measured assessment of the many different layers that compose the general context in the circumstances of each case. Other questions must be asked. Did the author of the offending text occupy a position of influence in society of a sort likely to amplify the impact of his words? Was the publication given a degree of prominence either in an important newspaper or through another medium which was likely to enhance the influence of the impugned speech? Were the words far away from the centre of violence or on its doorstep?

It is only by a careful examination of the context in which the offending words appear that one can draw a meaningful distinction between language which is shocking and offensive – which is protected by Article 10 – and that which forfeits its right to tolerance in a democratic society.

CONCURRING OPINION OF JUDGE BONELLO

I voted with the majority to find a violation of Article 10, but I do not endorse the primary test applied by the Court to determine whether the interference by the domestic authorities with the applicants' freedom of expression was justifiable in a democratic society.

Throughout these, and previous Turkish freedom-of-expression cases in which incitement to violence was an issue, the common test employed by the Court seems to have been this: if the writings published by the applicants supported or instigated the use of violence, then their conviction by the national courts was justifiable in a democratic society. I discard this yardstick as insufficient.

I believe that punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create 'a clear and present danger'. When the invitation to the use of force is intellectualised, abstract, and removed in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail.

I borrow what one of the mightiest constitutional jurists of all time had to say about words which tend to destabilise law and order: "We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country"[1].

The guarantee of freedom of expression does not permit a state to forbid or proscribe advocacy of the use of force except when such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action[2]. It is a question of proximity and degree[3].

In order to support a finding of clear and present danger which justifies restricting freedom of expression, it must be shown either that immediate serious violence was expected or was advocated, or that the past conduct of the applicant furnished reason to believe that his advocacy of violence would produce immediate and grievous action[4].

1. Justice Oliver Wendell Holmes in *Abrahams v. United States*, 250 U.S. 616 (1919) at 630.
2. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) at 447.
3. *Schenck v. United States* 294 U.S. 47 (1919) at 52.
4. *Whitney v. California* 274 U.S. 357 (1927) at 376.

It is not manifest to me that any of the words with which the applicants were charged, however pregnant with mortality they may appear to some, had the potential of imminently threatening dire effects on the national order. Nor is it manifest to me that instant suppression of those expressions was indispensable for the salvation of Turkey. They created no peril, let alone a clear and present one. Short of that, the Court would be subsidising the subversion of freedom of expression were it to condone the convictions of the applicants by the criminal courts.

In summary "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose, through discussion, the falsehood and the fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence".[1]

1. Justice Louis D. Brandeis, in *Whitney v. California*, 274 U.S. 357 (1927) at 377.

JOINT PARTLY DISSENTING OPINION OF JUDGES WILDHABER, KŪRIS, STRÁŽNICKÁ, BAKA AND TRAJA

In freedom of expression cases the Court is called upon to decide whether the alleged interference has a sufficient basis in domestic law, pursues a legitimate aim and is justifiable in a democratic society. This flows not only from the clear wording of the second paragraph of Article 10, but also from the extensive case-law on that provision. Freedom of expression under the Convention is not absolute. Although the protection of Article 10 extends to information and ideas that "offend, shock or disturb the State or any section of the Community" (see Handyside v. United Kingdom, 7.12.1976, Series A n° 24, § 49; Castells v. Spain, 23.4.1992, Series A n° 236, § 42; Jersild v. Denmark, 23.9.1994, Series A no. 298, § 37; Fressoz & Roire v. France, 21.1.1999, § 45), this is always subject to paragraph 2. Those invoking Article 10 must not overstep certain bounds.

In the assessment of whether restrictive measures are necessary in a democratic society, due deference will be accorded to the State's margin of appreciation; the democratic legitimacy of measures taken by democratically elected Governments commands a degree of judicial self-restraint. The margin of appreciation will vary: it will be narrow for instance where the speech interfered with is political speech because this type of expression is the essence of democracy and interference with it undermines democracy. On the other hand, where it is the nature of speech itself that creates a danger of undermining democracy, the margin of appreciation will be correspondingly wider.

Where there are competing Convention interests the Court will have to engage in a weighing exercise to establish the priority of one interest over the other. Where the opposing interest is the right to life or physical integrity, the scales will tilt away from freedom of expression (see the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, p. 2533, §§ 51, 55 and 61).

It will therefore normally be relatively easy to establish that it is necessary in a democratic society to restrict speech which constitutes incitement to violence. Violence as a means of political expression being the antithesis of democracy, irrespective of the ends to which it is directed, incitement to it will tend to undermine democracy. In the case of United Communist Party of Turkey v. Turkey (30.1.1998, *Reports* 1998-I p. 1, § 57) the Court refers to democracy as the only political model contemplated by the Convention and notes that "one of the principal

characteristics of democracy [is] the possibility it offers of resolving a country's problems through dialogue, without recourse to violence". Violence is intrinsically inimical to the Convention. Unlike the advocacy of opinions on the free marketplace of ideas, incitement to violence is the denial of a dialogue, the rejection of the testing of different thoughts and theories in favour of a clash of might and power. It should not fall under the ambit of Article 10.

In the instant case, we acknowledge that the four left-wing organisations in question are illegal under Turkish law. However, we consider the tone of the joint statement published by them to be relatively moderate. These opinions could not justify an interference with the applicants' right to freedom of expression.

As regards the interview with the PKK's second-in-command, we would stress at the outset that it must be possible for a leader of an illegal organisation to express his views on a given political situation. It may also be legitimate to interview a leader of such an organisation. This does not mean however that it is legitimate to publish all of his views, in particular given the sensitivity of the political and security situation in south-east Turkey.

The published interview contains words and expressions such as "the war will go on until there is only one single individual left on our side", "there will be no single step backwards", "the war will escalate", "our combat has reached a certain level. Tactics have to be developed which match that level". The interview also refers to the tactics which the PKK would use to combat the State. It is very difficult not to view these sentences as an encouragement to further violence. The author's language is direct and clear and its meaning – that there will be no compromise even if the war escalates – was likely to be understood by the public at large. In this respect we consider that some of the wording is very similar to that used in the articles in Sürek v. Turkey (no. 1) case, where the Court found no violation of Article 10.

Given this assessment of the facts of the case before us, we feel that the majority of the Court should have followed § 60 of the judgment, in which it is explained that "where remarks incite to violence ..., the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression". The Court's decision in fact largely disavows the clear statement in § 60. We cannot follow the majority in this respect. We therefore consider that the interference with the

applicants' freedom of expression was, in the circumstances of the case, proportionate to the legitimate aims relied on by the Government and accepted by the Court.

In the present case we accordingly cannot agree with the opinion of the majority of the Court that there has been a violation of Article 10 of the Convention.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Provisional translation*)

To my great regret, I cannot agree with the majority of the Court that there has been a violation of Article 10 of the Convention. In my opinion, there is no valid reason to find that the interference in this case was not necessary in a democratic society and, in particular, not proportionate to the aim of preserving national security and public order.

Nor do I share the majority's view that there has been a violation of Article 6 § 1 in that the National Security Courts are not "independent and impartial tribunals" within the meaning of that provision owing to the presence of a military judge on the bench.

The general principles which emerge from the judgment of 25 November 1995 in the case of Zana v. Turkey and which I recall in my dissenting opinion annexed to the Gerger v. Turkey judgment (of 8 July 1999) are relevant to, and hold good in, the instant case. To avoid repetition, I refer the reader to paragraphs 1-9 of that dissenting opinion.

The case of Sürek and Özdemir v. Turkey is indistinguishable, if not in form, at least in content, from the Zana and Gerger cases. Indeed, the European Commission of Human Rights concluded that there had been a violation of Article 10 only with a very small majority (by 17 votes to 15). I entirely agree with the dissenting opinion of the minority (Mr S. Trechsel, Me E. Busuttil, Mr G. Jörundsson, Mr A.S. Gözübüyük, Mr A. Weitzel, Mrs J. Liddy, Mr I. Cabral Barreto, Mr N. Bratza, Mr D. Švàby, Mr G. Ress, Mr A. Perenič, Mr C. Bîrsan, Mr K. Herndl, Mr E. Bieliūnas and Mr E.A. Alkema) who considered that there had been no violation of that provision. May I therefore be permitted to reproduce that opinion at length as if it were my own dissenting opinion.

> "We regret that we are unable to share the view of the majority of the Commission that there has been a violation of Article 10 of the Convention in the present case.
>
> While we agree that the published declaration by four socialist organisations was not such as to justify an interference with the applicants' right to freedom of expression, we take a different view of the interview with C.B. which was published in two parts in the 31 May and 7 June 1992 editions of the applicants' weekly review.
>
> We attach special significance to the fact that C.B. was at the time of the interview the second-in-command of the P.K.K., an armed terrorist organisation which was and is engaged in violent terrorist acts. Like the majority of the Commission, we do not consider that the mere fact of publication of an interview with a leading member of the P.K.K. would be sufficient to justify an interference with freedom of expression. Thus, for example, an interview with a terrorist leader which contained a factual analysis of the development of the conflict or which put forward suggestions for bringing about its peaceful solution would not in our view of itself justify action against the publisher.

However, it is in our view incumbent on those who publish such interviews to take special care to ensure that they do not contain anything which can fairly be interpreted as an encouragement to further violent acts.

The majority of the Commission conclude that the replies of C.B., while including a clear prediction of continued armed action from the Turkish State as well as from the P.K.K., can hardly be interpreted as an incitement to further violence. We cannot agree. There are in our view a number of passages in the interview which can only be interpreted as an encouragement to further terrorist violence. In particular, we draw attention to the following replies: "Our combat has reached a certain level. Tactics have to be developed which match that level, because it is a mistake to wage war with less developed tactics. Progress can be achieved in the war by using tactics in keeping with the level of warfare which has now been reached. That is why an action of that nature was planned. The idea was to attack in the morning and hold our ground, continuing the clashes throughout the day - and it was successful in the end. It was an experiment. From our point of view there are conclusions to be drawn from it. We are studying the matter. We shall benefit from that in the actions we carry out in the future. ... This war will continue as long as the Turkish State refuses to accept the will of the people of Kurdistan. There will be not one single step backwards. The war will go on until there is only one single individual left on our side."

The Commission has previously drawn attention to the particular difficulty in striking a fair balance between the requirements of protecting freedom of information and the imperatives of protecting the State and the public against armed conspiracies seeking to overthrow the democratic order, in a situation where the advocates of this violence seek access to the media for publicity purposes (see eg., No. 15404/89, Dec. 16.4.91, D.R. 70, p. 262).

In the present case we consider that the national authorities did not exceed their margin of appreciation in taking measures against the publications and that such measures may be regarded as necessary in a democratic society to achieve the aims of national security and public safety."

As regards the Court's finding of a violation of Article 6 § 1, I refer to the dissenting opinion which I expressed jointly with those eminent judges Mr Thór Vilhjálmsson, Mr Matscher, Mr Foighel, Sir John Freeland, Mr Lopes Rocha, Mr Wildhaber and Mr Gotchev in the case of Incal v. Turkey of 9 June 1998 and to my individual dissenting opinion in the case of Çıraklar v. Turkey of 28 October 1998. I remain convinced that the presence of a military judge in a court composed of three judges, two of whom are civil judges, in no way affects the independence and impartiality of the National Security Courts, which are courts of the non-military (ordinary) judicial order whose decisions are subject to review by the Court of Cassation.

I wish to stress that: (1) the conclusion of the majority results from an unjustified extension to the theory of outward appearances; (2) it does not suffice to say, as the majority do in paragraph 79 of the judgment, that it is "understandable that the applicants ... should be apprehensive about being tried by a bench which included a regular army officer, who was a member

of the Military Legal Service", and then simply to rely on the Incal precedent (Çıraklar being a mere repetition of what was said in the Incal judgment); and (3) the majority's opinion is in the abstract and ought therefore, if it was to be justifiable, to have been better supported both factually and legally.

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

CASE OF SÜREK v. TURKEY (No. 1)

(Application no. 26682/95)

JUDGMENT

STRASBOURG

8 July 1999

In the case of Sürek v. Turkey (no. 1),

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr A. PASTOR RIDRUEJO,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mr J.-P. COSTA,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mr K. TRAJA,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,

and also of Mr P.J. MAHONEY and Mrs M. DE BOER-BUQUICCHIO, *Deputy Registrars*,

Having deliberated in private on 1 March and 16 June 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") on 17 March 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 26682/95) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Kamil Tekin Sürek, on 20 February 1995.

Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

The Commission's request referred to former Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 § 1 and 10 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of former Rules of Court A[1], the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (former Rule 30). The lawyer was given leave by the President of the Court at the time, Mr R. Bernhardt, to use the Turkish language in the written procedure (Rule 27 § 3).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal, in particular, with procedural matters that might arise before the entry into force of Protocol No. 11, Mr Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 10 and 17 July 1998 respectively. On 8 September 1998 the Government filed with the Registry additional information in support of their memorial and on 22 November 1998 the applicant filed details of his claims for just satisfaction. On 26 February 1999 the Government filed observations on the applicant's claims for just satisfaction.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The President of the Court, Mr L. Wildhaber, decided that, in the interests of the proper administration of justice, a single Grand Chamber should be constituted to hear the instant case and twelve other cases against Turkey, namely: Karataş v. Turkey (application no. 23168/94); Arslan v. Turkey (no. 23462/94); Polat v. Turkey (no. 23500/94); Ceylan v. Turkey (no. 23556/94); Okçuoğlu v. Turkey (no. 24246/94); Gerger v. Turkey (no. 24919/94); Erdoğdu and İnce v. Turkey (nos. 25067/94 and 25068/94); Başkaya and Okçuoğlu v. Turkey (nos. 23536/94 and 24408/94); Sürek and Özdemir v. Turkey (nos. 23927/94 and 24277/94); Sürek v. Turkey (no. 2) (no. 24122/94); Sürek v. Turkey (no. 3) (no. 24735/94); and Sürek v. Turkey (no. 4) (no. 24762/94).

1. *Note by the Registry*. Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States not bound by that Protocol.

5. The Grand Chamber constituted for that purpose included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mrs F. Tulkens, Mrs V. Strážnická, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr A.B. Baka, Mr R. Maruste and Mrs S. Botoucharova (Rule 24 § 3 and Rule 100 § 4).

On 19 November 1998 Mr Wildhaber exempted Mr Türmen from sitting after his withdrawal from the case in the light of the decision of the Grand Chamber taken in accordance with Rule 28 § 4 in the case of Oğur v. Turkey. On 16 December 1998 the Government notified the Registry that Mr F. Gölcüklü had been appointed *ad hoc* judge (Rule 29 § 1).

Subsequently, Mr K. Traja, substitute, replaced Mrs Botoucharova, who was unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

6. At the invitation of the Court (Rule 99), the Commission delegated one of its members, Mr H. Danelius, to take part in the proceedings before the Grand Chamber.

7. In accordance with the decision of the President, who had also given the applicant's lawyer leave to address the Court in Turkish (Rule 34 § 3), a hearing took place in public in the Human Rights Building, Strasbourg, on 1 March 1999, the case being heard simultaneously with those of Arslan v. Turkey and Ceylan v. Turkey.

There appeared before the Court:

(a) *for the Government*
Mr D. TEZCAN,
Mr M. ÖZMEN, *Co-Agents*,
Mr B. ÇALIŞKAN,
Ms G. AKYÜZ,
Ms A. GÜNYAKTI,
Mr F. POLAT,
Ms A. EMÜLER,
Mrs I. BATMAZ KEREMOĞLU,
Mr B. YILDIZ,
Mr Y. ÖZBEK, *Advisers*;

(b) *for the applicant*
Mr H. KAPLAN, of the Istanbul Bar, *Counsel*;

(c) *for the Commission*
Mr H. DANELIUS, *Delegate*.

The Court heard addresses by Mr Danelius, Mr Kaplan and Mr Tezcan.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant

8. The applicant is a Turkish citizen who was born in 1957 and lives in Istanbul.

9. At the material time, the applicant was the major shareholder in Deniz Basın Yayın Sanayi ve Ticaret Organizasyon, a Turkish limited liability company which owns a weekly review entitled *Haberde Yorumda Gerçek* ("The Truth of News and Comments"), published in Istanbul.

B. The impugned letters

10. In issue no. 23 dated 30 August 1992, two readers' letters, entitled "*Silahlar Özgürlüğü Engelleyemez*" ("Weapons cannot win against freedom") and "*Suç Bizim*" ("It is our fault"), were published.

11. The letters read as follows (translation):

(a) "Weapons cannot win against freedom

In the face of the escalating war of national liberation in Kurdistan, the fascist Turkish army continues to carry out bombings. The 'Şırnak massacre' which Gerçek journalists revealed at the cost of great self-sacrifice has been another concrete example this week.

The brutalities in Kurdistan are in fact the worst that have been experienced there in the past few years. The massacre carried out in Halepçe in southern Kurdistan by the reactionary BAAS administration is now taking place in northern Kurdistan. Şırnak is concrete proof of it. By causing provocation in Kurdistan, the Turkish Republic was heading for a massacre. Many people were killed. In a three-day attack with tanks, shells and bombs, Şırnak was razed to the ground.

And the bourgeois press, *en masse*, wrote about the slaughter. And as the bourgeois press has said, there are indeed scores of 'unanswered' questions to be asked. As to Şırnak, the attack on Şırnak is the most effective form of the campaign that is being waged throughout Turkey to eradicate the Kurds. Fascism will follow it up with many more Şırnaks.

But the struggle of our people for national freedom in Kurdistan has reached a point where it can no longer be thwarted by bloodshed, tanks and shells. Every attack launched by the Turkish Republic to wipe out the Kurds intensifies the struggle for freedom. The bourgeoisie and its toadying press, which draw attention every day to the brutalities in Bosnia-Herzegovina, fail to see the brutalities committed in Kurdistan. Of course, one can hardly expect reactionary fascists who call for a halt in the brutalities in Bosnia-Herzegovina to call for a halt in the brutalities in Kurdistan.

The Kurdish people, who are being torn from their homes and their fatherland, have nothing to lose. But they have much to gain."

(b) "It is our fault

The TC[1] murder gang is continuing its murders ... on the grounds of 'protecting the Republic of Turkey'. But as people wake up to what is happening and become more aware, as they gradually learn to stand up for their rights and the idea that 'if they won't give, then we'll take by force' gradually germinates in people's minds and grows stronger day by day – as long as this continues, the murders will obviously also continue ... Beginning of course with those who planted the seed in people's minds – according to the generals, imperialism's hired killers, and according to the double-chinned, pot-bellied, stiff-necked Turguts, Süleymans and Bülents ... Hence the events of 12 March, hence the events of 12 September ... Hence the gallows, hence the prisons, hence the people sentenced to 300 or 400 years. Hence the people murdered in the torture rooms 'in order to protect the Republic of Turkey'. Hence the Mazlum Doğans exterminated in Diyarbakır Prison ... Hence the Revolutionaries recently officially assassinated ... The TC murder gang is continuing – and will continue – to commit its murders. Because the awakening of the people is like a flood of enthusiasm ... Hence Zonguldak, hence the municipal workers, hence the public service employees ... Hence Kurdistan. Can the 'murder gangs' stop that flood? There may be some who see the title of this letter and wonder what on earth it has to do with the text.

The 'hired killers' of imperialism, i.e. the authors of the 12 September *coup d'état*, and their successors of yesterday and today, those who are still looking for 'democracy', who in the past participated in one way or another in the struggle for democracy and freedom, who now covertly or openly criticise their past actions, who confuse the masses and present the parliamentary system and the rule of law as the means of salvation, give the green light to the killings of the TC murder gang.

1. The Republic of Turkey (*Türkiye Cumhuriyeti*).

I am addressing the 'faithful servants' of imperialism and its hardened spokesman (-men), the one(s) who said some time ago 'You won't get me to say that the nationalists commit crimes'[1], who say(s) today 'Those are not what we call journalists', who say(s) 'Who's against demonstrations? Who's against claiming one's rights? Of course they can hold a march ... They're my workers, my peasants, my public employees', but then has (have) the public employees who march to Ankara beaten up in the very heart of the city and say(s) afterwards 'The police did the right thing', and who postpone(s) strikes for months on end. I am addressing the blabbers, the deserters and the charlatans who are stirring up the reactionary consciousness of the masses, who try to judge these people by their attitude towards Kurdistan and try to work out how 'democratic' they are. The guilt of the murder gang is proven. It is through flesh-and-blood experience that people are beginning to see it and realise it. But what about the guilt of the charlatans, the ones who are thwarting the struggle for democracy and freedom ... Yes, what about their guilt ... They have their share in the killings by the murder gang ... May their 'union' be a happy one!"

C. The charges against the applicant

12. In an indictment dated 21 September 1992, the public prosecutor at the Istanbul National Security Court (*İstanbul Devlet Güvenlik Mahkemesi*) charged the applicant in his capacity as the owner of the review, as well as the review's editor, with disseminating propaganda against the indivisibility of the State and provoking enmity and hatred among the people. The charges were brought under Article 312 of the Criminal Code and section 8 of the Prevention of Terrorism Act 1991 ("the 1991 Act" – see paragraphs 22 and 24 below).

D. The applicant's conviction

13. In the proceedings before the Istanbul National Security Court, the applicant denied the charges. He asserted that the expression of an opinion could not constitute an offence. He further stated that the letters in issue had been written by the readers of the review and for that reason could not engage his responsibility.

14. In a judgment dated 12 April 1993, the court found the applicant guilty of an offence under the first paragraph of section 8 of the 1991 Act. It found no grounds for convicting him under Article 312 of the Criminal Code. The court initially sentenced the applicant to a fine of 200,000,000 Turkish liras (TRL). However, having regard to the applicant's good conduct during the trial, it reduced the fine to TRL 166,666,666. The editor of the review was for his part sentenced to five months' imprisonment and to a fine of TRL 83,333,333.

1. The phrases in inverted commas in this paragraph are quotations from the public speeches of Mr Demirel, former Prime Minister of Turkey.

15. In its judgment, the court held that the incriminated letters contravened section 8 of the 1991 Act. The court concluded that the letters referred to eight districts in the south-east of Turkey as an independent State, "Kurdistan", described the PKK (Workers' party of Kurdistan) as a national liberation movement involved in a "national independence war" against the Turkish State and amounted to propaganda aimed at the destruction of the territorial integrity of the Turkish State. In addition the court found that the letters contained discriminatory statements on grounds of race.

E. The applicant's appeal against conviction and subsequent proceedings

16. The applicant appealed against his conviction to the Court of Cassation, contending that his trial and conviction contravened Articles 6 and 10 of the Convention. He asserted that section 8 of the 1991 Act was contrary to the Constitution and denied that the letters in question disseminated separatist propaganda. He also maintained that he had not been able to be present at the hearing at which the decision on his conviction had been given. He pleaded that the decision given in his absence and without his final statement having been taken was contrary to law.

17. On 26 November 1993 the Court of Cassation ruled that the amount of the fine imposed by the National Security Court was excessive and set aside the applicant's conviction and sentence on that account. The court remitted the case to the Istanbul National Security Court.

18. In its judgment of 12 April 1994, the Istanbul National Security Court sentenced the applicant to a fine of TRL 100,000,000 but subsequently reduced the fine to TRL 83,333,333. As to the grounds for conviction, the court, *inter alia*, reiterated the reasoning used in its judgment of 12 April 1993.

19. The applicant appealed. He relied on the defence grounds which he had invoked at his first trial. He also maintained that the National Security Court had convicted him without having duly heard his defence.

20. On 30 September 1994 the Court of Cassation dismissed his appeal, upholding the National Security Court's reasoning and its assessment of the evidence.

F. The impact of the legislative amendments to the 1991 Act

21. Following the amendments made by Law no. 4126 of 27 October 1995 to the 1991 Act (see paragraph 25 below), the Istanbul National Security Court *ex officio* re-examined the applicant's case. On 8 March

1996 the court confirmed the sentence which it had initially imposed on him.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal law

1. The Criminal Code

22. The relevant provisions of the Criminal Code read as follows:

Article 2 § 2

"Where the legislative provisions in force at the time when a crime is committed are different from those of a later law, the provisions most favourable to the offender shall be applied."

Article 19

"The term 'heavy fine' shall mean payment to the Treasury of from twenty thousand to one hundred million Turkish liras, as the judge shall decide ..."

Article 36 § 1

"In the event of conviction, the court shall order the seizure and confiscation of any object which has been used for the commission or preparation of the crime or offence …"

Article 142
(repealed by Law no. 3713 of 12 April 1991 on the Prevention of Terrorism)

"Harmful propaganda

1. A person who by any means whatsoever spreads propaganda with a view to establishing the domination of one social class over the others, annihilating a social class, overturning the fundamental social or economic order established in Turkey or the political or legal order of the State shall, on conviction, be liable to a term of imprisonment of from five to ten years.

2. A person who by any means whatsoever spreads propaganda in favour of the State's being governed by a single person or social group to the detriment of the underlying principles of the Republic and democracy shall, on conviction, be liable to a term of imprisonment of from five to ten years.

3. A person who, prompted by racial considerations, by any means whatsoever spreads propaganda aimed at abolishing in whole or in part public-law rights

guaranteed by the Constitution or undermining or destroying patriotic sentiment shall, on conviction, be liable to a term of imprisonment of from five to ten years.

…"

Article 311 § 2

"Public incitement to commit an offence

…

Where incitement to commit an offence is done by means of mass communication, of whatever type – whether by tape recordings, gramophone records, newspapers, press publications or other published material – by the circulation or distribution of printed papers or by the placing of placards or posters in public places, the terms of imprisonment to which convicted persons are liable shall be doubled …"

Article 312[1]

"Non-public incitement to commit an offence

A person who expressly praises or condones an act punishable by law as an offence or incites the population to break the law shall, on conviction, be liable to between six months' and two years' imprisonment and a heavy fine of from six thousand to thirty thousand Turkish liras.

A person who incites the people to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions, shall, on conviction, be liable to between one and three years' imprisonment and a fine of from nine thousand to thirty-six thousand liras. If this incitement endangers public safety, the sentence shall be increased by one-third to one-half.

The penalties to be imposed on those who have committed the offences defined in the previous paragraph shall be doubled when they have done so by the means listed in Article 311 § 2."

2. The Press Act (Law no. 5680 of 15 July 1950)

23. The relevant provisions of the Press Act 1950 read as follows:

1. The conviction of a person pursuant to Article 312 § 2 entails further consequences, particularly with regard to the exercise of certain activities governed by special legislation. For example, persons convicted of an offence under that Article may not found associations (Law no. 2908, section 4(2)(b)) or trade unions, nor may they be members of the executive committee of a trade union (Law no. 2929, section 5). They are also forbidden to found or join political parties (Law no. 2820, section 11(5)) and may not stand for election to Parliament (Law no. 2839, section 11(f3)). In addition, if the sentence imposed exceeds six months' imprisonment, the convicted person is debarred from entering the civil service, except where the offence has been committed unintentionally (Law no. 657, section 48(5)).

Section 3

"For the purposes of the present Law, the term 'periodicals' shall mean newspapers, press agency dispatches and any other printed matter published at regular intervals.

'Publication' shall mean the exposure, display, distribution, emission, sale or offer for sale of printed matter on premises to which the public have access where anyone may see it.

An offence shall not be deemed to have been committed through the medium of the press unless publication has taken place, except where the material in itself is unlawful."

Additional section 4(1)

"Where distribution of the printed matter whose distribution constitutes the offence is prevented … by a court injunction or, in an emergency, by order of the Principal Public Prosecutor … the penalty imposed shall be reduced to one-third of that laid down by law for the offence concerned."

3. The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991)[1]

24. The relevant provisions of the Prevention of Terrorism Act 1991 read as follows:

Section 6

"It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to announce, orally or in the form of a publication, that terrorist organisations will commit an offence against a specific person, whether or not that person's ... identity is divulged provided that it is done in such a manner that he or she may be identified, or to reveal the identity of civil servants who have participated in anti-terrorist operations or to designate any person as a target.

It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to print or publish declarations or leaflets emanating from terrorist organisations.

…

Where the offences contemplated in the above paragraphs are committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, or from the sales of the previous issue if the periodical appears monthly or less frequently, *or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed*

1. This law, promulgated with a view to preventing acts of terrorism, refers to a number of offences defined in the Criminal Code which it describes as "acts of terrorism" or "acts perpetrated for the purposes of terrorism" (sections 3 and 4) and to which it applies.

matter other than periodicals or if the periodical has just been launched[1]. However, the fine may not be less than fifty million Turkish liras. The editor of the periodical shall be ordered to pay a sum equal to half the fine imposed on the publisher."

Section 8
(before amendment by Law no. 4126 of 27 October 1995)

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited, irrespective of the methods used and the intention. Any person who engages in such an activity shall be sentenced to not less than two and not more than five years' imprisonment and a fine of from fifty million to one hundred million Turkish liras.

Where the crime of propaganda contemplated in the above paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, *or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed matter other than periodicals or if the periodical has just been launched*[2]. However the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment."

Section 8
(as amended by Law no. 4126 of 27 October 1995)

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited. Any person who engages in such an activity shall be sentenced to not less than one and not more than three years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras. The penalty imposed on a reoffender may not be commuted to a fine.

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly. However, the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment.

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of printed matter or by means of mass communication other than periodicals within the meaning of the second paragraph, those responsible and the owners of the means of mass communication shall be sentenced to not less than six

1-2. The phrase in italics was deleted by a judgment of the Constitutional Court on 31 March 1992 and went out of force on 27 July 1993.

months' and not more than two years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras …

…"

Section 13
(before amendment by Law no. 4126 of 27 October 1995)

"The penalties for the offences contemplated in the present Law may not be commuted to a fine or any other measure, nor may they be accompanied by a reprieve."

Section 13
(as amended by Law no. 4126 of 27 October 1995)

"The penalties for the offences contemplated in the present Law may not be commuted to a fine or any other measure, nor may they be accompanied by a reprieve.

However, the provisions of this section shall not apply to convictions pursuant to section 8[1]."

Section 17

"Persons convicted of the offences contemplated in the present Law who ... have been punished with a custodial sentence shall be granted automatic parole when they have served three-quarters of their sentence, provided they have been of good conduct.

…

The first and second paragraphs of section 19[2] … of the Execution of Sentence Act (Law no. 647) shall not apply to the convicted persons mentioned above."

4. Law no. 4126 of 27 October 1995 amending sections 8 and 13 of Law no. 3713

25. The following amendments were made to the Prevention of Terrorism Act 1991 following the enactment of Law no. 4126 of 27 October 1995:

Transitional provision relating to section 2

"In the month following the entry into force of the present Law, the court which has given judgment shall re-examine the case of a person convicted pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) and, in accordance with the amendment ... to section 8 of Law no. 3713, shall reconsider the term of imprisonment

1. See the relevant provision of Law no. 4126, reproduced below.
2. See paragraph 27 below.

imposed on that person and decide whether he should be allowed the benefit of sections 4[1] and 6[2] of Law no. 647 of 13 July 1965."

5. *Law no. 4304 of 14 August 1997 on the deferment of judgment and of executions of sentences in respect of offences committed by editors before 12 July 1997*

26. The following provisions are relevant to sentences in respect of offences under the Press Act:

Section 1

"The execution of sentences passed on those who were convicted under the Press Act (Law no. 5680) or other laws as editors for offences committed before 12 July 1997 shall be deferred.

The provision in the first paragraph shall also apply to editors who are already serving their sentences.

The institution of criminal proceedings or delivery of final judgments shall be deferred where proceedings against the editor have not yet been brought, or where a preliminary investigation has been commenced but criminal proceedings have not been instituted, or where the final judicial investigation has been commenced but judgment has not yet been delivered, or where the judgment has still not become final."

Section 2

"If an editor who has benefited under the provisions of the first paragraph of section 1 is convicted as an editor for committing an intentional offence within three years of the date of deferment, he must serve the entirety of the suspended sentence.

…

Where there has been a deferment, criminal proceedings shall be instituted or judgment delivered if an editor is convicted as such for committing an intentional offence within three years of the date of deferment.

Any conviction as an editor for an offence committed before 12 July 1997 shall be deemed a nullity if the aforesaid period of three years expires without any further conviction for an intentional offence. Similarly, if no criminal proceedings have been instituted, it shall no longer be possible to bring any, and, if any have been instituted, they shall be discontinued."

1. This provision concerns substitute penalties and measures which may be ordered in connection with offences attracting a prison sentence.
2. This provision concerns reprieves.

6. The Execution of Sentences Act (Law no. 647 of 13 July 1965)

27. The Execution of Sentences Act 1965 provides, *inter alia*:

Section 5

"The term 'fine' shall mean payment to the Treasury of a sum fixed within the statutory limits.

…

If, after service of the order to pay, the convicted person does not pay the fine within the time-limit, he shall be committed to prison for a term of one day for every ten thousand Turkish liras owed, by a decision of the public prosecutor.

…

The sentence of imprisonment thus substituted for the fine may not exceed three years …"

Section 19(1)

"… persons who ... have been ordered to serve a custodial sentence shall be granted automatic parole when they have served half of their sentence, provided they have been of good conduct ..."

7. The Code of Criminal Procedure (Law no. 1412)

28. The Code of Criminal Procedure contains the following provisions:

Article 307

"An appeal on points of law may not concern any issue other than the lawfulness of the impugned judgment.

Non-application or erroneous application of a legal rule shall constitute unlawfulness[1]."

Article 308

"Unlawfulness is deemed to be manifest in the following cases:

1- where the court is not established in accordance with the law;

2- where one of the judges who have taken the decision was barred by statute from participating;

1. On the question whether the judgment is unlawful, the Court of Cassation is not bound by the arguments submitted to it. Moreover, the term "legal rule" refers to any written source of law, to custom and to principles deduced from the spirit of the law.

…”

B. Criminal case-law submitted by the Government

29. The Government supplied copies of several decisions given by the prosecutor attached to the Ankara National Security Court withdrawing charges against persons suspected of inciting people to hatred or hostility, especially on religious grounds (Article 312 of the Criminal Code), or of disseminating separatist propaganda against the indivisible unity of the State (section 8 of Law no. 3713 – see paragraph 24 above). In the majority of cases where offences had been committed by means of publications the reasons given for the prosecutor’s decision included such considerations as the fact that the proceedings were time-barred, that some of the constituent elements of the offence could not be made out or that there was insufficient evidence. Other grounds included the fact that the publications in issue had not been distributed, that there had been no unlawful intent, that no offence had been committed or that those responsible could not be identified.

30. Furthermore, the Government submitted a number of decisions of the National Security Courts as examples of cases in which defendants accused of the above-mentioned offences had been found not guilty. These were the following judgments: 1991/23–75–132–177–100; 1992/33–62–73–89–143; 1993/29–30–38–39–82–94–114; 1994/3–6–12–14–68–108–131–141–155–171–172; 1995/1–25–29–37–48–64–67–84–88–92–96–101–120–124–134–135; 1996/2–8–18–21–34–38–42–43–49–54–73–86–91–103–119–353; 1997/11–19–32–33–82–89–113–118–130–140–148–152–153–154–187–191–200–606; 1998/6–8–50–51–56–85–162.

31. As regards more particularly proceedings against authors of works dealing with the Kurdish problem, the National Security Courts in these cases reached their decisions on the ground that there had been no dissemination of “propaganda”, one of the constituent elements of the offence, or on account of the objective nature of the words used.

C. The National Security Courts[1]

1. The Constitution

32. The constitutional provisions governing judicial organisation of the National Security Courts are worded as follows:

Article 138 §§ 1 and 2

"In the performance of their duties, judges shall be independent; they shall give judgment, according to their personal conviction, in accordance with the Constitution, statute and the law.

No organ, authority, ... or ... person may give orders or instructions to courts or judges in the exercise of their judicial powers, or send them circulars or make recommendations or suggestions to them."

Article 139 § 1

"Judges … shall not be removed from office or compelled to retire without their consent before the age prescribed by the Constitution …"

Article 143 §§ 1-5

"National Security Courts shall be established to try offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free democratic system of government, and offences which directly affect the State's internal or external security.

National Security Courts shall be composed of a president, two other regular members, two substitute members, a prosecutor and a sufficient number of assistant prosecutors.

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1. The National Security Courts were created by Law no. 1773 of 11 July 1973, in accordance with Article 136 of the 1961 Constitution. That law was annulled by the Constitutional Court on 15 June 1976. The courts in question were later reintroduced into the Turkish judicial system by the 1982 Constitution. The relevant part of the statement of reasons contains the following passage:

"There may be acts affecting the existence and stability of a State such that when they are committed, special jurisdiction is required in order to give judgment expeditiously and appropriately. For such cases it is necessary to set up National Security Courts. According to a principle inherent in our Constitution, it is forbidden to create a special court to give judgment on a specific act after it has been committed. For that reason the National Security Courts have been provided for in our Constitution to try cases involving the above-mentioned offences. Given that the special provisions laying down their powers have been enacted in advance and that the courts have been created before the commission of any offence …, they may not be described as courts set up to deal with this or that offence after the commission of such an offence."

The president, one of the regular members, one of the substitutes and the prosecutor shall be appointed from among judges and public prosecutors of the first rank, according to procedures laid down in special legislation; one regular member and one substitute shall be appointed from among military judges of the first rank and the assistant prosecutors from among public prosecutors and military judges.

Presidents, regular members and substitute members ... of National Security Courts shall be appointed for a renewable period of four years.

Appeals against decisions of National Security Courts shall lie to the Court of Cassation.

..."

Article 145 § 4

"Military legal proceedings

The personal rights and obligations of military judges … shall be regulated by law in accordance with the principles of the independence of the courts, the safeguards enjoyed by the judiciary and the requirements of military service. Relations between military judges and the commanders under whom they serve in the performance of their non-judicial duties shall also be regulated by law ..."

2. Law no. 2845 on the creation and rules of procedure of the National Security Courts

33. Based on Article 143 of the Constitution, the relevant provisions of Law no. 2845 on the National Security Courts, provide as follows:

Section 1

"In the capitals of the provinces of … National Security Courts shall be established to try offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free democratic system of government, and offences which directly affect the State's internal or external security."

Section 3

"The National Security Courts shall be composed of a president, two other regular members and two substitute members."

Section 5

"The president of a National Security Court, one of the [two] regular members and one of the [two] substitutes ... shall be civilian … judges, the other members, whether regular or substitute, military judges of the first rank …"

Section 6(2), (3) and (6)

"The appointment of military judges to sit as regular members and substitutes shall be carried out according to the procedure laid down for that purpose in the Military Legal Service Act.

Except as provided in the present Law or other legislation, the president and the regular or substitute members of the National Security Courts … may not be appointed to another post or place, without their consent, within four years …

…

If, after an investigation concerning the president or a regular or substitute member of a National Security Court conducted according to the legislation concerning them, competent committees or authorities decide to change the duty station of the person concerned, the duty station of that judge or the duties themselves … may be changed in accordance with the procedure laid down in that legislation."

Section 9(1)

"National Security Courts shall have jurisdiction to try persons charged with

(a) the offences contemplated in Article 312 § 2 … of the Turkish Criminal Code,

…

(d) offences having a connection with the events which made it necessary to declare a state of emergency, in regions where a state of emergency has been declared in accordance with Article 120 of the Constitution,

(e) offences committed against the Republic, whose constituent qualities are enunciated in the Constitution, against the indivisible unity of the State – meaning both the national territory and its people – or against the free democratic system of government, and offences which directly affect the State's internal or external security.

…"

Section 27(1)

"The Court of Cassation shall hear appeals against the judgments of the National Security Courts."

Section 34(1) and (2)

"The rules governing the rights and obligations of … military judges appointed to the National Security Courts and their supervision …, the institution of disciplinary proceedings against them, the imposition of disciplinary penalties on them and the investigation and prosecution of any offences they may commit in the performance of their duties ... shall be as laid down in the relevant provisions of the laws governing their profession …

The observations of the Court of Cassation on military judges, the assessment reports on them drawn up by Ministry of Justice assessors … and the files on any investigations conducted in respect of them … shall be transmitted to the Ministry of Justice."

Section 38

"A National Security Court may be transformed into a Martial-Law Court, under the conditions set forth below, where a state of emergency has been declared in all or part of the territory in respect of which the National Security Court concerned has jurisdiction, provided that within that territory there is more than one National Security Court …"

3. The Military Legal Service Act (Law no. 357)

34. The relevant provisions of the Military Legal Service Act are worded as follows:

Additional section 7

"The aptitude of military judges … appointed as regular or substitute members of the National Security Courts that is required for promotion or advancement in salary step, rank or seniority shall be determined on the basis of assessment reports drawn up according to the procedure laid down below, subject to the provisions of the present Law and the Turkish Armed Forces Personnel Act (Law no. 926).

(a) The first superior competent to carry out assessment and draw up assessment reports for military judges, whether regular or substitute members … shall be the Minister of State in the Ministry of Defence, followed by the Minister of Defence.

…"

Additional section 8

"Members … of the National Security Courts belonging to the Military Legal Service … shall be appointed by a committee composed of the personnel director and the legal adviser of the General Staff, the personnel director and the legal adviser attached to the staff of the arm in which the person concerned is serving and the Director of Military Judicial Affairs at the Ministry of Defence …"

Section 16(1) and (3)

"Military judges … shall be appointed by a decree issued jointly by the Minister of Defence and the Prime Minister and submitted to the President of the Republic for approval, in accordance with the provisions on the appointment and transfer of members of the armed forces …

…

The procedure for appointment as a military judge shall take into account the opinion of the Court of Cassation, the reports by Ministry of Justice assessors and the assessment reports drawn up by the superiors …"

Section 18(1)

"The rules governing the salary scales, salary increases and various personal rights of military judges … shall be as laid down in the provisions relating to officers."

Section 29

"The Minister of Defence may apply to military judges, after considering their defence submissions, the following disciplinary sanctions:

A. A warning, which consists in giving the person concerned notice in writing that he must exercise more care in the performance of his duties.

…

B. A reprimand, which consists in giving the person concerned notice in writing that a particular act or a particular attitude has been found to be blameworthy.

…

The said sanctions shall be final, mentioned in the assessment record of the person concerned and entered in his personal file …"

Section 38

"When military judges … sit in court they shall wear the special dress of their civilian counterparts …"

4. The Military Criminal Code

35. Article 112 of the Military Criminal Code of 22 May 1930 provides:

"It shall be an offence, punishable by up to five years' imprisonment, to abuse one's authority as a civil servant in order to influence the military courts."

5. Law no. 1602 of 4 July 1972 on the Supreme Military Administrative Court

36. Under section 22 of Law 1602 the First Division of the Supreme Military Administrative Court has jurisdiction to hear applications for judicial review and claims for damages based on disputes relating to the personal status of officers, particularly those concerning their professional advancement.

PROCEEDINGS BEFORE THE COMMISSION

37. Mr Kamil Tekin Sürek applied to the Commission on 20 February 1995. He argued that his conviction and sentence constituted an unjustified interference with his right to freedom of expression as guaranteed by Article 10 of the Convention and that his case had not been heard by an independent and impartial tribunal, in breach of Article 6 § 1. He also maintained that the criminal proceedings against him had not been concluded within a reasonable time, which gave rise to a separate violation of Article 6 § 1.

38. The Commission declared the application (no. 26682/95) admissible on 14 October 1996, with the exception of the Article 6 § 1 complaint relating to the length of the criminal proceedings. In its report of 11 December 1997 (former Article 31 of the Convention), it expressed the opinion that there had been no violation of Article 10 (nineteen votes to thirteen) but that there had been a violation of Article 6 § 1 (thirty-one votes to one). Extracts from the Commission's opinion and one of the three separate opinions contained in the report are reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

39. The applicant requested the Court to find the respondent State in breach of its obligations under Articles 6 § 1 and 10 of the Convention and to award him just satisfaction under Article 41.

The Government for their part invited the Court to reject the applicant's complaints.

THE LAW

I. SCOPE OF THE CASE

40. The Court notes that the applicant in his memorial complained of the unreasonableness of the length of the criminal proceedings in his case and contended that this gave rise to a breach of Article 6 § 1 of the Convention. However that particular complaint was declared inadmissible by the

1. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

Commission (see paragraph 38 above) and for that reason it cannot be considered to be within the scope of the case before the Court (see, among other authorities, *Janowski v. Poland* [GC], no. 25716/94, § 19, ECHR 1999-I). The Court will therefore confine its examination to the applicant's main complaint under Article 6 § 1 relating to the independence and impartiality of the Istanbul National Security Court as well as to his complaint under Article 10.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

41. The applicant alleged that the authorities had unjustifiably interfered with his right to freedom of expression guaranteed under Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

42. The Government maintained that the interference with the applicant's right to freedom of expression was justified under the provisions of the second paragraph of Article 10. The Commission agreed with the Government on this point.

A. Existence of an interference

43. The Court notes that it is clear, and this has not been disputed, that there has been an interference with the applicant's right to freedom of expression on account of his conviction and sentence under section 8 of the Prevention of Terrorism Act 1991 ("the 1991 Act").

B. Justification of the interference

44. The interference contravened Article 10 unless it was "prescribed by law", had one or more of the legitimate aims referred to in paragraph 2 of Article 10 and was "necessary in a democratic society" for achieving such aim or aims. The Court will examine each of these criteria in turn.

1. "Prescribed by law"

45. The applicant did not specifically address the compatibility of section 8 of the 1991 Act with this requirement. He confined himself to stating that this provision was used by the authorities to silence the opposition press and to punish the dissemination of views and opinions including those which do not incite to violence or espouse the cause of illegal organisations or advocate the division of the State.

46. The Government replied that the interference with the applicant's right to freedom of expression was based on section 8 of the 1991 Act which was aimed at the suppression of acts of separatist propaganda such as the one which resulted in the applicant's conviction.

47. The Delegate of the Commission observed at the hearing before the Court that the wording of section 8 of the 1991 Act was rather vague and that it might be questioned whether it satisfied the conditions of clarity and foreseeability inherent in the prescribed-by-law requirement. He noted however that the Commission had accepted that section 8 formed a sufficient legal basis for the applicant's conviction and concluded that the interference was "prescribed by law".

48. The Court notes the concern of the Delegate about the vagueness of section 8 of the 1991 Act. However, like the Commission, the Court accepts that since the applicant's conviction was based on section 8 of the 1991 Act the resultant interference with his right to freedom of expression could be regarded as "prescribed by law", all the more so given that the applicant has not specifically disputed this.

2. Legitimate aim

49. The applicant repeated his earlier contention that section 8 of the 1991 Act was designed to muzzle the opposition press. The measures which had been taken against him could not be justified on any of the grounds relied on by the Government since the letters published in his review could not be seen as a threat to national security and territorial integrity or as an encouragement to violence.

50. The Government disputed this argument. They submitted that the applicant had been convicted of disseminating separatist propaganda by publishing letters which threatened territorial integrity and the unity of the nation, public order and national security. These were legitimate aims under Article 10 § 2 of the Convention.

51. The Commission for its part considered that the applicant's conviction was part of the authorities' efforts to combat illegal terrorist activities and to maintain national security and public safety, which are legitimate aims under Article 10 § 2.

52. The Court considers that, having regard to the sensitivity of the security situation in south-east Turkey (see the Zana v. Turkey judgment of

25 November 1997, *Reports of Judgments and Decisions* 1997-VII, p. 2539, § 10) and to the need for the authorities to be alert to acts capable of fuelling additional violence, the measures taken against the applicant can be said to have been in furtherance of certain of the aims mentioned by the Government, namely the protection of national security and territorial integrity and the prevention of disorder and crime. This is certainly true where, as with the situation in south-east Turkey at the time of the circumstances of this case, the separatist movement had recourse to methods which rely on the use of violence.

3. "Necessary in a democratic society"

(a) Arguments of those appearing before the Court

(i) The applicant

53. The applicant affirmed that his prosecution, conviction and sentence were an unjustified interference with his right to freedom of expression. He stressed that although he was the owner of the review with no editorial responsibility for its content, he had nonetheless been punished as a terrorist under section 8 of the 1991 Act.

54. The applicant further pleaded that neither he nor his review had any links with terrorist organisations and that the letters which had been published in that review did not incite to violence or support terrorism or amount to separatist propaganda of a criminal nature.

(ii) The Government

55. The Government challenged the merits of the applicant's arguments. They maintained that the letters in question had depicted the respondent State as a criminal organisation and indirectly portrayed the acts of the PKK as acts of national liberation. In their submission, separatist propaganda inevitably incites to violence and provokes hostility among the various groups in Turkish society thus endangering human rights and democracy. As the owner of the review the applicant had participated in the dissemination of separatist propaganda by publishing letters which expressed hatred and praised terrorist crime and threatened fundamental interests of the national community such as territorial integrity, national unity and security and the prevention of crime and disorder.

56. In the Government's view the measures taken against the applicant were within the authorities' margin of appreciation in relation to the type of activity which endangers the vital interests of the State and the taking of these measures in the instant case found its justification under paragraph 2 of Article 10.

(iii) The Commission

57. Having regard to the security situation in south-east Turkey and to the fact that the language used in the impugned letters could be interpreted as an encouragement to further violence, the Commission considered that the authorities of the respondent State had been entitled to take the view that the publication of the letters was harmful to national security and public safety. The Commission reasoned that the applicant, as the owner of the review, had assumed duties and responsibilities with respect to the publication of the letters. His conviction and sentence could be considered in the circumstances a proportionate response to a pressing social need to maintain national security and public safety, a response which fell within the authorities' margin of appreciation. For these reasons, the Commission concluded that there had been no violation of Article 10 in the circumstances of the case.

(b) The Court's assessment

58. The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out, for example, in the Zana judgment (cited above, pp. 2547-48, § 51) and in *Fressoz and Roire v. France* ([GC], no. 29183/95, § 45, ECHR 1999-I).

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

(iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

59. Since the applicant was convicted of disseminating separatist propaganda through the medium of the review of which he was the owner, the impugned interference must also be seen in the context of the essential role of the press in ensuring the proper functioning of political democracy (see, among many other authorities, the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, p. 26, § 41, and *Fressoz and Roire* cited above, § 45). While the press must not overstep the bounds set, *inter alia*, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders (see the Lingens judgment cited above, p. 26, §§ 41-42).

60. The Court notes that the applicant's review published two letters which had been submitted by readers. These letters vehemently condemned the military actions of the authorities in south-east Turkey and accused them of brutal suppression of the Kurdish people in their struggle for independence and freedom (see paragraph 11 above). The letter entitled "Weapons cannot win against freedom" makes reference to two massacres which the writer claims were intentionally committed by the authorities as part of a strategic campaign to eradicate the Kurds. It concludes by reaffirming the Kurds' determination to win their freedom. The second letter, "It is our fault", alleges that the institutions of the Republic of Turkey connived in imprisonment, torture and killing of dissidents in the name of the protection of democracy and the Republic.

The Istanbul National Security Court found that the charge against the applicant under section 8 of the 1991 Act was proved (see paragraph 14 above). The court held that the impugned letters contained words which were aimed at the destruction of the territorial integrity of the Turkish State by describing areas of south-east Turkey as an independent State, "Kurdistan", and the PKK as a national liberation movement (see paragraph 15 above).

61. In assessing the necessity of the interference in the light of the principles set out above (see paragraphs 58 and 59), the Court recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see the Wingrove v. the United Kingdom judgment of 25 November 1996, *Reports*

1996-V, pp. 1957-58, § 58). Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks (see the Incal v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1567-68, § 54). Finally, where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

62. The Court will have particular regard to the words used in the letters and to the context in which they were published. In this latter respect it takes into account the background to cases submitted to it, particularly the problems linked to the prevention of terrorism (see the Incal judgment cited above, pp. 1568-69, § 58).

It notes in the first place that there is a clear intention to stigmatise the other side to the conflict by the use of labels such as “the fascist Turkish army”, “the TC murder gang” and “the hired killers of imperialism” alongside references to “massacres”, “brutalities” and “slaughter”. In the view of the Court the impugned letters amount to an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices which have manifested themselves in deadly violence. Furthermore, it is to be noted that the letters were published in the context of the security situation in south-east Turkey, where since approximately 1985 serious disturbances have raged between the security forces and the members of the PKK involving a very heavy loss of life and the imposition of emergency rule in much of the region (see the Zana judgment cited above, p. 2539, § 10). In such a context the content of the letters must be seen as capable of inciting to further violence in the region by instilling a deep-seated and irrational hatred against those depicted as responsible for the alleged atrocities. Indeed, the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor.

It must also be observed that the letter entitled “It is our fault” identified persons by name, stirred up hatred for them and exposed them to the possible risk of physical violence (see paragraph 11 above). It is in this perspective that the Court finds that the reasons given by the authorities for the applicant’s conviction with their emphasis on the destruction of the

territorial integrity of the State (see paragraph 15 above) are both relevant and sufficient to ground an interference with the applicant's right to freedom of expression. The Court reiterates that the mere fact that "information" or "ideas" offend, shock or disturb does not suffice to justify that interference (see paragraph 58 above). What is in issue in the instant case, however, is hate speech and the glorification of violence.

63. While it is true that the applicant did not personally associate himself with the views contained in the letters, he nevertheless provided their writers with an outlet for stirring up violence and hatred. The Court does not accept his argument that he should be exonerated from any criminal liability for the content of the letters on account of the fact that he only has a commercial and not an editorial relationship with the review. He was an owner and as such had the power to shape the editorial direction of the review. For that reason, he was vicariously subject to the "duties and responsibilities" which the review's editorial and journalistic staff undertake in the collection and dissemination of information to the public and which assume an even greater importance in situations of conflict and tension.

64. In view of the above considerations the Court concludes that the penalty imposed on the applicant as the owner of the review could reasonably be regarded as answering a "pressing social need" and that the reasons adduced by the authorities for the applicant's conviction are "relevant and sufficient".

It is also to be noted that the applicant first received a relatively modest fine of TRL 166,666,666, which was later halved to TRL 83,333,333 (see paragraphs 14 and 18 above). The Court observes in this connection that the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference.

65. For these reasons and having regard to the margin of appreciation which national authorities have in such a case, the Court considers that the interference in issue was proportionate to the legitimate aims pursued. There has consequently been no breach of Article 10 of the Convention in the circumstances of this case.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

66. The applicant complained that he had been denied a fair hearing in breach of Article 6 § 1 of the Convention on account of the presence of a military judge on the bench of the National Security Court which tried and convicted him. The relevant parts of Article 6 § 1 provide:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law ..."

67. The Government contested this allegation whereas the Commission accepted it.

68. In the applicant's submission, the military judges appointed to the National Security Courts such as the Istanbul National Security Court were dependent on the executive, being appointed by the joint decree of the Minister of Defence and the Prime Minister, subject to the approval of the President of the Republic. He pointed to the fact that their professional assessment and promotion as well as their security of tenure were within the control of the executive branch and in turn the army. The ties which bound them to the executive and to the army made it impossible for military judges to discharge their functions on the bench in an independent and impartial manner. The applicant further stressed that the independence and impartiality of military judges and hence of the courts on which they sat were compromised since these judges were unable to take a position which might be contradictory to the views of their commanding officers.

69. The applicant stated that these considerations impaired the independence and impartiality of the Istanbul National Security Court and prevented him from receiving a fair trial, in violation of Article 6 § 1.

70. The Government replied that the rules governing the appointment of military judges to the National Security Courts and the guarantees which they enjoyed in the performance of their judicial functions on the bench were such as to ensure that these courts fully complied with the requirements of independence and impartiality within the meaning of Article 6 § 1. The Government disputed the applicant's argument that military judges were accountable to their superior officers. In the first place, it was an offence under Article 112 of the Military Criminal Code for a public official to attempt to influence the performance by a military judge of his judicial functions (see paragraph 35 above). Secondly, the assessment reports referred to by the applicant related only to conduct of a military judge's non-judicial duties. Military judges had access to their assessment reports and were able to challenge their content before the Supreme Military Administrative Court (see paragraph 36 above). When acting in a judicial capacity a military judge was assessed in exactly the same manner as a civilian judge.

71. The Government further averred that the fairness of the applicant's trial had not been prejudiced by reason of the presence of a military judge on the bench. They claimed that neither the military judge's hierarchical superiors nor the public authorities which had appointed him to the court had any interest in the proceedings or in the outcome of the case. Moreover, the applicant's original conviction had been quashed on appeal by the Court of Cassation after a full rehearing of the case. When the case was referred back to it the Istanbul National Security Court followed the higher court's ruling and its subsequent judgment was later upheld on appeal by the Court

of Cassation, a court whose independence and impartiality have not been impugned by the applicant (see paragraphs 17-20 above).

72. The Government also impressed upon the Court the need to have particular regard to the security context in which the decision to establish National Security Courts was taken pursuant to Article 143 of the Constitution. In view of the experience of the armed forces in the anti-terrorism campaign the authorities had considered it necessary to strengthen these courts by including a military judge in order to provide them with the necessary expertise and knowledge to deal with threats to the security and integrity of the State.

73. The Commission concluded that the Istanbul National Security Court could not be considered an independent and impartial tribunal for the purposes of Article 6 § 1 of the Convention. The Commission referred in this respect to its opinion in the case of Incal v. Turkey as expressed in its report adopted on 25 February 1997 and to the reasons supporting that opinion.

74. The Court recalls that in its Incal judgment cited above and in its Çıraklar v. Turkey judgment of 28 October 1998 (*Reports* 1998-VII) the Court had to address arguments similar to those raised by the Government in their pleadings in the instant case. In those judgments the Court noted that the status of military judges sitting as members of National Security Courts did provide some guarantees of independence and impartiality (see the Incal judgment cited above, p. 1571, § 65, and paragraph 32 above). On the other hand, the Court found that certain aspects of these judges' status made their independence and impartiality questionable (ibid., p. 1572, § 68): for example, the fact that they are servicemen who still belong to the army, which in turn takes its orders from the executive; the fact that they remain subject to military discipline; and the fact that decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army (see paragraphs 33-36 above).

75. As in its Incal judgment the Court considers that its task is not to determine *in abstracto* the necessity for the establishment of National Security Courts in the light of the justifications advanced by the Government. Its task is to ascertain whether the manner in which the Istanbul National Security Court functioned infringed Mr Sürek's right to a fair trial, in particular whether, viewed objectively, he had a legitimate reason to fear that the court which tried him lacked independence and impartiality (see the Incal judgment cited above, p. 1572, § 70, and the Çıraklar judgment cited above, pp. 3072-73, § 38).

As to that question, the Court sees no reason to reach a conclusion different from that in the cases of Mr Incal and Mr Çıraklar, both of whom, like the present applicant, were civilians. It is understandable that the applicant – prosecuted in a National Security Court for disseminating propaganda aimed at undermining the territorial integrity of the State and

national unity – should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service (see paragraph 34 above). On that account he could legitimately fear that the Istanbul National Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, the applicant's fears as to that court's lack of independence and impartiality can be regarded as objectively justified. The proceedings in the Court of Cassation were not able to dispel these fears since that court did not have full jurisdiction (see the Incal judgment cited above, p. 1573, § 72 *in fine*).

76. For these reasons the Court finds that there has been a breach of Article 6 § 1 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. The applicant claimed compensation for pecuniary and non-pecuniary damage as well as reimbursement of costs and expenses incurred in the domestic and Convention proceedings. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

78. The applicant claimed the sum of 150,000 French francs (FRF) by way of compensation for (a) the fine imposed on him and paid (see paragraph 18 above) and (b) expenditure incurred in pursuing the case in the domestic courts. The amount claimed included interest accrued, took account of the high rate of inflation in the respondent State and was calculated on the basis of the current exchange rate.

79. The Government maintained that the sum claimed by the applicant was exorbitant having regard to the fact that the applicant was only fined 83,333,333 Turkish liras and he was allowed to pay the fine in monthly instalments. The Government also pointed out that the applicant had not provided any details to substantiate the amount claimed for his alleged out-of-pocket expenses.

80. The Delegate of the Commission did not comment at the hearing on the amount claimed.

81. The Court would observe that it cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 would have been, irrespective of its own finding that the respondent State is not in breach of

Article 10 on account of the applicant's conviction and sentence. It considers that in the circumstances the applicant's claim should be disallowed.

B. Non-pecuniary damage

82. The applicant claimed that as a lawyer his career had been blighted on account of the fact that he had a conviction recorded against him for an offence of terrorism. He requested the Court to award him the sum of FRF 100,000 by way of compensation for non-pecuniary damage.

83. The Government argued that if the Court were minded to find a violation in this case that finding would constitute in itself sufficient just satisfaction under this head.

84. The Delegate of the Commission did not comment at the hearing on this limb of the applicant's claim either.

85. The Court recalls that it has found that there has been no violation of Article 10 on the facts of this case. It considers that a finding of a violation of Article 6 § 1 constitutes in itself sufficient just satisfaction for the applicant's alleged non-pecuniary damage.

C. Costs and expenses

86. The applicant claimed the legal costs and expenses (translation, postal, communications and travel expenditure) which he incurred in the domestic proceedings as well as in bringing his case before the Convention institutions. He assessed these at FRF 90,000. As to the proceedings before the Commission and Court the applicant stated that his lawyer's fees were based on the Turkish Bar Association's minimum rate scales. The applicant added that the total amount claimed took account of the high level of inflation in Turkey and was based on current exchange rates.

87. The Government stated that the amount claimed was exaggerated in comparison with fees earned by Turkish lawyers in the domestic courts and had not been properly justified. The case was simple and had not required much effort on the part of the applicant's lawyer who had dealt with it throughout the proceedings in his own language. They cautioned against the making of an award which would only constitute a source of unjust enrichment having regard to the socio-economic situation in the respondent State.

88. The Delegate of the Commission did not comment at the hearing on the sum claimed.

89. The Court notes that it has found a breach only in respect of Article 6 § 1 of the Convention. It further notes that the applicant's lawyer has been associated with the preparation of other cases before the Court concerning complaints under Articles 6 and 10 of the Convention which are

based on similar facts. Deciding on an equitable basis and according to the criteria laid down in its case-law (see, among many other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II), the Court awards the applicant the sum of FRF 10,000.

D. Default interest

90. The Court deems it appropriate to adopt the statutory rate of interest applicable in France at the date of adoption of the present judgment, which is 3.47% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by eleven votes to six that there has been no violation of Article 10 of the Convention;

2. *Holds* by sixteen votes to one that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* by sixteen votes to one that the finding of a violation of Article 6 § 1 of the Convention constitutes in itself sufficient just satisfaction for the non-pecuniary damage alleged by the applicant;

4. *Holds* unanimously
   (a) that the respondent State is to pay the applicant in respect of costs and expenses, within three months, the sum of 10,000 (ten thousand) French francs, to be converted into Turkish liras at the rate applicable on the date of settlement;
   (b) that simple interest at an annual rate of 3.47% shall be payable on the above sum from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 1999.

Luzius WILDHABER
President

Paul MAHONEY
Deputy Registrar

A declaration by Mr Wildhaber and, in accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Mrs Palm;

(b) partly dissenting opinion of Mr Bonello;

(c) joint partly dissenting opinion of Mrs Tulkens, Mr Casadevall and Mrs Greve;

(d) partly dissenting opinion of Mr Fischbach;

(e) partly dissenting opinion of Mr Gölcüklü.

L.W.
P.J.M.

DECLARATION BY JUDGE WILDHABER

Although I voted against the finding of a violation of Article 6 § 1 of the Convention in the case of Incal v. Turkey (judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV), I now consider myself bound to adopt the view of the majority of the Court.

PARTLY DISSENTING OPINION OF JUDGE PALM

I agree with Court's conclusion that there has been a violation of Article 6 § 1 in this case. My dissent relates to the Court's general approach to examining whether there has been a violation of Article 10.

In my opinion the majority has attached too much weight to the admittedly harsh and vitriolic language used in the impugned letters and insufficient attention to the general context in which the words were used and their likely impact. Undoubtedly the words in question shock and disturb the reader with their general accusatory tone and their underlying violence. But in a democracy, as our Court has emphasised, even such "fighting" words may be protected by Article 10. The question in the present case concerns the approach employed by the Court to decide the point at which such "violent" and offensive speech ceases to be protected by the Convention.

My answer to this question is to focus less on the vehemence and outrageous tone of the words employed and more on the different elements of the contextual setting in which the speech was uttered. Was the language intended to inflame or incite to violence? Was there a real and genuine risk that it might actually do so? The answer to these questions in turn requires a measured assessment of the many different layers that compose the general context in the circumstances of each case.

This was in fact the approach of the former Court when it found that there had been no violation of Article 10 in the Zana case although I dissented in that case on other grounds. In Zana the applicant had indicated his support for the PKK during an interview. The Court examined the context in which the statement was made, noting (1) that the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where extreme tension reigned at the material time; (2) that the applicant was the mayor of Diyarbakır – the most important city in south-east Turkey; (3) that the interview had been given in a major national daily newspaper and had to be judged as likely to exacerbate the already explosive situation in that region (see the Zana v. Turkey judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, p. 2549, §§ 59 and 60).

Applying this approach to the facts of the present case I attach weight to the following elements. In the first place, the applicant was not punished for the offence of incitement to hatred pursuant to Article 312 of the Criminal Code but for an offence of disseminating separatist propaganda under section 8(1) of the Prevention of Terorrism Act 1991 (see paragraphs 13-20 of the judgment). In fact the courts found "no grounds for convicting him under Article 312" (see paragraph 14 of the judgment). The majority's reliance on the letters as capable of inciting to violence or as hate speech

which glorifies violence thus goes significantly further than the approach of the national courts. Secondly, the applicant was only the major shareholder in the review and not the author of the impugned letters nor even the editor of the review responsible for selecting the material in question. He was thus lower down in the chain of responsibility for the publication of readers' letters. Nor was he (or the authors) a prominent figure in Turkish life capable, as in the Zana case, of exercising an influence on public opinion. Thirdly, the review was published in Istanbul far away from the zone of conflict in south-east Turkey. Finally, letter-writing by readers does not occupy a central or headline position in a review and is by its very nature of limited influence. Moreover some allowance must be made for the fact that members of the public expressing their views in letters for publication are likely to use a more direct and vehement style than professional journalists.

The combination of these factors leads me to the conclusion that there was no real or genuine risk of the speech at issue inciting to hatred or to violence and that the applicant was sanctioned because of the political message of the letters rather than their inflammatory tone. I am thus of the view that there was a violation of Article 10 in this case.

PARTLY DISSENTING OPINION OF JUDGE BONELLO

I voted to find a violation of Article 10, as I do not endorse the primary test applied by the Court to determine whether the interference by the domestic authorities with the applicant's freedom of expression was justifiable in a democratic society.

Throughout these, and previous Turkish freedom-of-expression cases in which incitement to violence was an issue, the common test employed by the Court seems to have been this: if the writings published by the applicant supported or instigated the use of violence, then his conviction by the national courts was justifiable in a democratic society. I discard this yardstick as insufficient.

I believe that punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create "a clear and present danger". When the invitation to the use of force is intellectualised, abstract, and removed in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail.

I borrow what one of the mightiest constitutional jurists of all time had to say about words which tend to destabilise law and order: "We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[1]

The guarantee of freedom of expression does not permit a state to forbid or proscribe advocacy of the use of force except when such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action[2]. It is a question of proximity and degree[3].

In order to support a finding of clear and present danger which justifies restricting freedom of expression, it must be shown either that immediate serious violence was expected or was advocated, or that the past conduct of the applicant furnished reason to believe that his advocacy of violence would produce immediate and grievous action[4].

It is not manifest to me that any of the words with which the applicant was charged, however pregnant with mortality they may appear to some, had the potential of imminently threatening dire effects on the national order. Nor is it manifest to me that instant suppression of those expressions was indispensable for the salvation of Turkey. They created no peril, let

1. Justice Oliver Wendell Holmes in *Abrahams v. United States* 250 U.S. 616 (1919) at 630.
2. *Brandenburg v. Ohio* 395 U.S. 444 (1969) at 447.
3. *Schenck v. United States* 294 U.S. 47 (1919) at 52.
4. *Whitney v. California* 274 U.S. 357 (1927) at 376.

alone a clear and present one. Short of that, the Court would be subsidising the subversion of freedom of expression were it to condone the conviction of the applicant by the criminal courts.

In summary, "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose, through discussion, the falsehood and the fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence"[1].

Moreover, I did not support the majority in its ruling that the finding of a violation of Article 6 § 1 of the Convention constitutes in itself just satisfaction for the non-pecuniary damage alleged by the applicant. I believe that such non-redress is inadequate in any court of justice and is negated by the clear wording of the Convention, as explained in detail in my partly dissenting opinion annexed to *Aquilina v. Malta* ([GC], no. 25642/94, ECHR 1999-III).

1. Justice Louis D. Brandeis in *Whitney v. California* 274 U.S. 357 (1927) at 377.

JOINT PARTLY DISSENTING OPINION OF JUDGES TULKENS, CASADEVALL AND GREVE

(*Translation*)

Like the majority, we voted in favour of finding a violation of Article 6 § 1 of the Convention. However, unlike the majority, we consider that there was also a breach of Article 10 in the present case. Our opinion is based in particular on the following considerations.

1. While, on the one hand, the Court reiterates that freedom of the press must make it possible to "*... impart information and ideas on political issues, including divisive ones*" (see paragraph 59 of the judgment), it finds on the other hand that the impugned letters "*... amount to an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices which have manifested themselves in deadly violence*" (see paragraph 62). In addition to the fact that the letters concerned must be read in context, it is, in our view, difficult to assess accurately and objectively the meaning of the terms employed and how they should be construed. We consider that freedom of expression as protected by the Convention may be curtailed only when there is direct provocation to commit serious criminal offences (*crimes*).

2. Furthermore, the Court's analysis in the instant case seems to us to be inconsistent with its conclusions in the Arslan, Ceylan and several other cases, three of which also involved the applicant, Mr Sürek. All of those cases concerned the right to information and freedom of expression. The Court hardly distinguishes between these cases in its assessment of the political statements and sometimes virulent and acerbic criticism of the Turkish authorities' actions; in none of them did it find any justification for making an exception to Article 10 of the Convention. More particularly, we fail to see why in the present case, but not in the others "*... the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor*", as the majority assert in paragraph 62 of the judgment.

3. The case of Sürek (no. 1) differs markedly from Zana, as in the latter case the applicant's statements were unambiguous, they coincided "*... with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time*" and Mr Zana was a political figure and former mayor of Diyarbakır, so that it followed that the published comments could be regarded as "*... likely to exacerbate an already explosive situation in that region*" (see the Zana v. Turkey judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, p. 2549, §§ 59-60). In the present case Mr Sürek was not even the author of the comments in the impugned letters, which had been written by readers of the review.

4. The criteria used by the majority in its assessment (see paragraphs 59 and 61 of the judgment) and the fact that, as the Court has regularly stated, paragraph 2 of Article 10 must be strictly construed so as to leave little scope for limitations on freedom of expression, meant that the Court should, in our view, have found that there was an unjustified interference with the applicant's right to freedom of expression and, consequently, a violation of Article 10.

PARTLY DISSENTING OPINION OF JUDGE FISCHBACH

(*Translation*)

Having voted with the majority in favour of finding a violation of Article 6 § 1, I regret that I am unable to agree with the reasoning that led it to conclude that there has been no violation of Article 10.

Obviously, I agree with the Court's case-law affording the national authorities a wider margin of appreciation when considering whether there is a need for interference in the exercise of freedom of expression in cases concerning comments inciting people to use violence against an individual, a State representative or a sector of the population.

I cannot, however, detect in the remarks made in the two letters written by readers an incitement to use violence. In view of the situation that has prevailed in south-east Turkey since 1985, it seems to me that only conduct of that nature may be regarded as overstepping the limits of freedom of expression as protected by the Convention. The applicant, who has done no more than to describe, admittedly in violent and shocking terms, what is happening in the region, has not said any more in his comments than what the Court has in other cases regarded as tolerable and thus not falling within the exceptions to Article 10 (see *Ceylan v. Turkey* [GC], no. 23556/94, ECHR 1999-IV, and *Arslan v. Turkey* [GC], no. 23462/94, 8 July 1999).

That is why I find that there has been a violation of Article 10 in the present case.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Translation*)

To my great regret, I do not agree with the view of the majority of the Court that there has been a violation of Article 6 § 1 in that the National Security Courts are not "independent and impartial tribunals" within the meaning of that provision owing to the presence of a military judge on the bench. In that connection, I refer to the partly dissenting opinion which I expressed jointly with those eminent judges, Mr Thór Vilhjálmsson, Mr Matscher, Mr Foighel, Sir John Freeland, Mr Lopes Rocha, Mr Wildhaber and Mr Gotchev in the case of Incal v. Turkey (judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV), and to my individual dissenting opinion in the case of Çıraklar v. Turkey (judgment of 28 October 1998, *Reports* 1998-VII). I remain firmly convinced that the presence of a military judge in a court composed of three judges, two of whom are civilian judges, in no way affects the independence and impartiality of the National Security Courts, which are courts of the non-military (ordinary) judicial order whose decisions are subject to review by the Court of Cassation.

I wish to stress that: (1) the conclusion of the majority results from an unjustified extension to the theory of outward appearances; (2) it does not suffice to say, as the majority do in paragraph 75 of the judgment, that it is "understandable that the applicant ... should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service", and then simply to rely on the Incal precedent (Çıraklar being a mere repetition of what was said in the Incal judgment); and (3) the majority's opinion is in the abstract and ought therefore, if it was to be justifiable, to have been better supported both factually and legally.

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

CASE OF SÜREK v. TURKEY (No. 2)

(Application no. 24122/94)

JUDGMENT

STRASBOURG

8 July 1999

This judgment is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.

In the case of Sürek v. Turkey (no. 2),

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") as amended by Protocol No. 11[1] to the Convention and the relevant provisions of its Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr A. PASTOR RIDRUEJO,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mr J.-P. COSTA,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A. B. BAKA,
Mr R. MARUSTE,
Mr K. TRAJA,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,

and also of Mr P.J. MAHONEY and Mrs M. DE BOER BUQUICCHIO, *Deputy Registrars*,

Having deliberated in private on 4 March and 16 June 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") on 17 March 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no.24122/94) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Kamil Tekin Sürek, on 9 March 1994.

Notes by the Registry

[1.-2.] Protocol No. 11 and the Rules of Court entered into force on 1 November 1998.

[3.] Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

The Commission's request referred to former Articles 44 and 48 of the Convention and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 § 1 and 10 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the former Rules of Court A[1], the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (former Rule 30). Mr R. Bernhardt, President of the Court at the time, subsequently authorised the applicant's lawyer to use the Turkish language in the written procedure (former Rule 27 § 3). At a later stage, Mr L. Wildhaber, President of the new Court, authorised the applicant's lawyer to use the Turkish language in the oral proceedings (Rule 36 § 5).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal in particular with procedural matters that might arise before the entry into force of Protocol No. 11, Mr Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 23 September and 14 October 1998 respectively. On 8 September 1998 the Government filed with the Registry additional information in support of their memorial and on 22 November 1998 the applicant filed further details of his claim for just satisfaction. On 26 February 1999 the Government filed observations on the applicant's claims for just satisfaction.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. On 22 October 1998 Mr Wildhaber had decided that, in the interests of the proper administration of justice, a single Grand Chamber should be constituted to hear the instant case and twelve other cases against Turkey, namely: Karataş v. Turkey (application no. 23168/94); Arslan v. Turkey (no. 23462/94); Polat v. Turkey (no. 23500/94); Ceylan v. Turkey (no. 23556/94); Okçuoğlu v. Turkey (no. 24246/94); Gerger v. Turkey (no. 24919/94); Erdoğdu and İnce v. Turkey (nos. 25067/94 and 25068/94); Başkaya and Okçuoğlu v. Turkey (nos. 23536/94 and 24408/94); Sürek v. Turkey no. 1 (no. 26682/95); Sürek and Özdemir v. Turkey

[1]. *Note by the Registry*. Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States not bound by that Protocol.

(nos. 23927/94 and 24277/94); Sürek v. Turkey no. 3 (no. 24735/94) and Sürek v. Turkey no. 4 (no. 24762/94).

5. The Grand Chamber constituted for that purpose included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr Wildhaber, the President of the Court, Mrs E. Palm Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mrs F. Tulkens, Mrs V. Strážnická, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr A.B. Baka, Mr R. Maruste, and Mrs S. Botoucharova (Rule 24 § 3 and Rule 100 § 4).

On 19 November 1998 Mr Wildhaber exempted Mr Türmen from sitting after his withdrawal from the case having regard to the decision of the Grand Chamber in the case of Oğur v. Turkey taken in accordance with Rule 28 § 4. On 16 December 1998 the Government notified the registry that Mr F. Gölcüklü had been appointed *ad hoc* judge (Rule 29 § 1).

Subsequently, Mr K. Traja replaced Mrs S. Botoucharova, who was unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

6. Pursuant to the invitation of the Court (Rule 99), the Commission delegated one of its members, Mr D. Šváby, to take part in the consideration of the case before the Grand Chamber. The Commission subsequently informed the Registry that the Commission would not be represented at the oral hearing. On 16 February 1999 the Delegate filed his written pleadings on the case with the Registry.

7. In accordance with the President's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 3 March 1999, the case being heard simultaneously with the case of Sürek and Özdemir v. Turkey. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr D. TEZCAN, *Agent*,
Mrs D. AKCAY, *co-Agent*,
Mr B. ÇALIŞKAN,
Miss G. AKYÜZ,
Miss A. GÜNYAKTI,
Mr F. POLAT,
Miss A. EMÜLER,
Mrs I. BATMAZ KEREMOĞLU,
Mr B. YILDIZ,
Mr Y. ÖZBEK, *Advisers*;

(b) *for the applicant*
Mr H. KAPLAN, Istanbul Bar, *Advocate*.

The Court heard addresses by Mr Tezcan and Mr Kaplan.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant

8. The applicant is a Turkish citizen who was born in 1957 and lives in Istanbul.

9. At the material time, the applicant was the major shareholder in *Deniz Basın Yayın Sanayi ve Ticaret Organizasyon*, a Turkish limited liability company which owns a weekly review entitled *Haberde Yorumda Gerçek* ("The Truth of News and Comments"), published in Istanbul.

B. The impugned news report

10. The issue dated 26 April 1992 contained a news report providing information given at a press conference by a delegation - which included two former Turkish parliamentarians Leyla Zana and Orhan Doğan, Lord Avebury and a member of the Anglican Church - on its visit to Şırnak village, in the wake of tensions in the area.

The news report included an article reporting the Governor of Şırnak as having told the delegation that the Şırnak Chief of Police had given an order to open fire on the people.

It further rendered a dialogue between Leyla Zana, Orhan Doğan and İsmet Yediyıldız, a Gendarme Commander.

The relevant part of the report read:

> "Gendarmerie Regiment Commander İsmet Yediyıldız:
>
> 'Your blood would not quench my thirst…'
>
> While the British delegation and Diyarbakır MP Leyla Zana, Şırnak MP Orhan Doğan and Bismil District Governor Mehmet Kurdoğlu managed to persuade the people of Tepe village, which was blockaded by the security forces, after talking to them for a while and telling them that permission had been obtained for them to get the bodies of their dead, an interesting conversation took place between

Diyarbakır Security Director Ramazan Er and Gendarmerie Regiment Commander İsmet Yediyıldız.

The conversation between the MPs Leyla Zana and Orhan Doğan on the one hand and Colonel İsmet Yediyıldız on the other hand was recounted by Leyla Zana as follows:

Colonel Yediyıldız: What business do you have here? There had been nobody here until you arrived. You have come and stirred things up again.

Leyla Zana: No, Sir. The situation had been extremely tense before we arrived. We have come with the District Governor and are trying to calm down the tension here. Here is the District Governor.

Colonel Yediyıldız: No, that's not true. We saw when we were flying by helicopter that there was nobody here before. People gathered when you arrived.

Orhan Doğan: No, you can ask the District Governor if you like. (Meanwhile, District Governor Mehmet Kurdoğlu was also being told off.)

Colonel Yediyıldız: Do you know who these dead people are?

Orhan Doğan: Yes, they are our children, the children of all of us.

Colonel Yediyıldız: No, these are not our children, they are your children.

Orhan Doğan: But my Colonel ...

Colonel Yediyıldız: Do not call me your colonel. I am not your colonel. Your blood would not quench my thirst. You should also be honest and freely admit that my blood would not quench your thirst. Right now I could kill you like a rat. Your death would give us pleasure. Your blood would not quench my thirst.

Leyla Zana: If the problem can be solved by killing us, then here are our people; let's go among them and you kill us and this problem is solved.

Colonel Yediyıldız: No, I would not kill you now. I would kill you after disgracing you in the eyes of the people."

C. The charges against the applicant

11. On 29 May 1992 the Public Prosecutor at the Istanbul National Security Court (*İstanbul Devlet Güvenlik Mahkemesi*) charged the applicant, being the owner of the review, with revealing the identity of officials mandated to fight terrorism and thus rendering them terrorist targets. The charges were brought under section 6 of the Prevention of Terrorism Act 1991 ("the 1991 Act"; see paragraph 16 below).

12. In the proceedings before the Istanbul National Security Court the applicant denied the charges and advanced the following arguments in his

defence. The news report had been published with the aim of informing the public of the events which had occurred during the 1992 Newroz celebrations. It had been based on a joint press declaration by former deputies Leyla Zana and Orhan Doğan and an English delegation, during their visit to south-east Turkey. By virtue of the fact that section 6 of the 1991 Act contained an absolute prohibition on the disclosure and dissemination of the identity of officials appointed to fight terrorism, it enabled officials to abuse their authority, violate the law and subject citizens to ill-treatment. The right to receive and impart information, including information concerning acts of officials, was fundamental in a democratic society. Section 6 of the 1991 Act contravened not only the Turkish Constitution but also Article 10 of the Convention.

D. The applicant's conviction

13. In a judgment of 2 September 1993 the National Security Court convicted the applicant under section 6 of the 1991 Act and sentenced him to pay a fine of 54,000,000 Turkish lira. It noted that the news report had contained an allegation to the effect that the Governor of Şırnak had stated to the visiting delegation that the Şırnak Chief of Police had given an order to open fire on the people. It had further affirmed that a gendarme commander had stated to Orhan Doğan in Leyla Zana's presence "[y]our death would give us pleasure. Your blood would not quench my thirst". By having disclosed the identity of these officials, the publication had rendered them targets for terrorist attack.

E. The applicant's appeal against conviction and subsequent proceedings

14. The applicant appealed, reiterating his defence before the National Security Court. He also argued that the press declaration at issue had already been reported in other newspapers and magazines and that the incriminated news report had added nothing to these.

15. On 10 December 1993 the Court of Cassation dismissed the appeal. It upheld the cogency of the National Security Court's assessment of the evidence and its reasoning for rejecting the applicant's defence.

II. RELEVANT DOMESTIC LAW

A. The criminal law

The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991)[1]

16. The relevant provisions of the Prevention of Terrorism Act 1991 read as follows:

Section 6

"It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to announce, orally or in the form of a publication, that terrorist organisations will commit an offence against a specific person, whether or not that person's ... identity is divulged, provided that it is done in such a manner that he or she may be identified, or to reveal the identity of civil servants who have participated in anti-terrorist operations or to designate any person as a target.

It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to print or publish declarations or leaflets emanating from terrorist organisations.

…

Where the offences contemplated in the above paragraphs are committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, or from the sales of the previous issue if the periodical appears monthly or less frequently, *or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed matter other than periodicals or if the periodical has just been launched.*[2] However, the fine may not be less than fifty million Turkish liras. The editor of the periodical shall be ordered to pay a sum equal to half the fine imposed on the publisher."

B. The National Security Courts

17. The relevant provisions of domestic law governing the organisation and procedure of the National Security Court are quoted in paragraphs 32-33 of the Sürek no. 1 v. Turkey judgment, which is being delivered on the same date as the present judgment.

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1. This law, promulgated with a view to preventing acts of terrorism, refers to a number of offences defined in the Criminal Code which it describes as "acts of terrorism" or "acts perpetrated for the purpose of terrorism" (sections 3 and 4) and to which it applies.

2. The phrase in italics was deleted by a judgment of the Constitutional Court on 31 March 1992 and went out of force on 27 July 1993.

PROCEEDINGS BEFORE THE COMMISSION

18. Mr Kamil Tekin Sürek applied to the Commission on 9 March 1994. He complained that his conviction and sentence constituted an unjustified interference with his right to freedom of expression as guaranteed by Article 10 of the Convention and that his case had not been heard by an independent and impartial tribunal, in breach of Article 6 § 1 of the Convention. He also maintained that the criminal proceedings against him had not been concluded within a reasonable time, which gave rise to a separate violation of Article 6 § 1.

19. The Commission declared the application (no. 24122/94) admissible on 2 September 1996, with the exception of the applicant's Article 6 § 1 complaint relating to the length of the criminal proceedings in his case. In its report of 13 January 1998 (former Article 31), it expressed the opinion that there had been no violation of Article 10 of the Convention (23 votes to 9) and that there had been a violation of Article 6 § 1 (31votes to 1). The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

20. The applicant requested the Court to find the respondent State in breach of its obligations under Articles 6 § 1 and 10 of the Convention and to award him just satisfaction under Article 41.

The Government for their part invited the Court to reject the applicant's complaints.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

21. The applicant alleged that the authorities had unjustifiably interfered with his right to freedom of expression guaranteed under Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without

[1] *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's reports is obtainable from the Registry.

interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

22. The Government maintained that the interference with the applicant's right to freedom of expression was justified under the provisions of the second paragraph of Article 10. The Commission agreed with the Government on this point.

A. Existence of an interference

23. The Court notes that it is clear, and this has not been disputed, that there has been an interference with the applicant's right to freedom of expression on account of his conviction and sentence under section 6 of the Prevention of Terrorism Act 1991 (hereinafter "the 1991 Act").

B. Justification of the interference

24. The interference contravened Article 10 unless it was "prescribed by law", had one or more of the legitimate aims referred to in paragraph 2 of Article 10 and was "necessary in a democratic society" for achieving such aim or aims. The Court will examine each of these criteria in turn.

1. "Prescribed by law"

25. It was not disputed that the interference had a legal basis in section 6 of the 1991 Act and was thus "prescribed by law" within the meaning of Article 10 § 2 of the Convention. The Court does not see any reason for arriving at a contrary conclusion.

2. Legitimate aim

26. The applicant did not dispute that the interference pursued a legitimate aim under the second paragraph of Article 10 of the Convention.

27. The Government submitted that the measures had been imposed in the interests of national security and territorial integrity.

28. The Commission was of the opinion that the applicant's conviction and sentence for the disclosure of the identities of certain officials pursued the legitimate aim of protection of the rights of others. The Commission left

it open whether other aims, such as the protection of national security and public safety, were relevant.

29. The Court, having regard to the sensitivity of the security situation in south-east Turkey (see the Zana v. Turkey judgment of 25 November 1997, Reports 1997-VII, p. 2547, §§ 19 and 50) and to the need for the authorities to take particular steps to protect public officials involved in the fight against terrorism from being targeted for terrorist attack, considers that the contested measures can be said to have been taken in the interest of national security and territorial integrity and for the protection of the rights of others, which are legitimate aims under Article 10 § 2 of the Convention.

3. "Necessary in a democratic society"

(a) Arguments of those appearing before the Court

(i) The applicant

30. The applicant complained that although he was the owner of the review with no editorial responsibility for its content, he had nonetheless been punished under section 6 of the 1991 Act for the disclosure of the names of the public officials in question. He submitted that the impugned data had formed part of an objective news report aimed at providing the public with information given at a press conference by a delegation of public figures, in the wake of certain tensions at Şırnak in 1992. The publication did not praise the PKK. Nor did the review or the applicant himself have any links with that organisation. Finally, he stressed that the press declaration at issue had already been reported in other newspapers and that the incriminated news report added nothing to these reports.

(ii) The Government

31. The Government maintained that the news report published by the applicant had contained unfounded accusations which, by virtue of the disclosure of the identity of certain officials involved in the fight against terrorism, had put their lives at danger from terrorist attack.

As the owner of the review the applicant had participated in the dissemination of separatist propaganda by publishing a news report which, by attempting in a veiled but nonetheless obvious manner to vindicate a terrorist organisation, threatened fundamental interests of the national community such as territorial integrity, national unity and security and the prevention of crime and disorder. In the Government's submission, separatist propaganda inevitably incites to violence and provokes hostility among the various groups in Turkish society, thus endangering human rights and democracy.

In the Government's view the measures taken against the applicant did were within the authorities' margin of appreciation in relation to the type of activity which endangers the vital interests of the State and the taking of these measures in the instant case found its justification under paragraph 2 of Article 10.

(iii) The Commission

32. The Commission observed that, bearing in mind the general tension and the level of terrorism and violence occurring in south-east Turkey, the officials engaged in State action against terrorist groups in that area were frequently exposed to serious risks and therefore a high degree of protection was required. According to the findings of the National Security Court, the disclosure of the identities of the officials concerned had made them possible targets of terrorist attack. In the Commission's opinion, the incriminated news report, which in itself might have contained information of public interest, could well have been published without disclosure of the identities of the two officials concerned. It concluded that there had been no violation of Article 10 in the circumstances of the case.

(b) The Court's assessment

33. The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out in, for example, its Zana v. Turkey judgment (cited above, pp. 2547-48, § 51) and in its Fressoz and Roire v. France judgment of 21 January 1999 (*Reports* 1999-, p. …, § 45).

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

(iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

34. The Court further recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see the Wingrove v. the United Kingdom judgment of 25 November 1996 Reports 1996-V, p. 1957, § 58). The dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks (see the Incal v. Turkey judgment of 9 June 1998, Reports 1998-IV, p. 1567, § 54). Finally, where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

35. Since the applicant was convicted of disclosing the identity of certain public officials through the medium of the review of which he was the owner, the impugned interference must also be seen in the context of the essential role of the press in ensuring the proper functioning of a political democracy (see among many other authorities, the Lingens v. Austria judgment of 8 July 1986, Series A, no. 103, p. 26, § 41; and the above-mentioned Fressoz and Roire judgment, p…., § 45). While the press must not overstep the bounds set, *inter alia*, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders (see the above-mentioned Lingens judgment, p. 26 §§ 41-42).

36. The Court notes that the applicant's conviction and sentence had been imposed on the ground that his review had published a news report

identifying certain officials with certain statements suggesting misconduct on their part. While it is true that the applicant did not personally associate himself with the information contained in the news report, the Court does not accept his argument that he should be exonerated from any criminal liability for their contents on account of the fact that he only had a commercial and not an editorial relationship with the review. He was an owner and as such had the power to shape the editorial direction of the review. For that reason, he was vicariously subject to the "duties and responsibilities" which the review's editorial and journalist staff undertake in the collection and dissemination of information to the public and which assume an even greater importance in situations of conflict and tension.

37. The applicant's conviction and sentence related, in the first place, to the fact that his publication had reported the Governor of Şırnak to have affirmed that the Şırnak Chief of Police had given order to open fire against the people. Secondly, it had quoted Leyla Zana, a former parliamentarian, as having stated that a named Gendarme Commander had told Orhan Doğan, also a former parliamentarian, that "[y]our death would give us pleasure. Your blood would not quench my thirst" (see paragraph 10 above).

Thus, the wording of the statements clearly implied serious misconduct on the part of the police and gendarme officers in question. Although the statements were not presented in a manner which could be regarded as incitement to violence against the officers concerned or the authorities, they were capable of exposing the officers to strong public contempt. Moreover, the news report was published in the context of the security situation in south-east Turkey, where since approximately 1985 serious disturbances have raged between the security forces and the members of the PKK involving a very heavy loss of life and the imposition of emergency rule in much of the region (see the above-mentioned Zana judgment, p. 2539, § 10).

38. In the light of the foregoing, the Court sees no reason to doubt that the applicant's conviction and sentence were supported by reasons which were relevant for the purposes of the necessity test under paragraph 2 of Article 10.

39. As regards the further question whether the reasons relied on could also be considered sufficient, the Court observes that the contested interference related to journalistic reporting of statements made by certain politicians to the press concerning their visit to an area of Turkey where tensions had occurred (see the Jersild v. Denmark judgment of 23 September 1994, Series A no. 298, p. 23, § 31). The impugned news report simply reiterated what a police officer and a gendarme officer were said to have ordered or affirmed on specific occasions. Assuming that the assertions were true, the Court considers that, in view of the seriousness of the misconduct in question, the public had a legitimate interest in knowing not only the nature of the conduct but also the identity of the officers.

However, the defences of truth (see the Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 24, §§ 47-48) and public interest could not have been pleaded under the relevant Turkish law.

40. Furthermore, it is undisputed that the press declaration on which the news report was based had already been reported in other newspapers and that the incriminated news coverage added nothing to those reports. Nor has it been submitted that other newspapers were prosecuted in respect of publication of information derived from the said declaration (see the Weber v. Switzerland judgment of 22 May 1990, Series A no. 177, p. 23, § 51). At the time of the publication of the news report in the present case, the information in issue, identifying specific police and gendarme officers with serious misconduct, was already in the public domain. Thus, the interest in protecting the identity of the officers concerned had been substantially diminished and the potential damage which the restriction was aimed at preventing had already been done (see the *Observer and Guardian* and the *Sunday Times* (no. 2) judgments of 26 November 1991, respectively Series A no. 216, pp. 34-35, §§ 69-71; and Series A no. 217, pp. 30-31, §§ 54-56).

41. Finally, the Court considers that the conviction and sentence were capable of discouraging the contribution of the press to open discussion on matters of public concern.

42. In the light of the above, the Court does not find that the objective of the Government in protecting the officers in question against terrorist attack was sufficient to justify the restrictions placed on the applicant's right to freedom of expression under Article 10 of the Convention. In the absence of a fair balance between the interests in protecting the freedom of the press and those in protecting the identity of the public officials in question, the interference complained of was disproportionate to the legitimate aims pursued. There has therefore been a breach of Article 10 of the Convention in the present case.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

A. The Government's preliminary objection

43. In their memorial to the Court the Government maintained that the applicant, not having raised before the domestic courts his complaint that his case had not been heard by an independent and impartial tribunal, had failed to exhaust domestic remedies as required by Article 35 of the Convention.

44. The Court reiterates that it takes cognisance of preliminary objections in so far as the State in question has already raised them, at least in substance and with sufficient clarity, before the Commission, in principle at the stage of the initial examination of admissibility (see, for instance, the Aytekin v. Turkey judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VII, p. § 77). However, it does not appear from the observations submitted by the Government to the Commission that they objected, on the ground of non-exhaustion, to the admissibility of the above-mentioned complaint. Accordingly, they are estopped from raising their preliminary objection.

B. The merits of the applicant's complaint

45. The applicant complained that he had been denied a fair hearing in breach of the Article 6 § 1 of the Convention on account of the presence of a military judge on the bench of the National Security Court which tried and convicted him. In so far as is relevant Article 6 § 1 provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law..."

46. The Government contested this allegation whereas the Commission accepted it.

47. In the applicant's submission the military judges appointed to the National Security Courts such as the Istanbul National Security Court were dependent on the executive, being appointed by the joint decree of the Minister of Defence and the Prime Minister subject to the approval of the President of the Republic. He pointed to the fact that their professional assessment and promotion as well as their security of tenure were within the control of the executive branch and in turn the army. The ties which bound them to the executive and to the army made it impossible for military judges to discharge their functions on the bench in an independent and impartial manner. The applicant further stressed that the independence and impartiality of military judges and hence of the courts on which they sat were compromised since these judges were unable to take a position which might be contradictory to the views of their commanding officers.

The applicant stated that these considerations impaired the independence and impartiality of the Istanbul National Security Court and prevented him from receiving a fair trial, in violation of Article 6 § 1.

48. The Government replied that the rules governing the appointment of military judges to the National Security Courts and the guarantees which they enjoy in the performance of their judicial functions on the bench were such as to ensure that these courts fully complied with the requirements of

independence and impartiality within the meaning of Article 6 § 1. The Government disputed the applicant's argument that military judges were accountable to their superior officers. In the first place, it was an offence under section 112 of the Military Code for a public official to attempt to influence the performance by a military judge of his judicial functions (see paragraph 17 above). Secondly, the assessment reports referred to by the applicant related only to conduct of a military judge's non-judicial duties. Military judges had access to their assessment reports and were able to challenge their content before the Military Supreme Administrative Court (*ibidem*). When acting in a judicial capacity a military judge was assessed in exactly the same manner as a civilian judge.

49. The Government further averred that the fairness of the applicant's trial had not been prejudiced by reason of the presence of a military judge on the bench. They claimed that neither the military judge's hierarchical authorities nor the public authorities which had appointed him to the court had any interest in the proceedings or in the outcome of the case. The Istanbul National Security Court's judgment was later upheld on appeal by the Court of Cassation, a court whose independence and impartiality have not been impugned (see paragraphs 13-15 above).

50. The Government also impressed upon the Court the need to have particular regard to the security context in which the decision to establish National Security Courts was taken pursuant to Article 143 of the Constitution. In view of the experience of the armed forces in the anti-terrorism campaign the authorities had considered it necessary to strengthen these courts by including a military judge in order to provide them with the necessary expertise and knowledge to deal with threats to the security and integrity of the State.

51. The Commission concluded that the Istanbul National Security Court could not be considered an independent and impartial tribunal for the purposes of Article 6 § 1 of the Convention. The Commission referred in this respect to its opinion in the Incal v. Turkey case in its Article 31 report adopted on 25 February 1997 and the reasons supporting that opinion.

52. The Court recalls that in its Incal v. Turkey judgment of 9 June 1998 (Reports 1998-IV, p. 1504) and in its Çiraklar v. Turkey judgment of 28 October 1998 (Reports 1998-, p. …) the Court had to address arguments similar to those raised by the Government in their pleadings in the instant case. In those judgments the Court noted that the status of military judges sitting as members of National Security Courts did provide certain guarantees of independence and impartiality (see the above-mentioned Incal judgment, p. 1571, § 65). On the other hand, the Court found that some aspects of these judges' status made their independence and impartiality questionable (*ibidem*, § 68): for example, the fact that they are servicemen

who still belong to the army, which in turn takes its orders from the executive; or that they remain subject to military discipline; and the fact that decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army (see paragraph 17 above).

53. As in its Incal judgment the Court considers that its task is not to determine *in abstracto* the necessity for the establishment of National Security Courts in the light of the justifications advanced by the Government. Its task is to ascertain whether the manner in which the Istanbul National Security Court functioned infringed Mr Sürek's right to a fair trial, in particular whether, viewed objectively, he had a legitimate reason to fear that the court which tried him lacked independence and impartiality (see the above-mentioned Incal judgment, p. 1572, § 70; and the above-mentioned Çiraklar judgment, p. …, § 38).

As to that question, the Court sees no reason to reach a conclusion different from that in the cases of Mr Incal and Mr Çiraklar, both of whom, like the present applicant, were civilians. It is understandable that the applicant – prosecuted in a National Security Court for disclosing the identity of officials involved in the fight against terrorism - should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service (see paragraph 17 above). On that account he could legitimately fear that the Istanbul National Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, the applicant's fears as to that court's lack of independence and impartiality can be regarded as objectively justified. The proceedings in the Court of Cassation were not able to dispel these fears since that court did not have full jurisdiction (see the above-mentioned Incal judgment, p.1573, § 72 *in fine*).

54. For these reasons the Court finds that there has been a breach of Article 6 § 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. The applicant claimed compensation for pecuniary and non-pecuniary damage as well as reimbursement of costs and expenses incurred in the domestic and Convention proceedings. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

56. The applicant claimed the sum of 100, 000 French francs (FRF) by way of compensation for the fine imposed on him and paid (see paragraph 13 above). The amount claimed included interest accrued, took account of the high rate of inflation in the respondent State and was calculated on the basis of an exchange rate from 1992.

57. The Government maintained that the sum claimed by the applicant was exorbitant having regard to the fact that the applicant was only fined 54,000,000 Turkish liras and he was allowed to pay the fine in monthly instalments.

58. The Delegate of the Commission did not comment.

59. The Court cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 would have been, but has found that the respondent State is in breach of Article 10 on account of the applicant's conviction and sentence. Having regard to the rates of exchange during the relevant period, it considers that in the circumstances the applicant should be awarded FRF 13,000 in respect of pecuniary damage.

B. Non-pecuniary damage

60. The applicant claimed that as a lawyer his career had been blighted on account of the fact that he has a conviction recorded against him for an offence of terrorism. He requested the Court to award him the sum of FRF 80,000 by way of compensation for moral damage.

61. The Government argued that if the Court were minded to find a violation in this case that finding would constitute in itself sufficient just satisfaction under this head.

62. The Delegate of the Commission did not comment on this limb of the applicant's claim either.

63. The Court considers that the applicant may be taken to have suffered distress on account of the facts of the case. Making an assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant in compensation the sum of FRF 30,000 under this head.

C. Costs and expenses

64. The applicant claimed the legal costs and expenses (translation, postal, communications and travel expenditure) which he incurred in the proceeding before the domestic courts and the Convention institutions. He

assessed these at 50,000 FRF. As to the proceedings before the Commission and Court he stated that his lawyer's fees were based on the Turkish Bar Association's minimum rate scales. The applicant added that the total amount claimed took account of the high level of inflation in Turkey and was based on current exchange rates.

65. The Government stated that the amount claimed was exaggerated in comparison with fees earned by Turkish lawyers in the domestic courts and had not been properly justified. The case was simple and had not required much effort on the part of the applicant's lawyer who had dealt with it throughout the proceedings in his own language. They cautioned against the making of an award which would only constitute a source of unjust enrichment having regard to the socio-economic situation in the respondent State.

66. The Delegate of the Commission did not comment.

67. The Court notes that the applicant's lawyer has been associated with the preparation of other cases before the Court concerning complaints under Articles 6 and 10 of the Convention which are based on similar facts. Deciding on an equitable basis and according to the criteria laid down in its case-law (see, among many other authorities, the above-mentioned Nikolova v. Bulgaria judgment Reports 1999-... p. …, § 79), the Court awards the applicant the sum of FRF 15,000.

D. Default interest

68. The Court deems it appropriate to adopt the statutory rate of interest applicable in France at the date of adoption of the present judgment which, according to the information available to it, is 3.47 % per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by sixteen votes to one that there has been a violation of Article 10 of the Convention;

2. *Dismisses* unanimously the Government's preliminary objection concerning the exhaustion of domestic remedies in relation to the applicant's complaint under Article 6 § 1 of the Convention;

3. *Holds* by sixteen votes to one that there has been a violation of Article 6 § 1 of the Convention;

4. *Holds* by sixteen votes to one
   (a) that the respondent State is to pay the applicant, within three months, the following sums, to be converted into Turkish liras at the rate applicable on the date of settlement:
      (i) 13,000 (thirteen thousand) French francs in respect of pecuniary damage;
      (ii) 30,000 (thirty thousand) French francs in respect of non-pecuniary damage;
      (iii) 15,000 (fifteen thousand) French francs in respect of costs and expenses;
   (b) that simple interest at an annual rate of 3.47 % shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 1999.

Luzius WILDHABER
President

Paul MAHONEY
Deputy Registrar

A declaration by Mr Wildhaber and, in accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of Rules of Court, the following separate opinions are annexed to this judgment:
(a) concurring opinion of Mr Bonello;
(b) dissenting opinion of Mr Gölcüklü.

Initialled: L. W.
Initialled: P. J. M.

DECLARATION OF JUDGE WILDHABER

Although I voted against the finding of a violation of Article 6 § 1 of the Convention in the case of Incal v. Turkey of 9 June 1998 (*Reports* 1998-IV, p. 1547), I now consider myself bound to adopt the view of the majority of the Court.

CONCURRING OPINION OF JUDGE BONELLO

I voted with the majority to find a violation of Article 10, but I do not endorse the primary test applied by the Court to determine whether the interference by the domestic authorities with the applicant's freedom of expression was justifiable in a democratic society.

Throughout these, and previous Turkish freedom-of-expression cases in which incitement to violence was an issue, the common test employed by the Court seems to have been this: if the writings published by the applicant supported or instigated the use of violence, then his conviction by the national courts was justifiable in a democratic society. I discard this yardstick as insufficient.

I believe that punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create "a clear and present danger". When the invitation to the use of force is intellectualised, abstract, and removed in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail.

I borrow what one of the mightiest constitutional jurists of all time had to say about words which tend to destabilise law and order: "We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country"[1].

The guarantee of freedom of expression does not permit a state to forbid or proscribe advocacy of the use of force except when such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action[2]. It is a question of proximity and degree[3].

In order to support a finding of clear and present danger which justifies restricting freedom of expression, it must be shown either that immediate serious violence was expected or was advocated, or that the past conduct of the applicant furnished reason to believe that his advocacy of violence would produce immediate and grievous action[4].

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1. Justice Oliver Wendell Holmes in *Abrahams v. United States*, 250 U.S. 616 (1919) at 630.
2. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) at 447.
3. *Schenck v. United States* 294 U.S. 47 (1919) at 52.
4. *Whitney v. California* 274 U.S. 357 (1927) at 376.

It is not manifest to me that any of the words with which the applicant was charged, however pregnant with mortality they may appear to some, had the potential of imminently threatening dire effects on the national order. Nor is it manifest to me that instant suppression of those expressions was indispensable for the salvation of Turkey. They created no peril, let alone a clear and present one. Short of that, the Court would be subsidising the subversion of freedom of expression were it to condone the conviction of the applicant by the criminal courts.

In summary "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose, through discussion, the falsehood and the fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence".[1]

[1.] Justice Louis D. Brandeis, in *Whitney v. California*, 274 U.S. 357 (1927) at 377.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Provisional translation*)

To my great regret, I cannot agree with the majority of the Court that there has been a violation of Article 10 of the Convention. In my opinion, there is no valid reason to find that the interference in this case was not necessary in a democratic society and, in particular, not proportionate to the aim of preserving national security and public order.

Nor do I share the majority's view that there has been a violation of Article 6 § 1 in that the National Security Courts are not "independent and impartial tribunals" within the meaning of that provision owing to the presence of a military judge on the bench.

The general principles which emerge from the judgment of 25 November 1995 in the case of Zana v. Turkey and which I recall in my dissenting opinion annexed to the Gerger v. Turkey judgment (of 8 July 1999) are relevant to, and hold good in, the instant case. To avoid repetition, I refer the reader to paragraphs 1-9 of that dissenting opinion.

The case of Sürek v. Turkey (no. 2) is indistinguishable, if not in form, at least in content, from the Zana and Gerger cases or from the cases of Sürek (no. 4) and Sürek and Özdemir. Indeed, the European Commission of Human Rights concluded by 23 votes to 9 that there had been no violation of Article 10 of the Convention. The Commission also noted: "the State Security Court's finding that the disclosure of the identities of the officials concerned made them possible targets of terrorist attack. Having regard to the general tension and to the level of terrorism and violence occurring in south-east Turkey, the Commission accepts that officials engaged in State action against terrorist groups in that area are frequently exposed to serious risks and therefore require a high degree of protection. Moreover, the Commission notes that the incriminated news report, which in itself may have contained information of public interest, could well have been published without disclosure of the identities of the two officials concerned." In conclusion, the Commission said "the interference with the applicant's freedom of expression was proportionate and could reasonably be regarded as necessary for the purpose of protecting the rights of the two officials concerned."

As regards the Court's finding of a violation of Article 6 § 1, I refer to the dissenting opinion which I expressed jointly with those eminent judges Mr Thor Vilhjálmsson, Mr Matscher, Mr Foighel, Sir John Freeland, Mr Lopes Rocha, Mr Wildhaber and Mr Gotchev in the case of Incal v. Turkey of 9 June 1998 and to my individual dissenting opinion in the case of Çiraklar v. Turkey of 28 October 1998. I remain convinced that the

presence of a military judge in a court composed of three judges, two of whom are civil judges, in no way affects the independence and impartiality of the National Security Courts, which are courts of the non-military (ordinary) judicial order whose decisions are subject to review by the Court of Cassation.

I wish to stress that: (1) the conclusion of the majority results from an unjustified extension to the theory of outward appearances; (2) it does not suffice to say, as the majority do in paragraph 79 of the judgment, that it is "understandable that the applicants ... should be apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service", and then simply to rely on the Incal precedent (Çiraklar being a mere repetition of what was said in the Incal judgment); and (3) the majority's opinion is in the abstract and ought therefore, if it was to be justifiable, to have been better supported both factually and legally.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

CASE OF SÜREK v. TURKEY (No. 4)

(application no. 24762/94)

JUDGMENT

STRASBOURG

8 July 1999

This judgment is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.

In the case of Sürek v. Turkey no. 4,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr A. PASTOR RIDRUEJO,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mr J.-P. COSTA,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mr K. TRAJA,
Mr F. GÖLCÜKLÜ, *ad hoc judge*,

and also of Mr P. J. MAHONEY and Mrs M. DE BOER-BUQUICCHIO, *Deputy Registrars*,

Having deliberated in private on 3 March and 16 June 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court as established under former Article 19 of the Convention[3] by the European Commission of Human Rights ("the Commission") on 27 April 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 24762/94) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Kamil Tekin Sürek, on 27 July 1994.

Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court entered into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

The Commission's request referred to former Articles 44 and 48 of the Convention and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 § 1 and 10 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the former Rules of Court A[1], the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). Mr R. Bernhardt, President of the Court at the time, subsequently authorised the applicant's lawyer to use the Turkish language in the written procedure (Rule 27 § 3). At a later stage, Mr L. Wildhaber, President of the new Court, authorised the applicant's lawyer to use the Turkish language in the oral proceedings (Rule 36 § 5).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal in particular with procedural matters that might arise before the entry into force of Protocol No. 11, Mr Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the Government's and the applicant's memorials on 23 September and 13 October 1998 respectively. On 29 September 1998 the Government filed with the Registry additional information in support of their memorial and on 14 October 1998 the applicant filed details of his claims for just satisfaction. On 26 February 1999 the applicant filed further details of his claims for just satisfaction. On 1 March 1999 the Government filed their observations in reply to the applicant's claims for just satisfaction.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. On 22 October 1998 Mr Wildhaber had decided that, in the interests of the proper administration of justice, a single Grand Chamber should be constituted to hear the instant case and twelve other cases against Turkey, namely: Karataş v. Turkey (no. 23168/94); Arslan v. Turkey (no. 23462/94); Polat v. Turkey (no. 23500/94); Ceylan v. Turkey (no. 23556/94); Okçuoğlu v. Turkey (no. 24246/94); Gerger v. Turkey (no. 24919/94); Erdoğdu and İnce v. Turkey (nos. 25067/94 and 25068/94);

Note by the Registry

1. Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol.

Başkaya and Okçuoğlu v. Turkey (nos. 23536/94 and 24408/94); Sürek v. Turkey no. 1 (no. 26682/95); Sürek and Özdemir v. Turkey (nos. 23927/94 and 24277/94); Sürek v. Turkey no. 2 (no. 24122/94) and Sürek v. Turkey no. 3 (no. 24735/94).

5. The Grand Chamber constituted for that purpose included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mrs F. Tulkens, Mrs V. Strážnická, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr A. B. Baka, Mr R. Maruste and Mrs S. Botoucharova (Rules 24 § 3 and 100 § 4).

On 19 November 1998 Mr Wildhaber exempted Mr Türmen from sitting after his withdrawal from the case having regard to the decision of the Grand Chamber in the case of Oğur v. Turkey taken in accordance with Rule 28 § 4. On 16 December 1998 the Government notified the Registry that Mr F. Gölcüklü had been appointed *ad hoc* judge (Rule 29 § 1).

Subsequently Mr K. Traja replaced Mrs Botoucharova who was unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

6. Pursuant to the invitation of the Court (Rule 99), the Commission delegated one of its members, Mr D. Šváby, to take part in the consideration of the case before the Grand Chamber. The Commission subsequently informed the Registry that the Commission would not be represented at the oral hearing. On 16 February 1999 the Delegate filed his written pleadings on the case with the Registry.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 3 March 1999, the case being heard simultaneously with the case of Sürek v. Turkey no 3. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr	D. TEZCAN,	*Agent*,
Mrs	D. AKÇAY,	*Co-Agent*,
Mr	B. ÇALIŞKAN,	
Ms	G. AKYÜZ,	
Mr	F. POLAT,	
Ms	A. EMÜLER,	*Advisers*;

(b) *for the applicant*

Mr	S. MUTLU, of the Istanbul Bar,	*Lawyer*.

The Court heard addresses by Mr Mutlu and Mr Tezcan.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant

8. The applicant is a Turkish citizen who was born in 1957 and lives in Istanbul.

9. At the material time, the applicant was the major shareholder in *Deniz Basın Yayın Sanayi ve Ticaret Organizasyon*, a Turkish limited liability company which owns a weekly review entitled *Haberde Yorumda Gerçek* (The Truth of News and Comments), published in Istanbul.

B. The impugned publications

10. In issue no. 51 of the review, dated 13 March 1993, a news commentary entitled "*Kawa*[1] and *Dehak*[2] Once Again" was published. The article analysed possible events, which could occur during the upcoming celebrations of *Newroz*[3].

11. A translation of the relevant parts of the news commentary is as follows:

> "... It's *Newroz* week in Kurdistan. The biggest confrontation between the demands of the Kurdish people and intolerance in the face of the expression of these demands occurs during these days. The tradition of rebellion is awakened. *Dehak* and *Kawa* are once again invested with flesh and bones. It is time to settle accounts. There is nothing vague about *Kawa*. All the mountains, all the cities are full of *Kawa*. There are millions of them. All right, who, then, is *Dehak*? Who is the candidate for representing *Dehak* in our day? Is it Demirel? Is it Güreş? The regional Governor? Or the new commander İlter? This time round, is *Dehak* represented by every counter-insurgency

1. *Kawa*: legendary Kurdish hero who led a peasants' uprising against King *Dehak*.
2. King *Dehak*: legendary Middle-Eastern king supposed to have lived in the 6th century B.C.
3. *Newroz* (or Noruz) is the name of the celebrations for greeting spring and new year in Kurdish and Iranian tradition.

chief, indeed, every counter-insurgency operative, every special team member, every police commissioner or superintendent officer? Has *Dehak* become anonymous too? Be it as it may, but *Dehak* and *Kawa* will settle their accounts once again. ...

Last year, a revolutionary publication described the days preceding *Newroz* as follows:

'Nowadays over 200 thousand soldiers massed into Kurdistan. Tanks and weapons are sent over. Bombs are raining on Kurdish villages and mountains. The Chief of the General Staff has inspected the preparations for the offensive. Instructions are being issued to provincial and district governors, special team leaders, police chiefs and military officials. The Head of MİT intelligence agency talks of the prospect of much blood being shed. Members of Parliament are organising information-gathering trips in order to take the pulse of the people.' ...

Unlike previous years, the PKK-leaning Kurdistan National Assembly (KUM) is also expected to take on a role during *Newroz* this year. ...

On the other hand emergency measures are being implemented in large cities outside Kurdistan where there are concentrations of Kurdish people. It is highly likely that there will be large demonstrations in the Kurdish quarters there."

12. In the same issue and within the context of the above news commentary, an interview was also published by the Kurdish News Agency with a representative of the National Liberation Front of Kurdistan ("the ERNK"), the political wing of the Kurdistan Workers' Party ("the PKK"). Both organisations are illegal under Turkish law.

13. A translation of the relevant part of the interview is as follows:

"... We wish to emphasise this finding, indeed, we feel that it ought to be underlined. And we call on all European countries. We are open to any humanitarian, political solution, including the calls for an armistice. The PKK movement and its struggle are absolutely not terrorist movements. This misapprehension must be abandoned – it must definitely be abandoned – and a move must be made towards co-operation and support. The real terrorist is the Republic of Turkey. We believe that attitudes on this matter will be much clarified this year, that very positive dialogues will develop and that the Republic of Turkey will be gradually further isolated."

C. The measures taken by the authorities

1. The seizure of the review

14. On 14 March 1993 the Istanbul National Security Court *(İstanbul Devlet Güvenlik Mahkemesi)* ordered the seizure of all copies of issue no. 51 of the review, since it allegedly disseminated separatist propaganda.

2. The charges against the applicant

15. In an indictment dated 22 April 1993, the Public Prosecutor at the Istanbul National Security Court, on account of the publication of the above news commentary, charged the applicant in his capacity as the owner of the review with disseminating propaganda against the indivisibility of the State. He was also charged with publishing the declaration of the ERNK (see paragraph 12 above). The charges were brought under sections 8 and 6 of the Prevention of Terrorism Act 1991 (hereinafter "the 1991 Act": see paragraphs 24 and 25 below), respectively.

3. The proceedings before the Istanbul National Security Court

16. In the proceedings before the Istanbul National Security Court, the applicant denied the charges. He pleaded that the incriminated news commentary did not fall within the scope of section 8 of the 1991 Act. He maintained that arguing and commenting on possible activities in which the PKK might engage during the *Newroz* celebrations could not be regarded as publishing a declaration of a terrorist organisation within the meaning of section 6 of the 1991 Act. As regards his freedom of expression, the applicant referred to Article 10 of the Convention and the case-law of the Commission and the Court. He stated that pluralism of opinion was essential in a democratic society including opinions which shock or offend. He argued that the provisions of sections 6 and 8 of the 1991 Act restricted freedom of expression in contravention of the Turkish Constitution and the criteria laid down in the case-law of the Commission and the Court.

4. The applicant's conviction

17. In a judgment dated 27 September 1993, the Istanbul National Security Court found the applicant guilty of an offence under section 8 § 2 of the 1991 Act. The court first sentenced the applicant to a fine of 100,000,000 Turkish liras. However, having regard to the applicant's good conduct during the trial, it reduced the fine to 83,333,333 Turkish liras.

18. In its reasoning, the court held that the incriminated news commentary contravened section 8 of the 1991 Act. The court concluded that it referred to a certain part of the Turkish territory as "Kurdistan" as well as a certain section of the population as "Kurds", and amounted to propaganda against the indivisibility of the Turkish State.

The court further observed that the review had also published the declaration of an illegal terrorist organisation in which the Republic of Turkey was referred to as a terrorist State. However, it considered that the declaration constituted part of the incriminated news commentary. Having regard to the provisions of Article 79 of the Turkish Criminal Code, the court found no grounds for a separate conviction under section 6 of the 1991 Act.

5. The applicant's appeal

19. The applicant appealed against his conviction to the Court of Cassation. He relied on the defence grounds which he had invoked at his trial before the National Security Court.

20. On 8 February 1994 the Court of Cassation dismissed the applicant's appeal, upholding the National Security Court's reasoning and its assessment of the evidence.

On 29 November 1995 the applicant paid the last instalment of the fine imposed on him.

6. Further developments

21. Following the amendments made by Law No. 4126 of 27 October 1995 to the 1991 Act (see paragraphs 24 and 25 below), the Istanbul National Security Court *ex officio* re-examined the applicant's case.

On 22 April 1996 the court ruled that these amendments did not affect the applicant's case as his sentence had already been executed.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The criminal law

1. The Criminal Code (Law no. 765)

22. The relevant provisions of the Criminal Code read as follows:

Article 36 § 1

"In the event of conviction, the court shall order the seizure and confiscation of any object which has been used for the commission or preparation of the crime or offence…"

Article 79

"A person who infringes various provisions of this Code by a single act, shall be punished under the provision which prescribes the heaviest punishment."

2. The Press Act (Law no. 5680 of 15 July 1950)

23. The relevant provisions of the Press Act 1950 read as follows:

Section 3

"For the purposes of the present Law, the term 'periodicals' shall mean newspapers, press agency dispatches and any other printed matter published at regular intervals.

'Publication' shall mean the exposure, display, distribution, emission, sale or offer for sale of printed matter on premises to which the public have access where anyone may see it.

An offence shall not be deemed to have been committed through the medium of the press unless publication has taken place, except where the material in itself is unlawful."

3. The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991)[1]

24. The relevant provisions of the Prevention of Terrorism Act 1991 read as follows:

Section 6

"It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to announce, orally or in the form of a publication, that terrorist organisations will commit an offence against a specific person, whether or not that person's ... identity is divulged provided that it is done in such a manner that he or she may be identified, or to reveal the identity of civil servants who have participated in anti-terrorist operations or to designate any person as a target.

It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to print or publish declarations or leaflets emanating from terrorist organisations.

…

Where the offences contemplated in the above paragraphs are committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, or from the sales of the previous issue if the periodical appears monthly or less frequently, *or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed matter other than periodicals or if the periodical has just been launched*[2]. However, the fine may not be less than fifty million Turkish liras. The editor of the periodical shall be ordered to pay a sum equal to half the fine imposed on the publisher."

Section 8

(before amendment by Law no. 4126 of 27 October 1995)

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited, irrespective of the methods used and the intention. Any person who engages in such an activity shall be sentenced to not less than two and not

1. This law, promulgated with a view to preventing acts of terrorism, refers to a number of offences defined in the Criminal Code which it describes as "acts of terrorism" or "acts perpetrated for the purposes of terrorism" (sections 3 and 4) and to which it applies.
2. The phrase in italics was deleted by a judgment of the Constitutional Court on 31 March 1992 and went out of force on 27 July 1993.

more than five years' imprisonment and a fine of from fifty million to one hundred million Turkish liras.

Where the crime of propaganda contemplated in the above paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, *or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed matter other than periodicals or if the periodical has just been launched*[1]. However the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment."

Section 8

(as amended by Law no. 4126 of 27 October 1995)

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited. Any person who engages in such an activity shall be sentenced to not less than one and not more than three years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras. The penalty imposed on a reoffender may not be commuted to a fine.

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly. However, the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment.

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of printed matter or by means of mass communication other than periodicals within the meaning of the second paragraph, those responsible and the owners of the means of mass communication shall be sentenced to not less than six months' and not more than two years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras…

…"

4. Law no. 4126 of 27 October 1995 amending sections 8 and 13 of Law no. 3713

25. The following amendments were made to the Prevention of Terrorism Act 1991 after the enactment of Law 4126 of 27 October 1995:

1. The phrase in italics was deleted by a judgment of the Constitutional Court on 31 March 1992 and went out of force on 27 July 1993.

Temporary provision relating to section 2

"In the month following the entry into force of the present Law, the court which has given judgment shall re-examine the case of a person convicted pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) and, in accordance with the amendment ... to section 8 of Law no. 3713, shall reconsider the term of imprisonment imposed on that person and decide whether he should be allowed the benefit of sections 4^{1} and 6^{2} of Law no. 647 of 13 July 1965."

5. The Code of Criminal Procedure (Law no. 1412)

26. The Code of Criminal Procedure contains the following provisions:

Article 307

"An appeal on points of law may not concern any issue other than the lawfulness of the impugned judgment.

Non-application or erroneous application of a legal rule shall constitute unlawfulness[3]."

Article 308

"Unlawfulness is deemed to be manifest in the following cases:

1- where the court is not established in accordance with the law;

2- where one of the judges who have taken the decision was barred by statute from participating;

…"

B. Criminal law cases submitted by the Government

27. The Government supplied copies of several decisions given by the prosecutor attached to the Istanbul National Security Court withdrawing charges against persons suspected of inciting people to hatred or hostility, especially on religious grounds (Article 312 of the Criminal Code), or of disseminating separatist propaganda against the indivisible unity of the State (section 8 of Law no. 3713 – see paragraph 23 above). In the majority of

1. This provision concerns substitute penalties and measures which may be ordered in connection with offences attracting a prison sentence.
2. This provision concerns reprieves.
3. On the question whether the judgment is unlawful, the Court of Cassation is not bound by the arguments submitted to it. Moreover, the term "legal rule" refers to any written source of law, to custom and to principles deduced from the spirit of the law.

cases where offences had been committed by means of publications the reasons given for the prosecutor's decisions included such considerations as the fact that the proceedings were time-barred, that some of the constituent elements of the offence could not be made out or that there was insufficient evidence. Other grounds included the fact that the publications in issue had not been distributed, that there had been no unlawful intent, that no offence had been committed or that those responsible could not be identified.

28. Furthermore, the Government submitted a number of decisions of the National Security Courts as examples of cases in which defendants accused of the above-mentioned offences had been found not guilty. These were the following judgments: 19 November (no. 1996/428) and 27 December 1996 (no. 1996/519); 6 March (no. 1997/33), 3 June (no. 1997/102), 17 October (no. 1997/527), 24 October (no. 1997/541) and 23 December 1997 (no. 1997/606); 21 January (no. 1998/8), 3 February (no. 1998/14), 19 March (no. 1998/56), 21 April 1998 (no. 1998/87) and 17 June 1998 (no. 1998/133).

29. As regards more particularly proceedings against authors of works dealing with the Kurdish problem, the National Security Courts in these cases reached their decisions on the ground that there had been no dissemination of "propaganda", one of the constituent elements of the offence, or on account of the scientific, historical and/or objective nature of the words used.

C. The National Security Courts[1]

1. The Constitution

30. The constitutional provisions governing judicial organisation of the National Security Courts are worded as follows:

---

1. The National Security Courts were created by Law no. 1773 of 11 July 1973, in accordance with Article 136 of the 1961 Constitution. That law was annulled by the Constitutional Court on 15 June 1976. The courts in question were later reintroduced into the Turkish judicial system by the 1982 Constitution. The relevant part of the statement of reasons contains the following passage:

"There may be acts affecting the existence and stability of a State such that when they are committed, special jurisdiction is required in order to give judgment expeditiously and appropriately. For such cases it is necessary to set up National Security Courts. According to a principle inherent in our Constitution, it is forbidden to create a special court to give judgment on a specific act after it has been committed. For that reason the National Security Courts have been provided for in our Constitution to try cases involving the above-mentioned offences. Given that the special provisions laying down their powers have been enacted in advance and that the courts have been created before the commission of any offence …, they may not be described as courts set up to deal with this or that offence after the commission of such an offence."

Article 138 §§ 1 and 2

"In the performance of their duties, judges shall be independent; they shall give judgment, according to their personal conviction, in accordance with the Constitution, statute and the law.

No organ, authority, ... or ... person may give orders or instructions to courts or judges in the exercise of their judicial powers, or send them circulars or make recommendations or suggestions to them."

Article 139 § 1

"Judges … shall not be removed from office or compelled to retire without their consent before the age prescribed by the Constitution…"

Article 143 §§ 1-5

"National Security Courts shall be established to try offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free democratic system of government, and offences which directly affect the State's internal or external security.

National Security Courts shall be composed of a president, two other regular members, two substitute members, a prosecutor and a sufficient number of assistant prosecutors.

The president, one of the regular members, one of the substitutes and the prosecutor, shall be appointed from among judges and public prosecutors of the first rank, according to procedures laid down in special legislation; one regular member and one substitute shall be appointed from among military judges of the first rank and the assistant prosecutors from among public prosecutors and military judges.

Presidents, regular members and substitute members ... of National Security Courts shall be appointed for a renewable period of four years.

Appeal against decisions of National Security Courts shall lie to the Court of Cassation.

..."

Article 145 § 4

"Military legal proceedings

"The personal rights and obligations of military judges … shall be regulated by law in accordance with the principles of the independence of the courts, the safeguards enjoyed by the judiciary and the requirements of military service. Relations between military judges and the commanders under whom they serve in the performance of their non-judicial duties shall also be regulated by law..."

2. Law no. 2845 on the creation and rules of procedure of the National Security Courts[1]

31. Based on Article 143 of the Constitution, the relevant provisions of Law no. 2845 on the National Security Courts, provide as follows:

Section 1

"In the capitals of the provinces of … National Security Courts shall be established to try persons accused of offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free, democratic system of government and offences directly affecting the State's internal or external security."

Section 3

"The National Security Courts shall be composed of a president, two other regular members and two substitute members."

Section 5

"The president of a National Security Court, one of the [two] regular members and one of the [two] substitutes ... shall be civilian … judges, the other members, whether regular or substitute, military judges of the first rank…"

Section 6(2) and (6)

"The appointment of military judges to sit as regular members and substitutes shall be carried out according to the procedure laid down for that purpose in the Military Legal Service Act.

Except as provided in the present Law or other legislation, the president and the regular or substitute members of the National Security Courts … may not be appointed to another post or place, without their consent, within four years…

…

If, after an investigation concerning the president or a regular or substitute member of a National Security Court conducted according to the legislation concerning them, competent committees or authorities decide to change the duty station of the person concerned, the duty station of that judge or the duties themselves … may be changed in accordance with the procedure laid down in that legislation."

1. These provisions are based on Article 143 of the Constitution, to the application of which they refer.

Section 9(1)(a)

"National Security Courts shall have jurisdiction to try persons charged with

(a) the offences contemplated in Article 312 § 2 … of the Turkish Criminal Code …,

…

(d) offences having a connection with the events which made it necessary to declare a state of emergency, in regions where a state of emergency has been declared in accordance with Article 120 of the Constitution,

(e) offences committed against the Republic, whose constituent qualities are enunciated in the Constitution, against the indivisible unity of the State – meaning both the national territory and its people – or against the free, democratic system of government and offences directly affecting the State's internal or external security.

…"

Section 27(1)

"The Court of Cassation shall hear appeals against the judgments of the National Security Courts."

Section 34(1) and (2)

"The rules governing the rights and obligations of … military judges appointed to the National Security Courts and their supervision …, the institution of disciplinary proceedings against them, the imposition of disciplinary penalties on them and the investigation and prosecution of any offences they may commit in the performance of their duties ... shall be as laid down in the relevant provisions of the laws governing their profession…

The observations of the Court of Cassation on military judges, the assessment reports on them drawn up by Ministry of Justice assessors … and the files on any investigations conducted in respect of them … shall be transmitted to the Ministry of Justice."

Section 38

"A National Security Court may be transformed into a Martial Law Court, under the conditions set forth below, where a state of emergency has been declared in all or part of the territory in respect of which the National Security Court concerned has jurisdiction, provided that within that territory there is more than one National Security Court…"

3. The Military Legal Service Act (Law no. 357)

32. The relevant provisions of the Military Legal Service Act are worded as follows:

Additional section 7

"The aptitude of military judges … appointed as regular or substitute members of the National Security Courts that is required for promotion or advancement in salary step, rank or seniority shall be determined on the basis of assessment reports drawn up according to the procedure laid down below, subject to the provisions of the present Law and the Turkish Armed Forces Personnel Act (Law no. 926).

(a) The first superior competent to carry out assessment and draw up assessment reports for military judges, whether regular or substitute members … shall be the Minister of State in the Ministry of Defence, followed by the Minister of Defence.

…"

Additional section 8

"Members … of the National Security Courts belonging to the Military Legal Service … shall be appointed by a committee composed of the personnel director and the legal adviser of the General Staff, the personnel director and the legal adviser attached to the staff of the arm in which the person concerned is serving and the Director of Military Judicial Affairs at the Ministry of Defence…"

Section 16(1) and (3)

"Military judges … shall be appointed by a decree issued jointly by the Minister of Defence and the Prime Minister and submitted to the President of the Republic for approval, in accordance with the provisions on the appointment and transfer of members of the armed forces…

…

The procedure for appointment as a military judge shall take into account the opinion of the Court of Cassation, the reports by Ministry of Justice assessors and the assessment reports drawn up by the superiors…"

Section 18(1)

"The rules governing the salary scales, salary increases and various personal rights of military judges … shall be as laid down in the provisions relating to officers."

Section 29

"The Minister of Defence may apply to military judges, after considering their defence submissions, the following disciplinary sanctions:

A. A warning, which consists in giving the person concerned notice in writing that he must exercise more care in the performance of his duties.

…

B. A reprimand, which consists in giving the person concerned notice in writing that a particular act or a particular attitude has been found to be blameworthy.

…

The said sanctions shall be final, mentioned in the assessment record of the person concerned and entered in his personal file…"

Section 38

"When military judges … sit in court they shall wear the special dress of their civilian counterparts…"

4. Article 112 of the Military Code (of 22 May 1930)

33. Article 112 of the Military Criminal Code of 22 May 1930 provides:

"It shall be an offence, punishable by up to five years' imprisonment, to abuse one's authority as a civil servant in order to influence the military courts."

5. Law no. 1602 of 4 July 1972 on the Supreme Military Administrative Court

34. Under section 22, the First Division of the Supreme Military Administrative Court has jurisdiction to hear applications for judicial review and claims for damages based on disputes relating to the personal status of officers, particularly those concerning their professional advancement.

PROCEEDINGS BEFORE THE COMMISSION

35. Mr Kamil Tekin Sürek applied to the Commission on 27 July 1994. He argued that his conviction and sentence constituted an unjustified interference with his right to freedom of expression as guaranteed by Article 10 of the Convention and that his case had not been heard by an independent and impartial tribunal, in breach of Article 6 § 1 of the

Convention. He also maintained that the criminal proceedings against him had not been concluded within a reasonable time, which gave rise to a separate violation of Article 6 § 1.

36. The Commission declared the application (no. 24762/94) admissible on 2 September 1996, with the exception of the Article 6 § 1 complaint relating to the length of the criminal proceedings brought against the applicant. In its report of 13 January 1998 (former Article 31), it expressed the opinion that there had been a violation of Article 10 of the Convention (30 votes to 2) as well as a violation of Article 6 § 1 (31 votes to 1). The full text of the Commission's opinion and the separate opinions contained in the report are reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

37. The applicant requested the Court to find the respondent State in breach of its obligations under Articles 6 § 1 and 10 of the Convention and to award him just satisfaction under Article 41.

The Government for their part requested the Court to reject the applicant's allegations.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

38. The applicant alleged that the authorities had unjustifiably interfered with his right to freedom of expression guaranteed under Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or

1. *Note by the Registry*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1999), but a copy of the Commission's report is obtainable from the Registry.

rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

39. The Government maintained that the interference with the applicant's right to freedom of expression was justified under the provisions of the second paragraph of Article 10. The Commission on the other hand accepted the applicant's allegations.

A. Existence of an interference

40. The Court notes that it is clear, and this has not been disputed, that there has been an interference with the applicant's right to freedom of expression on account of his conviction and sentence under section 8 of the Prevention of Terrorism Act 1991 ("the 1991 Act").

B. Justification of the interference

41. The above-mentioned interference contravened Article 10 unless it was "prescribed by law", had one or more of the legitimate aims referred to in paragraph 2 of Article 10 and was "necessary in a democratic society" for achieving such aim or aims. The Court will examine each of these criteria in turn.

1. "Prescribed by law"

42. The applicant did not comment on whether there had been compliance with this requirement.

43. The Government pointed out that the measures taken against the applicant were based on section 8 of the 1991 Act.

44. The Commission accepted the Government's view and concluded that the interference was prescribed by law.

45. The Court, like the Commission, accepts that since the applicant's conviction was based on section 8 of the 1991 Act, the resultant interference with his right to freedom of expression could be regarded as "prescribed by law", all the more so given that the applicant has not specifically disputed this.

2. Legitimate aim

46. The applicant did not make any submissions on this issue, other than disputing generally the lawfulness of the interference with his right to freedom of expression.

47. The Government reiterated that the measures taken against the applicant were based on section 8 of the 1991 Act. That provision was aimed at protecting interests such as territorial integrity, national unity, national security and the prevention of crime and disorder.

48. The Commission for its part concluded that the applicant's conviction was part of the authorities' efforts to combat illegal terrorist activities and to maintain national security and public safety, which are legitimate aims under Article 10 § 2.

49. The Court considers that, having regard to the sensitivity of the security situation in south-east Turkey (see the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, p. 2539, § 10) and to the need for the authorities to be alert to acts capable of fuelling additional violence, the measures taken against the applicant can be said to have been in furtherance of certain of the aims mentioned by the Government, namely the protection of national security and territorial integrity and the prevention of disorder and crime.

This is certainly true where, as with the situation in south-east Turkey at the time of the circumstances of this case, the separatist movement had recourse to methods which rely on the use of violence.

3. "Necessary in a democratic society"

(a) Arguments of those appearing before the Court

(i) The applicant

50. The applicant stressed that neither he nor the review had any links with the PKK. He contended that the impugned publications did not praise that organisation or comment favourably on it. They were written and published with complete objectivity in accordance with the principles of objective journalism. The subject of the news commentary in question was the approaching feast of *Newroz*, which had been celebrated for thousands of years in the Middle-East and had given rise to bloody incidents in recent years in Turkey.

The applicant further pleaded that as the owner of the review he had no editorial responsibility for its content and on that account he should not have been convicted and fined heavily. He maintained that the measures taken against him amounted to a disproportionate interference with his rights under Article 10.

(ii) The Government

51. The Government replied that the applicant was found guilty of disseminating separatist propaganda given that the impugned publications encouraged violence against the State and overtly promoted the cause of a terrorist organisation. In support of their argument the Government highlighted several extracts from the incriminated texts which, in their view, openly encouraged violence, provoked hostility and hatred among the

different groups in Turkish society, depicted Turkey as an "enemy" and a "terrorist State" and presented the terrorism of the PKK as heroic and justified.

52. Having regard to the PKK's history of terrorism, the Government argued that the applicant had been rightly convicted under section 8 of the 1991 Act and that the measures taken against him were within the authorities' margin of appreciation in this area. The interference was accordingly justified under Article 10 § 2 of the Convention.

(iii) The Commission

53. While acknowledging that some of the statements in the incriminated articles were highly polemical, the Commission was nevertheless of the view that there were no passages in the texts which could be held to have encouraged or incited to further violence. Even taking into account the margin of appreciation of the national authorities in this context, the Commission found that the applicant's conviction and sentence could not be considered in the circumstances a proportionate response to a pressing social need to maintain national security and public safety. The measures taken by the authorities amounted to a kind of censure, which was likely to discourage the applicant or others from publishing views on the situation in south-east Turkey in the future. The Commission concluded that there had been a violation of Article 10 in the circumstances of the case.

(b) The Court's assessment

54. The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out in, for example, its Zana v. Turkey judgment (cited above, pp. 2547-48, § 51), and in its Fressoz and Roire v. France judgment of 21 January 1999 (*Reports* 1999-…, p. …, § 45).

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both

the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

(iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

55. Since the applicant was convicted of disseminating separatist propaganda through the medium of the review of which he was the owner, the impugned interference must accordingly also be seen in the context of the essential role of the press in ensuring the proper functioning of political democracy (see among many other authorities, the Lingens v. Austria judgment of 8 July 1986, Series A, no.103, p. 26, § 41; and the above-mentioned Fressoz and Roire judgment, p. ..., § 45). While the press must not overstep the bounds set, *inter alia*, for the protection of vital interests of the state such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders (see the above-mentioned Lingens judgment, p. 26, §§ 41-42).

56. The Court notes that the Istanbul National Security Court found that the charge against the applicant under section 8 of the 1991 Act was proven (see paragraphs 17 and 18 above). The court held that the impugned news commentary contained words which were aimed at the destruction of the territorial integrity of the Turkish State by describing areas of south-east Turkey as an independent State – "Kurdistan", and by referring to a part of the Turkish population as "Kurds". The court further observed that, as a part of the news commentary, the review had published the declaration of an illegal terrorist organisation in which the Republic of Turkey was referred to as a "terrorist State" (see paragraph 18 above).

57. In assessing the necessity of the interference in the light of the principles set out above (see paragraphs 54 and 55 above) the Court recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest

(see the Wingrove v. the United Kingdom judgment of 25 November 1996, *Reports* 1996-V, p. 1957, § 58). Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks (see the Incal v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, p. 1567, § 54). Finally, where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

58. The Court will have particular regard to the words used in the articles and to the context in which they were published. In this latter respect it will take into account the background to cases submitted to it, particularly the problems linked to the prevention of terrorism (see the above-mentioned Incal v. Turkey judgment, p. 1568, § 58).

It notes in the first place that the incriminated news commentary can be interpreted as describing an awakening of Kurdish sentiment, mainly by way of romanticising the Kurdish cause and drawing on the names of legendary figures of the past. Admittedly, the text states that "it is time to settle accounts". However, in the Court's view this reference must be seen in the context of the overall literary and metaphorical tone of the article and not as an appeal to violence. It is true also that the impugned interview (see paragraph 13 above) contained hard-hitting criticism of the Turkish authorities such as the statement that "the real terrorist is the Republic of Turkey". For the Court, however, this is more a reflection of the hardened attitude of one side to the conflict, rather than a call to violence. In fact, the declaration in the same paragraph that the ERNK (see paragraph 12 above) was "open to any humanitarian, political solution, including the calls for an armistice" can even be considered conciliatory in tone. On the whole, the content of the articles cannot be construed as being capable of inciting to further violence. The Court is of course mindful of the concern of the authorities about words or deeds which have the potential to exacerbate the security situation in the region, where since approximately 1985 serious disturbances have raged between the security forces and the members of the

PKK involving a very heavy loss of life and the imposition of emergency rule in much of the region (see the above-mentioned Zana judgment, p. 2539, § 10). However, it would appear to the Court that the domestic authorities in the instant case failed to have sufficient regard to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them. As noted previously, the views expressed in the articles cannot be read as an incitement to violence; nor could they be construed as liable to incite to violence. In the Court's view the reasons given by the Istanbul National Security Court for convicting and sentencing the applicant (see paragraph 18 above), although relevant, cannot be considered sufficient to justify the interference with his right to freedom of expression.

59. The Court also observes that Mr Sürek was ordered to pay a substantial fine (see paragraph 17 above). Furthermore, the copies of the review in which the impugned publications appeared were seized by the authorities (see paragraph 14 above). The Court notes in this connection that the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference.

60. The Court stresses that the "duties and responsibilities" which accompany the exercise of the right to freedom of expression by media professionals assume special significance in situations of conflict and tension. Particular caution is called for when consideration is being given to the publication of views of representatives of organisations which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence. At the same time, where such views cannot be categorised as such, Contracting States cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.

61. Having regard to the above considerations, the Court concludes that the conviction and sentencing of the applicant were disproportionate to the aims pursued and therefore not "necessary in a democratic society". There has accordingly been a violation of Article 10 of the Convention in the particular circumstances of this case.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

62. The applicant submitted that he had been denied a fair hearing in breach of the Article 6 § 1 of the Convention on account of the presence of a military judge on the bench of the Istanbul National Security Court which tried and convicted him. Article 6 § 1 provides as relevant:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law..."

63. The Government raised an objection to the admissibility of this complaint and contended in the alternative that there had been no breach of Article 6 § 1. The Commission agreed with the applicant's allegation.

A. The Government's preliminary objection – non-exhaustion of domestic remedies

64. The Government maintained that the applicant at no stage of the domestic proceedings claimed that his trial was unfair on account of the participation of a military judge in the proceedings. For this reason the applicant's complaint should be rejected for failure to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention. They relied on the Court's Sadık v. Greece judgment of 15 November 1996 in support of their contention (*Reports* 1996-V, p. 1638).

65. The Court observes that the Government did not raise this objection before the Commission, when the admissibility of the application was being considered. Their observations on this issue related solely to the fact that the applicant had not disputed the independence and impartiality of the Court of Cassation. The applicant's complaint on the other hand is that the Istanbul National Security Court lacked these very qualities. The Government are therefore estopped from raising their objection at this stage of the proceedings (see, among other authorities, the above-mentioned Zana v. Turkey judgment, p. 2546, § 44; and the Nikolova v. Bulgaria judgment of 25 March 1999, *Reports* 1999, p. …, § 44).

B. Merits

66. In the applicant's submission, the military judges appointed to the National Security Courts such as the Istanbul National Security Court were dependent on the executive, being appointed by the joint decree of the Minister of Defence and the Prime Minister, subject to the approval of the President of the Republic. He pointed to the fact that their professional assessment and promotion as well as their security of tenure were within the control of the executive branch and in turn the army. The ties which bound them to the executive and to the army made it impossible for military judges to discharge their functions on the bench in an independent and impartial manner. The applicant further stressed that the independence and impartiality of military judges and hence of the courts on which they sat were compromised since these judges were unable to take a position which might be contradictory to the views of their commanding officers.

67. The applicant stated that these considerations impaired the independence and impartiality of the Istanbul National Security Court and prevented him from receiving a fair trial, in violation of Article 6 § 1.

68. The Government replied that the rules governing the appointment of military judges to the National Security Courts and the guarantees which they enjoy in the performance of their judicial functions on the bench were such as to ensure that these courts fully complied with the requirements of independence and impartiality within the meaning of Article 6 § 1. The Government disputed the applicant's argument that military judges were accountable to their superior officers. In the first place, it was an offence under Article 112 of the Military Code for a public official to attempt to influence the performance by a military judge of his judicial functions (see paragraph 33 above). Secondly, the assessment reports referred to by the applicant related only to conduct of a military judge's non-judicial duties. Military judges have access to their assessment reports and are able to challenge their content before the Supreme Military Administrative Court (see paragraph 34 above). When acting in a judicial capacity a military judge is assessed in exactly the same manner as a civilian judge.

69. The Government further averred that the fairness of the applicant's trial had not been prejudiced by reason of the presence of a military judge on the bench. They claimed that neither the military judge's hierarchical superiors nor the public authorities which had appointed him to the court had any interest in the proceedings or in the outcome of the case. Moreover, the applicant's conviction was upheld on appeal by the Court of Cassation, a court whose independence and impartiality have not been impugned by the applicant (see paragraph 20 above).

70. The Government also impressed upon the Court the need to have particular regard to the security context in which the decision to establish National Security Courts was taken pursuant to Article 143 of the Constitution. In view of the experience of the armed forces in the anti-terrorism campaign the authorities had considered it necessary to strengthen these courts by including a military judge in order to provide them with the necessary expertise and knowledge to deal with threats to the security and integrity of the State.

71. The Commission concluded that the Istanbul National Security Court could not be considered an independent and impartial tribunal for the purposes of Article 6 § 1 of the Convention. The Commission referred in this respect to its opinion in the Incal v. Turkey case in its Article 31 report adopted on 25 February 1997 and the reasons supporting that opinion.

72. The Court recalls that in its Incal v. Turkey judgment of 9 June 1998 (*Reports* 1998-IV, p. 1547) and in its Çıraklar v. Turkey judgment of 28 October 1998 (*Reports* 1998-…, p. …) the Court had to address

arguments similar to those raised by the Government in their pleadings in the instant case. In those judgments the Court noted that the status of military judges sitting as members of National Security Courts did provide some guarantees of independence and impartiality (see the above-mentioned Incal judgment, p. 1571, § 65). On the other hand, the Court found that certain aspects of these judges' status made their independence and impartiality questionable (ibid., § 68): for example, the fact that they are servicemen who still belong to the army, which in turn takes its orders from the executive; the fact that they remain subject to military discipline; and the fact that decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army (see paragraphs 32 to 34 above).

73. As in its Incal judgment the Court considers that its task is not to determine *in abstracto* the necessity for the establishment of National Security Courts in the light of the justifications advanced by the Government. Its task is to ascertain whether the manner in which the Istanbul National Security Court functioned infringed Mr Sürek's right to a fair trial, in particular whether, viewed objectively, he had a legitimate reason to fear that the court which tried him lacked independence and impartiality (see the above-mentioned Incal judgment, p. 1572, § 70; and the above-mentioned Çıraklar judgment, p. …, § 38).

As to that question, the Court sees no reason to reach a conclusion different from that in the cases of Mr Incal and Mr Çıraklar, both of whom, like the present applicant, were civilians. It is understandable that the applicant – prosecuted in a National Security Court for disseminating propaganda aimed at undermining the territorial integrity of the State and national unity – should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service (see paragraph 32 above). On that account he could legitimately fear that the Istanbul National Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, the applicant's fears as to that court's lack of independence and impartiality can be regarded as objectively justified. The proceedings in the Court of Cassation were not able to dispel these fears since that court did not have full jurisdiction (see the above-mentioned Incal judgment, p. 1573, § 72 *in fine*).

74. For these reasons the Court finds that there has been a breach of Article 6 § 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. The applicant claimed compensation for pecuniary and non-pecuniary damage as well as reimbursement of costs and expenses incurred

in the domestic and Convention proceedings. Article 41 of the Convention stipulates in this respect:

> "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

76. The applicant claimed the sum of 100,000 French francs ("FRF") to compensate him for the fine which he had to pay. He stated that the amount which he claimed in French francs was equivalent in today's terms to the fine imposed in 1993 and took account of the high rate of inflation in the respondent State since that date.

77. The Government maintained that the sum claimed by the applicant was exorbitant having regard to the amount of the fine in question. They added that Mr Sürek was allowed to pay off his fine in monthly instalments.

78. The Court considers that the applicant should be compensated for the fine he had to pay. Deciding on an equitable basis, it awards him the sum of FRF 3,000.

B. Non-pecuniary damage

79. The applicant claimed FRF 80,000 in compensation for moral damage without specifying its nature.

80. The Government contended that the claim should be rejected. In the alternative they argued that should the Court be minded to find a violation of any of the Articles invoked by the applicant that in itself would constitute sufficient just satisfaction.

81. The Court finds that the applicant may be taken to have suffered distress on account of the facts of the case. Making an assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant in compensation the sum of FRF 30,000 under this head.

C. Costs and expenses

82. The applicant claimed reimbursement of his legal costs and expenses, which he assessed at FRF 50,000. He submitted to the Court in support of his claim the contract which he had drawn up with his lawyer for the payment of legal fees in connection with this and three other cases he had lodged with the Convention institutions.

83. The Government stated that the amount claimed was exaggerated in comparison with fees earned by Turkish lawyers in the domestic courts and had not been properly justified. The case was simple and had not required much effort on the part of the applicant's lawyer who had dealt with it throughout the proceedings in his own language. They cautioned against the making of an award which would only constitute a source of unjust enrichment having regard to the socio-economic situation in the respondent State.

84. The Court notes that the applicant's lawyer has been associated with the preparation of other cases before the Court concerning complaints under Articles 6 and 10 of the Convention which are based on similar facts. Deciding on an equitable basis and according to the criteria laid down in its case-law (see, among many other authorities, the above-mentioned Nikolova v. Bulgaria judgment, p. …, § 79), the Court awards the applicant the sum of FRF 15,000.

D. Default interest

85. The Court deems it appropriate to adopt the statutory rate of interest applicable in France at the date of adoption of the present judgment which, according to the information available to it, is 3.47 % per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by 16 votes to 1 that there has been a violation of Article 10 of the Convention;

2. *Dismisses* unanimously the Government's preliminary objection under Article 6 § 1 of the Convention;

3. *Holds* by 16 votes to 1 that there has been a violation of Article 6 § 1 of the Convention;

4. *Holds* by 16 votes to 1
   (a) that the respondent State is to pay the applicant, within three months, the following sums, to be converted into Turkish liras at the rate applicable on the date of settlement:
      (i) 3,000 (three thousand) French francs in respect of pecuniary damage;
      (ii) 30,000 (thirty thousand) French francs in respect of non-pecuniary damage;

(iii) 15,000 (fifteen thousand) French francs in respect of costs and expenses;

(b) that simple interest at an annual rate of 3.47% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 1999.

Signed: Luzius WILDHABER
President

Signed: Paul MAHONEY
Deputy Registrar

A declaration by Mr Wildhaber and, in accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of Rules of Court, the following separate opinions are annexed to this judgment:

a) joint concurring opinion of Mrs Palm, Mrs Tulkens, Mr Fischbach, Mr Casadevall and Mrs Greve;
b) concurring opinion of Mr Bonello;
c) dissenting opinion of Mr Gölcüklü.

Initialled: L. W.
Initialled: P. J. M

DECLARATION BY JUDGE WILDHABER

Although I voted against the finding of a violation of Article 6 § 1 of the Convention in the case of Incal v. Turkey of 9 June 1998 (*Reports* 1998-IV, p. 1547), I now consider myself bound to adopt the view of the majority of the Court.

JOINT CONCURRING OPINION OF JUDGES PALM, TULKENS, FISCHBACH, CASADEVALL AND GREVE

We share the Court's conclusion that there has been a violation of Article 10 in the present case although we have reached the same result by a route which employs the more contextual approach as set out in the partly dissenting opinion of Judge Palm in the case of Sürek v. Turkey (no.1).

In our opinion the majority assessment of the Article 10 issue in this line of cases against the respondent State attaches too much weight to the form of words used in the publication and insufficient attention to the general context in which the words were used and their likely impact. Undoubtedly the language in question may be intemperate or even violent. But in a democracy, as our Court has emphasised, even "fighting" words may be protected by Article 10.

An approach which is more in keeping with the wide protection afforded to political speech in the Court's case-law is to focus less on the inflammatory nature of the words employed and more on the different elements of the contextual setting in which the speech was uttered. Was the language intended to inflame or incite to violence? Was there a real and genuine risk that it might actually do so? The answer to these questions in turn requires a measured assessment of the many different layers that compose the general context in the circumstances of each case. Other questions must be asked. Did the author of the offending text occupy a position of influence in society of a sort likely to amplify the impact of his words? Was the publication given a degree of prominence either in an important newspaper or through another medium which was likely to enhance the influence of the impugned speech? Were the words far away from the centre of violence or on its doorstep?

It is only by a careful examination of the context in which the offending words appear that one can draw a meaningful distinction between language which is shocking and offensive – which is protected by Article 10 – and that which forfeits its right to tolerance in a democratic society.

CONCURRING OPINION OF JUDGE BONELLO

I voted with the majority to find a violation of Article 10, but I do not endorse the primary test applied by the Court to determine whether the interference by the domestic authorities with the applicant's freedom of expression was justifiable in a democratic society.

Throughout these, and previous Turkish freedom-of-expression cases in which incitement to violence was an issue, the common test employed by the Court seems to have been this: if the writings published by the applicant supported or instigated the use of violence, then his conviction by the national courts was justifiable in a democratic society. I discard this yardstick as insufficient.

I believe that punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create 'a clear and present danger'. When the invitation to the use of force is intellectualised, abstract, and removed in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail.

I borrow what one of the mightiest constitutional jurists of all time had to say about words which tend to destabilise law and order: "We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country"[1].

The guarantee of freedom of expression does not permit a state to forbid or proscribe advocacy of the use of force except when such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action[2]. It is a question of proximity and degree[3].

In order to support a finding of clear and present danger which justifies restricting freedom of expression, it must be shown either that immediate serious violence was expected or was advocated, or that the past conduct of

1. Justice Oliver Wendell Holmes in *Abrahams v. United States*, 250 U.S. 616 (1919) at 630.
2. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) at 447.
3. *Schenck v. United States* 294 U.S. 47 (1919) at 52.

the applicant furnished reason to believe that his advocacy of violence would produce immediate and grievous action[1].

It is not manifest to me that any of the words with which the applicant was charged, however pregnant with mortality they may appear to some, had the potential of imminently threatening dire effects on the national order. Nor is it manifest to me that instant suppression of those expressions was indispensable for the salvation of Turkey. They created no peril, let alone a clear and present one. Short of that, the Court would be subsidising the subversion of freedom of expression were it to condone the conviction of the applicant by the criminal courts.

In summary "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose, through discussion, the falsehood and the fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence".[2]

1. *Whitney v. California* 274 U.S. 357 (1927) at 376.
2. Justice Louis D. Brandeis, in *Whitney v. California*, 274 U.S. 357 (1927) at 377.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Provisional translation*)

To my great regret, I cannot agree with the majority of the Court that there has been a violation of Article 10 of the Convention. In my opinion, there is no valid reason to find that the interference in this case was not necessary in a democratic society and, in particular, not proportionate to the aim of preserving national security and public order.

Nor do I share the majority's view that there has been a violation of Article 6 § 1 in that the National Security Courts are not "independent and impartial tribunals" within the meaning of that provision owing to the presence of a military judge on the bench.

The general principles which emerge from the judgment of 25 November 1995 in the case of Zana v. Turkey and which I recall in my dissenting opinion annexed to the Gerger v. Turkey judgment (of 8 July 1999) are relevant to, and hold good in, the instant case. To avoid repetition, I refer the reader to paragraphs 1-9 of that dissenting opinion.

The case of Sürek v. Turkey (no. 4) is indistinguishable, if not in form, at least in content, from the Zana and Gerger cases and from the case of and Sürek and Özdemir v. Turkey. I therefore find that there has been no violation of Article 10 in the present case. The article entitled "Kawa and Dehak once again" contained, *inter alia*, passages such as "[t]he tradition of rebellion is awakened" and "[i]s is time to settle accounts". In addition, the article noted that a year earlier allegations had been published that "[b]ombs are raining on Kurdish villages and mountains", "[t]he Chief of the General Staff has inspected the preparations for the offensive" and [th]e Head of [the] intelligence agency talks of the prospect of much blood being shed". Further, the article intimated that it was possible that in 1993, "[u]nlike previous years, the PKK-leaning Kurdistan National Assembly (KUM) [wa]s also expected to take on a role during *Newroz*..." (see paragraphs 11 and 13 of the judgment). In my view, the quoted passages can objectively be construed as an incitement to hatred and violence. Taking into account the margin of appreciation which must be left to the national authorities, I therefore conclude that the interference in issue cannot be described as disproportionate – with the result that it can be regarded as having been necessary in a democratic society.

As regards the Court's finding of a violation of Article 6 § 1, I refer to the dissenting opinion which I expressed jointly with those eminent judges Mr Thor Vilhjálmsson, Mr Matscher, Mr Foighel, Sir John Freeland, Mr Lopes Rocha, Mr Wildhaber and Mr Gotchev in the case of Incal v. Turkey of 9 June 1998 and to my individual dissenting opinion in the case of Çıraklar v. Turkey of 28 October 1998. I remain convinced that the presence of a military judge in a court composed of three judges, two of whom are civil judges, in no way affects the independence and impartiality

of the National Security Courts, which are courts of the non-military (ordinary) judicial order whose decisions are subject to review by the Court of Cassation.

I wish to stress that: (1) the conclusion of the majority results from an unjustified extension to the theory of outward appearances; (2) it does not suffice to say, as the majority do in paragraph 79 of the judgment, that it is "understandable that the applicants ... should be apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service", and then simply to rely on the Incal precedent (Çıraklar being a mere repetition of what was said in the Incal judgment); and (3) the majority's opinion is in the abstract and ought therefore, if it was to be justifiable, to have been better supported both factually and legally.

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

FIRST SECTION

CASE OF SCHARSACH AND NEWS VERLAGSGESELLSCHAFT mbH v. AUSTRIA

(Application no. 39394/98)

JUDGMENT

STRASBOURG

13 November 2003

FINAL

13/02/2004

In the case of Scharsach and News Verlagsgesellschaft mbH v. Austria,

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

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mr V. ZAGREBELSKY, *judges*,
Mr F. MATSCHER, ad hoc *judge*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 28 November 2002 and 23 October 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 39394/98) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Hans-Henning Scharsach ("the first applicant), an Austrian national, and News Verlagsgesellschaft mbH, the owner and publisher of the weekly magazine *News* which has its head office in Vienna ("the applicant company"), on 24 October 1997.

2. The applicants were represented by Lansky, Ganzger & Partner, a law firm in Vienna.

3. The Austrian Government ("the Government") were represented by their Agent, Mr H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

4. The applicants alleged, in particular, that their conviction for defamation under the Criminal Code and the Media Act, respectively, had infringed their right to freedom of expression under Article 10 of the Convention.

5. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

6. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court).

7. On 19 September 2000 the Court communicated the complaint under Article 10 of the Convention to the Government and declared the remainder of the application inadmissible.

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

9. Mrs E. Steiner, the judge elected in respect of Austria, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr F. Matscher to sit as *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

10. By a decision of 28 November 2002, the Chamber declared the application admissible as far as it concerned the above complaint under Article 10 of the Convention.

11. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The first applicant, an Austrian national born in 1943 and living in Vienna, is a journalist by profession. The applicant company is the owner and publisher of the Austrian weekly magazine *News*.

13. In 1995 the first applicant published a one-page article under the heading “Brown instead of Black and Red?” (*Braun statt Schwarz und Rot?)* in the applicant company's magazine *News.* In the Austrian political context, “Brown” means a person or group having some affinity with National Socialist ideology, “Black” refers to the People's Party (ÖVP) and “Red” to the Social Democratic Party (SPÖ). The article discussed the question whether it was possible and desirable to form a coalition government with the Austrian Freedom Party (FPÖ) under the leadership of Jörg Haider.

14. The first applicant explained why, in his view, such a coalition government was not desirable. He gave nine reasons, each of which was dealt with under a separate subheading. Referring to statements by Jörg Haider and other FPÖ members, he broached topics such as the FPÖ's specific view of history, its German jingoism (*Deutschtümelei*), that is, its

chauvinist and nostalgic affinity with Germany, its inclination towards racism, the opinion poll "Austria first" (*Österreich zuerst*) initiated by it, its political style and the possible negative reaction by foreign countries.

1. The passage in issue

"**4. Violent Scene [*Gewaltszene*]**

Right-wing thugs [*Braune Schläger*], fire-raisers and bomb-throwers have emerged from the FPÖ. Leading figures of brown terror, such as Burger, Haas, Honsik and Küssel, started their career with the Freedom Party. Under Steger the 'old closet Nazis' [*Kellernazi*] had left the party. Under Haider they are returning and are even allowed to run for office. Names such as B., Bl., D., Dü., G., Gr., H., Hat., K., M., Mi., Mrs Rosenkranz, S., Sch., St., Su. and W. show that the dissociation [*Abgrenzung*] from the extreme right that is constantly being stressed by Haider has in reality never taken place."

15. Mr Steger was Chairman of the FPÖ in the early 1980s, when the party supported more moderate positions. In 1986 Mr Haider became Chairman of the FPÖ. Mrs Rosenkranz is a politician. At the material time, she was a member of the Lower Austria Regional Parliament (*Landtag*) and the deputy chairperson of the Lower Austria regional branch of the FPÖ; at present, she is a member of the Austrian National Assembly (*Nationalrat*) and the chairperson of the Lower Austria regional branch of the FPÖ. Her husband is a well-known right-wing politician and the editor of the magazine *fakten*, which is considered to be extreme right-wing.

2. Defamation proceedings and compensation under the Media Act

16. Mrs Rosenkranz filed a private prosecution for defamation (*üble Nachrede*) against the first applicant and a compensation claim against the applicant company under the Media Act (*Mediengesetz*) in the St. Pölten Regional Court (*Landesgericht*).

17. On 21 June 1998 the first applicant was convicted of defamation under Article 111 of the Criminal Code (*Strafgesetzbuch*). The court sentenced him to forty day-fines (*Tagessätze*) of 1,500 Austrian schillings (ATS) each (that is, a total of ATS 60,000) or twenty days' imprisonment in default, suspended for a three-year probationary period. The applicant company was ordered to pay ATS 30,000 in compensation to Mrs Rosenkranz pursuant to section 6 of the Media Act.

18. The court noted in its reasoning that the passage in issue was to be understood in the way it would be perceived by an average reader. The term "closet Nazi" was used to describe a person who supported National Socialist ideas, not in public, but in private through clandestine activities. Belonging to such a circle of persons meant having a contemptible character and behaving in a manner contrary to honour or morality. According to the court, it could not be established that Mrs Rosenkranz was a co-author of

her husband's magazine. Even assuming that she had contributed to certain passages of some of the articles published in it, as contended by the applicants, these were unproblematic in terms of the National Socialism Prohibition Act (*Verfassungsgesetz vom 8. Mai 1945 über das Verbot der NSDAP, Verbotsgesetz 1947* – "the Prohibition Act"). As regards a statement by Mrs Rosenkranz in which she had said that she did not find her husband's activities immoral, the court found that Mr Rosenkranz had so far not been convicted of contravening the Prohibition Act. On the other hand, Mrs Rosenkranz had not said that she supported her husband's activities or identified herself with them. Moreover, a wife could not be expected to criticise her husband in public. Although she had criticised the National Socialism Prohibition Act in public statements, the court found that the applicants had failed to provide evidence of any clandestine National Socialist activities undertaken by Mrs Rosenkranz that would justify calling her a "closet Nazi".

19. The applicants appealed, arguing that the term "closet Nazi" had been coined by Mr Steger when he was Chairman of the FPÖ. It was meant to describe those of his party colleagues who, officially, demonstrated support for democracy, but who, unofficially or secretly, did not dissociate themselves from neo-Nazi ideas or from contacts with the neo-Nazi scene. Therefore, their relation to the extreme right appeared to be unclear. The applicants complained that the court had in fact failed to conclude that Mrs Rosenkranz had contributed to the editing of her husband's xenophobic magazine. They argued that Mrs Rosenkranz, as a politician, exposed herself to public scrutiny and advocated views of a political nature. As a politician, it was part of her functions to participate in political debate. Therefore, in the light of the right to freedom of expression and information of citizens and the electorate, it was legitimate to expect her to take a stand also in regard to her husband's political activities. Taking sides with her husband might do her credit as a wife, but, as a politician, she had to bear criticism under such circumstances, as her failure to dissociate herself from the extreme right could be perceived as an approval of her husband's political activities. Had the court correctly assessed the meaning of the incriminated passage, it would have concluded that the applicants had furnished proof of its factual basis.

20. On 3 March 1997 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the appeal and upheld the lower court's judgment.

21. It considered that the Regional Court had correctly found that the term "closet Nazi" was to be assessed from the point of view of an average reader, who could not be expected to know the original meaning given to it by Mr Steger some six years previously. Therefore, the article had insinuated clandestine neo-Nazi activities on the part of Mrs Rosenkranz that were not proved. Consequently, it was irrelevant to take evidence relating to possible extreme right-wing activities of her husband, as

proposed by the applicants. Moreover, the first-instance court had correctly found that neither Mrs Rosenkranz's public speeches when compared to certain passages of articles in her husband's magazine, nor her statement that she did not find her husband's activities immoral warranted the conclusion that she supported National Socialist ideas. Therefore, the evidence the applicants' proposed to adduce to the effect that Mrs Rosenkranz knew the contents of her husband's magazine and that she in fact contributed from time to time to its editing was not sufficient to furnish proof of her clandestine support for National Socialist ideas.

II. RELEVANT DOMESTIC LAW

22. Section 6 of the Media Act provides for the strict liability of the publisher in cases of defamation; the victim can thus claim damages from him. Compensation up to 14,535 euros (EUR) can be awarded. In this context, "defamation" is defined in Article 111 of the Criminal Code as follows:

> "1. Anyone who accuses another, as it may be perceived by a third party, of having a contemptible character or attitude, or of behaviour contrary to honour or morality, and of such a nature as to make him contemptible or otherwise lower him in public esteem, shall be liable to a term of imprisonment not exceeding six months or a fine not exceeding 360 day-fines.
>
> 2. Anyone who commits this offence in a printed document, by broadcasting or otherwise, in such a way as to make the defamation accessible to a broad section of the public, shall be liable to a term of imprisonment not exceeding one year or a fine not exceeding 360 day-fines.
>
> 3. The person making the statement shall not be punished if it is proved to be true. As regards the offence defined in paragraph 1, he shall also not be liable if circumstances are established which gave him sufficient reason to assume that the statement was true."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

23. The applicants complained that their convictions for defamation under the Criminal Code and the Media Act respectively had infringed their right to freedom of expression under Article 10 of the Convention, the relevant part of which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Whether there was an interference

24. The Court considers, and this was common ground between the parties, that the applicants' convictions by the Austrian courts constituted an interference with their right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention.

B. Whether the interference was justified

25. An interference contravenes Article 10 of the Convention unless it is "prescribed by law", pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" for achieving such an aim or aims.

1. "Prescribed by law"

26. The Court considers, and this was acknowledged by the parties, that the interference was prescribed by law, namely by Article 111 of the Criminal Code and section 6 of the Media Act.

2. Legitimate aim

27. The Court further finds, and this was likewise not disputed between the parties, that the interference served a legitimate aim, namely "the protection of the reputation or rights of others" within the meaning of Article 10 § 2 of the Convention.

3. "Necessary in a democratic society"

28. The applicants argued that the courts had wrongly classified the term in issue as a statement of fact instead of a value judgment, which, at all events, was based on true facts: Mrs Rosenkranz was a member of the FPÖ; through her husband she was in direct contact with neo-Nazis; she had occasionally helped in the correction of orthographic and grammatical mistakes in an extreme-right magazine and – despite Mr Haider's

announcements and proclamations on that issue – she had not clearly and publicly dissociated herself from National Socialist ideas. The meaning of the term in issue was clear for an average reader of the magazine, as Mrs Rosenkranz's name was quoted in the context of criticism of the FPÖ for failure to dissociate itself from right-wing extremists. The first applicant's obvious intention had never been to defame Mrs Rosenkranz or to link her with criminal conduct, but to criticise her position within the FPÖ and her failure to dissociate herself in public from neo-Nazi ideas. Therefore the statement was in no way excessive and Mrs Rosenkranz, as a politician and member of a regional parliament, had to bear the criticism contained therein. The first applicant's criminal conviction and the imposition of a fine on the applicant company had in any event been disproportionate.

29. The Government noted that the courts had classified the offending passage as a statement of fact which insinuated clandestine neo-Nazi activities on the part of Mrs Rosenkranz that had not been proved. In Austria, any allegation that a person had an ambiguous relation to National Socialism constituted a very serious reproach coming close to a charge of criminal behaviour under the Prohibition Act, which bans National Socialist activities in various forms and provides for severe terms of imprisonment. Finally, the penalties imposed on the applicants had been within the lowest range of possible punishment; the interference with the rights guaranteed by Article 10 had therefore not been disproportionate.

30. The Court reiterates the principles established by its case-law under Article 10 of the Convention.

(i) The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 233-34, § 37). Not only does it have the task of imparting such information and ideas, the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, p. 27, § 63; Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III; and *Unabhängige Initiative Informationsvielfalt v. Austria*, no. 28525/95, § 37, ECHR 2002-I).

(ii) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. As set forth in Article 10 § 2, this freedom is

subject to exceptions, which must, however, be construed strictly and the need for any restrictions must be established convincingly (see *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

(iii) There is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV). Moreover, the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his words and deeds by journalists and the public at large, and he must consequently display a greater degree of tolerance (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 42, and *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1567, § 54).

(iv) The notion of necessity implies a "pressing social need". The Contracting States enjoy a margin of appreciation in this respect, but this goes hand in hand with a European supervision which is more or less extensive depending on the circumstances. In reviewing under Article 10 the decisions taken by the national authorities pursuant to their margin of appreciation, the Court must determine, in the light of the case as a whole, whether the interference in issue was "proportionate" to the legitimate aim pursued and whether the reasons adduced by them to justify the interference are "relevant and sufficient" (see *Lingens*, cited above, pp. 25-26, §§ 39-40; and The Sunday Times *v. the United Kingdom (no. 2)*, judgment of 26 November 1991, Series A no. 217, p. 28-29, § 50).

(v) The nature and severity of the penalty imposed are also factors to be taken into account when assessing the proportionality of the interference (see, for example, *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV; *Tammer v. Estonia*, no. 41205/98, § 69, ECHR 2001-I; and *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V).

31. Turning to the particular circumstances of the case, the Court will assess the following elements: (a) the nature of the interference; (b) the position of the applicants and that of Mrs Rosenkranz, who instituted the proceedings; (c) the subject matter of the article; and (d) the reasons given by the national courts.

(a) The nature of the interference

32. As to the nature of the interference, the Court observes that the first applicant was sentenced to a suspended fine in the amount of ATS 60,000 (EUR 4,360). Even though this fine was in the lower range of possible penalties and was suspended for a three-year probationary period, it was a sentence under criminal law, registered in the first applicant's criminal record.

33. The second applicant was ordered to pay ATS 30,000 (EUR 2,180) as compensation to Mrs Rosenkranz in the related civil proceedings. The Court considers this fine to be moderate.

(b) The position of the applicants and of Mrs Rosenkranz

34. As to the position of the applicants, the Court notes that the first applicant is a journalist by profession and the applicant company is the owner of the magazine in which the article was published. Mrs Rosenkranz is a politician. At present, she is the chairperson of the Lower Austria regional branch of the FPÖ and a member of the Austrian National Assembly; at the material time, she was the deputy chairperson of the Lower Austria regional branch of the FPÖ and a member of the Lower Austria Regional Parliament.

(c) The subject matter of the article

35. The subject matter of the article was the first applicant's thoughts on a possible coalition government with the FPÖ under the leadership of Mr Haider, expressing the first applicant's view that such a coalition government was not desirable. The article, including the passage in issue, was, therefore, of a political nature on a question of public interest at that time.

(d) The reasons given by the national courts

36. As regards the qualification of the impugned statement by the Austrian courts, the Court observes that they did not accept the applicants' argument that the statement in issue was a value judgment, but considered it to be a statement of fact, insinuating clandestine neo-Nazi activities on the part of Mrs Rosenkranz that had not been proved. In the Austrian courts' view, belonging to such a circle of persons meant having a contemptible character and behaving in a manner contrary to honour or morality. The passage in issue had therefore defamed Mrs Rosenkranz.

37. The Court considers that the reasons given by the Austrian courts were “relevant” to justify the interference complained of. It remains to be examined whether the reasons adduced were also “sufficient” within the meaning of Article 10 § 2.

38. The Court observes that the article was written in a political context, namely when a possible coalition government including the FPÖ was being mooted, and that it expressed the first applicant's view that such a coalition government was not desirable. The term “closet Nazi” was used in connection with a passage criticising FPÖ politicians, amongst them Mrs Rosenkranz, for failure to dissociate themselves from the extreme right. Moreover, the Court considers unconvincing the Regional Court's finding that a wife could not be expected to criticise her husband in public, as the statement in the present case clearly addressed Mrs Rosenkranz as a

politician and public figure – at the material time, a member of the Lower Austria Regional Parliament and the deputy chairperson of the Lower Austria regional branch of the FPÖ – in respect of whom the limits of acceptable criticism are wider than for a private individual (see *Feldek v. Slovakia*, no. 29032/95, § 85, ECHR 2001-VIII). The Court thus finds that the Austrian courts failed to take sufficient account of the political context in which the impugned term was used when assessing its meaning.

39. Considering that Mrs Rosenkranz's name in the article in question was mentioned together with other FPÖ politicians in the sentence criticising their failure to dissociate themselves from the extreme right, that is, to take a stand against extreme-right positions, the Court considers that the term "closet Nazi", which appears in inverted commas in the article, taken in its context, was to be understood in the sense given to it by Mr Steger who had first used this expression in the political debate in his party, namely describing a person who had an ambiguous relation to National Socialist ideas (see paragraph 19 above).

40. Further, the Court observes that much of the parties' arguments revolve around the assessment of whether the term "closet Nazi" was a statement of fact or a value judgment, and that the domestic courts, considering it to be a statement of fact, had never examined the question whether it could be considered as a value judgment. The Court notes in this respect that the assessment of whether a certain statement constitutes a value judgment or a statement of fact might in many cases be difficult. However, since under the Court's case-law a value judgment must be based on sufficient facts in order to constitute a fair comment under Article 10 (see *De Haes and Gijsels*, cited above, p. 249, § 47, and *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II), their difference finally lies in the degree of factual proof which has to be established (see *Krone Verlag GmbH & Co. KG and Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v. Austria* (dec.), no. 42429/98, 20 March 2003).

41. The Court agrees with the domestic courts' finding that there is no indication in the present case that Mrs Rosenkranz herself is a neo-Nazi. However, contrary to the domestic courts' position, the Court considers that the impugned statement, taken in its context, is not a statement of fact but has to be understood as a permissible value judgment. Mrs Rosenkranz is the wife of a well-known right-wing politician, who is the editor of a magazine considered to be extreme right-wing. This element in itself does not constitute a sufficient factual basis. However, Mrs Rosenkranz is also a politician, who has never publicly dissociated herself from her husband's political views but has criticised the Prohibition Act, which bans National Socialist activities, in public statements. In this context, it is to be noted that the essence of the impugned article was exactly the reproach that FPÖ politicians failed to dissociate themselves clearly from the extreme right. Therefore, the body of facts available constituted a sufficient factual basis

for the contested statement, understood in the above sense, namely that Mrs Rosenkranz's stand towards extreme right political positions was at the least unclear. The Court considers that the applicants published what may be considered to have been their fair comment, namely the first applicant's personal political analysis of the Austrian political scene. Therefore his opinion was a value judgment on an important matter of public interest.

42. Regarding the Government's argument that, in Austria, any allegation that a person has an ambiguous relation to National Socialism constitutes a very serious reproach coming close to a charge of criminal behaviour under the Prohibition Act, the Court refers to *Wabl v. Austria* (no. 24773/94, § 41, 21 March 2000), in which it acknowledged that the special connotation of the term "Nazi" in Austria, *inter alia*, justified the interference under Article 10 § 2 of the Convention. Unlike the position in *Wabl*, the interference in the present case was not an injunction issued under civil law, prohibiting the repetition of a particular statement, but a criminal conviction for the first applicant and a fine for the applicant company.

43. The Court further considers that use of the term "Nazi" does not automatically justify a conviction for defamation on the ground of the special stigma attached to it. The Court reiterates in this context that the degree of precision for establishing the well-foundedness of a criminal charge by a competent court can hardly be compared to that which ought to be observed by a journalist when expressing his opinion on a matter of public concern, in particular when expressing his opinion in the form of a value judgment (see *Unabhängige Initiative Informationsvielfalt*, cited above, § 46). Therefore, the Court is not convinced by the Regional Court's reasoning, in response to Mrs Rosenkranz's statement that she saw nothing immoral in her husband's political activities, to the effect that Mr Rosenkranz had so far not been convicted of contravening the Prohibition Act. The standards applied when assessing someone's political activities in terms of morality are different from those required for establishing an offence under criminal law.

44. Moreover, the Court observes that in *Wabl* the term "Nazi" was used without any connection to the underlying debate, while in the present case it was used precisely in the context of the allegation that certain politicians of the FPÖ had failed to dissociate themselves from the extreme right.

45. Considering, on the one hand, that Mrs Rosenkranz is a politician and, on the other, the role of a journalist and the press of imparting information and ideas on matters of public interest, even those that may offend, shock or disturb, the use of the term "closet Nazi" did not exceed what may be considered acceptable in the circumstances of the present case.

46. In conclusion, the Court finds that the standards applied by the Austrian courts were not compatible with the principles embodied in Article 10 and that they did not adduce "sufficient" reasons to justify the interference in issue, namely the first applicant's conviction for defamation

and the imposition of a fine on the applicant company for having published the critical statement in question. Therefore, having regard to the fact that there is little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest, the Court finds that the domestic courts overstepped the narrow margin of appreciation afforded to member States, and that the interference was disproportionate to the aim pursued and was thus not "necessary in a democratic society".

Accordingly, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

48. The first applicant claimed 386.50 euros (EUR) in respect of pecuniary damage for ten hours' loss of earnings resulting from attending court hearings and consultations with his lawyer. The applicants sought EUR 3,417.38, corresponding to costs awarded to Mrs Rosenkranz by the Austrian courts. Under the head of pecuniary damage, the applicant company requested reimbursement of the 30,000 Austrian schillings (EUR 2,180.19) paid to Mrs Rosenkranz by virtue of the court sentence, and of EUR 7,049.26 for loss of advertising income resulting from the publication of the judgment in its newspaper. The applicants sought EUR 10,000 each in respect of non-pecuniary damage for loss of reputation resulting from the judgment against them.

49. As regards the claims for pecuniary damage, the Government argued that the first applicant's claim was unsubstantiated; they did not comment on the applicant company's requests or the applicants' claim for reimbursement of Mrs Rosenkranz's costs in the domestic proceedings. In respect of non-pecuniary damage, the Government submitted that the finding of a violation would constitute sufficient reparation.

50. The Court considers, as regards the first applicant's claim for pecuniary damage, that there is no causal link between the violation found and the alleged loss of earnings. Even if the Austrian courts had not convicted him, his preparation for and attendance at the court hearings would have been necessary. Therefore, no award can be made under that head to the first applicant. Having regard to the direct link between the applicants' claim concerning reimbursement of Mrs Rosenkranz's costs in

the domestic proceedings and the violation of Article 10 found by the Court, the applicants are entitled to recover the full amount of EUR 3,417.38. As regards the applicant company, the Court finds that the claims resulted from the order made against it by the Austrian courts and thus awards the full amount of EUR 9,229.45 in respect of pecuniary damage.

51. The Court considers that the first applicant's conviction entered in the criminal record entailed adverse effects and awards him, on an equitable basis, EUR 5,000 under the head of non-pecuniary damage (see *mutatis mutandis*, *Nikula v. Finland*, no. 31611/96, § 65, ECHR 2002-II). As regards the applicant company, the Court finds, like the Government, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained.

B. Costs and expenses

52. The applicants sought reimbursement of EUR 3,417.40 for costs and expenses incurred in the domestic proceedings. They further requested EUR 3,007.54 for costs and expenses incurred in the Strasbourg proceedings.

53. The Government did not comment on the costs claim for the domestic proceedings. As regards the claim concerning the Convention proceedings, they considered that the amounts charged for written submissions to the Court were reasonable, whereas the claims for telephone calls and correspondence were unsubstantiated.

54. The Court finds the above claims reasonable and awards the full amount of EUR 6,424.94 under this head.

C. Default interest

55. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds*, by six votes to one, that there has been a violation of Article 10 of the Convention;

2. *Holds*, unanimously, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant company;

3. *Holds*

(a) unanimously, that the respondent State is to pay the applicants:

(i) EUR 12,646.83 (twelve thousand six hundred and forty-six euros eighty-three cents) in respect of pecuniary damage;

(ii) EUR 6,424.94 (six thousand four hundred and twenty-four euros ninety-four cents) in respect of costs and expenses;

(b) by six votes to one, that the respondent State is to pay the first applicant EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;

(c) unanimously, that the respondent State is to pay the applicants any tax that may be chargeable on the above amounts;

4. *Holds*, unanimously, that the above amounts are to be paid within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, and that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 13 November 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Matscher is annexed to this judgment.

C.L.R.
S.N.

PARTLY DISSENTING OPINION OF JUDGE MATSCHER

To my regret, I cannot subscribe to the reasoning or to the decision of the majority of the Chamber on two points.

The merits

The applicants were not able to adduce the slightest evidence that Mrs Rosenkranz's behaviour or statements justified her description as a "closet Nazi" or that she had secretly supported Nazi ideas.

The mere fact that Mrs Rosenkranz is married to a (locally) known right-wing politician and had refused to dissociate herself in public from her husband's ideas does not show that she identified herself with those ideas. People cannot be held liable for the ideas of a member of their family (see, *mutatis mutandis*, *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 236, § 45: "It is unacceptable that someone should be exposed to opprobrium because of matters concerning a member of his family.").

Under these circumstances, the allegation that Mrs Rosenkranz had an ambiguous relation to National Socialism constituted a very serious reproach in Austria, which justified a criminal conviction and, therefore, an interference under Article 10 § 2 of the Convention (see *Wabl v. Austria*, no. 24773/94, § 41, 21 March 2000).

Moreover, the applicants' argument that the term "closet Nazi" had to be understood in the special meaning given to it by Mr Steger is not convincing. Mr Steger, a former leader of the Austrian Freedom Party (FPÖ) coined the expression in the early 1980s. The impugned article was published in 1995. At that time virtually no one remembered the special sense given to the term "closet Nazi" by Mr Steger about ten years earlier, and the vast majority of the population understood it in its ordinary meaning, as a person supporting Nazi ideas and perhaps acting secretly for the Nazi movement.

The decision on the alleged non-pecuniary damage

It is not realistic to consider that the first applicant's criminal conviction caused him, as a journalist, particular damage; rather, the contrary is more plausible. The reference to *Nikula v. Finland* (no. 31611/96, § 65, ECHR 2002-II) is irrelevant because the situation in that case was very different.

It is for this reason that in comparable Austrian cases (such as *Oberschlick v. Austria*, judgment of 23 May 1991, Series A no. 204, p. 29, § 69, and *Schwabe v. Austria*, judgment of 28 August 1992, Series A no. 242-B, p. 35, § 39) no award was made for non-pecuniary damage. I see no reason to depart from that jurisprudence.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF SKAŁKA v. POLAND

(Application no. 43425/98)

JUDGMENT

(This version has been rectified under article 81 of the Rules of Court on 17 September 2003)

STRASBOURG

27 May 2003

FINAL

27/08/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Skałka v. Poland,

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

Mr G. RESS, *President*,
Mr L. CAFLISCH,
Mr P. KŪRIS,
Mr J. HEDIGAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mrs H.S. GREVE,
Mr L. GARLICKI, *judges*,
and Mr M. VILLIGER, *Deputy Section Registrar*,

Having deliberated in private on 3 October 2002, 6 March 2003 and 6 May 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 43425/98) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Edward Skałka ("the applicant"), on 17 October 1997.

2. The applicant, who had been granted legal aid, was represented by Mr Adam Bezucha, a lawyer practising in Kłodzko. The Polish Government ("the Government") were represented by their Agent, Mr Krzysztof Drzewicki, of the Ministry of Foreign Affairs.

3. The applicant complained under Article 6 § 1 that the proceedings were conducted by courts which lacked impartiality and alleged that his criminal conviction was in breach of Article 10 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol no. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 12 June 2001 the Court declared the complaint under Article 6 § 1 inadmissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section.

8. By a decision of 3 October 2002, the Court declared the remainder of the application admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1941. He is currently serving a prison sentence.

10. On 16 December 1993 the Nowy Targ District Court convicted the applicant of aggravated theft and sentenced him to imprisonment. While in prison, on unspecified dates the applicant wrote a letter to the Penitentiary Division of the Katowice Regional Court and he received a reply. Dissatisfied with that reply, on 15 November 1994 the applicant sent a letter to the President of the Katowice Regional Court, complaining about the judge who had replied to his letter. The relevant passages of the applicant's letter read:

> "(...) It cannot be excluded that further acts of that kind on the part of the Penitentiary Division of the Regional Court would make me complain to the judicial supervision about the irresponsible clowns placed in that Division.
>
> I will start by saying that any little cretin, whether he wears a gown or not, should vent his need to intimidate others by making allusions to legal responsibility [for their acts] on his mistress, if he has one, or on his dog, but not on me. I am not going to be afraid of any such clown who wants to intimidate me, but the truth is that my request of 18 August 1994 was addressed to the court, not to some fool.
>
> I expect that the President of the Katowice Regional Court will somehow convey my request to that bully and that he will, at the same time, read his reply to me (...)
>
> Not only does [the judge] write rubbish about my alleged request for a pardon, which my request was absolutely not, but he also intimidates me. If he is such a brilliant lawyer that he is able to reply to questions that were not asked – and his legal skills can be seen if the content of my letter is compared with his reply – he should find a relevant legal provision to use against me. It would not change the fact that such a limited individual, such a cretin should not take the post of a reliable lawyer who would know how to reply to a letter. A cretin he will remain and I see no reason to be afraid of any legal consequences. "You know, you understand, shut up" – that is all the education he has, as a fool does not need any better."

11. Subsequently, on an unspecified date, the Sosnowiec District Prosecutor instituted criminal proceedings against the applicant. On 31 January 1994 the prosecuting authorities lodged a bill of indictment against the applicant with the Sosnowiec District Court. He was charged with proffering insults against a State authority at its headquarters or in

public, an offence punishable under Article 237 of the Criminal Code 1969, committed by sending a letter to the President of the Katowice Regional Court. In this letter the applicant had insulted an unidentified judge of that court's Penitentiary Division and all judges of that court. The applicant had been questioned in connection with the offence. He had stated that he had not meant the court as a whole, but only one judge, and this in his personal, not professional, capacity. He maintained that the letter could only be regarded as an insult against a private person, but not a State institution.

12. On 6 September 1995 the Sosnowiec District Court convicted the applicant of insulting a State authority and sentenced him to eight months' imprisonment. The court found that on 15 November 1994 the applicant had sent a letter to the President of the Regional Court in which he referred to all judges of the Regional Court's Penitentiary Division in an insulting and abusive manner as "irresponsible clowns". Moreover, further on in the same letter, he referred in a particularly insulting manner ("*w sposób szczególnie obraźliwy*") to an unidentified judge of the same Division, to whom he had allegedly written certain letters, which remained unanswered.

13. The court had regard to the results of the applicant's examination by psychiatrists who found that he could be held criminally responsible.

The court further took into consideration the questioning of the applicant during the investigations. He had denied that he had committed a criminal offence. He had stated that the charge against him did not correspond to the facts of the case as in his letter he referred to a particular person, not to the court as a whole, and that the phrases construed as insults concerned the judge in his personal capacity only. When later heard by the court, the applicant had stated that he had written this letter with a specific person in mind, namely a judge who had previously examined his various complaints. He maintained that he had not named that judge, because the letter from the Penitentiary Division in reply to his complaints, which had provoked him to write his impugned reply, had not been signed. The applicant had also stated that he was of the view that the opinions formulated in his letter were, in the circumstances of the case, correct.

14. The court considered that it was beyond any doubt that it was the applicant who had written the impugned letter. The analysis of its content and form led to the conclusion that the applicant had acted with the firm intention of insulting the Regional Court as a judicial authority. He had first addressed himself to the judges of that court as a group, and then focused on one unidentified judge. Accordingly, it had to be understood that the applicant had insulted the court as the State authority, and the unidentified judge could be regarded as a symbol of that court.

The court further observed that the applicant, as a citizen, had a constitutional right to criticise the State authorities. However, the impugned letter had largely exceeded the limits of acceptable criticism and was directly aimed at lowering the court in the public esteem.

The court further observed that the sentence was commensurate with the applicant's degree of guilt and with the seriousness of the offence. The assessment of the latter had been made having regard to the nature and importance of the interests protected by the criminal law provision applied in the case, i.e. by Article 237 of the Criminal Code.

15. The applicant and his officially assigned lawyer lodged appeals against this judgment.

16. On 19 June 1996 the Katowice Court of Appeal, following a request from all of the judges of the Katowice Regional Court to be allowed to step down, considered that, in view of fact that the offence had been directed against the judges of that court, it was in the interest of the good administration of justice and the impartiality of the court that the appeal be transferred to the Bielsko-Biała Regional Court.

17. On 10 September 1996 the Bielsko-Biała Regional Court upheld the contested judgment, having examined both the appeal lodged by the applicant himself and that of his lawyer.

The court first noted that the first-instance court had accurately established the facts of the case. The court went on to state that it shared the conclusions of the first-instance court, namely that the content and form of the letter called for the conclusion that the applicant had acted with the firm intention of insulting the Regional Court as a State authority. The legal assessment of the facts of the case was correct, and the sentence imposed corresponded to the degree of the applicant's guilt. The applicant had a long criminal record, even though he had been assessed positively by the penitentiary services, and could be held criminally responsible. The applicant's lawyer had argued that the applicant had intended to insult a specific person, not an institution. However, in the light of the court's other findings, this analysis was rejected.

18. The applicant's lawyer lodged a cassation appeal with the Supreme Court.

19. On 2 June 1997 the Supreme Court dismissed the appeal and confirmed the contested judgment. The court referred to the grounds of appeal in which it had been argued that the conviction had been in flagrant breach of Article 237 of the Criminal Code in that the applicant's acts, in the light of his submissions as to his motives, did not amount to a punishable criminal offence.

20. The Supreme Court first noted that the grounds of the applicant's cassation appeal had been laconic and limited in their reasoning. Moreover, it clearly transpired therefrom that in fact the applicant's lawyer contested the assessment of evidence and the factual findings made by the lower courts, whereas the purpose of the cassation appeal was only to bring procedural complaints to the attention of the Supreme Court. This in itself constituted a sufficient basis for dismissing the appeal as not being in

compliance with the requirements laid down by the applicable procedural provisions.

21. However, the court emphasised, it was worth noting that the Regional Court in its judgment had examined all complaints submitted in the appeal against the first-instance judgment, including those concerning the assessment of evidence and the factual findings of the first-instance court. No new arguments had been submitted to the Supreme Court to show that there had been any procedural shortcomings in the proceedings. Certainly the argument that the applicant's acts could not be regarded as a criminal offence could not be regarded as such a procedural complaint.

22. The Supreme Court went on to state that the applicant's abusive letter, referred to and quoted by the Regional Court, had clearly exceeded the limits of acceptable criticism. Even if it were acknowledged that in the second part of the letter the applicant had focused on one judge, it had to be recognised that at the beginning he had attacked all the judges of the Regional Court. The appellate court correctly had regard thereto. It had also indicated why it considered that the applicant's attitude could be qualified as an offence under Article 237 of the Criminal Code 1969. The Supreme Court therefore dismissed the cassation appeal as unfounded.

II. RELEVANT DOMESTIC LAW

23. Article 237 of the Criminal Code 1969, applicable at the relevant time, read as follows:

> "Anyone who insults a State authority at the place where it carries out its duties or in public, is liable to up to two years' imprisonment, to a restriction of personal liberty or a fine."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

24. The applicant complained that his criminal conviction ran counter to Article 10 of the Convention, which reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are

prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The parties' submissions

25. The Government submitted that, in assessing the limits of acceptable criticism towards the judiciary, regard must be had to the special role of the judiciary in society. As a guarantor of justice, a fundamental value in a State in which the rule of law is observed, the courts have to enjoy public confidence if they are to be successful in carrying out their duties. It might therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded (see *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p.17, § 34).

26. In the Government's argument, in the present case the applicant had criticised the Katowice Regional Court in an obviously insulting and abusive manner. In his letter he had not formulated any concrete request and had only suggested that his previous request had remained unanswered. That letter had been aimed at insulting an unidentified judge of the Penitentiary Division and all judges of the Katowice Regional Court. The applicant had referred to these judges as "irresponsible clowns". Furthermore, he had referred to an unidentified judge of that court in a particularly insulting manner, labelling him several times "a small-time cretin" ("*kretynek")*, "a clown" ("*błazen*"), "an illiterate" ("*analfabeta*"), "a fool" ("*dureń*"), "such a limited individual" ("*tego rodzaju ograniczone indywiduum*"), "outstanding cretin" ("*spotęgowany kretyn*").

27. The Government further emphasised that the purpose of the applicant's conviction had exclusively been to protect the Katowice Regional Court against an offensive and abusive verbal attack. Moreover, in the present case the requirements of such protection did not have to be weighed against the interest of open discussion of matters of public concern since the applicant's remarks were not uttered in such a context (see *Janowski v. Poland* [GC], no. 25716/94, ECHR 1999-I, pp. 199-200, § 33).

28. The applicant submitted that in his letter of 15 November 1994, which had given rise to his later criminal conviction, he had expressed strong criticism of an unidentified judge of the Katowice Regional Court. The offensive words used in the letter could not amount to an insult to the judiciary, since they had not been addressed against the official acts of the court, but against a person working at that court. Therefore the applicant should not have been convicted of the offence punishable under Article 237 of the 1969 Criminal Code, since an insult directed at a person working for a certain official institution cannot be perceived as an insult to that

institution itself, and it was only insulting of institutions which was punishable under that provision.

29. It was further argued that expressing criticism against an unidentified employee of a court constituted an exercise of freedom of expression within the meaning of Article 10 of the Convention. The courts convicting the applicant of an offence had manifestly breached his rights in a manner incompatible with this provision.

B. The Court's assessment

30. It is not in dispute between the Parties that the applicant's conviction amounted to an interference with the applicant's freedom of expression and that this interference was "prescribed by law" as required by Article 10 of the Convention, namely by Article 237 of the Criminal Code 1969, applicable at the relevant time.

31. It is also a common ground that the interference pursued a legitimate aim of maintaining the authority of the judiciary within the meaning of Article 10 of the Convention.

32. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among others, the following judgments: Jersild v. Denmark, 23 September 1994, Series A no. 298, § 31; *Janowski*, cited above, § 30, ECHR 1999-I; and *Nilsen and Johnsen v. Norway*, no. 23118/93, § 43, to be published in the official reports of the Court's judgments and decisions; *Perna v. Italy*, no. 48898/99, § 38).

33. The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see *Janowski*, cited above, § 30).

34. The work of the courts, which are the guarantors of justice and which have a fundamental role in a State governed by the rule of law, needs to enjoy public confidence. It should therefore be protected against

unfounded attacks (see, e.g. *Prager and Oberschlick*, cited above, § 34; *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 233-234, § 37).

The courts, as with all other public institutions, are not immune from criticism and scrutiny. Persons detained enjoy in this area the same rights as all other members of society. A clear distinction must, however, be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate punishment would not, in principle, constitute a violation of Article 10 § 2 of the Convention.

35. It is finally recalled that in exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which they were made. In particular, it must determine whether the interference in question was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see, among other authorities, *Nikula v. Finland*, no. 31611/96, 23 March 2002, § 44).

36. In the present case, the applicant, while serving a prison sentence, wrote a letter to the Penitentiary Division of the Katowice Regional Court and received a reply. Obviously dissatisfied with that reply, on 15 November 1994 the applicant sent a further letter to the President of the Katowice Regional Court, complaining about the unidentified judge who had replied to his first letter. It is not open to doubt that the applicant used insulting words in his second letter. He stated that "irresponsible clowns" were placed in the Penitentiary Division of that court, and went on to shower further abuse upon the author of the reply complained of: "small-time cretin", "some fool", "a limited individual", "outstanding cretin" (see § 9 above). The Court also observes that the tone of the letter as a whole was clearly derogatory.

37. It should also be noted that the applicant did not formulate any concrete complaints against the letter, which had so aggrieved him. He expressed his anger and frustration, but did not take reasonable care to articulate clearly why, in his view, the letter complained of deserved such a strong reaction.

38. On the other hand, as regards the requirements that the interference must comply with, and in particular as regards the proportionality test to be applied (see § 34 above), the Court recalls that in assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account (see *Ceylan v. Turkey* [GC], no. 23556/94, § 49, ECHR 1999-IV).

39. In this respect the Court's attention has been drawn, first and foremost, to the fact that the courts chose to impose a prison sentence of eight months on the applicant, which cannot but be regarded as a harsh measure. The Court notes that the first instance-court observed that the sentence was commensurate with the applicant's degree of guilt and with the seriousness of the offence. The assessment of its seriousness had been made having regard to the nature and importance of the interests protected by the provision of substantive criminal law applied in the case (see § 13 above). In the Court's view, this reasoning of the domestic court does not seem to address sufficiently the question of why it considered that the applicant's guilt was so grave, and why, in the particular circumstances of the case, the offence was considered serious enough to warrant eight months' imprisonment.

The Court further notes that the applicant had never previously been convicted of a similar offence. Had the applicant been so convicted, it would have been more acceptable that the courts would choose to impose a harsh sentence on him in order to make it more dissuasive in the face of his impenitence.

40. As regards the context in which the impugned statements were uttered, the Court recalls that the phrase “authority of the judiciary” includes, in particular, the notion that the courts are, and are accepted by the public at large as being the proper forum for the settlement of legal disputes and for the determination of a person's guilt or innocence on a criminal charge (*Worm v. Austria*, judgment of 29 August 1997, Reports 1997-V, § 40). What is at stake as regards protection of the authority of the judiciary, is the confidence which the courts in a democratic society must inspire in the accused, as far as criminal proceedings are concerned, and also in the public at large (see, *mutatis mutandis*, among many other authorities, *Fey v. Austria*, judgment of 24 February 1993, Series A no. 255-A, p. 12, § 30).

41. In the circumstances of the present case the Court considers that the interest protected by the impugned interference was important enough to justify limitations on the freedom of expression. In consequence, an appropriate sentence for insulting both the court as an institution and an unnamed but identifiable judge would not amount to a violation of Article 10 of the Convention.

Therefore, the question in the case is not whether the applicant should have been punished for his letter to the Regional Court, but rather whether the punishment was appropriate or “necessary” within the meaning of Article 10 § 2. It is the Court's assessment that the sentence of eight months' imprisonment was disproportionately severe. Even if it is in principle, for the national courts to fix the sentence, in view of the circumstances of the case, there are common standards which this Court has to ensure with the

principle of proportionality. These standards are the gravity of the guilt, the seriousness of the offence and the repetition of the alleged offences.

42. In the Court's view, the severity of the punishment applied in this case exceeded the seriousness of the offence. It was not an open and overall attack on the authority of the judiciary, but an internal exchange of letters of which nobody of the public took notice. Furthermore, the gravity of the offence was not such as to justify the punishment inflicted on the applicant. Moreover, it was for the first time that the applicant overstepped the bounds of the permissible criticism. Therefore, while a lesser punishment could well have been justified, the courts went beyond what constituted a "necessary" exception to the freedom of expression.

43. The Court therefore concludes that Article 10 has been violated.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

45. The applicant submitted that he had been sentenced to ten months prison sentence at the time when the average salary in Poland was PLN 2,100. Therefore he argued that the pecuniary and non-pecuniary damage that he had suffered amounted to PLN 21,000, i.e. the sum he would have been able to earn had he not been imprisoned.

46. The Government submitted that the applicant's claims were grossly excessive and that the damage sustained by the applicant, if any, should be assessed in the light of the relevant case-law of the Court in its cases against Poland, and with regard to the national economic circumstances.

47. As to the claim for pecuniary damages, the Court first notes that in fact in the criminal proceedings concerned in the present case the applicant was sentenced to eight, not ten, months of prison sentence. However, in any event, the Court observes that when the applicant was convicted, he was already serving a prison sentence imposed by the previous judgment given on 18 December 1993 by the Nowy Targ District Court (see § 9 above). It has not been argued, or shown, that because of the criminal conviction concerned in the present case he had to give up paid employment of any kind. The Court finds that there is not sufficient evidence of a causal link between the violation of Article 10 it has found and the pecuniary damage

allegedly sustained by the applicant. This claim must therefore be dismissed.

48. The Court considers that in the circumstances of the case the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant. It therefore sees no reasons for awarding the applicant any sum under this head.

B. Costs and expenses

49. The applicant, who was granted legal aid, claims EUR 32 in reimbursement for costs of translation by a sworn translator over and above EUR 815 he received in legal aid.

50. The Court is satisfied that the sum claimed was actually and necessarily incurred, and reasonable as to quantum (see, among other authorities, *Jecius v. Lithuania*, no. 34578/97, § 112, ECHR 2000). It therefore awards the full amount.

C. Default interest

51. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;

2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 32 (thirty-two euros) in respect of costs and expenses, to be converted into Polish zlotys at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 May 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Mark VILLIGER	Georg RESS
Deputy Registrar	President

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

FOURTH SECTION

CASE OF STEEL AND MORRIS v. THE UNITED KINGDOM

(Application no. 68416/01)

JUDGMENT

STRASBOURG

15 February 2005

FINAL

15/05/2005

In the case of Steel and Morris v. the United Kingdom,

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

Mr M. PELLONPÄÄ, *President*,
Sir Nicolas BRATZA,
Mrs V. STRÁŽNICKÁ,
Mr J. CASADEVALL,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 7 September 2004 and 25 January 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 68416/01) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two United Kingdom nationals, Ms Helen Steel and Mr David Morris ("the applicants"), on 20 September 2000.

2. The applicants, who had been granted legal aid, were represented by Mr M. Stephens, a lawyer practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, of the Foreign and Commonwealth Office.

3. The applicants alleged, in particular, that defamation proceedings brought against them had given rise to violations of their rights to a fair trial under Article 6 § 1 of the Convention and to freedom of expression under Article 10.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 6 April 2004, the Chamber declared the application partly admissible.

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 September 2004 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr	D. WALTON, Foreign and Commonwealth Office,	*Agent*,
Mr	P. SALES,	*Counsel*,
Mr	A. BROWN,	
Mr	D. WILLINK,	
Mr	R. WRIGHT,	*Advisers*;

(b) *for the applicants*

Mr	K. STARMER,	*Counsel*,
Mr	M. STEPHENS,	*Solicitor*,
Mr	A. HUDSON,	*Junior Counsel*,
Ms	P. WRIGHT,	*Adviser*.

The Court heard addresses by Mr Starmer and Mr Sales.

7. Following the hearing, both parties submitted information which had been requested by Judge Sir Nicolas Bratza at the hearing.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The leaflet

8. The applicants, Helen Steel and David Morris, were born in 1965 and 1954 respectively and live in London.

9. During the period with which this application is concerned, Ms Steel was at times employed as a part-time bar worker, earning approximately 65 pounds sterling (GBP) per week, and was at other times unwaged and dependent on income support. Mr Morris, a former postal worker, was unwaged and in receipt of income support. He was a single parent, responsible for the day-to-day care of his son, aged 4 when the trial began. At all material times the applicants were associated with London Greenpeace, a small group, unconnected to Greenpeace International, which campaigned principally on environmental and social issues.

10. In the mid-1980s London Greenpeace began an anti-McDonald's campaign. In 1986 a six-page leaflet entitled “What's wrong with McDonald's?” (“the leaflet”) was produced and distributed as part of that campaign. It was last reprinted in early 1987.

11. The first page of the leaflet showed a grotesque cartoon image of a man, wearing a Stetson and with dollar signs in his eyes, hiding behind a "Ronald McDonald" clown mask. Running along the top of pages 2 to 5 was a header comprised of the McDonald's "golden arches" symbol, with the words "McDollars, McGreedy, McCancer, McMurder, McDisease ..." and so forth superimposed on it.

12. The text of page 2 of the leaflet read as follows (extract):

> "**What's the connection between McDonald's and starvation in the 'Third World'?**
>
> THERE's no point feeling *guilty* about eating while watching starving African children on TV. If you do send money to Band Aid, or shop at Oxfam, etc., that's morally good but politically useless. It shifts the blame from governments and does nothing to challenge the power of multinational corporations.
>
> **HUNGRY FOR DOLLARS**
>
> McDonald's is one of several giant corporations with investments in vast tracts of land in poor countries, sold to them by the dollar-hungry rulers (often military) and privileged elites, evicting the small farmers that live there growing food for their own people.
>
> The power of the US dollar means that in order to buy technology and manufactured goods, poor countries are trapped into producing more and more food for export to the States. *Out of 40 of the world's poorest countries, 36 export food to the USA – the wealthiest.*
>
> **ECONOMIC IMPERIALISM**
>
> Some 'Third World' countries, where most children are undernourished, are actually exporting their staple crops as animal feed – i.e. to fatten cattle for turning into burgers in the 'First World'. Millions of acres of the best farmland in poor countries are being used for *our* benefit – for tea, coffee, tobacco, etc. – while people there are *starving*. McDonald's is directly involved in this economic imperialism, which keeps most black people poor and hungry while many whites grow fat.
>
> **GROSS MISUSE OF RESOURCES**
>
> GRAIN is fed to cattle in South American countries to produce the meat in McDonald's hamburgers. Cattle consume 10 times the amount of grain and soy that humans do: one calorie of beef demands ten calories of grain. Of the 145 million tons of grain and soy fed to livestock, only 21 million tons of meat and by-products are used. *The waste is 124 million tons a year at a value of 20 billion US dollars.* It has been calculated that this sum would feed, clothe and house the world's entire population for one year."

The first page of the leaflet also included a photograph of a woman and child, with the caption:

"*A typical image of 'Third World' poverty – the kind often used by charities to get 'compassion money'. This diverts attention from one cause: exploitation by multinationals like McDonald's.*"

The second and third pages of the leaflet contained a cartoon image of a burger, with a cow's head sticking out of one side and saying "If the slaughterhouse doesn't get you" and a man's head sticking out of the other, saying "the junk food will!" Pages 3 to 5 read as follows:

"**FIFTY ACRES EVERY MINUTE**

EVERY year an area of rainforest the size of Britain is cut down or defoliated, and burnt. Globally, one billion people depend on water flowing from these forests, which soak up rain and release it gradually. The disaster in Ethiopia and Sudan is at least partly due to uncontrolled deforestation. In Amazonia – where there are now about 100,000 beef ranches – torrential rains sweep down through the treeless valleys, eroding the land and washing away the soil. The bare earth, baked by the tropical sun, becomes useless for agriculture. *It has been estimated that this destruction causes at least one species of animal, plant or insect to become extinct every few hours.*

Why is it wrong for McDonald's to destroy rainforests?

AROUND the Equator there is a lush green belt of incredibly beautiful tropical forest, untouched by human development for one hundred million years, supporting about half of the Earth's life-forms, including some 30,000 plant species, and producing a major part of the planet's crucial supply of oxygen.

PET FOOD AND LITTER

McDonald's and Burger King are two of the many US corporations using lethal poisons to destroy vast areas of Central American rainforest to create grazing pastures for cattle to be sent back to the States as burgers and pet food, and to provide fast-food packaging materials. (Don't be fooled by McDonald's saying they use recycled paper: only a tiny per cent of it is. The truth is it takes *800 square miles* of forest just to keep them supplied with paper for one year. Tons of this end up littering the cities of 'developed' countries.)

COLONIAL INVASION

Not only are McDonald's and many other corporations contributing to a major ecological catastrophe, they are forcing the tribal peoples in the rainforests off their ancestral territories where they have lived peacefully, without damaging their environment, for thousands of years. This is a typical example of the arrogance and viciousness of multinational companies in their endless search for more and more profit.

It's no exaggeration to say that when you bite into a Big Mac, you're helping McDonald's empire to wreck this planet.

What's so unhealthy about McDonald's food?

McDONALD's try to show in their 'Nutrition Guide' (which is full of impressive-looking but really quite irrelevant facts and figures) that mass-produced hamburgers, chips, colas and milkshakes, etc., are a useful and nutritious part of any diet.

What they don't make clear is that a diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals – which describes an average McDonald's meal – is linked with cancers of the breast and bowel, and heart disease. This is accepted medical fact, not a cranky theory. Every year in Britain, heart disease alone causes about 18,000 deaths.

FAST = JUNK

Even if they like eating them, most people recognise that processed burgers and synthetic chips, served up in paper and plastic containers, is junk-food. McDonald's prefer the name 'fast-food'. This is not just because it is manufactured and served up as quickly a possible – it has to be *eaten* quickly too. It's a sign of the junk-quality of Big Macs that people actually hold competitions to see who can eat one in the shortest time.

PAYING FOR THE HABIT

Chewing is essential for good health, as it promotes the flow of digestive juices which break down the food and send nutrients into the blood. McDonald's food is so lacking in bulk it is hardly possible to chew it. Even their own figures show that a 'quarter-pounder' is 48% water. This sort of fake food encourages over-eating, and the high sugar and sodium content can make people develop a kind of addiction – a 'craving'. That means more profit for McDonald's, but constipation, clogged arteries and heart attacks for many customers.

GETTING THE CHEMISTRY RIGHT

McDONALD's stripy staff uniforms, flashy lighting, bright plastic décor, 'Happy Hats' and muzak, are all part of the gimmicky dressing-up of low-quality food which has been designed down to the last detail to look and feel and taste *exactly* the same in any outlet anywhere in the world. To achieve this artificial conformity, McDonald's require that their 'fresh lettuce leaf', for example, is treated with *twelve* different chemicals just to keep it the right colour at the right crispness for the right length of time. It might as well be a bit of plastic.

How do McDonald's deliberately exploit children?

NEARLY all McDonald's advertising is aimed at children. Although the Ronald McDonald 'personality' is not as popular as their market researchers expected (probably because it is totally unoriginal), thousands of young children now think of burgers and chips every time they see a clown with orange hair.

THE NORMALITY TRAP

No parent needs to be told how difficult it is to distract a child from insisting on a certain type of food or treat. Advertisements portraying McDonald's as a happy,

circus-like place where burgers and chips are provided for everybody at any hour of the day (and late at night), traps children into thinking they aren't 'normal' if they don't go there too. Appetite, necessity and – above all – money, never enter into the 'innocent' world of Ronald McDonald.

Few children are slow to spot the gaudy red and yellow standardised frontages in shopping centres and high streets throughout the country. McDonald's know exactly what kind of pressure this puts on people looking after children. It's hard not to give in to this 'convenient' way of keeping children 'happy', even if you haven't got much money and you try to avoid junk-food.

TOY FOOD

As if to compensate for the inadequacy of their products, McDonald's promote the consumption of meals as a 'fun event'. This turns the act of eating into a performance, with the 'glamour' of being in a McDonald's ('Just like it is in the ads!') reducing the food itself to the status of a prop.

Not a lot of children are interested in nutrition, and even if they were, all the gimmicks and routines with paper hats and straws and balloons hide the fact that the food they're seduced into eating is at best mediocre, at worst poisonous – and their parents know it's not even cheap.

RONALD'S DIRTY SECRET

ONCE told the grim story about how hamburgers are made, children are far less ready to join in Ronald McDonald's perverse antics. With the right prompting, a child's imagination can easily turn a clown into a bogeyman (a lot of children are very suspicious of clowns anyway). Children love a secret, and Ronald's is especially disgusting.

In what way are McDonald's responsible for torture and murder?

THE menu at McDonald's is based on meat. They sell millions of burgers every day in 35 countries throughout the world. This means the constant slaughter, day by day, of animals born and bred solely to be turned into McDonald's products.

Some of them – especially chickens and pigs – spend their lives in the entirely artificial conditions of huge factory farms, with no access to air or sunshine and no freedom of movement. Their deaths are bloody and barbaric.

MURDERING A BIG MAC

In the slaughterhouse, animals often struggle to escape. Cattle become frantic as they watch the animal before them in the killing-line being prodded, beaten, electrocuted and knifed.

A recent British government report criticised inefficient stunning methods which frequently result in animals having their throats cut while still fully conscious. McDonald's are responsible for the deaths of countless animals by this supposedly humane method.

We have the choice to eat meat or not. The *450 million* animals killed for food in Britain every year have no choice at all. It is often said that after visiting an abattoir, people become nauseous at the thought of eating flesh. How many of us would be prepared to work in a slaughterhouse and kill the animals we eat?

WHAT'S YOUR POISON?

MEAT is responsible for 70% of all food-poisoning incidents, with chicken and minced meat (as used in burgers) being the worst offenders. When animals are slaughtered, meat can be contaminated with gut contents, faeces and urine, leading to bacterial infection. In an attempt to counteract infection in their animals, farmers routinely inject them with doses of antibiotics. These, in addition to growth-promoting hormone drugs and pesticide residues in their feed, build up in the animals' tissues and can further damage the health of people on a meat-based diet.

What's it like working for McDonald's?

THERE must be a serious problem: even though 80% of McDonald's workers are part-time, the annual staff turnover is 60% (in the USA it's 300%). It's not unusual for their restaurant workers to quit after just four or five weeks. The reasons are not hard to find.

NO UNIONS ALLOWED

Workers in catering do badly in terms of pay and conditions. They are at work in the evenings and at weekends, doing long shifts in hot, smelly, noisy environments. Wages are low and chances of promotion minimal.

To improve this through Trade Union negotiation is very difficult: there is no union specifically for these workers, and the ones they could join show little interest in the problems of part-timers (mostly women). A recent survey of workers in burger-restaurants found that 80% said they needed union help over pay and conditions. Another difficulty is that the 'kitchen trade' has a high proportion of workers from ethnic minority groups who, with little chance of getting work elsewhere, are wary of being sacked – as many have been – for attempting union organisation.

McDonald's have a policy of preventing unionisation by getting rid of pro-union workers. So far this has succeeded everywhere in the world except Sweden, and in Dublin after a long struggle.

TRAINED TO SWEAT

It's obvious that all large chain-stores and junk-food giants depend for their fat profits on the labour of young people. McDonald's is no exception: three-quarters of its workers are under 21. The production-line system deskills the work itself: anybody can grill a hamburger, and cleaning toilets or smiling at customers needs no training. So there is no need to employ chefs or qualified staff – just anybody prepared to work for low wages.

As there is no legally-enforced minimum wage in Britain, McDonald's can pay what they like, helping to depress wage levels in the catering trade still further. They say they are providing jobs for school-leavers and take them on regardless of sex or race.

> The truth is McDonald's are only interested in recruiting cheap labour – which always means that disadvantaged groups, women and black people especially, are even more exploited by industry than they are already."

The leaflet continued, on pages 5 and 6, with a number of proposals and suggestions for change, campaigning and activity, and information about London Greenpeace.

B. Proceedings in the High Court

13. Because London Greenpeace was not an incorporated body, no legal action could be taken directly against it. Between October 1989 and January or May 1991, UK McDonald's hired seven private investigators from two different firms to infiltrate the group with the aim of finding out who was responsible for writing, printing and distributing the leaflet and organising the anti-McDonald's campaign. The inquiry agents attended over forty meetings of London Greenpeace, which were open to any member of the public who wished to attend, and other events such as "fayres" and public, fund-raising occasions. McDonald's subsequently relied on the evidence of some of these agents at trial to establish that the applicants had attended meetings and events and been closely involved with the organisation during the period when the leaflet was being produced and distributed.

14. On 20 September 1990 McDonald's Corporation ("US McDonald's") and McDonald's Restaurants Limited ("UK McDonald's"), together referred to herein as "McDonald's", issued a writ against the applicants and three others, claiming damages of up to GBP 100,000 for libel caused by the alleged publication by the defendants of the leaflet. McDonald's withdrew proceedings against the three other defendants, in exchange for their apology for the contents of the leaflet.

15. The applicants denied publication, denied that the words complained of had the meanings attributed to them by McDonald's and denied that all or some of the meanings were capable of being defamatory. Further, they contended, in the alternative, that the words were substantially true or else were fair comment on matters of fact.

16. The applicants applied for legal aid but were refused it on 3 June 1992, because legal aid was not available for defamation proceedings in the United Kingdom. They therefore represented themselves throughout the trial and appeal. Approximately GBP 40,000 was raised by donation to assist them (for example, to pay for transcripts: see paragraph 20 below), and they received some help from barristers and solicitors acting *pro bono*: thus, their initial pleadings were drafted by lawyers, they were given some advice on an *ad hoc* basis, and they were represented during five of the pre-trial hearings and on three occasions during the trial, including the appeal to the Court of Appeal against the trial judge's grant of leave to McDonald's to amend the statement of claim (see paragraph 24 below). They submitted,

however, that they were severely hampered by lack of resources, not just in the way of legal advice and representation, but also when it came to administration, photocopying, note-taking, and the tracing, preparation and payment of the costs and expenses of expert and factual witnesses. Throughout the proceedings McDonald's were represented by leading and junior counsel, experienced in defamation law, and by one or two solicitors and other assistants.

17. In March 1994 UK McDonald's produced a press release and leaflet for distribution to their customers about the case, entitled “Why McDonald's is going to Court”. In May 1994 they produced a document called “Libel Action – Background Briefing” for distribution to the media and others. These documents included, *inter alia*, the allegation that the applicants had published a leaflet which they knew to be untrue, and the applicants counter-claimed for damages for libel from UK McDonald's.

18. Before the start of the trial there were approximately twenty-eight interim applications, involving various issues of law and fact, some lasting as long as five days. For example, on 21 December 1993 the trial judge, Mr Justice Bell (“Bell J”), ruled that the action should be tried by a judge alone rather than a judge and jury, because it would involve the prolonged examination of documents and expert witnesses on complicated scientific matters. This ruling was upheld by the Court of Appeal on 25 March 1994, after a hearing at which the applicants were represented *pro bono*.

19. The trial took place before Bell J between 28 June 1994 and 13 December 1996. It lasted for 313 court days, of which 40 were taken up with legal argument, and was the longest trial (either civil or criminal) in English legal history. Transcripts of the trial ran to approximately 20,000 pages; there were about 40,000 pages of documentary evidence; and, in addition to many written witness statements, 130 witnesses gave oral evidence – 59 for the applicants, 71 for McDonald's. Ms Steel gave evidence in person but Mr Morris chose not to.

20. The applicants were unable to pay for daily transcripts of the proceedings, which cost approximately GBP 750 per day, or GBP 375 if split between the two parties. McDonald's paid the fee, and initially provided the applicants with free copies of the transcripts. However, McDonald's stopped doing this on 3 July 1995, because the applicants refused to undertake to use the transcripts only for the purposes of the trial, and not to publicise what had been said in court. The trial judge refused to order McDonald's to supply the transcripts in the absence of the applicants' undertaking, and this ruling was upheld by the Court of Appeal. Thereafter, the applicants, using donations from the public, purchased transcripts at reduced cost (GBP 25 per day), twenty-one days after the evidence had been given. They submit that, as a result, and without sufficient helpers to take notes in court, they were severely hampered in their ability to examine and cross-examine witnesses effectively.

21. During the trial, Mr Morris faced an unconnected action brought against him by the London Borough of Haringey relating to possession of a property. Mr Morris signed an affidavit ("the Haringey affidavit") in support of his application to have those proceedings stayed until the libel trial was over, in which he stated that the libel action had arisen "from leaflets we had produced concerning, *inter alia*, nutrition of McDonald's food ...". McDonald's applied for this affidavit to be adduced as evidence in the libel trial as an admission against interest on publication by Mr Morris, and Bell J agreed to this request. Mr Morris objected that the affidavit should have read "allegedly produced" but that there had been a mistake on the part of his solicitor. The solicitor confirmed in writing to the court that the second applicant had instructed her to correct the affidavit, but that she had not done so because the error had not been material to the Haringey proceedings. The applicants submitted that they assumed that the solicitor's letter would be admitted in evidence, and that Bell J did not warn them that it was inadmissible until the closure of evidence, so that they did not realise they needed to adduce further evidence to explain the mistake. The applicants' appeal to the Court of Appeal against Bell J's admission of the affidavit was refused on 25 March 1996.

22. On 20 November 1995, Bell J ruled on the meaning of the paragraph in the leaflet entitled "What's so unhealthy about McDonald's food?", finding that this part of the leaflet bore the meaning

> "... that McDonald's food is very unhealthy because it is high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, and because eating it may well make your diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, with the very real risk that you will suffer cancer of the breast or bowel or heart disease as a result; that McDonald's know this but they do not make it clear; that they still sell the food, and they deceive customers by claiming that their food is a useful and nutritious part of any diet".

23. The applicants appealed to the Court of Appeal against this ruling, initially relying on seven grounds of appeal. However, the day before the hearing on 2 April 1996 before the Court of Appeal, Ms Steel gave notice on behalf of both applicants that they were withdrawing six of the seven grounds, and now wished solely to raise the issue whether the trial judge had been wrong in determining a meaning which was more serious than that pleaded by McDonald's in their statement of claim. The applicants submitted that they withdrew the other grounds of appeal relating to the meaning of this part of the leaflet because lack of time and legal advice prevented them from fully pursuing them. They mistakenly believed that it would remain open to them to raise these matters again at a full appeal after the conclusion of the trial. The Court of Appeal decided against the applicants on the remaining single ground, holding that the meaning given to this paragraph by the judge was less severe than that pleaded by McDonald's.

24. In the light of the Haringey affidavit, McDonald's sought permission from the court to amend their statement of claim to allege that the applicants had been involved in the production of the leaflet and to allege publication dating back to September 1987. The applicants objected that such an amendment so late in the trial would be unduly prejudicial. However, on 26 April 1996 Bell J gave permission to McDonald's for the amendments; the applicants were allowed to amend their defence accordingly.

25. Before the trial, the applicants had sought an order that McDonald's disclose the notes made by their enquiry agents; McDonald's had responded that there were no notes. During the course of the trial, however, it emerged that the notes did exist. The applicants applied for disclosure, which was opposed by McDonald's on the ground that the notes were protected by legal professional privilege. On 17 June 1996 Bell J ruled that the notes should be disclosed, but with those parts which did not relate to matters contained in the witness statements or oral evidence of the enquiry agents deleted.

26. When all the evidence had been adduced, Bell J deliberated for six months before delivering his substantive 762-page judgment on 19 June 1997.

On the basis, principally, of the Haringey affidavit and the evidence of McDonald's enquiry agents, he found that the second applicant had participated in the production of the leaflet in 1986, at the start of London Greenpeace's anti-McDonald's campaign, although the precise part he played could not be identified. Mr Morris had also taken part in the leaflet's distribution. Having assessed the evidence of a number of witnesses, including Ms Steel herself, he found that her involvement had begun in early 1988 and took the form of participation in London Greenpeace's activities, sharing its anti-McDonald's aims, including distribution of the leaflet. The judge found that the applicants were responsible for the publication of "several thousand" copies of the leaflet. It was not found that this publication had any impact on the sale of McDonald's products. He also found that the London Greenpeace leaflet had been reprinted word for word in a leaflet produced in 1987 and 1988 by an organisation based in Nottingham called Veggies Ltd. McDonald's had threatened libel proceedings against Veggies Ltd, but had agreed a settlement after Veggies rewrote the section in the leaflet about the destruction of the rainforest and changed the heading "In what way are McDonald's responsible for torture and murder?" to read "In what way are McDonald's responsible for the slaughtering and butchering of animals?".

27. Bell J summarised his findings as to the truth or otherwise of the allegations in the leaflet as follows:

> "In summary, comparing my findings with the defamatory messages in the leaflet, of which the Plaintiffs actually complained, it was and is untrue to say that either Plaintiff has been to blame for starvation in the Third World. It was and is untrue to

say that they have bought vast tracts of land or any farming land in the Third World, or that they have caused the eviction of small farmers or anyone else from their land.

It was and is untrue to say that either Plaintiff has been guilty of destruction of rainforest, thereby causing wanton damage to the environment.

It was and is untrue to say that either of the Plaintiffs have used lethal poisons to destroy vast areas or any areas of Central American rainforest, or that they have forced tribal people in the rainforest off their ancestral territories.

It was and is untrue to say that either Plaintiff has lied when it has claimed to have used recycled paper.

The charge that McDonald's food is very unhealthy because it is high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, and because eating it more than just occasionally may well make your diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, with the very real, that is to say serious or substantial risk that you will suffer cancer of the breast or bowel or heart disease as a result, and that McDonald's know this but they do not make it clear, is untrue. However, various of the First and Second Plaintiffs' advertisements, promotions and booklets have pretended to a positive nutritional benefit which McDonald's food, high in fat and saturated fat and animal products and sodium, and at one time low in fibre, did not match.

It was true to say that the Plaintiffs exploit children by using them as more susceptible subjects of advertising, to pressurise their parents into going into McDonald's. Although it was true to say that they use gimmicks and promote the consumption of meals at McDonald's as a fun event, it was not true to say that they use the gimmicks to cover up the true quality of their food or that they promote them as a fun event when they know that the contents of their meals could poison the children who eat them.

Although some of the particular allegations made about the rearing and slaughter of animals are not true, it was true to say, overall, that the Plaintiffs are culpably responsible for cruel practices in the rearing and slaughter of some of the animals which are used to produce their food.

It was and is untrue that the Plaintiffs sell meat products which, as they must know, expose their customers to a serious risk of food poisoning.

The charge that the Plaintiffs provide bad working conditions has not been justified, although some of the Plaintiffs' working conditions are unsatisfactory. The charge that the Plaintiffs are only interested in recruiting cheap labour and that they exploit disadvantaged groups, women and black people especially as a result, has not been justified. It was true to say that the Second Plaintiff [UK McDonald's] pays its workers low wages and thereby helps to depress wages for workers in the catering trade in Britain, but it has not been proved that the First Plaintiff [US McDonald's] pays its workers low wages. The overall sting of low wages for bad working conditions has not been justified.

It was and is untrue that the Plaintiffs have a policy of preventing unionisation by getting rid of pro-union workers."

28. As regards the applicants' counter-claim, Bell J found that McDonald's allegation that the applicants had lied in the leaflet had been unjustified, although they had been justified in alleging that the applicants had wrongly sought to deny responsibility for it. He held that the unjustified remarks had not been motivated by malice, but had been made in a situation of qualified privilege because McDonald's had been responding to vigorous attacks made on them in the leaflet, and he therefore entered judgment for McDonald's on the counter-claim also.

29. The judge awarded US McDonald's GBP 30,000 damages and UK McDonald's a further GBP 30,000. Mr Morris was severally liable for the whole GBP 60,000, and Mr Morris and Ms Steel were to be jointly and severally liable for a total of GBP 55,000 (GBP 27,500 in respect of each plaintiff). McDonald's did not ask for an order that the applicants pay their costs.

C. The substantive appeal

30. The applicants appealed to the Court of Appeal on 3 September 1997. The hearing (before Lord Justices Pill and May and Mr Justice Keene) began on 12 January 1999 and lasted 23 days, and on 31 March 1999 the court delivered its 301-page judgment.

31. The applicants challenged a number of Bell J's decisions on general grounds of law, and contended as follows:

> "(a) [McDonald's] had no right to maintain an action for defamation because:
>
> – [US McDonald's] is a 'multinational' and [US and UK McDonald's] are each a public corporation which has (or should have) no right at common law to bring an action for defamation on the public policy ground that in a free and democratic society such corporations must always be open to unfettered scrutiny and criticism, particularly on issues of public interest;
>
> – the right of corporations such as [McDonald's] to maintain an action for defamation is not 'clear and certain' as the judge held ... The law is on the contrary uncertain, developing or incomplete ... Accordingly the judge should have considered and applied Article 10 of the European Convention on Human Rights ...
>
> (b) The judge was wrong to hold that [McDonald's] need [not] prove any particular financial loss or special damage provided that damage to its good will was likely.
>
> (c) The judge should have held that the burden was on [McDonald's] to prove that the matters complained of by them were false.
>
> (d) The judge was wrong to hold that, to establish a defence of justification, the [applicants] had to prove that the defamatory statements were true. The rule should be disapplied in the light of Article 10 of the ECHR.

(e) It should be a defence in English law to defamation proceedings that the defendant reasonably believed that the words complained of were true.

(f) There should be a defence in English law of qualified privilege for a publication concerning issues of public importance and interest relating to public corporations such as [McDonald's].

(g) The judge should have held that the publication of the leaflet was on occasions of qualified privilege because it was a reasonable and legitimate response to an actual or perceived attack on the rights of others, in particular vulnerable sections of society who generally lack the means to defend themselves adequately (e.g. children, young workers, animals and the environment) which the [applicants] had a duty to make and the public an interest to hear."

32. The Court of Appeal rejected these submissions.

On point (a), it held that commercial corporations had a clear right under English law to sue for defamation, and that there was no principled basis upon which a line might be drawn between strong corporations which should, according to the applicants, be deprived of this right, and weaker corporations which might require protection from unjustified criticism.

In dismissing ground (b), it held that, as with an individual plaintiff, there was no obligation on a company to show that it had suffered actual damage, since damage to a trading reputation might be as difficult to prove as damage to the reputation of an individual, and might not necessarily cause immediate or quantifiable loss. A corporate plaintiff which showed that it had a reputation within the jurisdiction and that the defamatory publication was apt to damage its goodwill thus had a complete cause of action capable of leading to a substantial award of damages.

On grounds (c) and (d), the applicants' submissions were contrary to clearly established English law, which stated that a publication shown by a plaintiff to be defamatory was presumed to be false until proved otherwise, and that it was for the defendants to prove the truth of statements presented as assertions of fact. Moreover, the court found some general force in McDonald's submission that in the instant case they had in fact largely accepted the burden of proving the falsity of the parts of the leaflet on which they had succeeded.

Dismissing grounds (e) to (g), the court observed that a defence of qualified privilege did exist under English law, but only where (i) the publisher acted under a legal, moral or social duty to communicate the information; (ii) the recipient of the information had an interest in receiving it; and (iii) the nature, status and source of the material and the circumstances of the publication were such that the publication should be protected in the public interest in the absence of proof of malice. The court accepted that there was a public interest in receiving information about the activities of companies and that the duty to publish was not confined to the mainstream media but could also apply to members of campaign groups, such as London Greenpeace. However, to satisfy the test, the duty to publish

had to override the requirement to verify the facts. Privilege was more likely to be extended to a publication that was balanced, properly researched, in measured tones and based on reputable sources. In the instant case, the leaflet "did not demonstrate that care in preparation and research, or reference to sources of high authority or status, as would entitle its publishers to the protection of qualified privilege".

English law provided a proper balance between freedom of expression and the protection of reputation and was not inconsistent with Article 10 of the Convention. Campaign groups could perform a valuable role in public life, but they should be able to moderate their publications so as to attract a defence of fair comment without detracting from any stimulus to public discussion which the publication might give. The relaxation of the law contended for would open the way for "partisan publication of unrestrained and highly damaging untruths", and there was a pressing social need "to protect particular corporate business reputations, upon which the well-being of numerous individuals may depend, from such publications".

33. The Court of Appeal further rejected the applicants' contention that the appeal should be allowed on the basis that the action was an abuse of process or that the trial was conducted unfairly, observing as follows:

> "Litigants in person who bring or contest a High Court action are inevitably undertaking a strenuous and burdensome task. This action was complex and the legal advice available to the [applicants] was, because of lack of funds, small in extent. We accept that the work required of the [applicants] at trial was very considerable and had to be done in an environment which, at least initially, was unfamiliar to them.
>
> As a starting-point, we cannot however hold it to be an abuse of process in itself for plaintiffs with great resources to bring a complicated case against unrepresented defendants of slender means. Large corporations are entitled to bring court proceedings to assert or defend their legal rights just as individuals have the right to bring actions and defend them. ...
>
> Moreover the proposition that the complexity of the case may be such that a judge ought to stop the trial on that ground cannot be accepted. The rule of law requires that rights and duties under the law are determined. ...
>
> As to the conduct of the trial, we note that the 313 hearing days were spread over a period of two and a half years. The timetable had proper regard to the fact that the [applicants] were unrepresented and to their other difficulties. They were given considerable time to prepare their final submissions to which they understandably attached considerable importance and which were of great length. For the purpose of preparing closing submissions, the [applicants] had possession of a full transcript of the evidence given at the trial. The fact that, for a part of the trial, the [applicants] did not receive transcripts of evidence as soon as they were made does not render the trial unfair. Quite apart from the absence of an obligation to provide a transcript, there is no substantial evidence that the [applicants] were in the event prejudiced by delay in receipt of daily transcripts during a part of the trial.

> On the hearing of the appeal, we have been referred to many parts of the transcripts of evidence and submissions and have looked at other parts on our own initiative. On such references, we have invariably been impressed by the care, patience and fairness shown by the judge. He was well aware of the difficulties faced by the [applicants] as litigants in person and had full regard to them in his conduct of the trial. The [applicants] conducted their case forcefully and with persistence as they have in this Court. Of course the judge listened to submissions from the very experienced leading counsel appearing for [McDonald's] but the judge applied his mind robustly and fairly to the issues raised. This emerges from the transcripts and from the judgment he subsequently handed down. The judge was not slow to criticise [McDonald's] in forthright terms when he thought their conduct deserved it. Moreover, it appears to us that the [applicants] were shown considerable latitude in the manner in which they presented their case and in particular in the extent to which they were often permitted to cross-examine witnesses at great length.
>
> ... [We] are quite unpersuaded that the appeal, or any part of it, should be allowed on the basis that the action was an abuse of the process of the Court or that the trial was conducted unfairly."

34. The applicants also challenged a number of Bell J's findings about the content of the leaflet, and the Court of Appeal found in their favour on several points, summarised as follows:

> "On the topic of nutrition, the allegation that eating McDonald's food would lead to a very real risk of cancer of the breast and of the bowel was not proved. On pay and conditions we have found that the defamatory allegations in the leaflet were comment.
>
> In addition to the charges found to be true by the judge – the exploiting of children by advertising, the pretence by the respondents that their food had a positive nutritional benefit, and McDonald's responsibility for cruel practices in the rearing and slaughtering of some of the animals used for their products – the further allegation that, if one eats enough McDonald's food, one's diet may well become high in fat etc., with the very real risk of heart disease, was justified. ..."

35. The Court of Appeal therefore reduced the damages payable to McDonald's, so that Ms Steel was now liable for a total of GBP 36,000 and Mr Morris for a total of GBP 40,000. It refused the applicants leave to appeal to the House of Lords.

36. On 21 March 2000 the Appeal Committee of the House of Lords also refused the applicants leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Defamation

37. Under English law the object of a libel action is to vindicate the plaintiff's reputation and to make reparation for the injury done by the wrongful publication of defamatory statements concerning him or her.

38. The plaintiff carries the burden of proving "publication". As a matter of law (*per* Bell J at p. 5 of the judgment in the applicants' case),

> "any person who causes or procures or authorises or concurs in or approves the publication of a libel is as liable for its publication as a person who physically hands it or sends it off to another. It is not necessary to have written or printed the defamatory material. All those jointly concerned in the commission of a tort (civil wrong) are jointly and severally liable for it, and this applies to libel as it does to any other tort".

39. A defence of justification applies where the defamatory statement is substantially true. The burden is on the defendant to prove the truth of the statement on the balance of probabilities. It is no defence to a libel action to prove that the defendant acted in good faith, believing the statement to be true. English law does, however, recognise the defence of "fair comment", if it can be established that the defamatory statement is comment, and not an assertion of fact, and is based on a substratum of facts, the truth of which the defendant must prove.

40. As a general principle, a trading or non-trading corporation is entitled to sue in libel to protect as much of its corporate reputation as is capable of being damaged by a defamatory statement. There are certain exceptions to this rule: local authorities, government-owned corporations and political parties, none of which can sue in defamation, because of the public interest that a democratically elected organisation, or a body controlled by such an organisation, should be open to uninhibited public criticism (see *Derbyshire County Council v. Times Newspapers Ltd* [1993] Appeal Cases 534; *British Coal Corporation v. NUM (Yorkshire Area) and Capstick*, unreported, 28 June 1996; and *Goldsmith and another v. Bhoyrul* [1997] 4 All England Law Reports 268).

B. Legal aid for defamation proceedings

41. Throughout the relevant time, the allocation of civil legal aid in the United Kingdom was governed by the Legal Aid Act 1988. Under Schedule 2, Part II, paragraph 1 of that Act, "[p]roceedings wholly or partly in respect of defamation" were excepted from the scope of the civil legal aid scheme.

42. The Access to Justice Act 1999 ("the AJA 1999") came into force on 1 April 2000, after the proceedings in the present case had concluded. It sets out the current statutory framework for legal aid in England and Wales, administered by the Legal Services Commission ("the Commission"), and made a number of reforms, for example, introducing the possibility for conditional fee agreements. Under the AJA 1999 the presumption remains that civil legal aid should not be granted in respect of claims in defamation (paragraph 1(a)(f) of Schedule). However, the Act contains a provision (section 6(8)) to enable discretionary "exceptional funding" of cases which otherwise fall outside the scope of legal aid, allowing the Lord Chancellor,

inter alia, to authorise the Commission to grant legal aid to an individual defamation litigant, following a request from the Commission.

The Lord Chancellor has issued guidance to the Commission as to the types of case he is likely to consider favourably, stressing that such cases are likely to be extremely unusual given that Parliament has already decided in the AJA 1999 that the types of case excepted from the legal aid scheme are of low priority. As well as financial eligibility for legal aid, the Commission must be satisfied either that "there is a significant wider public interest ... in the resolution of the case and funded representation will contribute to it", or that the case "is of overwhelming importance to the client", or that "there is convincing evidence that there are other exceptional circumstances such that without public funding for representation it would be practically impossible for the client to bring or defend the proceedings, or the lack of public funding would lead to obvious unfairness in the proceedings".

43. The normal rule in civil proceedings in England and Wales, including defamation proceedings, is that the loser pays the reasonable costs of the winner. This rule applies whether either party is legally aided or not. An unsuccessful privately paying party would usually be ordered to pay the legal costs of a successful legally aided opponent. However, an unsuccessful legally aided party is usually protected from paying the costs of a successful privately paying party, because the costs order made against the loser will not usually be enforceable without further order of the court, which is likely to be granted only in the event of a major improvement in the financial circumstances of the legally aided party.

C. Mode of trial

44. The Supreme Court Act 1981 provides in section 69:

> "(1) Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue –
>
> a claim in respect of libel, slander ...
>
> the action shall be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury."

D. Damages

45. The measure of damages for defamation is the amount that would put the plaintiff in the position he or she would have been in had the wrongdoing not been committed. The plaintiff does not have to prove that he has suffered any actual pecuniary loss: it is for the jury (or judge, if

sitting alone) to award a sum of damages sufficient to vindicate the plaintiff's reputation and to compensate for injury to feelings.

46. The Civil Procedure Rules (RSC, Ord. 46, rule 2(1)(a)) provide that leave of the court is required in order to enforce a judgment after a delay of six years or more. Leave to issue execution is usually refused after the expiration of six years from the date on which the judgment became enforceable (see *National Westminster Bank plc v. Powney* [1991] Chancery Division 339, [1990] 2 All England Law Reports 416, Court of Appeal, and *W.T. Lamb & Sons v. Rider* [1948] 2 King's Bench Reports 331, [1948] 2 All England Law Reports 402, Court of Appeal).

COMPLAINTS

47. The Court declared a number of the applicants' complaints inadmissible in its partial decision of 22 October 2002. The remaining complaints are, under Article 6 § 1 of the Convention, that the proceedings were unfair, principally because of the denial of legal aid, and, under Article 10, that the proceedings and their outcome constituted a disproportionate interference with the applicants' right to freedom of expression.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

48. The applicants raised a number of issues under Article 6 § 1 of the Convention, which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

The applicants' principal complaint under this provision was that they were denied a fair trial because of the lack of legal aid. They also alleged that unfairness was caused as a result of the trial judge's ruling to admit as evidence an affidavit sworn by the second applicant, his refusal to allow adjournments on a number of occasions and his granting of permission to McDonald's to amend their pleadings at a late stage in the proceedings.

A. Legal Aid

1. The parties' submissions

(a) The applicants

49. The applicants pointed out that this was the longest trial, either civil or criminal, in English legal history. The entire length of the proceedings, from the issue of the writ on 20 September 1990 to the refusal by the House of Lords of leave to appeal on 21 March 2000, was nine years and six months. Before the trial started there were 28 pre-trial hearings, some of which lasted up to five days. The hearing before the High Court lasted from 28 June 1994 until 13 December 1996, a period of two years and six months, of which 313 days were spent in court, together with additional days in the Court of Appeal to contest rulings made in the course of the trial. The High Court proceedings involved about 40,000 pages of documentary evidence and 130 oral witnesses. The appeal hearing lasted 23 days. Overall, the case included over 100 days of legal argument. The transcripts of the hearings exceeded 20,000 pages.

50. The adversarial system in the United Kingdom is based on the idea that justice can be achieved if the parties to a legal dispute are able to adduce their evidence and test their opponent's evidence in circumstances of reasonable equality. At the time of the proceedings in question, McDonald's economic power outstripped that of many small countries (they enjoyed worldwide sales amounting to approximately 30 billion United States dollars in 1995), whereas the first applicant was a part-time bar worker earning a maximum of GBP 65 a week and the second applicant was an unwaged single parent. The inequality of arms could not have been greater. McDonald's were represented throughout by Queen's Counsel and junior counsel specialising in libel law, supported by a team of solicitors and administrative staff from one of the largest firms in England. The applicants were assisted by lawyers working *pro bono*, who drafted their defence and represented them, during the 28 pre-trial hearings and appeals which took place over 37 court days, on eight days and in connection with five applications. During the main trial, submissions were made by lawyers on their behalf on only three occasions. It was difficult for sympathetic lawyers to volunteer help, because the case was too complicated for someone else just to “dip into”, and moreover the offers of help usually came from inexperienced, junior solicitors and barristers, without the time and resources to be effective.

51. The applicants bore the burden of proving the truth of a large number of allegations covering a wide range of difficult issues. In addition

to the more obvious disadvantages of being without experienced counsel to argue points of law and to conduct the examination and cross-examination of witnesses in court, they had lacked sufficient funds for photocopying, purchasing the transcripts of each day's proceedings, tracing and proofing expert witnesses, paying the witnesses' costs and travelling expenses and note-taking in court. All they could hope to do was keep going: on several occasions during the trial they had to seek adjournments because of physical exhaustion.

52. They claimed that, had they been provided with legal aid with which to trace, prepare and pay the expenses of witnesses, they would have been able to prove the truth of one or more of the charges found to have been unjustified, for example, the allegations on diet and degenerative disease, food safety, hostility to trade unionism and/or that some of McDonald's international beef supplies came from recently deforested areas. Moreover, the applicants' inexperience and lack of legal training led them to make a number of procedural mistakes. Had they been represented, it is unlikely that they would have withdrawn all but one of their grounds on the interim appeal (see paragraph 23 above) or that the Haringey affidavit would have been admitted in evidence (see paragraph 21 above), and it was mainly on the basis of the mistake contained in that affidavit that the second applicant was found to have been involved in the publication of the leaflet.

(b) The Government

53. The Government submitted that the Court should be slow to impose a duty to provide legal aid in civil cases, in view of the deliberate omission of any such obligation from the Convention. In contrast to the position in criminal proceedings (Article 6 § 3 (c)), the Convention left Contracting States with a free choice of the means of ensuring effective civil access to court (the Government relied on *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 14-16, § 26). States did not have unlimited resources to fund legal aid systems, and it was therefore legitimate to impose restrictions on eligibility for legal aid in certain types of low priority civil cases, provided such restrictions were not arbitrary (see *Winer v. the United Kingdom*, no. 10871/84, Commission decision of 10 July 1986, Decisions and Reports (DR) 48, p. 154, at pp. 171-72).

54. The Convention organs had considered the non-availability of legal aid in defamation cases under English law in six cases, and had never found it to be in breach of Article 6 § 1 (see *Winer*, cited above; *Munro v. the United Kingdom*, no. 10594/83, Commission decision of 14 July 1987, DR 52, p. 158; *H.S. and D.M. v. the United Kingdom*, no. 21325/93, Commission decision of 5 May 1993, unreported; *Stewart-Brady v. the United Kingdom*, nos. 27436/95 and 28406/95, Commission decision of 2 July 1997, DR 90-A, p. 45; *McVicar v. the United Kingdom*,

no. 46311/99, ECHR 2002-III; and *A. v. the United Kingdom*, no. 35373/97, ECHR 2002-X).

55. The Court should not depart from this consistent jurisprudence in the present case, which, in the Government's submission, fell far short of the kind of exceptional circumstances where the provision of legal aid was "indispensable for effective access to court" (see *Airey*, cited above, pp. 14-16, § 26).

56. First, the Government argued that the law and facts in issue in the litigation were not so difficult as to make legal aid essential. The applicants' conduct of their defence and counter-claim, and their success in proving many of the allegations made in the leaflet, demonstrated that they were capable of mastering any complexities of the law of defamation as it applied to them.

57. Furthermore, the Government contended that it was relevant that the applicants received advice and representation *pro bono* on a number of occasions, particularly for some of their appearances in the Court of Appeal and in drafting their pleadings. It appeared that the applicants also raised at least GBP 40,000 to fund their defence and that they received help with note-taking and other administrative tasks from volunteers sympathetic to their cause. Both Bell J and the Court of Appeal took into account the applicants' lack of legal training: Bell J, for example, assisted the applicants by reformulating questions for witnesses and did not insist on the usual procedural formalities, such as limiting the case to that pleaded; the Court of Appeal took note in its judgment of the need to safeguard the applicants from their lack of legal skill, conducted its own research to supplement the submissions made by the applicants and allowed them to introduce the defence of fair comment at the appeal stage, even though it had not been raised at first instance. The applicants intended the case to achieve maximum publicity, which it did. The hearings before the High Court and Court of Appeal took so long because the applicants were afforded every possible latitude in the presentation of their case; their evidence and submissions took up the great bulk of the time.

58. In the Government's submission it could not be assumed, in any event, that had legal aid generally been available for the defence of defamation actions, the applicants would have been granted it. The then Legal Aid Board (now the Legal Services Commission) would have had to make a decision, as it does in civil cases where legal aid is available, based on factors such as the merits of the case and whether the costs of litigation would be justified by the likely benefit to the aided party. The applicants published defamatory material without prior justification, and the tax-payer should not be required to pay for the research the applicants should have carried out before publishing the leaflet, or to bear the burden of placing the applicants in a position of equality with McDonald's, which was estimated to have spent in excess of GBP 10 million on legal expenses.

2. The Court's assessment

59. The Court reiterates that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial (see *Airey*, cited above, pp. 12-14, § 24). It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court (ibid.) and that he or she is able to enjoy equality of arms with the opposing side (see, among many other examples, *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 238, § 53).

60. Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants the above rights. The institution of a legal aid scheme constitutes one of those means but there are others, such as for example simplifying the applicable procedure (see *Airey*, pp. 14-16, § 26, and *McVicar*, § 50, both cited above).

61. The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, *inter alia*, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively (see *Airey*, pp. 14-16, § 26; *McVicar*, §§ 48 and 50; *P., C. and S. v. the United Kingdom*, no. 56547/00, § 91, ECHR 2002-VI; and also *Munro*, cited above).

62. The right of access to a court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate (see *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57). It may therefore be acceptable to impose conditions on the grant of legal aid based, *inter alia*, on the financial situation of the litigant or his or her prospects of success in the proceedings (see *Munro*, cited above). Moreover, it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* the adversary (see *De Haes and Gijsels*, p. 238, § 53, and also *McVicar*, §§ 51 and 62, both cited above).

63. The Court must examine the facts of the present case with reference to the above criteria.

First, as regards what was at stake for the applicants, it is true that, in contrast to certain earlier cases where the Court has found legal assistance to have been necessary for a fair trial (for example, *Airey* and *P., C. and S. v. the United Kingdom*, both cited above), the proceedings in issue here were not determinative of important family rights and relationships. The

Convention organs have observed in the past that the general nature of a defamation action, brought to protect an individual's reputation, is to be distinguished, for example, from an application for judicial separation, which regulates the legal relationship between two individuals and may have serious consequences for any children of the family (see *McVicar*, § 61, and *Munro*, both cited above).

However, it must be recalled that the applicants did not choose to commence defamation proceedings, but acted as defendants to protect their right to freedom of expression, a right accorded considerable importance under the Convention (see paragraph 87 below). Moreover, the financial consequences for the applicants of failing to verify each defamatory statement complained of were significant. McDonald's claimed damages up of to GBP 100,000 and the awards actually made, even after reduction by the Court of Appeal, were high when compared to the applicants' low incomes: GBP 36,000 for the first applicant, who was, at the time of the trial, a bar worker earning approximately GBP 65 a week, and GBP 40,000 for the second applicant, an unwaged single parent (see paragraphs 9, 14 and 35 above). McDonald's have not, to date, attempted to enforce payment of the awards, but this was not an outcome which the applicants could have foreseen or relied upon.

64. As for the complexity of the proceedings, the Court notes its finding in *McVicar* (cited above, § 55) that the English law of defamation and rules of civil procedure applicable in that case were not sufficiently complex as to necessitate the granting of legal aid. The proceedings defended by Mr McVicar required him to prove the truth of a single, principal allegation, on the basis of witness and expert evidence, some of which was excluded as a result of his failure to comply with the rules of court. He had also to scrutinise evidence submitted on behalf of the plaintiff and to cross-examine the plaintiff's witnesses and experts, in the course of a trial which lasted just over two weeks.

65. The proceedings defended by the present applicants were of a quite different scale. The trial at first instance lasted 313 court days, preceded by 28 interlocutory applications. The appeal hearing lasted 23 days. The factual case the applicants had to prove was highly complex, involving 40,000 pages of documentary evidence and 130 oral witnesses, including a number of experts dealing with a range of scientific questions, such as nutrition, diet, degenerative disease and food safety. Certain of the issues were held by the domestic courts to be too complicated for a jury properly to understand and assess. The detailed nature and complexity of the factual issues are further illustrated by the length of the judgments of the trial court and the Court of Appeal, which ran in total to over 1,100 pages (see, *inter alia*, paragraphs 18, 19, 30 and 49 above).

66. Nor was the case straightforward legally. Extensive legal and procedural issues had to be resolved before the trial judge was in a position

to decide the main issue, including the meanings to be attributed to the words of the leaflet, the question whether the applicants were responsible for its publication, the distinction between fact and comment, the admissibility of evidence and the amendment of the statement of claim. Overall, some 100 days were devoted to legal argument, resulting in 38 separate written judgments (ibid.).

67. Against this background, the Court must assess the extent to which the applicants were able to bring an effective defence despite the absence of legal aid. In *McVicar* (cited above, §§ 53 and 60), it placed weight on the facts that Mr McVicar was a well-educated and experienced journalist, and that he was represented during the pre-trial and appeal stages by a solicitor specialising in defamation law, from whom he could have sought advice on any aspects of the law or procedure of which he was unsure.

68. The present applicants appear to have been articulate and resourceful; in the words of the Court of Appeal, they conducted their case "forcefully and with persistence" (see paragraph 33 above), and they succeeded in proving the truth of a number of the statements complained of. It is not in dispute that they could not afford to pay for legal representation themselves, and that they would have fulfilled the financial criteria for the granting of legal aid. They received some help on the legal and procedural aspects of the case from barristers and solicitors acting *pro bono*: their initial pleadings were drafted by lawyers, they were given some advice on an *ad hoc* basis, and they were represented during five of the pre-trial hearings and on three occasions during the trial, including the appeal to the Court of Appeal against the trial judge's granting of leave to McDonald's to amend the statement of claim (see paragraph 16 above). In addition, they were able to raise a certain amount of money by donation, which enabled them, for example, to buy transcripts of each day's evidence 25 days later (ibid.). For the bulk of the proceedings, however, including all the hearings to determine the truth of the statements in the leaflet, they acted alone.

69. The Government have laid emphasis on the considerable latitude afforded to the applicants by the judges of the domestic courts, both at first instance and on appeal, in recognition of the disadvantages the applicants faced. However, the Court considers that, in an action of this complexity, neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel (cf. *P., C. and S. v. the United Kingdom*, cited above, §§ 93-95 and 99). The very length of the proceedings is, to a certain extent, a testament to the applicants' lack of skill and experience. It is, moreover, possible that had the applicants been represented they would have been successful in one or more of the interlocutory matters of which they specifically complain, such as the admission in evidence of the Haringey affidavit (see paragraph 21 above).

Finally, the disparity between the respective levels of legal assistance enjoyed by the applicants and McDonald's (see paragraph 16 above) was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness, despite the best efforts of the judges at first instance and on appeal.

70. It is true that the Commission declared inadmissible an earlier application under, *inter alia*, Article 6 § 1 by these same applicants (see *H.S. and D.M. v. the United Kingdom*, cited above), observing that "they seem to be making a tenacious defence against McDonald's, despite the absence of legal aid ...". That decision was, however, adopted over a year before the start of the trial, at a time when the length, scale and complexity of the proceedings could not reasonably have been anticipated.

71. The Government argued that, even if legal aid had been in principle available for the defence of defamation actions, it might well not have been granted in a case of this kind, or the amount awarded might have been capped or the award made subject to other conditions. The Court is not, however, persuaded by this argument. It is, in the first place, a matter of pure speculation whether, if legal aid had been available, it would have been granted in the applicants' case. More importantly, if legal aid had been refused or made subject to stringent financial or other conditions, substantially the same Convention issue would have confronted the Court, namely whether the refusal of legal aid or the conditions attached to its granting were such as to impose an unfair restriction on the applicants' ability to present an effective defence.

72. In conclusion, therefore, the Court finds that the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald's. There has, therefore, been a violation of Article 6 § 1 of the Convention.

B. Other complaints under Article 6 § 1

73. The applicants also alleged that a number of specific rulings made by the judges in the proceedings caused unfairness in breach of Article 6 § 1. Thus, they complained that the circumstances surrounding the admission in evidence of the Haringey affidavit (see paragraph 21 above) had been unfairly prejudicial, as had Bell J's refusal to grant adjournments on a number of occasions and his decision to allow McDonald's to amend their statement of claim (see paragraph 24 above).

74. The Government denied that any unfairness had been caused by these rulings, which had instead struck a fair balance between the opposing litigants.

75. To the extent that these particular complaints have merit, the Court considers that they are subsumed within the principal complaint about lack

of legal aid, since, even if it had not led to a different result, legal representation might have mitigated the effect on the applicants of the rulings in question.

76. In view of the above finding of a violation of Article 6 § 1 based on the lack of legal aid, the Court does not consider it necessary to examine separately these additional complaints.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

77. The applicants also complained of a breach of Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The parties' submissions

1. The applicants

78. The applicants emphasised the inter-relationship between Articles 6 and 10 of the Convention and claimed that the domestic proceedings and their outcome were disproportionate given, *inter alia*, that, without legal aid, they bore the burden of proving the truth of the matters set out in the leaflet.

79. This burden was contrary to Article 10. The issues raised in the leaflet were matters of public interest and it was essential in a democracy that such matters be freely and openly discussed. To require strict proof of every allegation in the leaflet was contrary to the interests of democracy and plurality because it would compel those without the means to undertake court proceedings to withdraw from public debate. The reasons under English law for permitting wider criticism of government bodies applied equally to criticism of large multinationals, particularly given that their vast economic power was coupled with a lack of accountability. In this regard, the applicants prayed in aid the principle in English law that local

authorities, government-owned corporations and political parties could not sue in defamation (see paragraph 40 above).

80. Moreover, it was significant that the applicants were not the authors of the leaflet. It was almost impossible for campaigners to prove the truth of the contents of a campaigning leaflet dealing with global issues that they were merely involved in distributing. In any event, the matters contained in the leaflet were already in the public domain and had, with only minor amendments, been set out in a leaflet printed and distributed by Veggies, to which McDonald's did not object (see paragraph 26 above). The applicants bore no malice against McDonald's and genuinely believed that the statements in the leaflet were true.

81. Finally, the applicants submitted that the damages awarded were excessive and quite beyond their means of paying. It was contrary to the freedom of expression for the law to presume damage without the need for McDonald's to show any loss of sales as a result of the publication.

2. The Government

82. The Government contended that the applicants in the present case were not responsible journalists, but participants in a campaign group carrying out a vigorous attack on McDonald's. There had been no attempt on their part to present a balanced picture, for example by giving McDonald's an opportunity to defend itself, and there was no suggestion that the applicants had carried out any research before publication. Domestic law was not arbitrary in allocating the burden of proving justification on the defendant. On the contrary, it reflected the ordinary principle that the party who asserts a particular fact should have to prove it. In many cases it would be unreasonable to expect a plaintiff to have to prove a negative, that a given allegation was untrue. Having taken it upon him or herself to publish a statement, it was not unreasonable to expect that the defendant should bear the limited burden of having to adduce evidence which showed, on the balance of probabilities, that the statement was true.

83. The Government rejected the applicants' argument that the ability of multinational corporations, such as McDonald's, to defend their reputations by bringing defamation claims amounted to a disproportionate restriction on the ability of individuals to exercise their right to freedom of expression. They denied that there was a parallel to be drawn with the position under domestic law whereby government bodies and political parties are unable to sue for defamation: this bar was justified for the protection of the democratic process, which required free, critical expression. The reputation of a large company might be vital for its commercial success, and the commercial success of companies of all sizes was important to society for a variety of reasons, such as fostering wealth creation, expanding the tax base and creating employment. Furthermore, the applicants' proposal that “multinational companies” should have no legal protection for their

reputations was unworkably vague and it would be difficult to draft and operate legislation to that effect. Their alternative suggestion, that multinationals should have to prove loss, was also misconceived. The vindication of a plaintiff's reputation was a legitimate aim in itself and it would place enormous evidential burdens on both sides if economic loss were to become a material issue.

84. It was irrelevant that certain of the defamatory statements had already been published, for example in the Veggies leaflet. A statement did not become true simply through repetition, and, even where a statement was in wide circulation and had been published by a number of authors, the defamed party must be free to take proceedings against whomever he, she or it chose.

B. The Court's assessment

85. It was not disputed between the parties that the defamation proceedings and their outcome amounted to an interference, for which the State had responsibility, with the applicants' rights to freedom of expression.

86. It is further not disputed, and the Court finds, that the interference was "prescribed by law". The Court further finds that the English law of defamation, and its application in this particular case, pursued the legitimate aim of "the protection of the reputation or rights of others".

87. The central issue which falls to be determined is whether the interference was "necessary in a democratic society". The fundamental principles relating to this question are well established in the case-law and have been summarised as follows (see, for example, *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, pp. 2329-30, § 46):

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
>
> (ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.
>
> (iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the

> decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' ... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ... ”

In its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. Where a statement amounts to a value judgment the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (see, for example, *Feldek v. Slovakia*, no. 29032/95, §§ 75-76, ECHR 2001-VIII).

88. The Court must weigh a number of factors in the balance when reviewing the proportionality of the measure complained of. First, it notes that the leaflet in question contained very serious allegations on topics of general concern, such as abusive and immoral farming and employment practices, deforestation, the exploitation of children and their parents through aggressive advertising and the sale of unhealthy food. The Court has long held that “political expression”, including expression on matters of public interest and concern, requires a high level of protection under Article 10 (see, for example, *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, and also *Hertel*, cited above, p. 2330, § 47).

89. The Government have pointed out that the applicants were not journalists, and should not therefore attract the high level of protection afforded to the press under Article 10. The Court considers, however, that in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment (see, *mutatis mutandis*, *Bowman v. the United Kingdom*, judgment of 19 February 1998, *Reports* 1998-I, and *Appleby and Others v. the United Kingdom*, no. 44306/98, ECHR 2003-VI).

90. Nonetheless, the Court has held on many occasions that even the press “must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information ...” (see, for example, Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/03, § 59, ECHR 1999-III). The safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they act in good faith in order

to provide accurate and reliable information in accordance with the ethics of journalism (Bladet Tromsø *and Stensaas*, § 65), and the same principle must apply to others who engage in public debate. It is true that the Court has held that journalists are allowed "recourse to a degree of exaggeration, or even provocation" (see, for example, Bladet Tromsø *and Stensaas*, § 59, or *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38), and it considers that in a campaigning leaflet a certain degree of hyperbole and exaggeration is to be tolerated, and even expected. In the present case, however, the allegations were of a very serious nature and were presented as statements of fact rather than value judgments.

91. The applicants deny that either was involved in the production of the leaflet (despite the High Court's finding to the contrary – see paragraph 26 above) and stress that they genuinely believed the leaflet's content to be true (see the High Court's finding in paragraph 28 above). They claim that it places an intolerable burden on campaigners such as themselves, and thus stifles public debate, to require those who merely distribute a leaflet to bear the burden of establishing the truth of every statement contained in it. They also argue that large multinational companies should not be entitled to sue in defamation, at least without proof of actual financial damage. Complaint is further made of the fact that under the law McDonald's were able to bring and succeed in a claim for defamation when much of the material included in the leaflet was already in the public domain.

92. As to this last argument, the Court notes that a similar contention was examined and rejected by the Court of Appeal on the ground either that the material relied on did not support the allegations in the leaflet or that the other material was itself lacking in justification. The Court finds no reason to reach a different conclusion.

93. As to the complaint about the burden of proof, the Court notes that in *McVicar* (cited above, § 87) it held that it was not in principle incompatible with Article 10 to place on a defendant in libel proceedings the onus of proving to the civil standard the truth of defamatory statements. The Court there referred to Bladet Tromsø *and Stensaas*, in which it commented that special grounds were required before a newspaper could be dispensed from its ordinary obligation to verify factual statements (*McVicar*, § 84).

94. The Court further does not consider that the fact that the plaintiff in the present case was a large multinational company should in principle deprive it of a right to defend itself against defamatory allegations or entail that the applicants should not have been required to prove the truth of the statements made. It is true that large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies (see *Fayed v. the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B, p. 53, § 75). However, in addition to the public interest in open debate about

business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good. The State therefore enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation (see *markt intern Verlag GmbH and Klaus Beermann v. Germany*, judgment of 20 November 1989, Series A no. 165, pp. 19-21, §§ 33-38).

95. If, however, a State decides to provide such a remedy to a corporate body, it is essential, in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms is provided for. The Court has already found that the lack of legal aid rendered the defamation proceedings unfair, in breach of Article 6 § 1. The inequality of arms and the difficulties under which the applicants laboured are also significant in assessing the proportionality of the interference under Article 10. As a result of the law as it stood in England and Wales, the applicants had the choice either to withdraw the leaflet and apologise to McDonald's, or bear the burden of proving, without legal aid, the truth of the allegations contained in it. Given the enormity and complexity of that undertaking, the Court does not consider that the correct balance was struck between the need to protect the applicants' rights to freedom of expression and the need to protect McDonald's rights and reputation. The more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible "chilling" effect on others are also important factors to be considered in this context, bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion (see, for example, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 27, § 44; Bladet Tromsø *and Stensaas*, cited above, § 64; and *Thorgeir Thorgeirson*, cited above, p.28, § 68). The lack of procedural fairness and equality therefore gave rise to a breach of Article 10 in the present case.

96. Moreover, the Court considers that the size of the award of damages made against the two applicants may also have failed to strike the right balance. Under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered (see *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B, pp. 75-76, § 49). The Court notes on the one hand that the sums eventually awarded in the present case (GBP 36,000 in the case of the first applicant and GBP 40,000 in the case of the second applicant), although relatively moderate by contemporary standards in defamation cases in England and Wales, were very substantial when compared to the modest incomes and resources of the two applicants. While accepting, on the other hand, that the statements in the leaflet which were found to be untrue contained serious allegations, the Court observes that not

only were the plaintiffs large and powerful corporate entities but that, in accordance with the principles of English law, they were not required to, and did not, establish that they had in fact suffered any financial loss as a result of the publication of the "several thousand" copies of the leaflets found by the trial judge to have been distributed (see paragraph 45 above and compare, for example, *Hertel*, cited above, p. 2331, § 49).

97. While it is true that no steps have to date been taken to enforce the damages award against either applicant, the fact remains that the substantial sums awarded against them have remained enforceable since the decision of the Court of Appeal. In these circumstances, the Court finds that the award of damages in the present case was disproportionate to the legitimate aim served.

98. In conclusion, given the lack of procedural fairness and the disproportionate award of damages, the Court finds that there has been a violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

100. The applicants claimed that, had their rights under Articles 6 and 10 of the Convention been adequately protected by the State, they would not have had to defend themselves throughout the entire defamation proceedings, which continued over nine years. They claimed payment for the legal work they had to carry out, at the rate applicable for litigants in person under the Civil Procedure Rules, namely GBP 9.25 per hour, plus reasonable travelling expenses. Using this rate, they calculated that they should each be reimbursed GBP 21,478.50 in respect of the 387 days each spent in court, together with GBP 100,233.00 each for preparation. Their total, joint claim for domestic legal costs therefore came to GBP 243,423.00, to which had to be added GBP 31,194.84 for expenses and disbursements such as photocopying, transcripts, telephone calls and travelling.

101. The applicants also asked the Court to ensure in its judgment that if McDonald's were ever successful in enforcing the GBP 40,000 award of damages against them, the respondent State should be required to reimburse the sum paid.

102. The Government commented that the amounts claimed by the applicants in respect of their court appearances and preparatory work did not reflect costs actually incurred by them or money actually lost as a result of the alleged violations of Articles 6 § 1 and 10. Had the applicants been awarded legal aid for their defence, the legal aid monies would have been paid to their legal representatives; under no circumstances would legal aid have constituted financial remuneration for the applicants themselves. As for the expenses claimed by the applicants, it was a matter of pure speculation whether and to what extent, if legal aid had been available, these expenses would have been covered by public funds.

103. As for the applicants' request for a “rider” to cover their liability should McDonald's decide to enforce the claim for damages, the Government submitted that this was not a concept known to international law and that such an order would be contrary to the parties' legitimate interest in the finality of litigation.

104. The Court notes that the applicants have not presented any evidence to suggest that the time they spent preparing and presenting their defence in the defamation proceedings caused them any actual pecuniary loss; it has not been suggested, for example, that either applicant lost earnings as a result of the lack of legal aid. They have filed an itemised claim in respect of expenses and disbursements, but they do not allege that their expenses exceeded the amount they were able to raise by voluntary donation (see paragraph 16 above). The Court is not, therefore, satisfied that the sums claimed represented losses or expenses actually incurred.

105. It further notes that, because of the period of time that has elapsed since the order for damages was made against the applicants, McDonald's would need the leave of the court before it could proceed to enforce the award (see paragraph 46 above). In these circumstances, despite its finding that the award of damages was disproportionate and in breach of Article 10, the Court does not consider it necessary to make any provision in respect of it under Article 41 at the present time.

106. In conclusion, therefore, the Court makes no award in respect of compensation for pecuniary damage.

B. Non-pecuniary damage

107. The applicants claimed that, during the period of over nine years in which they were defending the defamation action against such a powerful adversary, they had suffered considerable stress and anxiety. They had felt a responsibility to defend the case to the utmost because of the importance of the issues raised and the necessity of public debate. In consequence, they had been forced to sacrifice their health and their personal and family lives. Ms Steel provided the Court with doctors' letters from March 1995 and March 1996 stating that she was suffering from a stress-related illness

aggravated by the proceedings. Mr Morris, a single parent, had been unable to spend as much time as he would have wished with his young son. Ms Steel claimed GBP 15,000 under this head and Mr Morris claimed GBP 10,000.

108. The Government submitted that, in accordance with the Court's practice in the great majority of cases involving breaches of Article 10 and procedural breaches of Article 6, it was not necessary to make an award of compensation for non-pecuniary damage. There was no evidence that the applicants had suffered more stress than any individual, represented or not, involved in litigation and it was a matter of pure speculation whether and by how much the stress would have been reduced if the violations of Articles 6 and 10 had not taken place. In any event, the amounts claimed were excessive when compared with other past awards for serious violations of the Convention.

109. The Court has found violations of Articles 6 § 1 and 10 based, principally, on the fact that the applicants had to carry out themselves the bulk of the legal work in these exceptionally long and difficult proceedings to defend their rights to freedom of expression. In these circumstances the applicants must have suffered anxiety and disruption to their lives far in excess of that experienced by a represented litigant, and the Court also notes in this connection the medical evidence submitted by Ms Steel. It awards compensation for non-pecuniary damage of 20,000 euros (EUR) to the first applicant and EUR 15,000 to the second applicant.

C. Strasbourg costs and expenses

110. The applicants were represented before the Court by leading and junior counsel and a senior and assistant solicitor.

Both counsel claimed to have spent several hundred hours on the case, but, in order to keep costs within a reasonable limit, decided to halve their hourly rates (to GBP 125 and GBP 87.50 respectively) and to claim for only 115 hours' work for leading counsel and 75 hours' work for junior counsel. In addition, leading counsel claimed GBP 5,000 for preparing for and representing the applicants at the hearing on 7 September 2004, and junior counsel claimed GBP 2,500 for the hearing. The total fees for leading counsel were GBP 19,375 plus value-added tax (VAT), and those of junior counsel were GBP 9,062.50 plus VAT.

Despite having invested approximately 45 hours in the case, the senior solicitor claimed for only 25 hours and halved his hourly rate to GBP 175. He also claimed GBP 2,000 in respect of the hearing. The assistant solicitor claimed to have spent over 145 hours on the case, but claimed for 58 hours' work, at GBP 75 per hour, half her usual rate. She claimed GBP 1,500 for the hearing. The senior solicitor's total costs came to GBP 6,375 plus VAT, and those of the assistant solicitor came to GBP 5,850 plus VAT.

In addition, the applicants made a claim under this head for some of the work they had carried out in connection with the proceedings before the Court, namely 150 hours each at GBP 9.25 per hour: a total of GBP 2,775.

Finally, they claimed a total of GBP 3,330 travelling and accommodation expenses for the hearing in respect of the four lawyers and two applicants.

The total claim for costs and expenses under this head came to GBP 46,767.50, plus VAT.

111. The Government considered the use of four lawyers to have been unreasonable and excessive. They submitted that the costs and travelling expenses of senior counsel and one of the solicitors should be disallowed. The applicants were not entitled to claim any costs in respect of the work they had carried out, since this part of the claim did not represent pecuniary loss actually incurred.

112. The Court reiterates that only such costs and expenses as were actually and necessarily incurred in connection with the violation or violations found, and reasonable as to quantum, are recoverable under Article 41 of the Convention (see, for example, *Sahin v. Germany* [GC], no. 30943/96, § 105, ECHR 2003-VIII). It follows that it cannot make an award under this head in respect of the hours the applicants themselves spent working on the case, as this time does not represent costs actually incurred by them (see *Dudgeon v. the United Kingdom* (Article 50), judgment of 24 February 1983, Series A no. 59, p. 10, § 22, and *Robins v. the United Kingdom*, judgment of 23 September 1997, *Reports* 1997-V, pp. 1811-12, §§ 42-44). It is clear from the length and detail of the pleadings submitted by the applicants that a great deal of work was carried out on their behalf, but in view of the relatively limited number of relevant issues, it is questionable whether the entire sum claimed for costs was necessarily incurred. In the light of all the circumstances, the Court awards EUR 50,000 under this head, less the EUR 2,688.83 already paid in legal aid by the Council of Europe, together with any tax that may be chargeable.

D. Default interest

113. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into pounds sterling at the rate applicable at the time of settlement:
      (i) EUR 20,000 (twenty thousand euros) to the first applicant and EUR 15,000 (fifteen thousand euros) to the second applicant in respect of non-pecuniary damage;
      (ii) EUR 47,311.17 (forty-seven thousand three hundred and eleven euros seventeen cents) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 15 February 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Matti PELLONPÄÄ
President

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

SECOND SECTION

CASE OF STEUR v. THE NETHERLANDS

(Application no. 39657/98)

JUDGMENT

STRASBOURG

28 October 2003

FINAL

28/01/2004

In the case of Steur v. the Netherlands,

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

Mr J.-P. COSTA, *President*,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mrs A. MULARONI, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 18 June 2002 and 7 October 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 39657/98) against the Kingdom of the Netherlands lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Netherlands national, Mr Peter M. Steur ("the applicant"), on 25 November 1997.

2. The applicant, a lawyer practising in Oegstgeest, the Netherlands, presented his own case. The Netherlands Government ("the Government") were represented by their Agent, Mrs J. Schukking, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that there had been a violation of his rights under Article 10 of the Convention in that a statement which he had made in his professional capacity and in the course of judicial proceedings had led to a disciplinary complaint against him being upheld.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court).

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

7. By a decision of 18 June 2002, the Chamber declared the application partly admissible.

8. The Government, but not the applicant, filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is a Netherlands national who was born in 1951 and lives in Oegstgeest. He is a practising lawyer (*advocaat en procureur*). He was not represented before the Court.

10. On 26 November 1992 the social security investigating officer (*sociaal rechercheur*) Mr W. took and recorded a statement from one Mr B., a person of Surinamese origin who was suspected of having unjustly received social security benefits and, in this context, of having committed forgery. Mr B. was alone with Mr W. at the time and did not have the assistance of either a lawyer or an interpreter.

11. Subsequently, Mr B. was prosecuted for social security fraud. In addition, civil proceedings were instituted against him by the social security authorities for the recovery of the excess benefits paid to him. The applicant acted as Mr B.'s counsel in both sets of proceedings.

12. In the civil proceedings, the applicant declared, *inter alia*:

> "The statement recorded in writing by Mr W. cannot have been obtained in any other way than by the application of pressure in an unacceptable manner in order to procure incriminating statements, the significance of which was not or not sufficiently understood by Mr B. given the absence of an interpreter."

This passage appears in pleading notes submitted to the Hague Regional Court (*arrondissementsrechtbank*) at a hearing held on 27 June 1994.

13. Having learned of this statement in May 1995, Mr W. filed a disciplinary complaint within the meaning of section 46c of the Legal Profession Act (*Advocatenwet*) against the applicant to the Dean (*deken*) of the local Bar Association (*Orde van Advocaten*). He complained that the applicant's unfounded insinuations had tarnished his professional honour and good reputation, that the applicant had transgressed the limits of decency, and that the applicant had accused him obliquely of having committed perjury in drawing up the record in question.

14. Following an exchange of correspondence, the Dean forwarded Mr W.'s complaint to the Disciplinary Council (*Raad van Discipline*) of The Hague.

15. In its decision of 1 July 1996, following adversarial proceedings, the Disciplinary Council rejected as unfounded the complaint that the applicant had, in veiled terms, accused Mr W. of perjury. It did, however, consider that the applicant, by contending that Mr W. had exerted unacceptable pressure on Mr B., had made an assertion that was not supported by any facts. It concluded that the applicant had thus transgressed the limits of acceptable behaviour and failed to observe the standards expected from a lawyer ("*... de grenzen van het toelaatbare overschreden en heeft hij in strijd gehandeld met hetgeen een behoorlijk advocaat betaamt*"). Noting the nature and the limited degree of seriousness of the applicant's conduct, the Disciplinary Council considered it sufficient to declare the complaint of Mr W. partially well-founded without imposing any sanction.

16. The applicant lodged an appeal with the Disciplinary Appeals Tribunal (*Hof van Discipline*). He submitted that Mr B. had not had the assistance of a lawyer before he signed his written statement, despite having asked for a lawyer to be present, that no interpreter had been present at the interrogation, that Mr B. was a drug addict and that he had told him that pressure had been brought to bear. The applicant also referred to a statement taken by the investigating judge (*rechter-commissaris*) from Mr B. on 5 December 1994, which reads as follows:

> "In reply to the question why I stated to the police that I had lived together with my ex-wife during the relevant period ... I say that I was pressured during that interrogation.
>
> This pressure consisted of kicking against the table and kicking motions in my direction. I was also verbally abused.
>
> When it came to signing the statement, I asked for the chief, but he was said to have already gone home. I then asked for a lawyer because I wanted an interpreter to come and read my statement to me. The police said, however, that no lawyer could come. So in the end I just signed the statement."

17. The applicant argued that in defending his client he should have been free to conclude, as he had, that his client's confession could only have resulted from unacceptable pressure being brought to bear by the investigating officer. It would then have been for the court to which this conclusion was presented to decide whether or not it hat been established that such unacceptable pressure was in fact exerted. But it was not for a disciplinary tribunal to find that a statement made at a trial in defence of his client was unacceptable because it had not been sufficiently verified.

18. In its decision of 26 May 1997, following adversarial proceedings, the Disciplinary Appeals Tribunal dismissed the applicant's appeal and upheld the decision of 1 July 1996 in its entirety.

19. It noted that, in the civil proceedings involving Mr B., the allegation in issue had been made in the applicant's submissions during the first-instance proceedings as well as in the proceedings on appeal before the

Hague Regional Court (in the latter proceedings in the course of a hearing held on 27 June 1994). It did not find it established that, at the material time, the applicant had in fact been informed by Mr B. that he considered that unacceptable pressure had been exerted on him when Mr W. took his statement. It further noted that the applicant's contention had remained wholly unsubstantiated at the material time.

20. The Disciplinary Appeals Tribunal agreed with the Disciplinary Council that a lawyer was not entitled to express reproaches of the kind in issue without any factual support, which implied that a lawyer, prior to raising such allegations, should seek information from his client as to the circumstances constituting the unacceptable pressure allegedly exerted.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. Section 46 of the Legal Profession Act provides as follows:

> "Advocates shall be subject to disciplinary proceedings regarding any act or omission which is in breach of the due care they ought to exercise as advocates *vis-à-vis* those whose interests they look after, or ought to look after, any breach of the Regulations of the National Bar, and any act or omission not befitting a respectable advocate. This disciplinary justice is dispensed in the first instance by the Disciplinary Councils, and, on appeal, by the Disciplinary Appeals Tribunal, which is also the highest instance."

22. A complaint against an advocate is submitted to the Dean of the local Bar Association (section 46c(1)), who shall investigate it (section 46c(2)). He may forward it to the Supervisory Board (*Raad van Toezicht*) for further action (section 46c(3)).

23. If a friendly settlement cannot be reached, the matter is referred to the Disciplinary Council by the Dean of the Bar Association (or the Supervisory Board as the case may be), either at the request of the complainant or *ex officio* (section 46c(3) and section 46d).

24. The sanctions available to the Disciplinary Councils and the Disciplinary Appeals Tribunal are: mere admonition; reprimand; suspension from practising for a period not exceeding one year; and disbarment (section 48).

25. Guidance on the nature of an "act or omission not befitting a respectable advocate" is found in the Rules of Conduct for Advocates (*Gedragsregels voor advocaten*), the most recent version of which dates from 1992. Rule 1 reads as follows:

> "Advocates should behave in such a way that confidence in the profession or in their own exercise of the profession is not harmed."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

26. The applicant complained that the decision of the Disciplinary Appeals Tribunal implied that, during trial proceedings, a lawyer was not allowed to conclude from facts known to him that unacceptable pressure had been exerted on his client. He alleged a violation of his right to freedom of expression, as guaranteed by Article 10 of the Convention, the relevant part of which provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ..."

The Government denied that there had been a violation of this provision.

A. Existence of an interference

27. The Government argued that the applicant had not been the subject of any "formalities, conditions, restrictions or penalties" of a nature to prevent him from adequately representing the interests of his client. He had been able to make whatever statements he saw fit, including the statement that Mr B. had been put under unacceptable pressure by the social security investigating officer. The Disciplinary Council and the Disciplinary Appeals Tribunal had merely found that the applicant was in breach of his duty to ensure that his statements had a proper basis in fact. They had not even imposed any sanction on the applicant.

28. The applicant submitted no argument on this point.

29. The Court acknowledges that no sanction was imposed on the applicant – not even the lightest sanction, a mere admonition. Nonetheless, the applicant was censured, that is, he was formally found at fault in that he had breached the applicable professional standards. This could have a negative effect on the applicant, in the sense that he might feel restricted in his choice of factual and legal arguments when defending his clients in future cases. It is therefore reasonable to consider that the applicant was made subject to a "formality" or a "restriction" on his freedom of expression. The Court would draw a parallel with its findings in *Nikula v. Finland*, (no. 31611/96, ECHR 2002-II). In that case the Finnish Supreme Court had in fact waived the sentence imposed on the applicant, but this did

not prevent the Court from finding that Article 10 was applicable (ibid., § 30).

30. It follows that the Court may make the same finding in the present case.

B. Whether there has been a violation of Article 10

31. It was not in dispute that the decisions complained of were "prescribed by law" and that they were intended to protect "the reputation or rights of others". Discussion centred on whether they could be considered "necessary in a democratic society" in pursuit of the said legitimate aim.

32. The applicant, in his observations submitted at the admissibility stage, argued in the first place that his statement that Mr B. had been placed under unacceptable pressure had been based on objective circumstances and was supported by a statement made by Mr B. to the investigating judge. Consequently, the Disciplinary Appeals Tribunal ought not to have found the applicant at fault for the sole reason that he had not been able to quote his client's statement in support when he first made the allegation in question.

33. More generally, he expressed the view that in a democratic State an advocate should be entitled, at all stages of the proceedings, to put forward all possible arguments based on information obtained from his client.

34. The Government, relying on *Peree v. the Netherlands* ((dec.), no. 34328/96, 17 November 1998), replied that it was not the Court's task, in exercising its supervisory function, to take the place of the national authorities, but rather to review under Article 10 the decisions they had taken pursuant to their power of appreciation. They also relied on *Wingerter v. Germany* ((dec.), no. 43718/98, 21 March 2002), in which the Court had rejected as manifestly ill-founded the complaint of a lawyer reprimanded for a statement in written appeal submissions collectively dismissing judges, public prosecutors and lawyers in a particular locality as incompetent.

35. Turning to the facts of the case, the Court notes that the applicant was found to have committed a disciplinary offence by stating that his client had apparently been pressured by a police officer, Mr W., into signing a confession of wrongdoing. The confession in question had been obtained in a criminal investigation for social security fraud, and was relied on by the competent authorities in parallel civil proceedings for recovering from the applicant's client the excess benefits paid to him. It was in these latter proceedings that the applicant made the impugned statement.

36. In *Nikula*, cited above, the Court stated the applicable principles as follows (§§ 44-45, case-law references omitted):

> "44. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including ... the content of the remarks held against the applicant and the context in which she made them. In particular, it must determine whether the interference in question was 'proportionate to the legitimate aims pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.
>
> 45. The Court reiterates that the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Moreover, the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein ..."

37. The special duties of lawyers led the Court to conclude in the same judgment that, in certain circumstances, an interference with counsel's freedom of expression in the course of a trial might raise an issue under Article 6 of the Convention with regard to the right of an accused client to receive a fair trial (loc. cit., § 49).

38. The Court has also previously pointed out that the special nature of the profession practised by members of the Bar must be considered. In their capacity as officers of the court, they are subject to restrictions on their conduct, which must be discreet, honest and dignified, but they also benefit from exclusive rights and privileges that may vary from one jurisdiction to another – among them, usually, a certain latitude regarding arguments used in court (see Nikula, cited in paragraph 36 above, and Casado *Coca v. Spain*, judgment of 24 February 1994, Series A no. 285-A, p. 19, § 46).

39. The Court notes that the applicant's criticism during the trial was aimed at the manner in which evidence was obtained by an investigating officer exercising his powers to interrogate the applicant's client in a criminal case and while the latter was in custody. As the Court has noted with reference to public prosecutors (see *Nikula*, cited above, § 50), the difference between the positions of an accused and an investigating officer calls for increased protection of statements whereby an accused criticises such an officer. This applies equally in this case, where the way in which such evidence was gathered was criticised in civil proceedings in which that evidence was to be used.

40. It is clear that the applicant's statement was of a nature to discredit a conscientious police officer such as Mr W. claimed to be. However, the Court reiterates in this context that the limits of acceptable criticism may in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals (see *Nikula*, cited above, § 48).

41. Although it cannot be said that civil servants are deprived of all protection against offensive and abusive verbal attacks in relation to the exercise of their duties (see *Janowski v. Poland* [GC], no. 25716/94, § 33, ECHR 1999-I), it has to be taken into account that in the present case the criticism was strictly limited to Mr W.'s actions as an investigating officer in the case against the applicant's client, as distinct from criticism focusing on Mr W.'s general professional or other qualities. Moreover, the criticism was confined to the courtroom and did not amount to a personal insult. The applicant's submission was based on the fact, as apparent, that his client had not fully understood his self-incriminating statement, given the absence of an interpreter during the interrogation. The submission was entirely consistent with a later statement which the applicant's client made to the investigating judge on 5 December 1994 (see paragraph 16 above), and thus before Mr W. lodged his complaint against the applicant and before the Disciplinary Council and the Disciplinary Appeals Tribunal considered the case.

42. The Court notes in this context, firstly, that the domestic disciplinary authorities did not attempt to establish the truth or falsehood of the impugned statement and, secondly, that they do not at any time seem to have addressed the question whether it was made in good faith; in other words, the applicant's honesty in acting as he did was never called into question.

43. In these circumstances, the Court is not convinced by the argument of the Disciplinary Appeals Tribunal that the mere fact that the applicant was able to cite information obtained from his client only after making the impugned statement made his action blameworthy.

44. It is true that no sanction was imposed on the applicant but, even so, the threat of an *ex post facto* review of his criticism with respect to the manner in which evidence was taken from his client is difficult to reconcile with his duty as an advocate to defend the interests of his clients and could have a “chilling effect” on the practice of his profession (see, *mutatis mutandis*, *Nikula*, cited above, § 54).

45. In the Court's view, therefore, no sufficient reasons have been shown to exist for the interference in question. The restriction on the applicant's right to freedom of expression therefore fails to answer any “pressing social need”.

46. There has accordingly been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

48. The applicant did not submit any claims for just satisfaction. The Court, for its part, sees no reason to examine the question of awarding just satisfaction of its own motion (see, among other authorities, *Nasri v. France*, judgment of 13 July 1995, Series A no. 320-B, p. 26, § 49, and, more recently, *Stambuk v. Germany*, no. 37928/97, § 59, 17 October 2002).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;

2. *Holds* that it is not necessary to apply Article 41 of the Convention in the present case.

Done in English, and notified in writing on 28 October 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

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

FIRST SECTION

CASE OF TAMMER v. ESTONIA

(Application no. 41205/98)

JUDGMENT

STRASBOURG

6 February 2001

FINAL

04/04/2001

In the case of Tammer v. Estonia,

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

Mrs E. PALM, *President*,
Mrs W. THOMASSEN,
Mr L. FERRARI BRAVO,
Mr GAUKUR JÖRUNDSSON,
Mr C. BÎRSAN,
Mr J. CASADEVALL, *judges*,
Mr U. LÕHMUS, ad hoc *judge*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 16 January 2001,

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

PROCEDURE

1. The case originated in an application (no. 41205/98) against the Republic of Estonia lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Estonian national, Mr Enno Tammer ("the applicant"), on 19 February 1998.

2. The applicant was represented by Mr I. Gräzin, Dean of the Law Faculty at University Nord in Tallinn, Estonia. The Estonian Government ("the Government") were represented by their Agents, Mr E. Harremoes, Special Adviser of the Permanent Representation of Estonia to the Council of Europe, and Ms M. Hion, First Secretary of the Human Rights Division of the Legal Department of the Ministry of Foreign Affairs.

3. The applicant alleged a violation of Article 10 of the Convention in connection with his conviction for remarks he made in a newspaper interview.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mr R. Maruste, the judge elected in respect of Estonia, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr U. Lõhmus to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. By a decision of 19 October 1999 the Chamber declared the application admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry.].

7. The Government, but not the applicant, filed written observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. At the material time the applicant was a journalist and editor of the Estonian daily newspaper *Postimees*.

9. The applicant's complaint under Article 10 of the Convention relates to his conviction by the Estonian courts of insulting Ms Vilja Laanaru in an interview he had conducted with another journalist, Mr Ülo Russak, which was published in *Postimees* on 3 April 1996. The interview was entitled "Ülo Russak denies theft" and was prompted by an allegation made by Ms Laanaru that Mr Russak, who had helped her to write her memoirs, had published them without her consent. The interview had the following background.

10. Ms Laanaru is married to the Estonian politician Edgar Savisaar. In 1990, when Mr Savisaar was still married to his first wife, he became Prime Minister of Estonia. Ms Laanaru, who had already been working for him, became his assistant. She continued to work with him during the following years and in 1995, when Mr Savisaar held the post of Minister of the Interior, she was one of his counsellors.

11. Ms Laanaru had been politically active in the Centre Party (*Keskerakond*) led by Mr Savisaar and was an editor of the party's paper.

12. In or around 1989 Ms Laanaru gave birth to a child by Mr Savisaar. As she was unwilling to place her child in a kindergarten, the child was entrusted to her parents.

13. On 10 October 1995 Mr Savisaar was forced to resign as Minister of the Interior following the discovery of secret tape recordings of his conversations with other Estonian politicians. On the same day Ms Laanaru issued a statement in which she claimed full responsibility for the secret recordings.

14. Ms Laanaru then left her post in the Ministry of the Interior and began writing her memoirs with the help of a journalist, Mr Russak.

15. In her memoirs, as recounted to Mr Russak, Ms Laanaru recalled her experiences in politics and the government. In considering the issue of the secret tape recordings she conceded that the statement she had made on 10 October 1995 was not true. According to Mr Russak, she also reflected on her relationship with Mr Savisaar, a married man, asking herself whether she had broken up his family. She admitted that she had not been as good a mother as she had wished to be and wondered whether she had paid too high a price in sacrificing her child to her career.

16. In the course of the writing, a disagreement arose between her and Mr Russak as to the publication and authorship of the memoirs.

17. On an unspecified date Ms Laanaru brought a civil action before the Tallinn City Court (*Tallinna Linnakohus*) for the protection of her rights as the author of the manuscript.

18. On 29 March 1996 the City Court issued an order prohibiting Mr Russak from publishing the manuscript pending the resolution of the issue of its authorship.

19. Following the court order, Mr Russak decided to publish the material collected in a different form, namely in the form of the information Ms Laanaru had given him during their collaboration.

20. Mr Russak's account of Ms Laanaru's story began appearing in the daily newspaper *Eesti Päevaleht* on 1 April 1996.

21. Later the same year, Ms Laanaru published her own memoirs. In her book she stated that some of the information published in the newspaper report of Mr Russak's story was incorrect, without specifying in which respect.

22. In the newspaper interview of 3 April 1996, mentioned in paragraph 9 above, the applicant questioned Mr Russak on the issue of the publication of the memoirs and asked him, *inter alia*, the following question:

> "By the way, don't you feel that you have made a hero out of the wrong person? A person breaking up another's marriage [*abielulõhkuja*], an unfit and careless mother deserting her child [*rongaema*]. It does not seem to be the best example for young girls." [*Note by the Registry*: The translation of the Estonian words "*abielulõhkuja*" and "*rongaema*" is descriptive since no one-word equivalent exists in English.}

23. Following the above publication, Ms Laanaru instituted private prosecution proceedings against the applicant for allegedly having insulted her by referring to her as "*abielulõhkuja*" and "*rongaema*".

24. In the proceedings before the City Court, the applicant argued that the expressions used had been intended as a question rather than a statement of his opinion and that a question mark after them had been left out by mistake in the course of the editing. He denied the intent to offend Ms Laanaru and considered the expressions used as neutral. He further claimed that Ms Laanaru's actions had justified his asking the question.

25. By a judgment of 3 April 1997, the City Court convicted the applicant under Article 130 of the Criminal Code of the offence of insulting Ms Laanaru and fined him 220 kroons, the equivalent of ten times the "daily income" rate (see paragraph 31 below). In finding against the applicant, the City Court took note of the expert opinion given by the Estonian Language Institute (*Eesti Keele Instituut*) and of the applicant's unwillingness to settle the case by issuing an apology. It also noted that under the relevant provision of the Criminal Code liability did not depend on whether or not the victim actually possessed the negative qualities ascribed to her by the applicant. According to the expert opinion, the words at issue constituted value judgments which expressed a strongly negative and disapproving attitude towards the phenomena to which they referred. The word "*rongaema*" indicated that a mother had not cared for her child, and the word "*abielulõhkuja*" indicated a person who had harmed or broken up someone else's marriage. Both phenomena had always been condemned in Estonian society and this was also reflected in the language. However, the words were not improper in their linguistic sense.

26. The applicant lodged an appeal with the Tallinn Court of Appeal (*Tallinna Ringkonnakohus*) in which he argued, *inter alia*, that the first-instance court had failed to take into account the context of the whole article in which the two words appeared. He also disputed the qualification of his action as a crime on the grounds that he had lacked criminal intent and that the form used was not improper. He further stressed his right as a journalist freely to disseminate ideas, opinions and other information guaranteed by the Estonian Constitution and argued that the judgment of the first-instance court constituted a violation of his freedom of speech.

27. By a judgment of 13 May 1997, the Court of Appeal dismissed the applicant's appeal and upheld the City Court's judgment. The Court of Appeal noted that in private prosecution cases its examination was limited to the claims put forward by the offended party. The text of the whole interview, however, had been added to the case file. While noting that the impugned expressions were not indecent, the Court of Appeal considered them to be grossly degrading to human dignity and their use by the applicant in the circumstances of the case abusive. Had he expressed his negative opinion about Ms Laanaru by stating that she did not raise her child and that she had destroyed Mr Savisaar's marriage, it would not have constituted an insult. The Court of Appeal pointed out that the Constitution and the Criminal Code expressly provided for the possibility of restricting freedom of speech if it infringed the reputation and rights of others. Despite the special interest of the press in public figures, the latter also had the right to have their honour and dignity protected.

28. The applicant lodged an appeal on points of law with the Supreme Court (*Riigikohus*) arguing, *inter alia*, that the two expressions did not have any synonyms in the Estonian language and he had therefore had no

possibility of using other words. The use of a longer sentence omitting the words had been precluded by objective circumstances peculiar to journalism.

29. By a judgment of 26 August 1997, the Supreme Court's Criminal Division rejected the applicant's appeal and upheld the Court of Appeal's judgment. Its judgment included the following reasons:

> "I. The principle of freedom of speech, including the principle of freedom of the press provided for in Article 45 § 1 of the Constitution of the Republic of Estonia ('the Constitution') and Article 10 § 1 of the European Convention on Human Rights ('the ECHR'), is an indispensable guarantee for the functioning of a democratic society and therefore one of the most essential social values.
>
> ...
>
> According to Article 11 of the Constitution the restriction of any rights or freedoms may take place only pursuant to the Constitution; such restrictions must moreover be necessary in a democratic society and must not distort the nature of the restricted rights and freedoms. Freedom of speech, including freedom of the press, as a fundamental right may be restricted pursuant to Article 45 of the Constitution for the protection of public order, morals, the rights and freedoms of other persons, health, honour and good name. Under Article 10 § 2 of the ECHR, freedom of speech may be restricted by law also for the protection of morals and the reputation or rights of others.
>
> II. In Estonia a person has in principle the right to protect his or her honour as one aspect of human dignity by bringing either civil or criminal proceedings.
>
> According to section 23(1) of the Law on General Principles of the Civil Code, a person has the right to apply for a court order to put a stop to the besmirching of his or her honour, the right to demand rebuttal of the impugned material provided that the person defaming him or her fails to prove the truthfulness of the material and also the right to demand compensation for pecuniary or non-pecuniary damage caused by the attack on his or her honour.
>
> Thus a person can seek protection through a civil procedure only if the person feels that his or her honour has been sullied with a statement of fact, as only a fact can be proved to be true. However, if a person feels that his or her honour has been besmirched by a value judgment, it is impossible to prove that allegation in a legal sense. In its Lingens v. Austria (1986) and Thorgeir Thorgeirson v. Iceland (1992) judgments, the European Court of Human Rights has also taken the view that a clear distinction must be made between facts and value judgments. Since the truth of a value judgment cannot be proved, the European Court of Human Rights has found that if a person offended by a journalist through a value judgment goes to a national court in order to prove the value judgment, this constitutes a violation of the freedom of speech provided for in Article 10 of the ECHR. Therefore, a person in Estonia has in fact no possibility of protecting his or her honour through civil-law remedies if he or she has been defamed by means of a value judgment. It follows that in [such] cases ... a person can only resort to criminal-law remedies for protecting his or her honour – by initiating a private prosecution under Article 130 of the Criminal Code. In the present case, the victim has availed herself of this sole opportunity.

III. The Criminal Division of the Supreme Court considers the judgments delivered by the Tallinn City Court and the Tallinn Court of Appeal on 3 April 1997 and 13 May 1997 respectively to be lawful and not subject to annulment.

In response to the arguments put forward in the appeal, the Criminal Division of the Supreme Court considers it necessary to note the following.

The appellant's statement that the words '*rongaema'* and '*abielulõhkuja*' could not be offensive to V. Laanaru since the sentence in the article which contained these words did not include the name of V. Laanaru, meaning that the words have not been used against anyone personally, is groundless and fabricated. Both the City Court and the Court of Appeal have correctly concluded that the expressions '*rongaema*' and '*abielulõhkuja*' have been used by [the applicant] to characterise the victim V. Laanaru (Savisaar). The Criminal Division of the Supreme Court wishes to add that in the formulation of his next argument – that it is legitimate to use the impugned expressions towards public figures – the appellant has considered V. Laanaru to be a public figure, thereby in fact invalidating his first argument.

Although Article 12 of the Constitution stipulates the equality of everyone before the law, the Criminal Division of the Supreme Court does not consider it necessary to question the special interest of the press towards public figures – a principle recognised in the practice of the European Court of Human Rights. However, the Criminal Division of the Supreme Court wishes to stress that in Estonia there is no legal definition of a public figure and in the practice of the European Court of Human Rights no one has been considered a public figure for the reason that he or she is a spouse, cohabitant, child or other person close to a public figure. It must be emphasised nevertheless that it cannot be concluded from the practice of the European Court of Human Rights that the special interest of the press towards public figures means that public figures cannot be offended. On the contrary, according to the criminal laws of several countries, such as Germany, the act of offending a public figure qualifies as a crime. The public has the right to expect the press to describe the life of public figures more thoroughly than the life of ordinary people, but the public has no right to expect the honour of public figures to be degraded, especially in the press and in an improper manner.

The Criminal Division does not agree with the standpoint put forward in the appeal that, since the words '*rongaema*' and '*abielulõhkuja*' are not vulgar or indecent, their use in referring to a person cannot be considered as degrading that person's honour and dignity in an improper manner, which is an obligatory element of the definition of the offence under Article 130 of the Criminal Code. Improper form as a legal category within the meaning of Article 130 of the Criminal Code does not only include the use of vulgar or indecent words, but also the use of negative and defamatory figurative expressions. Besides, improper form may also be non-verbal, for example a caricature. Both the City Court and the Court of Appeal have correctly taken the view, on the basis of an expert opinion, that by using the words '*rongaema*' and '*abielulõhkuja*' in reference to V. Laanaru in the newspaper article [the applicant] has treated the victim in public in a defamatory and thus improper manner.

The statement of [the applicant's] defence lawyer ... that the Court of Appeal had no right to prescribe which style a journalist was to use when writing a newspaper article is without foundation. Such a statement can be accepted in so far as the journalistic style does not offend or degrade human dignity. Concerning the protection of the

honour and dignity of a person, the court was correct in pointing out that the idea expressed in an improper form could also be expressed in a proper form in Estonian.

The argument of the appellant that the offensive expressions '*rongaema*' and '*abielulõhkuja*' were used due to the absence in the Estonian language of synonymous terms and that the use of a longer sentence avoiding these words was precluded by objective circumstances peculiar to journalism, is also ill-founded. There are probably no synonyms for several vulgar and indecent expressions in Estonian. This, however, does not justify their use. Any objective circumstances inherent in the functioning of the press – such as consideration of newspaper space and information density, according to the appellant – being values whose scope is limited to a particular sphere, cannot be compared to such values as human dignity.

Under Article 65 § 4 of the Code of Criminal Procedure in Appeal and Cassation Proceedings, the Supreme Court lacks competence to establish factual circumstances. Accordingly, the Supreme Court cannot reconsider the decision which the City Court and the Court of Appeal took on the basis of an expert opinion that the use of these offensive expressions constituted a value judgment by the journalist and not a question. However, the Criminal Division of the Supreme Court finds it necessary to point out that the prevailing opinion in legal writing is that insult is in principle possible also in the form of a question. It is also important to stress that if the newspaper *Postimees* has violated the rights of the author [the applicant] and distorted his intent by an incompetent technical editing [by leaving out the question mark at the end of the two expressions] (letter of the chief editor of *Postimees* of 16 May 1996 in the file), it would have been possible for [the applicant] or the newspaper to remedy the damage in an out-of-court settlement by simply publishing an apology as the victim had expressed readiness to reach such a settlement. However, neither [the applicant] nor the newspaper *Postimees* was willing to acknowledge in public that they had made a mistake and this constituted further evidence of direct intent to insult."

II. RELEVANT DOMESTIC LAW

30. The relevant provisions of the Estonian Constitution read as follows:

Article 45

"Everyone has the right to freely disseminate ideas, opinions, beliefs and other information by word, print, picture or other means. This right may be restricted by law to protect public order, morals, and the rights and freedoms, health, honour and good name of others."

Article 11

"Rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted."

31. The relevant provisions of the Criminal Code read as follows:

Article 130 – Insult

"The degradation of another person's honour and dignity in an improper form shall be punished with a fine or detention."

Article 28 – Fine

"1. A fine is a penalty which the court can impose up to a limit of nine hundred times a person's daily income. The 'daily income' rate is calculated on the basis of the average daily wage of the defendant following deduction of taxes and taking into account his or her family and financial status."

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

32. The applicant submitted that the decisions of the Estonian courts in which he was found guilty of insult constituted an unjustified interference with his right to freedom of expression under Article 10 of the Convention, which provides:

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

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

A. Existence of an interference

33. The Court notes that it is undisputed that the applicant's conviction amounted to an interference with his right to freedom of expression.

B. Justification for the interference

34. An interference contravenes Article 10 of the Convention unless it is "prescribed by law", pursues one or more of the legitimate aims referred to in paragraph 2 of Article 10 and is "necessary in a democratic society" for achieving such an aim or aims.

1. "Prescribed by law"

35. The applicant submitted that Article 130 of the Criminal Code, upon which his conviction was based, was not formulated with sufficient precision and clarity.

36. The Government argued that the Article defined the offence of insult in precise terms so as to allow the applicant to regulate his professional activities accordingly. The interpretation and application of Article 130 by the national courts did not go beyond what could reasonably be foreseen in the circumstances by the applicant.

37. The Court reiterates that one of the requirements flowing from the expression "prescribed by law" is the foreseeability of the measure concerned. A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Whilst certainty in the law is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see, for example, *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III).

38. The Court notes that Article 130 of the Criminal Code is worded in rather general terms, but finds that the statutory provision cannot be regarded as so vague and imprecise as to lack the quality of "law". It reiterates that it is primarily the task of national authorities to apply and interpret domestic law (see, for example, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A, p. 17, § 45). In the circumstances of the present case the Court is satisfied that the interference was "prescribed by law".

2. Legitimate aim

39. It was common ground that the interference in issue pursued the aim of "the protection of the reputation or rights of others".

40. Having regard to the circumstances of the case and to the judgments of the domestic courts, the Court considers that the conviction of the applicant pursued the legitimate aim of the protection of the reputation or rights of Ms Laanaru. The interference complained of therefore had a legitimate aim under paragraph 2 of Article 10.

3. "Necessary in a democratic society"

41. The applicant argued that his conviction was not proportionate to the legitimate aim pursued and that it was not necessary in a democratic society.

42. He disputed the qualification of the impugned expressions as insulting and contended that the courts had followed uncritically the flawed expert opinion of the Estonian Language Institute. The expert opinion and the courts had failed to make a distinction between the two impugned terms. The term "*abielulõhkuja*" was a statement verifiable by the facts whereas the term "*rongaema*" was a value judgment. The factual circumstances of the case proved the validity of the former term: Ms Laanaru's relationship was with a married man and it had actually destroyed his family. Ms Laanaru herself had admitted this in her memoirs. The applicant contended that the relationship had also been within the public domain. He acknowledged that in Estonian tradition the term "*rongaema*" had a significant negative emotional connotation. However, in the pragmatic use of today's language the traditional connotation of the term might have disappeared. The experts, adopting a conservative interpretation of the word, had ignored the radical changes which had taken place in Estonian society concerning the issue of single motherhood over the last century. Moreover, his interview had not been published for a narrow group of linguistic experts but for the public at large. Even the traditional interpretation of the term put it outside vulgar or insulting language. Although the expression was less factual than "*abielulõhkuja*", it was based on Ms Laanaru's own reflections on her relationship with her child. As both impugned expressions were thus not disproportionate to the underlying facts, they should not have been regarded as offensive.

43. The applicant contended that by asking the question with the two impugned expressions he had not intended to offend Ms Laanaru. His intent had been to provoke and receive a reaction from Mr Russak to his question and not to state an opinion of his own. Furthermore, the question had not been about Ms Laanaru as an individual, but about the attitude of the press towards a particular type of personality in Estonian society.

44. In addition, the applicant submitted that the dispute had been of a civil nature and should not have been tried in a criminal court. He argued that the Supreme Court, in its judgment of 26 August 1997, had held incorrectly that the protection of someone's honour against attacks through value judgments was possible only through criminal measures. He pointed out that on 1 December 1997 the Supreme Court had reversed this position,

holding that civil law provided remedies to protect a person's honour. The availability of civil remedies made it a grave injustice to sentence him as a criminal.

45. The applicant contended that Ms Laanaru was a public figure in her own right, a fact which made her open to heightened criticism and close scrutiny by the press. She had played an independent role in the political life of Estonia by holding the high and influential position of counsellor to the Minister of the Interior as well as by being an active social figure and an editor of a popular magazine. By putting herself in the centre of the secret tape-recording scandal, Ms Laanaru had attempted to obtain additional publicity for herself.

46. The applicant argued that the fact that Ms Laanaru had herself made the question of her interference into Mr Savisaar's first marriage as well as her relationship with her child a public issue had lessened the scope of her privacy.

47. The motive behind his question had been legitimate and had concerned a matter of public interest. The discovery of the secret recordings of Mr Savisaar's conversations with other politicians as well as several earlier controversial measures involving Mr Savisaar at a time when Ms Laanaru was his official counsellor had raised legitimate questions about the ethics and values of those in positions of power in Estonia. In this context, the modest and concerned question about the personality of Ms Laanaru had seemed perfectly justified. The impugned expressions had been used to serve the interests of the public in receiving information and not for the sole purpose of gratifying human curiosity without any real information value.

48. The applicant considered that he had not exceeded the limits of acceptable criticism and that his journalistic freedom outweighed Ms Laanaru's right to respect for her private and family life. The decisions of the Estonian courts amounted to a kind of censure which was likely to discourage journalists from making criticism of that kind again in the future.

49. The Government maintained that the interference was necessary in a democratic society, in other words it corresponded to a “pressing social need”, it was proportionate to the legitimate aim pursued and the reasons given to justify it were relevant and sufficient. They contended that, in the present case, the domestic authorities had not exceeded the margin of appreciation available to them in assessing the need for such interference.

50. They argued that the wider limits of journalistic freedom applicable to civil servants and politicians acting in their public capacity did not apply to the same extent in the case of Ms Laanaru. She was active in politics only as the wife, collaborator and supporter of Mr Savisaar, not independently of him. The disobliging references to an ordinary citizen's private life and history, even if her name was linked to that of a prominent politician, could not constitute a matter of serious public concern. The relationship between a

woman, who had withdrawn from the civil service, and a man, who at that time had withdrawn from politics, was a very private matter which could not be considered a question affecting the public. The impugned words did not bear on any matter of serious public interest and concern. There was no social purpose in making insulting comments on a private person's family life.

51. The Government refuted the applicant's argument concerning the need to inform the public about Ms Laanaru's private life. The applicant had chosen the words to provoke and to create sensational headlines and had not acted in good faith. In any event, such an argument could under no circumstances exonerate him from following the basic ethics of journalism and the defamation laws.

52. The Government stressed that the applicant had not been convicted for describing a factual situation or for expressing a critical opinion about Ms Laanaru's personality or about her private or family life. His conviction was based on his choice of words in relation to her which were considered to be insulting. Had the applicant just described Ms Laanaru as having been the cause of a divorce, as having broken up someone's marriage or as not taking care of her child, this would not have constituted an insult, as pointed out by the Court of Appeal (see paragraph 27 above).

53. The Government noted that the expressions "*rongaema*" and "*abielulõhkuja*" had a very special meaning in the Estonian language, and that they had no equivalent in English. When interpreting the words and their meaning, their specific nature within the Estonian language and culture should also be taken into account.

54. The Government argued that the applicant had used the impugned words not, as he claimed, to describe aspects of Ms Laanaru's private life which were largely known to the public, but to denigrate her in public opinion. They recalled that Ms Laanaru had entrusted her child to her mother as she did not wish to put the child into a kindergarten. It was quite common in Estonia today for grandparents to take care of their grandchildren.

55. The Government disputed the applicant's allegation that Ms Laanaru had herself placed her private life within the public domain. The interview published in April 1996 was not an interview with Ms Laanaru about her private and family life, but an interview with another journalist about the publication of Ms Laanaru's memoirs and her private life. They recalled that on 29 March 1996 Ms Laanaru had obtained a court order prohibiting the publication of her memoirs. At that time, she no longer had any intention of making them public.

56. As regards the proportionality of the interference to the legitimate aim pursued, the Government pointed out that the case was one of private prosecution, in other words the proceedings were initiated by the aggrieved Ms Laanaru and not by the prosecution authorities. The Tallinn City Court

had made an attempt to settle the case during the proceedings, but the applicant had refused to accept the proposal of apologising to Ms Laanaru. At no time had the public prosecutor intervened or associated himself with the proceedings, although he had had the right to participate in them and the court had invited him to do so. The executive had taken no action whatsoever before the national courts and had remained entirely neutral throughout the proceedings.

57. Furthermore, the Government submitted that the applicant had been sanctioned only with a modest fine of 220 kroons – an amount ten times the minimum daily salary.

58. Finally, the Government maintained that the decisions of the national courts had been based on the striking of a balance between a right protected under Article 8 of the Convention and a right protected under its Article 10. The Supreme Court, in rejecting the applicant's complaint, had applied the same test as the European Court of Human Rights does and there was ample reference in its judgment to the latter's case-law. The Supreme Court, in its thoroughly reasoned judgment, had duly and carefully balanced the applicant's interest in freely expressing his opinion against the need to protect the reputation and rights of Ms Laanaru.

59. According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no “democratic society”. This freedom is subject to the exceptions set out in Article 10 § 2, which must, however, be construed strictly. The need for any restrictions must be established convincingly (see, for example, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 41, and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

60. The adjective “necessary”, within the meaning of Article 10 § 2, implies the existence of a “pressing social need”. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a “restriction” is reconcilable with freedom of expression as protected by Article 10 (see *Lingens*, cited above, p. 25, § 39, and *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I).

61. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which

he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see The Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 38, § 62; *Lingens*, cited above, pp. 25-26, § 40; *Barfod v. Denmark*, judgment of 22 February 1989, Series A no. 149, p. 12, § 28; *Janowski*, cited above; and *News Verlags GmbH & CoKG v. Austria*, no. 31457/96, § 52, ECHR 2000-I). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, pp. 23-24, § 31).

62. The Court further recalls the essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds, particularly as regards the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *Jersild*, cited above, pp. 23-24, § 31; *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 233-34, § 37; and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III). In addition, the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38, and Bladet Tromsø *and Stensaas*, cited above). The limits of permissible criticism are narrower in relation to a private citizen than in relation to politicians or governments (see, for example, *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, pp. 23-24, § 46, and *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, pp. 1567-68, § 54).

63. In sum, the Court's task in exercising its supervision is not to take the place of national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).

64. Turning to the facts of the present case, the Court notes that the applicant was convicted on the basis of the remarks he had made in his capacity as a journalist in a newspaper interview with another journalist. The interview concerned the issue of publication of Ms Laanaru's personal memoirs following a dispute between her and the interviewed journalist who had helped writing them.

65. It observes that the domestic courts found the use of the words "*rongaema*" and "*abielulõhkuja*" offensive to Ms Laanaru and the imposed

restriction justified for the protection of her reputation and rights (see paragraphs 25, 27 and 29 above). In the context of the freedom of the press, the requirements of such protection have to be weighed in relation to the interest of the applicant as a journalist in imparting information and ideas on matters of public concern.

66. In this connection, the Court notes that the impugned remarks related to the aspects of Ms Laanaru's private life which she described in her memoirs written in her private capacity. While it is true that she herself had intended to make these details public, the justification for the use of the actual words by the applicant in the circumstances of the present case must be seen against the background which prompted their utterance as well as their value to the general public.

67. In this connection, the Court observes that the remarks were preceded by the reflections of Ms Laanaru on her role as a mother and in breaking up Mr Savisaar's family. It notes, however, that the domestic courts found that the words "*rongaema*" and "*abielulõhkuja*" amounted to value judgments couched in offensive language, recourse to which was not necessary in order to express a "negative" opinion (see paragraph 27 above). It considers that the applicant could have formulated his criticism of Ms Laanaru's actions without resorting to such insulting expressions (see, for example, *Constantinescu v. Romania*, no. 28871/95, § 74, ECHR 2000-VIII).

68. The Court notes the differences in the parties' position concerning the public-figure status of Ms Laanaru. It observes that Ms Laanaru resigned from her governmental position in October 1995 in the wake of the affair of the secret tape recordings by Mr Savisaar, for which she claimed responsibility (see paragraph 13 above). Despite her continued involvement in the political party, the Court does not find it established that the use of the impugned terms in relation to Ms Laanaru's private life was justified by considerations of public concern or that they bore on a matter of general importance. In particular, it has not been substantiated that her private life was among the issues that affected the public in April 1996. The applicant's remarks could therefore scarcely be regarded as serving the public interest.

69. In considering the way the domestic authorities dealt with the case, the Court observes that the Estonian courts fully recognised that the present case involved a conflict between the right to impart ideas and the reputation and rights of others. It cannot find that they failed properly to balance the various interests involved in the case. Taking into account the margin of appreciation left to the Contracting States in such circumstances, the Court considers that the domestic authorities were, in the circumstances of the case, entitled to interfere with the exercise of the applicant's right. It recalls that, in assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account (see, for example, *Ceylan v. Turkey* [GC], no. 23556/94, § 37,

ECHR 1999-IV). In this respect, it notes the limited amount of the fine imposed on the applicant as a sanction provided for in Article 28 of the Criminal Code (see paragraph 31 above).

70. Having regard to the foregoing, the Court considers that the applicant's conviction and sentence were not disproportionate to the legitimate aim pursued and that the reasons advanced by the domestic courts were sufficient and relevant to justify such interference. The interference with the applicant's right to freedom of expression could thus reasonably be considered necessary in a democratic society for the protection of the reputation or rights of others within the meaning of Article 10 § 2 of the Convention.

71. There has consequently been no breach of Article 10 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 6 February 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President

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

COURT (PLENARY)

CASE OF THE SUNDAY TIMES v. THE UNITED KINGDOM (No. 2)

(Application no. 13166/87)

JUDGMENT

STRASBOURG

26 November 1991

In the case of The Sunday Times v. the United Kingdom (no. 2)[*],

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 51 of the Rules of Court[**] and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr J. PINHEIRO FARINHA,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr S. K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J. M. MORENILLA,
Mr F. BIGI,
Mr A. BAKA,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 28 June and 24 October 1991,

Delivers the following judgment, which was adopted on the last-mentioned date:

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[*] Notes by the Registrar
The case is numbered 50/1990/241/312. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] The amended Rules of Court which entered into force on 1 April 1989 are applicable to the present case.

PROCEDURE

1. The case was referred to the Court on 12 October 1990 by the European Commission of Human Rights ("the Commission") and on 23 November 1990 by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government"), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 13166/87) against the United Kingdom lodged with the Commission under Article 25 (art. 25) on 31 July 1987 by Times Newspapers Ltd, a company incorporated in England, and Mr Andrew Neil, a British citizen.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46) and the Government's application, to Article 48 (art. 48). The object of the request and the application was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) and also, in the case of the request, Articles 13 and 14 (art. 13, art. 14) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

3. On 15 October 1990 the President of the Court decided, under Rule 21 para. 6 and in the interest of the proper administration of justice, that a single Chamber should be constituted to consider both the instant case and the Observer and Guardian case[***].

The Chamber thus constituted included ex officio Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 October 1990 the President drew by lot, in the presence of the Registrar, the names of the seven other members, namely Mr J. Cremona, Mrs D. Bindschedler-Robert, Mr F. Matscher, Mr R. Macdonald, Mr C. Russo, Mr R. Bernhardt and Mr R. Pekkanen (Article 43[****] in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the representatives of the applicants on

[***] Note by the Registrar
Case no. 51/1990/242/313

[****] Note by the Registrar
As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

the need for a written procedure (Rule 37 para. 1) and the date of the opening of the oral proceedings (Rule 38).

In accordance with the President's orders and directions, the registry received, on 2 April 1991, the applicants' memorial and, on 18 April, the Government's. By letter of 31 May 1991, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 21 March 1991 the Chamber decided, pursuant to Rule 51, to relinquish jurisdiction forthwith in favour of the plenary Court.

6. On 25 March 1991 the President granted, under Rule 37 para. 2, leave to "Article 19" (the International Centre against Censorship) to submit written comments on a specific issue arising in the case. He directed that the comments should be filed by 15 May 1991; they were, in fact, received on that date.

7. As directed by the President, the hearing, devoted to the present and the Observer and Guardian cases, took place in public in the Human Rights Building, Strasbourg, on 25 June 1991. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government
  Mrs A. GLOVER, Legal Counsellor,
  Foreign and Commonwealth Office, *Agent*,
  Mr N. BRATZA, Q.C.,
  Mr P. HAVERS, Barrister-at-Law, *Counsel*,
  Mrs S. EVANS, Home Office,
  Mr D. BRUMMELL, Treasury Solicitor, *Advisers*;
- for the Commission
  Mr E. BUSUTTIL, *Delegate*;
- for the applicants in the present case
  Mr A. LESTER, Q.C.,
  Mr D. PANNICK, Barrister-at-Law, *Counsel*,
  Mr M. KRAMER,
  Ms K. RIMELL, Solicitors,
  Mr A. WHITAKER, Legal Manager,
  Times Newspapers Ltd, *Adviser*;
- for the applicants in the Observer and Guardian case
  Mr D. BROWNE, Q.C., *Counsel*,
  Mrs J. MCDERMOTT, Solicitor.

The Court heard addresses by Mr Bratza for the Government, by Mr Busuttil for the Commission and by Mr Lester and Mr Browne for the applicants, as well as replies to questions put by the President of the Court.

8. The registry received, on 5 August 1991, the observations of the Government on the applicants' claim under Article 50 (art. 50) of the Convention and, on 13 September and on 4 and 7 October respectively, the

applicants' comments on those observations and further particulars of their claim. By letter of 3 October, a Deputy to the Secretary to the Commission informed the Registrar that the Delegate had no comments on this issue.

AS TO THE FACTS

I. INTRODUCTION

A. The applicants

9. The applicants in this case (who are hereinafter together referred to as "S.T.") are Times Newspapers Ltd, the publisher of the United Kingdom national Sunday newspaper The Sunday Times, and Mr Andrew Neil, its editor. They complain of interlocutory injunctions imposed by the English courts on the publication of details of the book Spycatcher and information obtained from its author, Mr Peter Wright.

B. Interlocutory injunctions

10. In litigation where the plaintiff seeks a permanent injunction against the defendant, the English courts have a discretion to grant the plaintiff an "interlocutory injunction" (a temporary restriction pending the determination of the dispute at the substantive trial) which is designed to protect his position in the interim. In that event the plaintiff will normally be required to give an undertaking to pay damages to the defendant should the latter succeed at the trial.

The principles on which such injunctions will be granted - to which reference was made in the proceedings in the present case - were set out in American Cyanamid Co. v. Ethicon Ltd([1975] Appeal Cases 396) and may be summarised as follows.

(a) It is not for the court at the interlocutory stage to seek to determine disputed issues of fact or to decide difficult questions of law which call for detailed argument and mature consideration.

(b) Unless the material before the court at that stage fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction, the court should consider, in the light of the particular circumstances of the case, whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

(c) If damages would be an adequate remedy for the plaintiff if he were to succeed at the trial, no interlocutory injunction should normally be

granted. If, on the other hand, damages would not provide an adequate remedy for the plaintiff but would adequately compensate the defendant under the plaintiff's undertaking if the defendant were to succeed at the trial, there would be no reason to refuse an interlocutory injunction on this ground.

(d) It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience arises.

(e) Where other factors appear evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo.

C. Spycatcher

11. Mr Peter Wright was employed by the British Government as a senior member of the British Security Service (MI5) from 1955 to 1976, when he resigned. Subsequently, without any authority from his former employers, he wrote his memoirs, entitled Spycatcher, and made arrangements for their publication in Australia, where he was then living. The book dealt with the operational organisation, methods and personnel of MI5 and also included an account of alleged illegal activities by the Security Service. He asserted therein, inter alia, that MI5 conducted unlawful activities calculated to undermine the 1974-1979 Labour Government, burgled and "bugged" the embassies of allied and hostile countries and planned and participated in other unlawful and covert activities at home and abroad, and that Sir Roger Hollis, who led MI5 during the latter part of Mr Wright's employment, was a Soviet agent.

Mr Wright had previously sought, unsuccessfully, to persuade the British Government to institute an independent inquiry into these allegations. In 1987 such an inquiry was also sought by, amongst others, a number of prominent members of the 1974-1979 Labour Government, but in vain.

12. Part of the material in Spycatcher had already been published in a number of books about the Security Service written by Mr Chapman Pincher. Moreover, in July 1984 Mr Wright had given a lengthy interview to Granada Television (an independent television company operating in the United Kingdom) about the work of the service and the programme was shown again in December 1986. Other books and another television programme on the workings and secrets of the service were produced at about the same time, but little Government action was taken against the authors or the media.

D. Institution of proceedings in Australia

13. In September 1985 the Attorney General of England and Wales ("the Attorney General") instituted, on behalf of the United Kingdom

Government, proceedings in the Equity Division of the Supreme Court of New South Wales, Australia, to restrain publication of Spycatcher and of any information therein derived from Mr Wright's work for the Security Service. The claim was based not on official secrecy but on the ground that the disclosure of such information by Mr Wright would constitute a breach of, notably, his duty of confidentiality under the terms of his employment. On 17 September he and his publishers, Heinemann Publishers Australia Pty Ltd, gave undertakings, by which they abided, not to publish pending the hearing of the Government's claim for an injunction.

Throughout the Australian proceedings the Government objected to the book as such; they declined to indicate which passages they objected to as being detrimental to national security.

II. THE INTERLOCUTORY PROCEEDINGS IN ENGLAND AND EVENTS OCCURRING WHILST THEY WERE IN PROGRESS

A. The Observer and Guardian articles and the ensuing injunctions

14. Whilst the Australian proceedings were still pending, the United Kingdom national Sunday newspaper Observer and the United Kingdom national daily newspaper The Guardian published, on Sunday 22 and Monday 23 June 1986 respectively, short articles on inside pages reporting on the forthcoming hearing in Australia and giving details of some of the contents of the manuscript of Spycatcher. These two newspapers had for some time been conducting a campaign for an independent investigation into the workings of the Security Service. The details given included the following allegations of improper, criminal and unconstitutional conduct on the part of MI5 officers:

(a) MI5 "bugged" all diplomatic conferences at Lancaster House in London throughout the 1950's and 1960's, as well as the Zimbabwe independence negotiations in 1979;

(b) MI5 "bugged" diplomats from France, Germany, Greece and Indonesia, as well as Mr Kruschev's hotel suite during his visit to Britain in the 1950's, and was guilty of routine burglary and "bugging" (including the entering of Soviet consulates abroad);

(c) MI5 plotted unsuccessfully to assassinate President Nasser of Egypt at the time of the Suez crisis;

(d) MI5 plotted against Harold Wilson during his premiership from 1974 to 1976;

(e) MI5 (contrary to its guidelines) diverted its resources to investigate left-wing political groups in Britain.

The Observer and Guardian articles, which were written by Mr David Leigh and Mr Paul Lashmar and by Mr Richard Norton-Taylor respectively,

were based on investigations by these journalists from confidential sources and not on generally available international press releases or similar material. However, much of the actual information in the articles had already been published elsewhere (see paragraph 12 above). The English courts subsequently inferred that, on the balance of probabilities, the journalists' sources must have come from the offices of the publishers of Spycatcher or the solicitors acting for them and the author (see the judgment of 21 December 1987 of Mr Justice Scott; paragraph 40 below).

15. The Attorney General instituted proceedings for breach of confidence in the Chancery Division of the High Court of Justice of England and Wales against The Observer Ltd, the proprietors and publishers of the Observer, Mr Donald Trelford, its editor, and Mr Leigh and Mr Lashmar, and against Guardian Newspapers Ltd, the proprietors and publishers of The Guardian, Mr Peter Preston, its editor, and Mr Norton-Taylor.

The Attorney General sought permanent injunctions against the defendants (who are hereinafter together referred to as "O.G."), restraining them from making any publication of Spycatcher material. He based his claim on the principle that the information in the memoirs was confidential and that a third party coming into possession of information knowing that it originated from a breach of confidence owed the same duty to the original confider as that owed by the original confidant. It was accepted that an award of damages would have been an insufficient and inappropriate remedy for the Attorney General and that only an injunction would serve his purpose.

16. The evidential basis for the Attorney General's claim was two affidavits sworn by Sir Robert Armstrong, Secretary to the British Cabinet, in the Australian proceedings on 9 and 27 September 1985. He had stated therein, inter alia, that the publication of any narrative based on information available to Mr Wright as a member of the Security Service would cause unquantifiable damage, both to the service itself and to its officers and other persons identified, by reason of the disclosures involved. It would also undermine the confidence that friendly countries and other organisations and persons had in the Security Service and create a risk of other employees or former employees of that service seeking to publish similar information.

17. On 27 June 1986 ex parte interim injunctions were granted to the Attorney General restraining any further publication of the kind in question pending the substantive trial of the actions. On an application by O.G. and after an inter partes hearing on 11 July, Mr Justice Millett (sitting in the Chancery Division) decided that these injunctions should remain in force, but with various modifications. The defendants were given liberty to apply to vary or discharge the orders on giving twenty-four hours' notice.

18. The reasons for Mr Justice Millett's decision may be briefly summarised as follows.

(a) Disclosure by Mr Wright of information acquired as a member of the Security Service would constitute a breach of his duty of confidentiality.

(b) O.G. wished to be free to publish further information deriving directly or indirectly from Mr Wright and disclosing alleged unlawful activity on the part of the Security Service, whether or not it had been previously published.

(c) Neither the right to freedom of speech nor the right to prevent the disclosure of information received in confidence was absolute.

(d) In resolving, as in the present case, a conflict between the public interest in preventing and the public interest in allowing such disclosure, the court had to take into account all relevant considerations, including the facts that this was an interlocutory application and not the trial of the action, that the injunctions sought at this stage were only temporary and that the refusal of injunctive relief might cause irreparable harm and effectively deprive the Attorney General of his rights. In such circumstances, the conflict should be resolved in favour of restraint, unless the court was satisfied that there was a serious defence of public interest that might succeed at the trial: an example would be when the proposed publication related to unlawful acts, the disclosure of which was required in the public interest. This could be regarded either as an exception to the American Cyanamid principles (see paragraph 10 above) or their application in special circumstances where the public interest was invoked on both sides.

(e) The Attorney General's principal objection was not to the dissemination of allegations about the Security Service but to the fact that those allegations were made by one of its former employees, it being that particular fact which O.G. wished to publish. There was credible evidence (in the shape of Sir Robert Armstrong's affidavits; see paragraph 16 above) that the appearance of confidentiality was essential to the operation of the Security Service and that the efficient discharge of its duties would be impaired, with consequent danger to national security, if senior officers were known to be free to disclose what they had learned whilst employed by it. Although this evidence remained to be tested at the substantive trial, the refusal of an interlocutory injunction would permit indirect publication and permanently deprive the Attorney General of his rights at the trial. Bearing in mind, inter alia, that the alleged unlawful activities had occurred some time in the past, there was, moreover, no compelling interest requiring publication immediately rather than after the trial.

In the subsequent stages of the interlocutory proceedings, both the Court of Appeal (see paragraphs 19 and 34 below) and all the members of the Appellate Committee of the House of Lords (see paragraphs 35-36 below) considered that this initial grant of interim injunctions by Mr Justice Millett was justified.

19. On 25 July 1986 the Court of Appeal dismissed an appeal by O.G. and upheld the injunctions, with minor modifications. It referred to the

American Cyanamid principles (see paragraph 10 above) and considered that Mr Justice Millett had not misdirected himself or exercised his discretion on an erroneous basis. It refused leave to appeal to the House of Lords. It also certified the case as fit for a speedy trial.

As amended by the Court of Appeal, the injunctions ("the Millett injunctions") restrained O.G., until the trial of the action or further order, from:

> "1. disclosing or publishing or causing or permitting to be disclosed or published to any person any information obtained by Peter Maurice Wright in his capacity as a member of the British Security Service and which they know, or have reasonable grounds to believe, to have come or been obtained, whether directly or indirectly, from the said Peter Maurice Wright;
>
> 2. attributing in any disclosure or publication made by them to any person any information concerning the British Security Service to the said Peter Maurice Wright whether by name or otherwise."

The orders contained the following provisos:

> "1. this Order shall not prohibit direct quotation of attributions to Peter Maurice Wright already made by Mr Chapman Pincher in published works, or in a television programme or programmes broadcast by Granada Television;
>
> 2. no breach of this Order shall be constituted by the disclosure or publication of any material disclosed in open court in the Supreme Court of New South Wales unless prohibited by the Judge there sitting or which, after the trial there in action no. 4382 of 1985, is not prohibited from publication;
>
> 3. no breach of this Order shall be constituted by a fair and accurate report of proceedings in (a) either House of Parliament in the United Kingdom whose publication is permitted by that House; or (b) a court of the United Kingdom sitting in public."

20. On 6 November 1986 the Appellate Committee of the House of Lords granted leave to appeal against the Court of Appeal's decision. The appeal was subsequently withdrawn in the light of the House of Lords decision of 30 July 1987 (see paragraphs 35-36 below).

B. The first-instance decision in Australia

21. The trial of the Government's action in Australia (see paragraph 13 above) took place in November and December 1986. The proceedings were reported in detail in the media in the United Kingdom and elsewhere. In a judgment delivered on 13 March 1987 Mr Justice Powell rejected the Attorney General's claim against Mr Wright and his publishers, holding that much of the information in Spycatcher was no longer confidential and that publication of the remainder would not be detrimental to the British Government or the Security Service. The undertakings not to publish were then discharged by order of the court.

The Attorney General lodged an appeal; after a hearing in the New South Wales Court of Appeal in the week of 27 July 1987, judgment was reserved. The defendants had given further undertakings not to publish whilst the appeal was pending.

C. Further press reports concerning Spycatcher; the Independent case

22. On 27 April 1987 a major summary of certain of the allegations in Spycatcher, allegedly based on a copy of the manuscript, appeared in the United Kingdom national daily newspaper The Independent. Later the same day reports of that summary were published in The London Evening Standard and the London Daily News.

On the next day the Attorney General applied to the Queen's Bench Division of the High Court for leave to move against the publishers and editors of these three newspapers for contempt of court that is conduct intended to interfere with or prejudice the administration of justice. Leave was granted on 29 April. In this application (hereinafter referred to as "the Independent case") the Attorney General was not acting - as he was in the breach of confidence proceedings against O.G. - as the representative of the Government, but independently and in his capacity as "the guardian of the public interest in the due administration of justice".

Reports similar to those of 27 April appeared on 29 April in Australia, in The Melbourne Age and the Canberra Times, and on 3 May in the United States of America, in The Washington Post.

23. On 29 April 1987 O.G. applied for the discharge of the Millett injunctions (see paragraph 19 above) on the ground that there had been a significant change of circumstances since they were granted. They referred to what had transpired in the Australian proceedings and to the United Kingdom newspaper reports of 27 April.

The Vice-Chancellor, Sir Nicolas Browne-Wilkinson, began to hear these applications on 7 May but adjourned them pending the determination of a preliminary issue of law, raised in the Independent case (see paragraph 22 above), on which he thought their outcome to be largely dependent, namely "whether a publication made in the knowledge of an outstanding injunction against another party, and which if made by that other party would be in breach thereof, constitutes a criminal contempt of court upon the footing that it assaults or interferes with the process of justice in relation to the said injunction". On 11 May, in response to the Vice-Chancellor's invitation, the Attorney General pursued the proceedings in the Independent case in the Chancery Division of the High Court and the Vice-Chancellor ordered the trial of the preliminary issue.

24. On 14 May 1987 Viking Penguin Incorporated, which had purchased from Mr Wright's Australian publishers the United States

publication rights to Spycatcher, announced its intention of publishing the book in the latter country.

25. On 2 June 1987 the Vice-Chancellor decided the preliminary issue of law in the Independent case. He held that the reports that had appeared on 27 April 1987 (see paragraph 22 above) could not, as a matter of law, amount to contempt of court because they were not in breach of the express terms of the Millett injunctions and the three newspapers concerned had not been a party to those injunctions or to a breach thereof by the persons they enjoined. The Attorney General appealed.

26. On 15 June 1987 O.G., relying on the intended publication in the United States, applied to have the hearing of their application for discharge of the Millett injunctions restored (see paragraph 23 above). The matter was, however, adjourned pending the outcome of the Attorney General's appeal in the Independent case, the hearing of which began on 22 June.

D. Serialisation of Spycatcher begins in The Sunday Times

27. On 12 July 1987 The Sunday Times, which had purchased the British newspaper serialisation rights from Mr Wright's Australian publishers and obtained a copy of the manuscript from Viking Penguin Incorporated in the United States, printed – in its later editions in order to avoid the risk of proceedings for an injunction - the first instalment of extracts from Spycatcher. It explained that this was timed to coincide with publication of the book in the United States, which was due to take place on 14 July.

On 13 July the Attorney General commenced proceedings against S.T. for contempt of court, on the ground that the publication frustrated the purpose of the Millett injunctions.

E. Publication of Spycatcher in the United States of America

28. On 14 July 1987 Viking Penguin Incorporated published Spycatcher in the United States of America; some copies had, in fact, been put on sale on the previous day. It was an immediate best-seller. The British Government, which had been advised that proceedings to restrain publication in the United States would not succeed, took no legal action to that end either in that country or in Canada, where the book also became a best-seller.

29. A substantial number of copies of the book were then brought into the United Kingdom, notably by British citizens who had bought it whilst visiting the United States or who had purchased it by telephone or post from American bookshops. The telephone number and address of such bookshops willing to deliver the book to the United Kingdom were widely advertised in that country. No steps to prevent such imports were taken by the British

Government, which formed the view that although a ban was within their powers, it was likely to be ineffective. They did, however, take steps to prevent the book's being available at United Kingdom booksellers or public libraries.

F. Conclusion of the Independent case

30. On 15 July 1987 the Court of Appeal announced that it would reverse the judgment of the Vice-Chancellor in the Independent case (see paragraph 25 above). Its reasons, which were handed down on 17 July, were basically as follows: the purpose of the Millett injunctions was to preserve the confidentiality of the Spycatcher material until the substantive trial of the actions against O.G.; the conduct of The Independent, The London Evening Standard and the London Daily News could, as a matter of law, constitute a criminal contempt of court because publication of that material would destroy that confidentiality and, hence, the subject-matter of those actions and therefore interfere with the administration of justice. The Court of Appeal remitted the case to the High Court for it to determine whether the three newspapers had acted with the specific intent of so interfering (sections 2(3) and 6(c) of the Contempt of Court Act 1981).

31. The Court of Appeal refused the defendants leave to appeal to the House of Lords and they did not seek leave to appeal from the House itself. Neither did they apply to the High Court for modification of the Millett injunctions. The result of the Court of Appeal's decision was that those injunctions were effectively binding on all the British media, including The Sunday Times.

G. Conclusion of the interlocutory proceedings in the Observer, Guardian and Sunday Times cases; maintenance of the Millett injunctions

32. S.T. made it clear that, unless restrained by law, they would publish the second instalment of the serialisation of Spycatcher on 19 July 1987. On 16 July the Attorney General applied for an injunction to restrain them from publishing further extracts, maintaining that this would constitute a contempt of court by reason of the combined effect of the Millett injunctions and the decision in the Independent case (see paragraph 30 above).

On the same day the Vice-Chancellor granted a temporary injunction restraining publication by S.T. until 21 July 1987. It was agreed that on 20 July he would consider the application by O.G. for discharge of the Millett injunctions (see paragraph 26 above) and that, since they effectively bound S.T. as well, the latter would have a right to be heard in support of that application. It was further agreed that he would also hear the Attorney

General's claim for an injunction against S.T. and that that claim would fail if the Millett injunctions were discharged.

33. Having heard argument from 20 to 22 July 1987, the Vice-Chancellor gave judgment on the last-mentioned date, discharging the Millett injunctions and dismissing the claim for an injunction against S.T.

The Vice-Chancellor's reasons may be briefly summarised as follows.

(a) There had, notably in view of the publication in the United States (see paragraphs 28-29 above), been a radical change of circumstances, and it had to be considered if it would be appropriate to grant the injunctions in the new circumstances.

(b) Having regard to the case-law and notwithstanding the changed circumstances, it had to be assumed that the Attorney General still had an arguable case for obtaining an injunction against O.G. at the substantive trial; accordingly, the ordinary American Cyanamid principles (see paragraph 10 above) fell to be applied.

(c) Since damages would be an ineffective remedy for the Attorney General and would be no compensation to the newspapers, it had to be determined where the balance of convenience lay; the preservation of confidentiality should be favoured unless another public interest outweighed it.

(d) Factors in favour of continuing the injunctions were: the proceedings were only interlocutory; there was nothing new or urgent about Mr Wright's allegations; the injunctions would bind all the media, so that there would be no question of discrimination; undertakings not to publish were still in force in Australia; to discharge the injunctions would mean that the courts were powerless to preserve confidentiality; to continue the injunctions would discourage others from following Mr Wright's example.

(e) Factors in favour of discharging the injunctions were: publication in the United States had destroyed a large part of the purpose of the Attorney General's actions; publications in the press, especially those concerning allegations of unlawful conduct in the public service, should not be restrained unless this was unavoidable; the courts would be brought into disrepute if they made orders manifestly incapable of achieving their purpose.

(f) The matter was quite nicely weighted and in no sense obvious but, with hesitation, the balance fell in favour of discharging the injunctions.

The Attorney General immediately appealed against the Vice-Chancellor's decision; pending the appeal the injunctions against O.G., but not the injunction against S.T. (see paragraph 32 above), were continued in force.

34. In a judgment of 24 July 1987 the Court of Appeal held that:

(a) the Vice-Chancellor had erred in law in various respects, so that the Court of Appeal could exercise its own discretion;

(b) in the light of the American publication of Spycatcher, it was inappropriate to continue the Millett injunctions in their original form;

(c) it was, however, appropriate to vary these injunctions to restrain publication in the course of business of all or part of the book or other statements by or attributed to Mr Wright on security matters, but to permit "a summary in very general terms" of his allegations.

The members of the Court of Appeal considered that continuation of the injunctions would: serve to restore confidence in the Security Service by showing that memoirs could not be published without authority (Sir John Donaldson, Master of the Rolls); serve to protect the Attorney General's rights until the trial (Lord Justice Ralph Gibson); or fulfil the courts' duty of deterring the dissemination of material written in breach of confidence (Lord Justice Russell).

The Court of Appeal gave leave to all parties to appeal to the House of Lords.

35. After hearing argument from 27 to 29 July 1987 (when neither side supported the Court of Appeal's compromise solution), the Appellate Committee of the House of Lords gave judgment on 30 July, holding, by a majority of three (Lord Brandon of Oakbrook, Lord Templeman and Lord Ackner) to two (Lord Bridge of Harwich - the immediate past Chairman of the Security Commission - and Lord Oliver of Aylmerton), that the Millett injunctions should continue. In fact, they subsequently remained in force until the commencement of the substantive trial in the breach of confidence actions on 23 November 1987 (see paragraph 39 below).

The majority also decided that the scope of the injunctions should be widened by the deletion of part of the proviso that had previously allowed certain reporting of the Australian proceedings (see paragraph 19 above), since the injunctions would be circumvented if English newspapers were to reproduce passages from Spycatcher read out in open court. In the events that happened, this deletion had, according to the Government, no practical incidence on the reporting of the Australian proceedings.

36. The members of the Appellate Committee gave their written reasons on 13 August 1987; they may be briefly summarised as follows.

(a) Lord Brandon of Oakbrook

(i) The object of the Attorney General's actions against O.G. was the protection of an important public interest, namely the maintenance as far as possible of the secrecy of the Security Service; as was recognised in Article 10 para. 2 (art. 10-2) of the Convention, the right to freedom of expression was subject to certain exceptions, including the protection of national security.

(ii) The injunctions in issue were only temporary, being designed to hold the ring until the trial, and their continuation did not prejudge the decision to be made at the trial on the claim for final injunctions.

(iii) The view taken in the courts below, before the American publication, that the Attorney General had a strong arguable case for obtaining final injunctions at the trial was not really open to challenge.

(iv) Publication in the United States had weakened that case, but it remained arguable; it was not clear whether, as a matter of law, that publication had caused the newspapers' duty of non-disclosure to lapse. Although the major part of the potential damage adverted to by Sir Robert Armstrong (see paragraph 16 above) had already been done, the courts might still be able to take useful steps to reduce the risk of similar damage by other Security Service employees in the future. This risk was so serious that the courts should do all they could to minimise it.

(v) The only way to determine the Attorney General's case justly and to strike the proper balance between the public interests involved was to hold a substantive trial at which evidence would be adduced and subjected to cross-examination.

(vi) Immediate discharge of the injunctions would completely destroy the Attorney General's arguable case at the interlocutory stage, without his having had the opportunity of having it tried on appropriate evidence.

(vii) Continuing the injunctions until the trial would, if the Attorney General's claims then failed, merely delay but not prevent the newspapers' right to publish information which, moreover, related to events that had taken place many years in the past.

(viii) In the overall interests of justice, a course which could only result in temporary and in no way irrevocable damage to the cause of the newspapers was to be preferred to one which might result in permanent and irrevocable damage to the cause of the Attorney General.

(b) Lord Templeman (who agreed with the observations of Lords Brandon and Ackner)

(i) The appeal involved a conflict between the right of the public to be protected by the Security Service and its right to be supplied with full information by the press. It therefore involved consideration of the Convention, the question being whether the interference constituted by the injunctions was, on 30 July 1987, necessary in a democratic society for one or more of the purposes listed in Article 10 para. 2 (art. 10-2).

(ii) In terms of the Convention, the restraints were necessary in the interests of national security, for protecting the reputation or rights of others, for preventing the disclosure of information received in confidence and for maintaining the authority of the judiciary. The restraints would prevent harm to the Security Service, notably in the form of the mass circulation, both now and in the future, of accusations to which its members could not respond. To discharge the injunctions would surrender to the press the power to evade a court order designed to protect the confidentiality of information obtained by a member of the Service.

(c) Lord Ackner (who agreed with the observations of Lord Templeman)

(i) It was accepted by all members of the Appellate Committee that: the Attorney General had an arguable case for a permanent injunction; damages were a worthless remedy for the Crown which, if the Millett injunctions were not continued, would lose forever the prospect of obtaining permanent injunctions at the trial; continuation of the Millett injunctions was not a "final locking-out" of the press which, if successful at the trial, would then be able to publish material that had no present urgency; there was a real public interest, that required protection, concerned with the efficient functioning of the Security Service and it extended, as was not challenged by the newspapers, to discouraging the use of the United Kingdom market for the dissemination of unauthorised memoirs of Security Service officers.

(ii) It would thus be a denial of justice to refuse to allow the injunctions to continue until the trial, for that would sweep aside the public-interest factor without any trial and would prematurely and permanently deny the Attorney General any protection from the courts.

(d) Lord Bridge of Harwich

(i) The case in favour of maintaining the Millett injunctions - which had been properly granted in the first place - would not be stronger at the trial than it was now; it would be absurd to continue them temporarily if no case for permanent injunctions could be made out.

(ii) Since the Spycatcher allegations were now freely available to the public, it was manifestly too late for the injunctions to serve the interest of national security in protecting sensitive information.

(iii) It could be assumed that the Attorney General could still assert a bare duty binding on the newspapers, but the question was whether the Millett injunctions could still protect an interest of national security of sufficient weight to justify the resultant encroachment on freedom of speech. The argument that their continuation would have a deterrent effect was of minimal weight.

(iv) The attempt to insulate the British public from information freely available elsewhere was a significant step down the road to censorship characteristic of a totalitarian regime and, if pursued, would lead to the Government’s condemnation and humiliation by the European Court of Human Rights.

(e) Lord Oliver of Aylmerton

(i) Mr Justice Millett’s initial order was entirely correct.

(ii) The injunctions had originally been imposed to preserve the confidentiality of what were at the time unpublished allegations, but that confidentiality had now been irrevocably destroyed by the publication of Spycatcher. It was questionable whether it was right to use the injunctive remedy against the newspapers (who had not been concerned with that publication) for the remaining purpose which the injunctions might serve, namely punishing Mr Wright and providing an example to others.

(iii) The newspapers had presented their arguments on the footing that the Attorney General still had an arguable case for the grant of permanent injunctions and there was force in the view that the difficult and novel point of law involved should not be determined without further argument at the trial. However, in the light of the public availability of the Spycatcher material, it was difficult to see how it could be successfully argued that the newspapers should be permanently restrained from publishing it and the case of the Attorney General was unlikely to improve in the meantime. No arguable case for permanent injunctions at the trial therefore remained and the Millett injunctions should accordingly be discharged.

H. Conclusion of the Australian proceedings; further publication of Spycatcher

37. On 24 September 1987 the New South Wales Court of Appeal delivered judgment dismissing the Attorney General's appeal (see paragraph 21 above); the majority held that his claim was not justiciable in an Australian court since it involved either an attempt to enforce indirectly the public laws of a foreign State or a determination of the question whether publication would be detrimental to the public interest in the United Kingdom.

The Attorney General appealed to the High Court of Australia. In view of the publication of Spycatcher in the United States and elsewhere, that court declined to grant temporary injunctions restraining its publication in Australia pending the hearing; it was published in that country on 13 October. The appeal was dismissed on 2 June 1988, on the ground that, under international law, a claim - such as the Attorney General's - to enforce British governmental interests in its security service was unenforceable in the Australian courts.

Further proceedings brought by the Attorney General against newspapers for injunctions were successful in Hong Kong but not in New Zealand.

38. In the meantime publication and dissemination of Spycatcher and its contents continued worldwide, not only in the United States (around 715,000 copies were printed and nearly all were sold by October 1987) and in Canada (around 100,000 copies printed), but also in Australia (145,000 copies printed, of which half were sold within a month) and Ireland (30,000 copies printed and distributed). Nearly 100,000 copies were sent to various European countries other than the United Kingdom and copies were distributed from Australia in Asian countries. Radio broadcasts in English about the book were made in Denmark and Sweden and it was translated into twelve other languages, including ten European.

III. THE SUBSTANTIVE PROCEEDINGS IN ENGLAND

A. Breach of confidence

39. On 27 October 1987 the Attorney General instituted proceedings against S.T. for breach of confidence; in addition to injunctive relief, he sought a declaration and an account of profits. The substantive trial of that action and of his actions against O.G. (see paragraph 15 above) - in which, by an amendment of 30 October, he now claimed a declaration as well as an injunction - took place before Mr Justice Scott in the High Court in November-December 1987. He heard evidence on behalf of all parties, the witnesses including Sir Robert Armstrong (see paragraph 16 above). He also continued the interlocutory injunctions, pending delivery of his judgment.

40. Mr Justice Scott gave judgment on 21 December 1987; it contained the following observations and conclusions.

(a) The ground for the Attorney General's claim for permanent injunctions was no longer the preservation of the secrecy of certain information but the promotion of the efficiency and reputation of the Security Service.

(b) Where a duty of confidence is sought to be enforced against a newspaper coming into possession of information known to be confidential, the scope of its duty will depend on the relative weights of the interests claimed to be protected by that duty and the interests served by disclosure.

(c) Account should be taken of Article 10 (art. 10) of the Convention and the judgments of the European Court establishing that a limitation of free expression in the interests of national security should not be regarded as necessary unless there was a "pressing social need" for the limitation and it was "proportionate to the legitimate aims pursued".

(d) Mr Wright owed a duty to the Crown not to disclose any information obtained by him in the course of his employment in MI5. He broke that duty by writing Spycatcher and submitting it for publication, and the subsequent publication and dissemination of the book amounted to a further breach, so that the Attorney General would be entitled to an injunction against Mr Wright or any agent of his, restraining publication of Spycatcher in the United Kingdom.

(e) O.G. were not in breach of their duty of confidentiality, created by being recipients of Mr Wright's unauthorised disclosures, in publishing their respective articles of 22 and 23 June 1986 (see paragraph 14 above): the articles were a fair report in general terms of the forthcoming trial in Australia and, furthermore, disclosure of two of Mr Wright's allegations was justified on an additional ground relating to the disclosure of "iniquity".

(f) S.T., on the other hand, had been in breach of the duty of confidentiality in publishing the first instalment of extracts from the book on 12 July 1987 (see paragraph 27 above), since those extracts contained certain material which did not raise questions of public interest outweighing those of national security.

(g) S.T. were liable to account for the profits accruing to them as a result of the publication of that instalment.

(h) The Attorney General's claims for permanent injunctions failed because the publication and worldwide dissemination of Spycatcher since July 1987 had had the result that there was no longer any duty of confidence lying on newspapers or other third parties in relation to the information in the book; as regards this issue, a weighing of the national security factors relied on against the public interest in freedom of the press showed the latter to be overwhelming.

(i) The Attorney General was not entitled to a general injunction restraining future publication of information derived from Mr Wright or other members of the Security Service.

After hearing argument, Mr Justice Scott imposed fresh temporary injunctions pending an appeal to the Court of Appeal; those injunctions contained a proviso allowing reporting of the Australian proceedings (see paragraphs 19 and 35 above).

41. On appeal by the Attorney General and a cross-appeal by S.T., the Court of Appeal (composed of Sir John Donaldson, Master of the Rolls, Lord Justice Dillon and Lord Justice Bingham) affirmed, on 10 February 1988, the decision of Mr Justice Scott.

However, Sir John Donaldson disagreed with his view that the articles in the Observer and The Guardian had not constituted a breach of their duty of confidence and that the claim for an injunction against these two newspapers in June 1986 was not "proportionate to the legitimate aim pursued". Lord Justice Bingham, on the other hand, disagreed with Mr Justice Scott's view that S.T. had been in breach of duty by publishing the first instalment of extracts from Spycatcher, that they should account for profits and that the Attorney General had been entitled, in the circumstances as they stood in July 1987, to injunctions preventing further serialisation.

After hearing argument, the Court of Appeal likewise granted fresh temporary injunctions pending an appeal to the House of Lords; O.G. and S.T. were given liberty to apply for variation or discharge if any undue delay arose.

42. On 13 October 1988 the Appellate Committee of the House of Lords (Lord Keith of Kinkel, Lord Brightman, Lord Griffiths, Lord Goff of Chieveley and Lord Jauncey of Tullichettle) also affirmed Mr Justice Scott's decision. Dismissing an appeal by the Attorney General and a cross-appeal by S.T., it held:

"(i) That a duty of confidence could arise in contract or in equity and a confidant who acquired information in circumstances importing such a duty should be precluded from disclosing it to others; that a third party in possession of information known to be confidential was bound by a duty of confidence unless the duty was extinguished by the information becoming available to the general public or the duty was outweighed by a countervailing public interest requiring disclosure of the information; that in seeking to restrain the disclosure of government secrets the Crown must demonstrate that disclosure was likely to damage or had damaged the public interest before relief could be granted; that since the world-wide publication of Spycatcher had destroyed any secrecy as to its contents, and copies of it were readily available to any individual who wished to obtain them, continuation of the injunctions was not necessary; and that, accordingly, the injunctions should be discharged.

(ii) (Lord Griffiths dissenting) that the articles of 22 and 23 June [1986] had not contained information damaging to the public interest; that the Observer and The Guardian were not in breach of their duty of confidentiality when they published [those] articles; and that, accordingly, the Crown would not have been entitled to a permanent injunction against both newspapers.

(iii) That The Sunday Times was in breach of its duty of confidence in publishing its first serialised extract from Spycatcher on 12 July 1987; that it was not protected by either the defence of prior publication or disclosure of iniquity; that imminent publication of the book in the United States did not amount to a justification; and that, accordingly, The Sunday Times was liable to account for the profits resulting from that breach.

(iv) That since the information in Spycatcher was now in the public domain and no longer confidential no further damage could be done to the public interest that had not already been done; that no injunction should be granted against the Observer and The Guardian restraining them from reporting on the contents of the book; and that (Lord Griffiths dissenting) no injunction should be granted against The Sunday Times to restrain serialising of further extracts from the book.

(v) That members and former members of the Security Service owed a lifelong duty of confidence to the Crown, and that since the vast majority of them would not disclose confidential information to the newspapers it would not be appropriate to grant a general injunction to restrain the newspapers from future publication of any information on the allegations in Spycatcher derived from any member or former member of the Security Service."

B. Contempt of court

43. The substantive trial of the Attorney General's actions for contempt of court against The Independent, The London Evening Standard, the London Daily News (see paragraph 22 above), S.T. (see paragraph 27 above) and certain other newspapers took place before Mr Justice Morritt in the High Court in April 1989. On 8 May he held, inter alia, that The Independent and S.T. had been in contempt of court and imposed a fine of £50,000 in each case.

44. On 27 February 1990 the Court of Appeal dismissed appeals by the latter two newspapers against the finding that they had been in contempt but concluded that no fines should be imposed. A further appeal by S.T. against the contempt finding was dismissed by the Appellate Committee of the House of Lords on 11 April 1991.

PROCEEDINGS BEFORE THE COMMISSION

45. In their application (no. 13166/87) lodged with the Commission on 31 July 1987, S.T. alleged that the interlocutory injunctions in question constituted an unjustified interference with their freedom of expression, as guaranteed by Article 10 (art. 10) of the Convention. They further claimed that, contrary to Article 13 (art. 13), they had no effective remedy before a national authority for their Article 10 (art. 10) complaint and that they were victims of discrimination in breach of Article 14 (art. 14).

46. The Commission declared the application admissible on 5 October 1989. In its report of 12 July 1990 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a violation of Article 10 (art. 10), but not of Article 13 (art. 13) or Article 14 (art. 14).

The full text of the Commission's opinion and of the concurring opinion contained in the report is reproduced as an annex to this judgment[*****]. On 2 February 1989, S.T lodged with the Commission a separate application - which is still pending before it - relating to the finding that the publication of the first extract from Spycatcher on 12 July 1987 constituted a breach of their duty of confidence (see paragraph 42 (iii) above). They informed the Court at its hearing on 25 June 1991 that they were also making a further application in respect of the finding that they had been in contempt of court (see paragraph 44 above).

FINAL SUBMISSIONS MADE TO THE COURT

47. At the hearing on 25 June 1991, S.T. requested the Court: (a) to find that the continuation of the injunctions on 30 July 1987 was a breach of Article 10 (art. 10); (b) to require the Government to pay to them the costs and expenses they had incurred in England and in Strasbourg; and (c) to

[*****] Note by the Registrar
For practical reasons this annex will appear only with the printed version of the judgment (volume 217 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

make it clear that the test laid down in American Cyanamid Co. v. Ethicon Ltd did not comply with Article 10 (art. 10).

The Government, for their part, invited the Court to make the findings set out in their memorial, namely that there had been no breach of S.T.'s rights under Articles 10, 13 or 14 (art. 10, art. 13, art. 14).

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10) OF THE CONVENTION

A. Introduction

48. S.T alleged that they had been victims of a violation of Article 10 (art. 10) of the Convention, which provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

This violation was said to have arisen on account of the interlocutory injunctions which were initially imposed on O.G. and which, as a result of the Independent case, were effectively binding on S.T. too, through the doctrine of contempt of court (see paragraphs 17-19 and 30-31 above). The complaint was directed to the restrictions in force during the period from 30 July 1987 to 13 October 1988 and not to the restraints to which S.T. were (see paragraph 32 above) or might have been subject before that.

The allegation was contested by the Government, but accepted unanimously by the Commission.

49. The restrictions complained of clearly constituted, as was not disputed, an "interference" with S.T.'s exercise of their freedom of expression, as guaranteed by paragraph 1 of Article 10 (art. 10-1).

S.T. did not suggest that this interference was not "prescribed by law" or did not have an aim or aims that were legitimate under Article 10 para. 2 (art. 10-2) and the Court perceives no ground for holding otherwise. For the reasons developed in its Observer and Guardian judgment of today's date (Series A no. 216, pp. 27- 29, paras. 50-57), it considers that the Millett injunctions were "prescribed by law" and had the primary aim of "maintaining the authority of the judiciary" and the further aim of protecting "national security". To this it would only add that there is no material before it in the present case to suggest that the principles of the law of contempt of court, by the operation whereof the Millett injunctions bound S.T., did not meet the requirements flowing from the expression "prescribed by law". Furthermore, those principles, being designed to prevent conduct intended to interfere with or prejudice the administration of justice (see paragraph 22 above), clearly had the aim of "maintaining the authority of the judiciary".

B. Was the interference "necessary in a democratic society"?

1. General principles

50. Argument before the Court was concentrated on the question whether the interference complained of could be regarded as "necessary in a democratic society". In this connection, the Court's judgments relating to Article 10 (art. 10) – starting with Handyside (7 December 1976; Series A no. 24), concluding, most recently, with Oberschlick (23 May 1991; Series A no. 204) and including, amongst several others, Sunday Times (26 April 1979; Series A no. 30) and Lingens (8 July 1986; Series A no. 103) - enounce the following major principles.

(a) Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.

(b) These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".

(c) The adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (art. 10).

(d) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 (art. 10) the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

51. For the avoidance of doubt, and having in mind the written comments that were submitted in this case by "Article 19" (see paragraph 6 above), the Court would only add to the foregoing that Article 10 (art. 10) of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such. This is evidenced not only by the words "conditions", "restrictions", "preventing" and "prevention" which appear in that provision, but also by the Court's Sunday Times judgment of 26 April 1979 and its markt intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989 (Series A no. 165). On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.

2. Application in the present case of the foregoing principles

52. S.T. contended that the interference complained of was not "necessary in a democratic society". They relied in particular on the fact that Spycatcher had been published in the United States of America on 14 July 1987 (see paragraph 28 above), with the result that the confidentiality of its contents had been destroyed. Furthermore, Mr Wright's memoirs were obtainable from abroad by residents of the United Kingdom, the Government having made no attempt to impose a ban on importation (see paragraph 29 above).

53. In the submission of the Government, the continuation of the interlocutory injunctions during the period from 30 July 1987 to 13 October 1988 nevertheless remained "necessary", in terms of Article 10 (art. 10), for

maintaining the authority of the judiciary and thereby protecting the interests of national security. They relied on the conclusion of the House of Lords in July 1987 that, notwithstanding the United States publication: (a) the Attorney General still had an arguable case for permanent injunctions against S.T., which case could be fairly determined only if restraints on publication were imposed pending the substantive trial; and (b) there was still a national security interest in preventing the general dissemination of the contents of the book through the press and a public interest in discouraging the unauthorised publication of memoirs containing confidential material.

54. The fact that the further publication of Spycatcher material could have been prejudicial to the trial of the Attorney General's claims for permanent injunctions was certainly, in terms of the aim of maintaining the authority of the judiciary, a "relevant" reason for continuing the restraints in question. The Court finds, however, that in the circumstances it does not constitute a "sufficient" reason for the purposes of Article 10 (art. 10).

It is true that the House of Lords had regard to the requirements of the Convention, even though it is not incorporated into domestic law (see paragraph 36 above). It is also true that there is some difference between the casual importation of copies of Spycatcher into the United Kingdom and mass publication of its contents in the press. On the other hand, even if the Attorney General had succeeded in obtaining permanent injunctions at the substantive trial, they would have borne on material the confidentiality of which had been destroyed in any event – and irrespective of whether any further disclosures were made by S.T. - as a result of the publication in the United States. Seen in terms of the protection of the Attorney General's rights as a litigant, the interest in maintaining the confidentiality of that material had, for the purposes of the Convention, ceased to exist by 30 July 1987 (see, mutatis mutandis, the Weber judgment of 22 May 1990, Series A no. 177, p. 23, para. 51).

55. As regards the interests of national security relied on, the Court observes that in this respect the Attorney General's case underwent, to adopt the words of Mr Justice Scott, "a curious metamorphosis" (Attorney General v. Guardian Newspapers Ltd (no. 2) [1990] 1 Appeal Cases 140F). As emerges from Sir Robert Armstrong's evidence (see paragraph 16 above), injunctions were sought at the outset, inter alia, to preserve the secret character of information that ought to be kept secret. By 30 July 1987, however, the information had lost that character and, as was observed by Lord Brandon of Oakbrook (see paragraph 36 (a) (iv) above), the major part of the potential damage adverted to by Sir Robert Armstrong had already been done. By then, the purpose of the injunctions had thus become confined to the promotion of the efficiency and reputation of the Security Service, notably by: preserving confidence in that Service on the part of third parties; making it clear that the unauthorised publication of memoirs

by its former members would not be countenanced; and deterring others who might be tempted to follow in Mr Wright's footsteps.

The Court does not regard these objectives as sufficient to justify the interference complained of. It is, in the first place, open to question whether the actions against S.T. could have served to advance the attainment of these objectives any further than had already been achieved by the steps taken against Mr Wright himself. Again, bearing in mind the availability of an action for an account of profits (see paragraphs 39-42 above), the Court shares the doubts of Lord Oliver of Aylmerton (see paragraph 36 (e)(ii) above) as to whether it was legitimate, for the purpose of punishing Mr Wright and providing an example to others, to use the injunctive remedy against persons, such as S.T., who had not been concerned with the publication of Spycatcher. Above all, continuation of the restrictions after July 1987 prevented newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern.

56. Having regard to the foregoing, the Court concludes that the interference complained of was not "necessary in a democratic society" and that there was accordingly a violation of Article 10 (art. 10).

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, TAKEN IN CONJUNCTION WITH ARTICLE 10 (art. 14+10)

57. S.T. complained that, unlike themselves, publishers in the United States of America and elsewhere outside the United Kingdom were free to impart the information and ideas contained in Spycatcher to their readers. They alleged that on this account they had been victims of a violation of Article 14 of the Convention, taken in conjunction with Article 10 (art. 14+10), the former provision (art. 14) reading as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

58. The Court agrees with the Government and the Commission that this complaint has to be rejected.

Article 14 (art. 14) affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see, for example, the Fredin judgment of 18 February 1991, Series A no. 192, p. 19, para. 60). If and in so far as foreign publishers were not subject to the same restrictions as S.T., this was because they were not subject to the jurisdiction of the English courts and hence were not in a situation similar to that of S.T.

59. There was thus no violation of Article 14 taken in conjunction with Article 10 (art. 14+10).

III. ALLEGED VIOLATION OF ARTICLE 13 (art. 13) OF THE CONVENTION

60. S.T. asserted that they had no effective remedy in England for their complaints: Articles 10 and 14 (art. 10, art. 14) of the Convention and their standards were not incorporated into English law and there were no equivalent domestic provisions, the standards laid down in American Cyanamid Co. v. Ethicon Ltd (see paragraph 10 above) being less strict. They alleged that on this account they had been victims of a violation of Article 13 (art. 13) of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

61. The Court agrees with the Government and the Commission that this allegation has to be rejected.

The thrust of S.T.'s complaint under the Convention was that the imposition of interlocutory injunctions constituted an unjustified interference with their freedom of expression and it is clear that they not only could but also did raise this issue in substance before the domestic courts. And it has to be recalled that the effectiveness of a remedy, for the purposes of Article 13 (art. 13), does not depend on the certainty of a favourable outcome (see the Soering judgment of 7 July 1989, Series A no. 161, p. 48, para. 122).

As regards the specific matters pleaded, the Court has held on several occasions that there is no obligation to incorporate the Convention into domestic law (see, for example, the James and Others judgment of 21 February 1986, Series A no. 98, p. 47, para. 84). Again, Article 13 (art. 13) does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention (see the same judgment, p. 47, para. 85).

62. There has accordingly been no violation of Article 13 (art. 13).

IV. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

63. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

S.T. made no claim for compensation for damage, but they did seek under this provision reimbursement of their legal costs and expenses in the domestic and the Strasbourg proceedings, in a total amount of £224,340.67.

The Court has examined this issue in the light of the criteria established in its case-law and of the observations submitted by the Government and the applicants.

A. The domestic proceedings

64. The breakdown of the claim, totalling £84,219.80, in respect of costs and expenses referable to the domestic proceedings (the hearings in 1987 before the Vice-Chancellor, the Court of Appeal and the House of Lords; see paragraphs 32-36 above) is as follows:

(a) profit costs of the applicants' solicitors: £36,143.50;

(b) solicitors' disbursements: £9,507.53;

(c) counsel's fees: £30,590.00;

(d) costs and interest paid by the applicants to the Attorney General: £7,978.77.

65. The Court's observations on this claim are as follows.

(a) It agrees with the Government that the costs charged by the solicitors cannot be regarded as "reasonable as to quantum" for the purposes of Article 50 (art. 50).

(b) Whilst it is not in a position to enter into the detailed calculations involved, it shares the Government's doubts as to whether all the disbursements can be considered to have been "necessarily" incurred. The figure to be allowed for this item should accordingly be reduced.

(c) It also considers that the total fees claimed for counsel exceed what can be regarded as reasonable as between the parties.

66. Having regard to the foregoing, the Court awards to the applicants, in respect of their costs and the amount paid to the Attorney General, the sum of £50,000.

B. The Strasbourg proceedings

67. The breakdown of the claim, totalling £140,120.87, in respect of costs and expenses referable to the proceedings before the Convention institutions is as follows:

(a) profit costs of the applicants' solicitors: £82,779.30;

(b) solicitors' disbursements: £16,791.57;

(c) counsel's fees: £40,550.00.

68. The Court's observations on this claim are as follows.

(a) The Government submitted that a reduction should be made if no breach of Articles 13 and 14 (art. 13, art. 14) were found. However, it would not be appropriate to make a significant reduction on this account, since the bulk of the work done by the applicants' advisers related to Article 10 (art. 10) (see, mutatis mutandis, the Granger judgment of 28 March 1990, Series A no. 174, p. 21, para. 55).

(b) The remarks in paragraph 65 above concerning the solicitors' charges, the disbursements and counsel's fees also apply to the Strasbourg proceedings.

69. Having regard to the foregoing, the Court awards the sum of £50,000.

C. Conclusion

70. The total amount to be paid to the applicants is accordingly £100,000. This figure is to be increased by any value-added tax that may be chargeable.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 10 (art. 10) of the Convention;

2. Holds that there has been no violation of Article 13 (art. 13) or of Article 14 taken in conjunction with Article 10 (art. 14+10);

3. Holds that the United Kingdom is to pay, within three months, to the applicants jointly the sum of £100,000 (one hundred thousand pounds), together with any value-added tax that may be chargeable, for costs and expenses;

4. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 November 1991.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) separate opinion of Mr De Meyer (concerning prior restraint), joined by Mr Pettiti, Mr Russo, Mr Foighel and Mr Bigi;

(b) separate opinion of Mr De Meyer (concerning domestic remedies), joined by Mr Pettiti;

(c) separate opinion of Mr Valticos.

R.R.
M.-A.E.

SEPARATE OPINION OF JUDGE DE MEYER (concerning prior restraint), JOINED BY JUDGES PETTITI, RUSSO, FOIGHEL AND BIGI

I concur in the result, but I cannot agree with the Court's reasoning on the subject of prior restraint: my reasons are those stated in my opinion concerning the Observer and Guardian case[*].

[*] Series A no. 216, p. 46.

SEPARATE OPINION OF JUDGE DE MEYER (concerning domestic remedies), JOINED BY JUDGE PETTITI

For the reasons stated in my separate opinion concerning the Observer and Guardian case[*], I cannot subscribe to the third sub-paragraph of paragraph 61 of the present judgment.

[*] Series A no. 216, p. 47.

SEPARATE OPINION OF JUDGE VALTICOS

(Translation)

The observations contained in my separate opinion in the Observer and Guardian case[*] apply equally to paragraph 61 of the present judgment.

[*] Series A no. 216, p. 48.

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

COURT (CHAMBER)

CASE OF THORGEIR THORGEIRSON v. ICELAND

(Application no. 13778/88)

JUDGMENT

STRASBOURG

25 June 1992

In the case of Thorgeir Thorgeirson v. Iceland[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[**] and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr L.-E. PETTITI,
Mr R. MACDONALD,
Mr A. SPIELMANN,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr Gardar GÍSLASON, ad hoc judge,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 27 January and 28 May 1992,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court on 8 March 1991 by the European Commission of Human Rights ("the Commission"), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 13778/88) against the Republic of Iceland lodged with the Commission under Article 25 (art. 25) by Mr Thorgeir Thorgeirson, an Icelandic citizen, on 19 November 1987.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Iceland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 para. 1 and 10 (art. 6-1, art. 10) of the Convention.

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[*] The case is numbered 47/1991/299/370. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings. The President granted him leave to present his own case, subject to his being assisted by the lawyer whom the applicant had designated (Rule 30).

3. The Chamber to be constituted included ex officio Mr Thór Vilhjálmsson, the elected judge of Icelandic nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 22 March 1991 the President drew by lot, in the presence of the Registrar, the names of the seven other members, namely Mr L.-E. Pettiti, Sir Vincent Evans, Mr R. Macdonald, Mr S. K. Martens, Mrs E. Palm, Mr R. Pekkanen and Mr A. N. Loizou (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr A. Spielmann replaced Sir Vincent Evans, who had resigned and whose successor at the Court had taken up his duties before the hearing (Rules 2 para. 3 and 22 para. 1).

By a letter of 1 October 1991 to the President, Mr Thór Vilhjálmsson gave notice of his withdrawal from the case pursuant to Rule 24 para. 2. On 18 November the Icelandic Government ("the Government") notified the Registrar that Mr Gardar Gíslason, then judge at the Reykjavik Civil Court, had been appointed as ad hoc judge (Article 43 of the Convention and Rule 23) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicant on the organisation of the procedure (Rules 37 para. 1 and 38).

In accordance with the order made in consequence, the registry received, on 10 September 1991, the applicant's memorial and, on 17 September, the Government's. On 20 November the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. A number of documents were filed on various dates between 13 October 1991 and 21 January 1992 by the applicant, the Commission and the Government, including further particulars of the his claim under Article 50 (art. 50).

6. As directed by the President, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 January 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr Thorsteinn GEIRSSON, Secretary General
of the Ministry of Justice and Ecclesiastical Affairs,
Agent,

Mr Gunnlaugur CLAESSEN, Solicitor-General
of the Government of Iceland, *Counsel*,

Mr Markús SIGURBJÖRNSSON, Professor, *Adviser*;
- for the Commission
Mr H. DANELIUS, *Delegate*;
- the applicant and his counsel,
Mr Tómas GUNNARSSON, Supreme Court lawyer.

The Court heard addresses by Mr Thorsteinn Geirsson and Mr Gunnlaugur Claessen for the Government, by Mr Danelius for the Commission and by Mr Thorgeir Thorgeirson and Mr Tómas Gunnarsson.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Background

7. Mr Thorgeir Thorgeirson is an Icelandic citizen. He is a writer and resides in Reykjavik, Iceland.

8. From 1979 to 1983 a number of incidents occurred in Iceland involving allegations of police brutality, about ten of which were reported to the police. The last such complaint was made in the autumn of 1983 by a journalist, Mr Skafti Jónsson, and it led to the prosecution of three members of the Reykjavik police, of whom two were acquitted and one convicted. His case received extensive coverage by the press and gave rise to considerable discussion on the relations between the public and the police. This caused the applicant to publish two articles on police brutality in the daily newspaper Morgunbladid on 7 and 20 December 1983 respectively.

9. The first article read as follows (translation):

"LET US CONSIDER NOW!

An open letter to the Minister of Justice Jón Helgason

Honourable Minister of Justice:

(1) Recently a problem which has been bothering - if not obsessing - me for several years has suddenly been highlighted by the press. One of the journalists of your very own progressive party-newspaper - Tíminn [The Time] - had a painful experience and returned with some injuries from the Reykjavik night-life jungle. Often the perils of the jungle and other such inhospitable regions can help us to visualise the hardships that missionaries such as Stanley and Livingstone had to endure, even if they were preaching the worth of God's own Kingdom rather than the co-operative Utopia.

(2) In this case trouble befell one of your political missionaries, the journalist Skafti, in the town's night-life. The photographs of his facial injuries, spread across four newspaper columns, have, of course, shocked us.

(3) We do not want to accept that our policemen have damaged this journalist's handsome face in this way. All he was doing, he tells us, was innocently looking for his overcoat when the beasts in uniform in the aforementioned jungle attacked him.

(4) In my opinion Skafti's case is of little importance. But as it has received a lot of attention and been widely discussed, I would like to use the opportunity to point out to you that the real problem is in fact bigger and much more horrifying.

(5) Skafti's case, brought to our attention by the press, is but the tip of the iceberg. Beneath it, in the dark sea of silence, lurks a problem nine times bigger.

(6) That is the part I would like to bring to your attention, because you are the Minister of Justice and thus in command of those wild beasts in uniform that creep around, silently or not, in the jungle of our town's night-life.

(7) I am certainly not underestimating the pain and hardship that this young man has unnecessarily had to endure. However, Skafti is obviously going to recover. The blue spots on his face will turn violet, then brown and in time they will eventually disappear. He will go back to working for [The Time] and his case will be buried under the mounds of day to day scandals which will pile up like snow after a heavy snowstorm.

That is if we do not use this opportunity to look at the problem in its entirety.

(8) Several years ago I had to spend several weeks on a ward in our local hospital. In a room leading off the same corridor was a man in his twenties lying in his bed. He was a promising and charming young person, but he was paralysed to the extent that he could not move any part of his body, other than his eyes. He was able to read with the aid of special machinery and a helping hand to turn the pages for him.

I was told that his chance of recovery was minimal.

(9) The young man's room-mates told me that his injuries had been inflicted by bouncers of a restaurant and some policemen. At first I could not believe this, so I enquired among the hospital staff and - Yes, they were right; we had there a victim of the Reykjavik night-squad.

(10) The image of this paralysed youngster somehow followed me out of the hospital and I couldn't help talking about his case. I then found out that most people had various stories of persons who had had a similar or even worse experiences with the beasts in uniform. Individuals reduced to a mental age of a new-born child as a result of strangle-holds that policemen and bouncers learn and use with brutal spontaneity instead of handling people with prudence and care. There are so many such stories, identical in substance, that you can hardly dismiss them merely as lies any more. Another thing that goes with those stories as inevitably as brutality follows stupidity is the statement that suing a policeman in such a case would be hopeless. The investigation would be undertaken by another department of the police and there be carried out by an élite group who see it as their duty to wash all policemen clean of any accusations made against them.

(11) The victims of the police brutes remain forgotten, without hope, as the years pass without their causes ever being seriously discussed.

(12) Now this might be one of those rare occasions. It is the reason for this letter of mine.

(13) I have little doubt that there is something essentially wrong in a system where the people in charge seem to disregard all sense of justice and misinterpret their duties by allowing brutes and sadists to act out their perversions - no matter who is the victim. In my opinion the Reykjavik Chief of Police is being stubborn in refusing to relieve the accused policemen from their duties while the 'Jónsson case' is being investigated. Moreover, he seems to lose little of his self-confidence, even though he is up against one of your own partisans in this case. But we shall see.

(14) Even if Mr Jónsson wins his case this will be an exception and will change nothing. Other victims of this brutality will continue to pile up in silence as before.

(15) My opinion is that the real problem lies with a system where policemen investigate other policemen's violations of correct professional conduct. This opinion I share with other much more competent persons - who are obviously hesitant in pronouncing their opinion on this matter fearing the reprisals and beatings that might follow.

The matter is as serious as that.

(16) Two of your predecessors in the office of Minister of Justice have received letters from me regarding these problems. Neither of them had the courtesy to answer.

(17) Recently I have been looking at pictures of you in the paper and I was struck by your facial appearance of fairness and youthfulness mixed with confidence. This indeed is the very kind of facial expression that could at any time easily seep into your character even if it was originally only meant for the photographer.

Therefore I am writing to you as well.

My proposal is the same as it was before:

(18) Stop putting these cases of police brutality into this perfunctory, useless automatic washing-machine. As long as policemen are allowed to clean one another you will never even have the possibility to consider the urgent things such as giving IQ and character tests which must be passed before they are taught how to exercise fatal tricks on people, to make them responsible in cases where they have momentarily lost control of their temper - all of which is needed in order to have a competent police force worthy of the power given to them.

But how can we get rid of the old system?

(19) You have to form a committee of trustworthy people to investigate the rumours, gradually becoming public opinion, that there is more and more brutality within the Reykjavik police force and being hushed up in an unnatural manner. Such a committee could ask victims of police brutality to come forward with their statements for eventual verification. Hopefully the committee will find that it is only a tiny

minority of policemen who are responsible. Those individuals should be advised to look for other jobs.

(20) I have the gut feeling that our Police Problem could be compared with the so-called Youth Problem in the sense that comparatively few individuals are responsible for this negative public opinion of them. Furthermore, those individuals could not be said to be typical of either group - nor the most intelligent.

(21) I have seen the policemen in this town perform many a good deed and therein I have met many an exemplary fellow. We cannot do without them. But I feel I owe it to the young man I met at the local hospital to muster my courage and put forward this proposal: let us try cleaning up this mess so that those who, ready to risk their lives, embark on the adventure of the jungle of the Reykjavik night-life in the future can at least be assured that a policeman in uniform is not among the perils therein.

There are enough other wild beasts.

(22) In court you sometimes put forward an alternative claim in case your main request is not accepted. Should you, Jón Helgason, fail to ensure that this neutral investigation is carried out, I call upon able journalists (Skafti for example) to start this investigation and to publish the results in a book that would very probably become a bestseller. I would at any time be prepared to participate in this.

With all my respect and best wishes,

Yours sincerely,

Thorgeir Thorgeirson"

10. Extracts from the second article read as follows:

"STRIKE WHILE THE FLY IS SITTING ON MY NOSE ...

(1) Thorgeir Thorgeirson’s statement on the policeman Einar Bjarnason’s behaviour in a television programme on December the 13th, in the evening.

...

(2) Last Tuesday, December the 13th, there was a programme about the police problem on television. Among the participants were two police intellectuals who were given free rein, according to the opinion of many spectators. The only spectator whom I heard excusing Bjarki and Einar argued that there had only been two of them and the third one was regrettably missing from their camp, that is to say the supervisor.

This might well be true.

(3) Towards the end of the programme Einar, who happens to be the Chairman of the Reykjavik Police Association, organised an amusing occasion: after having consulted Bjarki with much paper crackling and whispering, he started reading from a typed document containing filth about me, the undersigned, a liar and unreliable person (according to this document which the police somehow had managed to have signed by a person who had nothing to do with it).

(4) Einar could easily have got his message across without breaking the law on radio-broadcasting and thus risking both his honour and his job. Many spectators were astounded by the man's behaviour.

Not surprisingly.

(5) This venture can hardly be explained merely by loss of control, so I feel forced to add another article to what I had thought to be my final word about the matter a week ago (this is written Thursday the 15th of December and will be delivered to the newspaper on Friday the 16th of December).

I have to mention my experience over the last week.

(6) Last Wednesday, i.e. December the 7th, Morgunbladid published my letter to the highest official in the Icelandic judicial world. My request was that he immediately order a neutral investigation of the police problem instead of allowing the problem to control itself forever. Naturally I did not expect my text to be well received at the local police stations.

(7) A certain misunderstanding is always inevitable. Misconception surrounding this matter has bloomed; my ideas of a writer's duty are that he should, at least sometimes, be the local conscience, but our police officers seem to be of a totally different opinion, as is only to be expected.

No harm in that.

(8) The morning my letter to Minister Jón Helgason appeared in the newspaper, astonishingly many people phoned me. Among them was Gudmundur Hermannsson who introduced himself as the Chief Police Constable (yfirlögreglubjónn) of Reykjavik. He wanted to know what case I had been writing about in my article. I told him that the subject had been the situation in general; not an isolated case. There were at least several hundred cases concerned. Gudmundur then asked what the paralysed youngster at the local hospital was called, the one I had mentioned. I told him, which was true, that I had probably never heard the boy's name. Then I asked Gudmundur if the police were currently investigating the matter. His answer was yes. I then pointed out to him that it would be a very bold thing to do in the circumstances: if the police were once again policing themselves. At the same time I refused to say anything else on the telephone, except I told him the date of my hospitalisation. We bade farewell.

...

(9) Time passed until Sunday. The newspapers were full of sobbing statements made by policemen. Sunday's Morgunbladid published an article by a policeman, Jóhannes Jónsson, who referred to Friday the 9th's news item which meant that his manuscript would have reached the editorial office on Saturday. This seemed strange to me, knowing that the normal waiting time to have an article published in Morgunbladid is something like four to six days from the date when the manuscript is handed in to the date of publication. That is when ordinary citizens like us are involved. In his article the policeman also reiterated the 'police-truth' that the case Thorgeir 'meant to refer to' was to be found in a news item on page 13 of Friday's Morgunbladid.

...

(10) Since then something has occurred, and now I must ask Hall to keep his promise and publish this statement of mine. Even though Einar's blow towards the end of the television programme last Tuesday proved to be so much askew that it missed and I am not the one hurt by it, I must point out how very typical of the police his behaviour has been.

(11) What is at the root of this so-called Police Problem? Well - many people think that our policemen have already attacked too many a citizen, guilty or innocent. They have been lashing out far too frequently.

(12) The police reactions which have recently appeared in the press show that they are quite familiar with Jon Thoroddsen's novels - the person who gossips and spreads rumours appears frequently therein. They might also have been reading the Saga of Grettir the Strong whose principle was: you cure ills by pointing to worse.

Anyway that seems to be the line they have taken.

(13) This principle is far too pathetic for a whole police force to follow if we really want people to appreciate their services.

(14) Since Tuesday many people have telephoned me and expressed the opinion that the policemen's show on television was a disastrous exhibition of national characteristics for our children to see.

(15) - They should have been in uniform, someone said. Their behaviour was so typical of what is gradually becoming the public image of our police force defending itself: bullying, forgery, unlawful actions, superstitions, rashness and ineptitude.

In just those words.

(16) The title of this article is taken from the folk tale that everyone should know, about the couple hunting the fly. I thought of it as I was observing the detective sergeant fighting the bee in his bonnet during the television programme. Should our Minister of Justice not have had time to see the programme, I would like to suggest that he borrow the tape which can still be found at the television station - that is if he wants to see a near-perfect illustration of what the general public are more and more referring to as the Police Problem.

(17) The programme should be an example to us of the necessity of an impartial examination of the problem to prevent the police from repeatedly hurting themselves while "investigating" matters which touch their self- esteem and childish pride.

(18) Let us stop these fights and consider the proposal I put forward in my letter to the Minister of Justice. We could even consider an idea suggested by a witty friend of mine:

(19) - Thorgeir, he said. Wouldn't it be an idea to get a really good child psychologist to study these police fights?

Hopefully the matter is not all that complicated.

With thanks for the publication.

Thorgeir Thorgeirson"

11. In response to these articles, the Ministry of Justice sent the applicant a letter dated 9 January 1984. It informed him that the problems raised in the articles were being reviewed at various levels and that the matter was on the agenda of the Parliament (Althing) so that the Minister of Justice could report to it in the near future on the studies and proposals which had been made in this field.

B. Investigation and defamation proceedings

12. By letter of 27 December 1983, the Reykjavik Police Association had asked the public prosecutor to investigate the aforementioned allegations. Accordingly, he sent the case to the State Criminal Investigation Police ("SCIP") on 21 May 1984 to examine whether the publications constituted defamation within the meaning of Article 108 of the General Penal Code of 1940 (Law no. 19/1940 - "the Penal Code"). On 18 June the SCIP interrogated the applicant, who was assisted by his lawyer.

13. As a result, on 13 August 1985 the public prosecutor issued a bill of indictment charging the applicant with defamation of unspecified members of the Reykjavik police, contrary to Article 108 of the Penal Code.

14. The following passages of the first article were considered to be defamatory:

"beasts in uniform" (paragraph 9(3) above);

"of those wild beasts in uniform" (paragraph 9(6) above);

"The young man’s room-mates told me that his injuries had been inflicted by bouncers of a restaurant and some policemen. At first I could not believe this, so I enquired among the hospital staff and - Yes, they were right; we had there a victim of the Reykjavik night- squad" (paragraph 9(9) above);

"I then found out that most people had various stories of persons who had had a similar or even worse experiences with the beasts in uniform. Individuals reduced to a mental age of a new-born child as a result of strangle-holds that policemen and bouncers learn and use with brutal spontaneity instead of handling people with prudence and care. There are so many such stories, identical in substance, that you can hardly dismiss them merely as lies any more" (paragraph 9(10) above);

"victims of the police brutes" (paragraph 9(11) above);

"allowing brutes and sadists to act out their perversions" (paragraph 9(13) above).

15. The second article was also considered to contain a defamatory statement:

"Their behaviour was so typical of what is gradually becoming the public image of our police force defending itself: bullying, forgery, unlawful actions, superstitions, rashness and ineptitude" (paragraph 10(15) above).

16. On 9 September 1985 the indictment was served on the applicant; it summoned him to appear at a sitting on the following day of a chamber of the Reykjavik Criminal Court, of which Judge Pétur Gudgeirsson was the only member. At the applicant's request, the arraignment was adjourned until 17 September.On that day the court held a sitting at which he appeared, accompanied by Mr Tómas Gunnarsson, a Supreme Court lawyer; the public prosecutor was not present. The sitting proceeded as follows:

(a) As required by the second paragraph of Article 77 of the 1974 Code of Criminal Procedure (Law no. 74/1974), the judge informed the defendant that he was being questioned as he was suspected of having committed an offence.

(b) Mr Tómas Gunnarsson was appointed as the applicant's defence counsel. All the case documents were handed to them.

(c) The applicant was asked by the judge whether he had written the two newspaper articles. He replied that he had, but pointed out that the passages quoted in the indictment, while correct, had been removed from their context.

(d) The judge confronted the applicant with a record of his statement to the SCIP on 18 June 1984 and with his letter to them of 19 June. The applicant confirmed the accuracy of the record and that he had written the letter.

(e) When asked by the judge whether he could substantiate the relevant passages in his articles, the applicant maintained that, in their context in the indictment - on which he had already commented -, he was neither able nor obliged to do so; this was not his literary product, but the product of the accuser.

(f) The applicant asked to be given time in which to acquaint himself with the case documents and to prepare his comments. Another sitting was scheduled for 24 September 1985.

17. On that date the applicant and his counsel appeared before the court, again in the absence of the prosecution. Counsel submitted a motion that Judge Pétur Gudgeirsson should withdraw, on the ground that, in addition to acting as judge, he had represented the prosecution because of its absence at this and the previous sittings.

18. On 25 September 1985 the judge decided as follows:

> "This case does not warrant [an adversarial procedure] according to Article 130 of the Code of Criminal Procedure .... [The applicant's] motion that the judge yield his seat is unsupported by any valid arguments and totally unfounded. The judge is neither obliged nor allowed to yield his seat."

19. On 26 September 1985 the prosecution, pursuant to Article 171 of the Code of Criminal Procedure, refused the applicant's request for leave to file an appeal by way of a summary procedure against that decision with the Supreme Court. He subsequently asked the Ministry of Justice to appoint an

ad hoc prosecutor to consider whether leave should be granted, but this request was refused on 18 October.

20. During the period from 9 October 1985 until 28 April 1986, the Criminal Court held six more sittings at which the applicant and his counsel were present. Documents were submitted, oral statements made and witnesses heard. The public prosecutor appeared at each of these sittings, except that on 17 February 1986, when a video-taped television programme was shown to the court.

21. At a sitting held on 25 October 1985, Judge Pétur Gudgeirsson showed the applicant photographs of a person and asked him whether this was the young man at the local hospital, described in the first article (see paragraph 9(8) above). The applicant replied as follows:

> "... it is astounding for an experienced adult to hear another experienced adult ask a question like that. I see and study between one and two hundred persons daily. This would correspond to the entire population of Iceland in about 7 years. Therefore an individual whom I see less than 50 times does not stick in my mind unless there are some special reasons to the contrary. Therefore it is outright absurd and against the nature of the human mind, to ask a person whether he recognises an individual whom he might conceivably have seen seven years ago. I can, however, answer that this is not the young man I had in mind when I wrote the article 'Let Us Consider Now!' ..."

22. During a sitting held on 28 April 1986 the parties agreed that further investigation by the court was not required. Accordingly, counsel was given until 3 June 1986 to submit the applicant's written defence; the prosecutor declared that he would make no further observations.

23. In his defence, which was filed on 3 June 1986, the applicant resuscitated the claim (see paragraphs 17-19 above) that the case should be dismissed or the defendant acquitted on account of the prosecutor's absence at certain sittings of the trial. With regard to the merits of the case, he claimed, inter alia, the following:

> "It is of course the general public that is assaulted by policemen ... . Such an experience is quite memorable and, in the normal course of things, one person tells another. In the process descriptions frequently become exaggerated. As the instances increase in number a public opinion is formed, which naturally is even rougher at the edges than the problem itself. To a significant extent, I used this public opinion as a main feature of my article 'Let Us Consider Now!'. Public opinion is, of course, in itself a fact and its origins are generally less important and less open to dispute ...
>
> If public opinion turns sour, confidence in policemen is lost, also in policemen who have never as much as hurt a fly. In the autumn of 1983 this loss of confidence had assumed proportions outright dangerous to public welfare. So, when the case of Skafti Jónsson emerged, I became aware of this danger. And my ... article published in Morgunbladid on 7 December 1983 was my reaction to this dangerous situation. By writing the article I consider that I was performing the duty of an honourable writer who studies the spirit of the nation and reports his findings without hiding the truth. This is clear to any person who is willing to read the article in its entirety and puts his mind to really understanding what is written there.

...

But the main purpose of the article, and its conclusion, was to request the Minister to have an investigation carried out as to whether public opinion was correct or incorrect. The article was intended to raise a lawful, urgent question.

Even though my intention was to write an article completely within the limits of the law, I shall not hide the fact that I also tried to phrase the text in such a way as to elicit answers from the parties concerned. The question, of course, was about the truthfulness of the menacing public opinion. If this was incorrect, the police authorities (which alone may possess comprehensive knowledge of these matters) could be expected to react in the composed, confident and calm manner of respectable, honest souls. The Board of the Police Association and the Chief of Police would simply have recommended to the Minister that he initiate at the earliest opportunity an impartial investigation of the matter asked for. Such a reaction would also have calmed the public considerably, as it would have borne witness to good faith."

24. On 16 June 1986, at a sitting attended by the applicant, judgment was delivered by Judge Pétur Gudgeirsson who rejected the claim based on the prosecutor's absence at certain sittings. As to the merits he stated inter alia:

"According to the evidence submitted, the defendant underwent treatment at the Reykjavik City Hospital from 19 June to 11 July 1978. At the same time a patient named Trausti Ellidason ... was staying there, [completely] paralysed following a physical assault by an acquaintance of his ... . The defendant has been shown photographs of Trausti Ellidason taken at the City Hospital the day after the assault. The defendant has stated that Trausti Ellidason is not the man he describes in his ... article in the Morgunbladid; ...

A video-tape recording of the television programme 'Varied Opinions', broadcast on 13 December 1983, has been submitted in evidence.

...

Matters relating to law enforcement, the relations between the public and the police, as well as the 'Skafti case' ... were discussed. At the end of the programme Mr Einar Bjarnason, Police Sergeant and Chairman of the Reykjavik Police Association, pointed out that ... the defendant's article could be shown to be unfounded, as he had ... a statement from the young man of whom the defendant had written in the Morgunbladid. The sergeant read out [the statement]. [It] reads, inter alia 'What Thorgeir Thorgeirson says about my case in his article is wrong from beginning to end.' Having investigated the matter, [Mr Bjarnason] and Police Constable Bjarki Elíasson considered that the statement had been made by the person about whom the defendant had written.

As requested by the defendant's counsel ..., [Mr] Einar Bjarnason was called to testify. He said that the statement had been made by a young disabled man, called Trausti Ellidason, ... that he had obtained information as to the time when the defendant and Trausti Ellidason were in hospital, and that it had been assumed that the defendant had been referring to Trausti Ellidason in his article. That was how they had obtained his statement. Furthermore, the witness stated that, to his knowledge, no Reykjavik policeman had ever caused anyone injuries while on duty such as those described by the defendant in his article of 7 December 1983.

...

The defence ... submitted that in writing the two articles the defendant was performing a writer's duty to society by drawing attention to people's physical injuries that have been caused by the police, bringing such matters to light and requesting official action to prevent this. [This alone would get] little attention unless published in the media, and even then it would frequently go unnoticed. Harsh words and stylistic artifices also seemed necessary, as writers so well know. The defendant had been earning his living as a writer for many years, and public authorities had recognised his work, inter alia, by paying him a salary. His work fell within the scope of protection offered by Article 72 of the Constitution, which forbids censorship and other limitations on the freedom of the press.

However the said constitutional rule goes on to provide that a person may be held responsible for printed statements, a principle which has never been disputed in Icelandic law. There are various statutory provisions making it a punishable offence to express certain thoughts or statements in public, such as in print. In addition to Article 108 of the ... Penal Code, reference may be made in this regard to Articles 88, 95, 121, 125, 210, 229, and 233(a)-237 of the same Code. The defendant cannot be deemed to enjoy any privileges or greater freedom of expression than others owing to the fact that he is a writer.

The defendant's newspaper articles were published in his name, and he has acknowledged having been their author. The defendant was resident in Iceland when the articles were published in the Morgunbladid. Pursuant to Article 15 of the Right of Publications Act 1956 ... he thus incurs both criminal liability and liability for damages on account of the contents ... thereof.

The statements founding the charges in the indictment were said to be directed against unspecified members of the Reykjavik police force.

Notwithstanding that the wording of Article 108 of the ... Penal Code covers offences against specific ... civil servants, [this provision] also covers offences against a defined group of civil servants (see the judgment in the Supreme Court Reports, volume LIV, p. 57).

The words 'beasts in uniform' and 'of those wild beasts in uniform' are, in the context in which they were published, held to amount to vituperation against and insults to unspecified members of the Reykjavik police force. These statements are punishable according to Article 108 of the ... Penal Code.

In the indictment these statements are considered to be defamatory allegations. Having regard to the third paragraph of Article 118 of the Code of Criminal Procedure ..., the defendant can nevertheless be held responsible for their publication; his actions have been correctly reported and he cannot be held to have been prejudiced in the preparation of his defence case.

The passages 'The young man's room-mates ... Reykjavik night-squad' and 'Then I found out ... lies any more' and the words 'victims of the police brutes' are, both in themselves and in the context of the ... newspaper article ..., deemed to constitute allegations against unspecified members of the Reykjavik police force of committing many serious acts of physical assault on people who have become disabled as a result.

This falls under Article 218 ... of the ... Penal Code, a violation of which may carry the punishment of many years' imprisonment.

The defendant's allegations have not been justified, and [due to their] publication ... he is liable to punishment according to Article 108 of the ... Penal Code.

The expressions 'beasts in uniform' and 'police brutes' must also be deemed to constitute insults to and vituperation against unspecified members of the Reykjavik police force.

These statements are in the indictment said to be defamatory, but ... the defendant can nevertheless be held responsible for them under Article 108 of the ... Penal Code.

The words 'allowing brutes and sadists to act out their perversions' are, in the context of the said article, held to constitute vituperations against and insults to unspecified members of the Reykjavik police force.

The indictment states that these are defamatory, but ... the defendant can nevertheless be held responsible for them under Article 108 ...

The passage 'Their behaviour was so typical of what is gradually becoming the public image of our police force defending itself: bullying, forgery, unlawful actions, superstitions, rashness and ineptitude' has not been justified. With the exception of the words 'superstitions, rashness and ineptitude' the passage accuses unspecified members of the Reykjavik police of forgery and other ... criminal offences. This falls under the provisions of Chapters XIV and XVII of the ... Penal Code, a violation of which may entail a heavy prison sentence.

By making these statements the defendant has become liable to punishment according to Article 108 ...

The words 'superstitions, rashness and ineptitude' are, on the other hand, deemed to fall within the limits of permissible criticism, and the defendant is therefore not liable for them ..."

25. The applicant was sentenced to pay a fine of 10,000 Icelandic crowns to the State Treasury or, in default of payment within four weeks from service of the judgment, to eight days' imprisonment. He was also ordered to pay all the costs of the case, including his counsel's fees.

26. Both the applicant and the prosecutor appealed to the Supreme Court of Iceland, which heard the case on 22 September 1987. Counsel for the applicant requested that not only the Criminal Court's judgment but also the entire proceedings, starting with the issue of the indictment, be annulled and that the case be referred back to the Criminal Court for adjudication. In the alternative, he sought his client's acquittal on all charges. The prosecutor asked for aggravation of the penalty.

27. In its judgment of 20 October 1987, the Supreme Court held inter alia:

"... the request to annul the proceedings is based on the same arguments as those presented to the Criminal Court on 24 September 1985, when the defendant's lawyer made the following statement:

'... no representative of the prosecution was present at ... any former sittings in this case ... In view of Articles 20(1) and 36(1)(1) [of the Code of Criminal Procedure], the defendant considers the fact that one person performed both the role of judge and prosecutor in the same case to be unlawful. Having regard to the judge's lack of initiative in rectifying this state of affairs, [his] replacement ... is required.'

The Criminal Court judge dismissed this request and the public prosecutor refused to authorise an appeal therefrom by way of a summary procedure to the Supreme Court ... . No evidence has been produced during the proceedings in this non-prosecuted case, so classified in accordance with Article 130 of the aforementioned code, to justify a disqualification of the judge or quashing the [conviction] ...

The Criminal Court's finding of the defendant's guilt and its application of the penal law ... are upheld as well as the punishment imposed ... . The Criminal Court's decision on the costs of the case shall remain unaltered."

28. In a dissenting opinion one member of the Court held as follows:

"In a criminal action in respect of defamatory statements it is necessary to clearly define those to whom the statements are considered damaging. This is required both for the defence case and in order to resolve the difficult question of necessary limitations on discussion of matters of public concern.

The indictment states ... that the action is brought 'on account of defamatory allegations against policemen' and ... that the allegations in question are directed 'against unspecified members of the Reykjavik police force'. The indictment must thus be understood as relating to an offence directed against policemen in Reykjavik generally. While agreeing that the statements quoted in the indictment are harsh and have, as such, not been justified, I consider, by reference to the above-mentioned way in which the case has been set out in the indictment, that the conditions for punishment by reason of a violation of Article 108 ..., which is to be construed in the light of the fundamental principle of Icelandic constitutional law relating to freedom of expression in speech and writing, have not been fulfilled.

In view of the above I consider that the defendant should be acquitted and that all costs of the proceedings in the [Criminal] Court as well as in the Supreme Court should be paid by the State Treasury; these are to include the fees of the defendant's appointed counsel before the Supreme Court."

II. THE RELEVANT DOMESTIC LAW

A. Freedom of expression and defamation of civil servants

29. Article 72 of the Constitution of 17 June 1944 of the Republic of Iceland reads:

> "Every person has the right to express his thoughts in print. However, he may be held responsible for them in court. Censorship or other limitations on the freedom of the press may never be imposed."

The responsibility referred to in this provision is further defined by statute.

30. An author may, according to Article 15 of the Right of Publication Act 1956 (Law no. 57/1956), be held both criminally and civilly liable for publications made in his own name, if he is domiciled in Iceland at the time of publication or if he is within the jurisdiction of the Icelandic courts when an action is brought against him. If the publication is not made in his name, it is the publisher, editor, seller, distributor or printer who may incur such liability.

31. A defamatory publication constitutes a criminal offence under the Penal Code. Article 108 deals specifically with the defamation of civil servants, in the following terms:

> "Whoever vituperates or otherwise insults a civil servant in words or actions or makes defamatory allegations against or about him when he is discharging his duty, or on account of the discharge of his duty, shall be fined, detained or imprisoned for up to three years. An allegation, even if proven, may warrant a fine if made in an impudent manner."

32. In the applicant's case both the Criminal Court and a majority of the Supreme Court interpreted Article 108 as including defamatory statements directed not only against specific civil servants, but also against a limited group of unspecified civil servants. Precedents to support this interpretation may be found in two Supreme Court judgments: The Public Prosecutor v. Jónas Kristjánsson, 19 January 1983, and The Public Prosecutor v. Agnar Bogason, 31 October 1952.

B. Criminal procedure

33. Article 20 of the Code of Criminal Procedure vests authority to prosecute in the Public Prosecutor, who is assisted by the Assistant Public Prosecutor as well as several prosecutors and deputies. He decides how the investigation in criminal cases is to be conducted and supervises it (Article 21).

34. Under Article 115, the Public Prosecutor may initiate criminal proceedings by issuing an indictment against the accused. This must clearly specify, inter alia, the court in which the case is to be filed, the name of the defendant, the alleged offence and the potential penalty. The indictment is then transmitted, together with the case-file, to the appropriate court. The judge to whom the case is assigned notes on the indictment, which is subsequently served on the defendant, the time when the case will be formally opened.

35. The case is, according to Article 121, formally opened at a court sitting during which the Criminal Court makes the indictment and other documents available to the defendant. If the defendant makes a clear confession at this stage, the case will be adjudicated there and then. Otherwise, he must be given the opportunity to adduce evidence and present a defence, in writing or orally, with the assistance of counsel if appointed.

36. It is for the Public Prosecutor to determine whether the case warrants an adversarial procedure as set out in Articles 131 to 136. If so, the prosecution will appear before the Criminal Court judge. According to Article 130 such a procedure is to be followed if:

(a) the offence is punishable by a term of imprisonment of more than eight years;

(b) the offence is punishable by a term of imprisonment of more than five years and the issues of law or of fact involved require such a procedure; or

(c) the case concerns matters of special significance or the outcome of the case is otherwise of great public importance.

If the adversarial procedure is not followed, the conduct of the case is governed by Articles 123 to 129. The defendant presents his case before the judge in the absence of the prosecution, unless the Public Prosecutor decides otherwise.

37. When the prosecution does not appear the judge must, in accordane with the general rule contained in Article 75, investigate ex officio and independently, all the facts of and issues in the case, even if the prosecution has already investigated them and prepared reports thereon. The judge must also consider all factors relevant to the guilt or innocence of the accused and all mitigating or aggravating circumstances. Once the investigation is completed and the defendant, or his counsel, has submitted his evidence and written observations, the judge determines the case on the basis of all the evidence.

38. An appeal against a conviction by the Criminal Court lies to the Supreme Court. The Public Prosecutor must appear on an appeal, even if he did not do so before the Criminal Court.

39. The Supreme Court is empowered to review questions of both fact and law. According to Article 185, it may annul the entire proceedings or, alternatively, the judgment of the Criminal Court if it finds that serious errors occurred in the conduct of the case at first instance. In that event, the case may be referred back, in whole or in part, to the lower court for fresh proceedings.

40. Under Article 171, a defendant may, with leave of the Public Prosecutor, file a summary appeal with the Supreme Court against a refusal by a Criminal Court judge to withdraw. In the absence of such leave, it is possible for the defendant, in an ordinary appeal to the Supreme Court, to ask for the Criminal Court proceedings to be annulled on the ground that the judge should have withdrawn.

41. Article 36 of the Code of Civil Procedure (Law no. 85/1936) which, according to Article 15 of the Code of Criminal Procedure, applies also to criminal cases, provides that a judge shall withdraw in the following circumstances:

(a) if he is a party or representative of or related to a party to the litigation;

(b) if he has testified to the facts of the case or served as a surveyor or appraiser in connection with the case;

(c) if he has argued the case or given advice to a party;

(d) if he is hostile to a party;

(e) if the case is of financial or moral concern to himself or his relatives;

(f) if there is otherwise a risk that he will not be able to consider the case impartially.

If a judge is disqualified for any of the above-mentioned reasons, the Minister of Justice must appoint another judge to hear the case.

C. Revision of the Code of Criminal Procedure

42. A revised Code of Criminal Procedure is expected to enter into force on 1 July 1992. Article 123 of the Bill provides that if the prosecutor does not appear at a court sitting, the case must be adjourned.

PROCEEDINGS BEFORE THE COMMISSION

43. In his application (no. 13778/88) lodged with the Commission on 19 November 1987, Mr Thorgeir Thorgeirson alleged violations of Article 6 paras. 1 and 3(c) (art. 6-1, art. 6-3-c) (right to a fair hearing by an impartial tribunal and right to defend oneself) and Article 10 (art. 10) (right to freedom of expression) of the Convention as a result of the defamation proceedings instituted against him and his subsequent conviction.

44. On 14 March 1990 the Commission declared admissible the complaints concerning:

(a) the absence of the Public Prosecutor at certain court sittings during the applicant's trial and its effect on the impartiality of the Reykjavik Criminal Court; and

(b) the interference with the applicant's freedom of expression.

The remainder of the complaints were declared inadmissible.

In its report adopted on 11 December 1990 (Article 31) (art. 31), the Commission expressed the opinion that there had been no violation of Article 6 para. 1 (art. 6-1) (unanimously) and that there had been a violation of Article 10 (art. 10) (thirteen votes to one).

The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

45. At the hearing on 22 January 1992, the Government invited the Court to hold that, as submitted in their memorial of 16 September 1991, there had been no violation of the Convention in the present case.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

46. Mr Thorgeir Thorgeirson alleged that he had not received a hearing by an "impartial tribunal" within the meaning of Article 6 para. 1 (art. 6-1) of the Convention, which, in so far as relevant, provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal..."

The applicant complained that, under the current Icelandic legislation (see paragraph 36 above), less serious cases, which did not warrant an adversarial procedure, could be examined in the absence of the Public Prosecutor. This meant, according to the applicant, that district court judges were empowered in such cases to take over the prosecutor's functions. This situation had been criticised by a number of district court judges and was, moreover, about to be changed: pursuant to Article 123 of the Bill revising the Code of Criminal Procedure, which was expected to enter into force on 1 July 1992, the case would have to be adjourned if the prosecutor did not appear.

The applicant contended that in his own case, in which the Public Prosecutor had been absent from a number of sittings of the Reykjavik Criminal Court, the result of this legislation had been that Judge Pétur Gudgeirsson - the single member of that court - had not only conducted the court investigation but had also taken on a role as a representative of the

[*] Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 239 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

prosecution. Consequently, the Criminal Court did not satisfy the requirement of impartiality in Article 6 para. 1 (art. 6-1) of the Convention.

47. This claim was contested by the Government and was not accepted by the Commission.

48. It should be recalled that the Court's task is not to review the relevant law and practice in abstracto, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of Article 6 para. 1 (art. 6-1) (see, amongst other authorities, the Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, p. 21, para. 45).

49. The existence of impartiality for the purposes of Article 6 para. 1 (art. 6-1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (ibid., para. 46).

50. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (ibid., para. 47); the applicant has adduced no evidence to suggest that the judge in question was personally biased.

51. Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw.

This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (ibid., para. 48).

52. The Court notes that in the present case the Reykjavik Criminal Court held twelve sittings between 10 September 1985 and 16 June 1986. The Public Prosecutor was absent from the following six sittings which were devoted to the matters indicated:

(a) 10 September 1985: at the request of the applicant (who was also absent), the Court decided to adjourn the case (see paragraph 16 above);

(b) 17 September 1985: this sitting was of a preparatory character (see paragraph 16 above);

(c) and (d) 24 and 25 September 1985: the court dealt only with procedural matters, unrelated to the merits of the case (see paragraphs 17-18 above);

(e) 3 June 1986: the applicant filed his written defence (see paragraph 23 above);

(f) 16 June 1986: the court delivered judgment (see paragraph 24 above).

On the other hand, the Public Prosecutor was, with one exception, present at all the sittings at which evidence was submitted and witnesses were heard (9 and 25 October 1985, 15 November 1985, 31 January 1986 and 17 February 1986; see paragraphs 20-21 above). The exception was the sitting of 17 February 1986, which was essentially devoted to the showing of a video-taped television programme. Both the applicant and the prosecutor appeared at a further sitting held on 28 April 1986, when they agreed that no further investigation was necessary (see paragraph 22 above).

53. It can be seen from the foregoing that, at those sittings at which the Public Prosecutor was absent, the Reykjavik Criminal Court was not called upon to conduct any investigation into the merits of the case, let alone to assume any functions which might have been fulfilled by the prosecutor had he been present. In these circumstances, the Court does not consider that such fears as the applicant may have had, on account of the prosecutor's absence, as regards the Reykjavik Court's lack of impartiality can be held to be justified.

54. Accordingly, there has been no violation of Article 6 para. 1 (art. 6-1).

II. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

55. Mr Thorgeir Thorgeirson claimed that he had been a victim of a violation of Article 10 (art. 10) of the Convention, which is worded as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

This allegation was accepted by the Commission but contested by the Government.

56. The Court considers - and this was not disputed - that the applicant's conviction and sentence for defamation by the Reykjavik Criminal Court on 16 June 1986, as upheld by the Supreme Court on 20 October 1987 (see paragraphs 24-25 and 27 above), constituted an interference with his right to freedom of expression. Such an interference entails a violation of Article 10 (art. 10) unless it was "prescribed by law", had an aim or aims that is or are

legitimate under Article 10 para. 2 (art. 10-2) and was "necessary in a democratic society" for the aforesaid aim or aims.

A. Was the interference "prescribed by law"?

57. The applicant, referring to the dissenting opinion of a member of the Supreme Court in his case (see paragraph 28 above), submitted that Article 108 of the Penal Code, as interpreted in the light of the constitutional right to freedom of expression, could not provide a proper basis for his conviction.

58. However, the Court notes that the manner in which the Reykjavik Criminal Court and, subsequently, the majority of the Supreme Court (see paragraphs 24 and 27 above) interpreted and applied that Article in the present case was not excluded by its wording (see paragraph 31 above) and was, moreover, supported by precedent (see paragraph 32 above). Above all, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, amongst many other authorities, the Kruslin v. France judgment of 24 April 1990, Series A no. 176-A, p. 21, para. 29). Consequently, the Court agrees with the Government and the Commission that the interference was "prescribed by law".

B. Did the interference have a legitimate aim or aims?

59. It was not disputed that the applicant's conviction and sentence were aimed at protecting the "reputation ... of others" and thus had an aim that is legitimate under this provision.

C. Was the interference "necessary in a democratic society"?

60. In contesting the view of the applicant and the Commission that the interference complained of was not "necessary in a democratic society", the Government made submissions that fall into two groups, one relating to questions of general principle and the other relating to the specific circumstances of the case.

61. The submissions in the first group may be summarised as follows.

(a) The Court's Lingens v. Austria judgment of 8 July 1986 (Series A no. 103), Barfod v. Denmark judgment of 22 February 1989 (Series A no. 149) and Oberschlick v. Austria judgment of 23 May 1991 (Series A no. 204) showed that the wide limits of acceptable criticism in political discussion did not apply to the same extent in the discussion of other matters of public interest. The issues of public interest raised by the applicant's articles could not be included in the category of political discussion, which denoted direct or indirect participation by citizens in the decision-making process in a democratic society.

(b) The actions of civil servants should continually be subject to scrutiny and debate and be open to criticism. However, since they had no means of replying, it was not permissible to accuse them, without legitimate cause, of criminal conduct.

(c) Apart from the differences referred to under (a), it followed clearly from the three judgments cited that a person who claimed that his freedom of expression had been unnecessarily restricted must himself have exercised it in a manner consistent with democratic principles: he must have been in good faith as to the legitimacy of his statements and have voiced them in a way that was compatible with democratic aims; in addition, the statements must have effectively promoted those aims and been supported by facts.

62. With regard to the specific circumstances of the case, the Government made the following submissions.

(a) The statements in the applicant's articles lacked an objective and factual basis. Police brutality was very uncommon in Iceland; during the past fifteen years, there had been only two instances of policemen being convicted of physical assault. The story of the young man at the local hospital mentioned in the first article (see paragraph 9(8)- (9) above) was completely untrue and had merely been invented to provide arguments for a campaign against the police. The applicant had refused to co-operate in clarifying this matter and had adduced no proof to support his contention. In this connection, the Government referred to a declaration by a certain Mr Trausti Ellidason, who had been at the hospital at the relevant time, and to the proceedings before the Reykjavik Criminal Court (see paragraphs 21 and 24 above). Although it was the Skafti Jónsson case (see paragraph 8 above) that had prompted the applicant to act, his first article had not relied on that case, which it described as "of little importance". It dealt instead with police brutality that would never be brought to the public's knowledge and stated that "the real problem" was "in fact bigger and much more horrifying" (see paragraph 9(4) above). In the second article, the applicant had not discussed individual cases, but a situation which he said comprised at least several hundred cases (see paragraph 10(8) above).

(b) The applicant's articles had not been confined to a criticism of the manner in which the police performed their duties. The author's principal aim had not been to advocate new methods of investigating complaints against the police, but to damage the reputation of the Reykjavik police as a whole, by making specific allegations of misconduct, including serious crime.

(c) Even if it were accepted that there was a factual basis for the applicant's statements, he had clearly overstepped all reasonable limits by using malicious, insulting and vituperative language and by condemning the police on a slender foundation.

(d) The sanctions imposed, which did not include confiscation of the articles, had been insignificant and were not likely to discourage open discussion of matters of public concern.

63. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established (see the Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59).

In the present case, the applicant expressed his views by having them published in a newspaper. Regard must therefore be had to the pre-eminent role of the press in a State governed by the rule of law (see the Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 23, para. 43). Whilst the press must not overstep the bounds set, inter alia, for "the protection of the reputation of ... others", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see the above-mentioned Observer and Guardian judgment, pp. 29-30, para. 59).

64. On the questions of general principle raised by the Government, the Court observes that there is no warrant in its case-law for distinguishing, in the manner suggested by the Government, between political discussion and discussion of other matters of public concern. Their submission which seeks to restrict the right to freedom of expression on the basis of the recognition in Article 10 (art. 10) that the exercise thereof "carries with it duties and responsibilities" fails to appreciate that such exercise can be restricted only on the conditions provided for in the second paragraph of that Article (art. 10-2).

65. As regards the specific circumstances of the case, the Court is unable to accept the Government’s argument that the statements in the applicant’s articles lacked an objective and factual basis.

The first article took as its starting-point one specific case of ill-treatment - the Skafti Jónsson case - which gave rise to extensive public debate and led to the conviction of the policeman responsible. It is undisputed that this incident did actually occur.

With regard to the other factual elements contained in the articles, the Court notes that these consisted essentially of references to "stories" or "rumours" - emanating from persons other than the applicant - or "public opinion", involving allegations of police brutality. For instance, it was the

room-mates of the young man at the hospital who had recounted, and the hospital personnel who had confirmed, that he had been injured by the police (see paragraph 9(9) above). As was pointed out by the Commission, it has not been established that this "story" was altogether untrue and merely invented. Again, according to the first article, the applicant had found out that most people knew of various stories of that kind, which were so similar and numerous that they could hardly be treated as mere lies (see paragraph 9(10) above).

In short, the applicant was essentially reporting what was being said by others about police brutality. He was convicted by the Reykjavik Criminal Court of an offence under Article 108 of the Penal Code partly because of failure to justify what it considered to be his own allegations, namely that unspecified members of the Reykjavik police had committed a number of acts of serious assault resulting in disablement of their victims, as well as forgery and other criminal offences (see paragraphs 9(9)-(10), 10(15) and 24 above). In so far as the applicant was required to establish the truth of his statements, he was, in the Court's opinion, faced with an unreasonable, if not impossible task.

66. The Court is also not convinced by the Government's contention that the principal aim of the applicant's articles was to damage the reputation of the Reykjavik police as a whole.

In the first place, his criticisms could not be taken as an attack against all the members, or any specific member, of the Reykjavik police force. As stated in the first article, the applicant assumed that "comparatively few individuals [were] responsible" and that an independent investigation would hopefully show that a small minority of policemen were responsible (see paragraph 9(19)-(20) above). Secondly, as the Court has observed in paragraph 65 above, the applicant was essentially reporting what was being said by others.

These circumstances - combined with a perusal of the first article - confirm his contention that his principal purpose was to urge the Minister of Justice to set up an independent and impartial body to investigate complaints of police brutality. The second article, which was written in response to certain statements made by a police officer during a television programme, must be seen as a continuation of the first article.

67. The articles bore, as was not in fact disputed, on a matter of serious public concern. It is true that both articles were framed in particularly strong terms. However, having regard to their purpose and the impact which they were designed to have, the Court is of the opinion that the language used cannot be regarded as excessive.

68. Finally, the Court considers that the conviction and sentence were capable of discouraging open discussion of matters of public concern.

69. Having regard to the foregoing, the Court has come to the conclusion that the reasons advanced by the Government do not suffice to show that the

interference complained of was proportionate to the legitimate aim pursued. It was therefore not "necessary in a democratic society".

70. Accordingly, there was a violation of Article 10 (art. 10) of the Convention.

III. APPLICATION OF ARTICLE 50 (art. 50)

71. Mr Thorgeir Thorgeirson sought just satisfaction under Article 50 (art. 50) according to which:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Work carried out by the applicant

72. The applicant claimed 875,250 Icelandic crowns for his own work on the case over seven years, which he said had occupied forty-one days of his spare time per year.

The Court affords "just satisfaction" only "if necessary". The applicant, who was assisted by counsel both in Iceland and in Strasbourg, has not established why it is necessary to compensate him for his own work.

B. Pecuniary damage

73. The applicant sought 2,020,200 Icelandic crowns as compensation for loss of earnings (24,050 crowns per month during the years 1984 to 1991) resulting from his "dissident's status".

The Government disputed this claim, while the Commission left the matter to be decided by the Court.

The Court is unable to accept this claim since it has not been established that there was a sufficient connection between the alleged loss and the matter held in the present judgment to be in breach of Article 10 (art. 10).

C. Costs and expenses

74. The applicant claimed in respect of costs and expenses:

(a) 218,160 Icelandic crowns for the translation of documents submitted in the Strasbourg proceedings;

(b) 134,392 crowns for computer processing of such documents;

(c) 250,000 crowns for Mr Tómas Gunnarsson's fees for 100 hours' work (at 2,008 crowns per hour, plus 24.5% value-added tax) in connection with his representation before the Convention institutions;

(d) 73,473 crowns for the fine imposed and legal costs in the domestic proceedings.

75. As to items (a) and (b), the Government expressed their willingness to pay a suitable amount, to be assessed by the Court on the basis of particulars supplied by the applicant. In their view, item (c) was reasonable.

On the other hand, the Government pointed out that the fine and the domestic legal costs had never been paid by the applicant. Moreover, they stated that the fine had become unenforceable by reason of lapse of time and that they were prepared to take appropriate measures to ensure that the costs would not be collected, should the Court find a violation.

76. The Court accepts the claims under headings (a), (b) and (c). Taking account of the Court's case-law in this field as well as the relevant legal aid payments made to the applicant by the Council of Europe, the Court considers that he is entitled to be reimbursed, for costs and expenses, the sum of 530,000 Icelandic crowns.

FOR THESE REASONS, THE COURT

1. Holds unanimously that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention;

2. Holds by eight votes to one that there has been a violation of Article 10 (art. 10);

3. Holds unanimously that Iceland is to pay, within three months, 530,000 (five hundred and thirty thousand) Icelandic crowns to the applicant for costs and expenses;

4. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 June 1992.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the separate opinion of Mr Gardar Gíslason is annexed to this judgment.

R.R.
M.-A.E

PARTLY DISSENTING OPINION OF JUDGE GARDAR GÍSLASON

It is on the final question arising under Article 10 (art. 10) - whether in the specific circumstances of the case (see paragraphs 65-69 of the judgment) the interference was "necessary in a democratic society" - that I regretfully depart from the opinion of the majority.

Allegations that crimes have been committed are either true or false. It is certainly "necessary" to restrain false allegations of serious crime in order to protect the reputation or rights of others. Therefore, in a defamation case it is in my view crucial whether or not the imputation of a serious crime has been made in good faith as to its truth.

Although the applicant, in his article of 7 December 1983, took as his starting-point the much debated Skafti Jónsson case, he emphasised that he considered it to be "of little importance"; for him, the real problem was "bigger and much more horrifying". He referred to another case, that of a young man whom he had seen at a hospital several years previously and who had been paralysed by the brutal methods of the Reykjavik police. In my view he thereby implied that this "case" had not been investigated in any way and that no policeman had therefore been questioned, let alone found guilty. The applicant did nothing to substantiate this story, and there is no indication that the young man had actually been ill-treated by the police. In the defamation case the applicant was convicted not only for vituperation and insults but also for the above-mentioned imputation to policemen of serious crimes which, if they had in fact been committed, would have made them liable to heavy sentences.

Bearing the above in mind, I fully endorse the Court’s reasoning in its Barfod v. Denmark judgment of 22 February 1989 (Series A no. 149, p. 14, para. 35). Mr Thorgeir Thorgeirson was convicted not for criticising but rather for making defamatory accusations against members of the Reykjavik police, which were likely not only to lower them in public esteem but also to expose them to hatred and contempt, and those accusations were published without any supporting evidence or other justification.

It is therefore my opinion that no breach of Article 10 (art. 10) has been established in the circumstances of the present case.

I have voted on the Article 50 (art. 50) issue on the basis of the findings of the majority concerning Article 10 (art. 10).

In the case of Tolstoy Miloslavsky v. the United Kingdom (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr B. Walsh,
Mr C. Russo,
Mrs E. Palm,
Mr I. Foighel,
Mr R. Pekkanen,
Sir John Freeland,
Mr B. Repik,
Mr P. Jambrek,

and also of Mr H. Petzold, Registrar,

Having deliberated in private on 26 January, 24 February and 23 June 1995,

Delivers the following judgment, which was adopted on the last-mentioned date:

_____

Notes by the Registrar

1. The case is numbered 8/1994/455/536. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 March 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 18139/91) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by Count Nikolai Tolstoy Miloslavsky, who is a British citizen, on 18 December 1990.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 para. 1 and 10 (art. 6-1, art. 10) of the

Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 March 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr B. Walsh, Mr C. Russo, Mrs E. Palm, Mr I. Foighel, Mr R. Pekkanen, Mr B. Repik and Mr P. Jambrek (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 23 September 1994 and the Government's memorial on 27 September. On 28 October the Secretary to the Commission indicated that the Delegate would submit his observations at the hearing.

5. On 14 October the applicant submitted further observations on his claim under Article 50 (art. 50) of the Convention.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 January 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr I. Christie, Assistant Legal Adviser, Foreign and Commonwealth Office, Agent,
Mr D. Pannick, QC, Counsel,
Mr M. Collon, Lord Chancellor's Department, Adviser;

(b) for the Commission

Sir Basil Hall, Delegate;

(c) for the applicant

Lord Lester of Herne Hill, QC,
Ms D. Rose, Barrister, Counsel,
Ms K. Rimell, Solicitor,
Mr M. Kramer, Solicitor, Advisers.

The Court heard addresses by Sir Basil Hall, Lord Lester and Mr Pannick, and also replies to questions put by one of its members individually.

AS TO THE FACTS

I. Particular circumstances of the case

7. Count Nikolai Tolstoy Miloslavsky, a British citizen, lives in Southall, Berkshire, in the United Kingdom. He is a historian.

A. The impugned pamphlet

8. In March 1987 a pamphlet written by the applicant and entitled "War Crimes and the Wardenship of Winchester College" was circulated by Mr Nigel Watts to parents, boys, staff and former members of the school as well as to Members of Parliament, Members of the House of Lords and the press. Mr Watts bore a grievance against the Warden of Winchester College, Lord Aldington, at the time Chairman of an insurance company, concerning an insurance claim. The pamphlet included the following statements:

> "Between mid-May and early June 1945 some 70,000 Cossack and Yugoslav prisoners-of-war and refugees were handed over to Soviet and Titoist communist forces as a result of an agreement made with the British 5 Corps administering occupied Austria. They included a large proportion of women, children, and even babies. The majority of Cossack officers and their families handed over held League of Nations passports or those of the Western European countries in which they had found refuge after being evacuated from Russia by their British and French Allies in 1918-20, and were hence not liable to return under the terms of the Yalta Agreement, which related only to Soviet citizens.
>
> ...
>
> As was anticipated by virtually everyone concerned, the overwhelming majority of these defenceless people, who reposed implicit trust in British honour, were either massacred in circumstances of unbelievable horror immediately following their handover, or condemned to a lingering death in Communist gaols and forced labour camps. These operations were achieved by a combination of duplicity and brutality without parallel in British history since the Massacre of Glencoe. Outside Lienz may be seen today a small Cossack cemetery, whose tombstones commemorate men, women and children shot, clubbed, or bayonetted to death by British troops.
>
> ...
>
> The man who issued every order and arranged every detail of the lying and brutality which resulted in these massacres was Brigadier Toby Low, Chief of Staff to General Keightley's 5 Corps, subsequently ennobled by Harold Macmillan as the 1st Baron Aldington. Since 1979 he has been Warden of Winchester College, one of the oldest and most respected of English public schools. Whether Lord Aldington is an appropriate figure for such a post is primarily a matter for the College to decide. But it is also surely a legitimate matter of broader public concern that a man responsible for such enormities should continue to occupy a post of such honour and prominence within the community, in particular one which serves as exemplar for young people themselves likely one day to achieve high office and responsibility.
>
> ... The truth is, however, that Lord Aldington knows every one of his pleas to be wholly or in large part false. The evidence is overwhelming that he arranged the perpetration of a major war

crime in the full knowledge that the most barbarous and dishonourable aspects of his operations were throughout disapproved and unauthorised by the higher command, and in the full knowledge that a savage fate awaited those he was repatriating.

... Those who still feel that a man with the blood of 70,000 men, women and children on his hands, helpless charges whom the Supreme Allied Commander was making every attempt to protect, is a suitable Warden for Winchester might care to ask themselves (or Lord Aldington, if they can catch him) the following questions:

...

Lord Aldington has been repeatedly charged in books and articles, by press and public, with being a major war criminal, whose activities merit comparison with those of the worst butchers of Nazi Germany or Soviet Russia ..."

B. Libel proceedings

1. Proceedings in the High Court

9. Lord Aldington instituted proceedings against Mr Watts for libel in the High Court of Justice (Queen's Bench Division). The applicant was subsequently joined to these proceedings at his own request. The defendants pleaded "justification" and "fair comment".

10. Lord Aldington asked that the case be heard by a single judge without a jury. However, the applicant exercised his right to trial by jury.

11. The trial began on 2 October 1989 and lasted until 30 November when the jury of twelve returned its verdict. In the course of the trial Lord Aldington gave evidence for some six and a half days and was cross-examined. The applicant gave evidence for more than five days and a number of witnesses were called.

Mr Justice Michael Davies devoted some ten pages of his summing-up to the question of the assessment of damages if defamation were to be established. He directed the jury, inter alia, as follows:

"... Let us now, members of the jury, ... deal with the aspect of damages ... I have to give you this direction in law because damages may arise ... If the plaintiff wins, you have got to consider damages. Some would say that the only direction on damages necessary in this particular case was to say: [the applicant] says that if damages are to be payable he agrees they should be enormous. Mr Rampton [defence counsel], I do not think, in his final speech could quite bring himself to utter that word, but he said they will be very generous - and I could stop there. But that is not the way, you see, because the parties do not dictate (even if they are making concessions) how you should approach damages. You do it in accordance with the law, and that is what I am now going to tell you. You have to accept my directions about it, and you will apply them of course as you think fit.

... the means of the parties - the plaintiff or the defendant - is immaterial ...

Neither, as I think I said earlier but I say it now, is the question whether Lord Aldington or [the applicant], or for that matter Mr Watts, have been or will be financially supported by any well wishers as to damages relevant at all. Nor is it relevant the undoubted fact that legal aid is not available in libel cases to a plaintiff or a defendant. All irrelevant, and if it is to be changed it is up to Parliament to do something about it ...

... what you are seeking to do, what a jury has to do, is to fix a sum which will compensate the plaintiff - to make amends in financial terms for the wrong done to him, because wrong has been done if you have got to the stage of awarding damages. It is not your duty or your right to punish a defendant ...

What [Lord Aldington] does claim, of course, is for 'general damages', as lawyers call it, a sum of money to compensate him. First of all, you have to take into account the effect in this case, as in every case where there is libel, on the position, standing and reputation of the successful plaintiff ...

... If they [the allegations made in the pamphlet] were untrue and not fair comment, where it is suggested that they were comment, he is entitled to be compensated for that, so that that will register your view of that.

Then you have got to consider ... the injury to his feelings. I told you that he cannot, of course, claim on behalf of his wife or any member of his family, although the affect on them may have had an affect on him which is a reaction, which you are entitled to take into account.

It is not just his feelings when he read this ... It is his feelings during the time whilst awaiting the trial ... and the publicity ...

... you have to consider ... what lawyers call `vindication' ...

You may think - it is a matter for you - that in this particular case vindication - showing that he was right - is the main reason for Lord Aldington bringing this action - that is what he says anyway - to restore his character and standing ... 'An award, an enormous award', to use [the applicant's] words - 'a very generous award' to use Mr Rampton's words, will enable him to say that put the record straight.

Members of the jury, of course, you must not, as a result of what I have just said, just bump and bump the damages up. You must, at all times, as they say, keep your feet on the ground.

... You have to take into account the extent and nature of the publication.

... whilst you must leave aside any thought of punishing the defendants if you find for the plaintiff, juries are always entitled, as I have hinted already, to take into account any conduct of the defendant which has aggravated the damages - that is to say, made the damage more serious and the award higher - or mitigated them - made the damage done less serious and the

award smaller.

...

Now, two general remarks which I make in every case: nobody asks you how you arrive at your verdict, and you do not have to give reasons like a Judge does, so it is exceedingly important that you look at the matter judicially, and that means that you should not be outrageously or unreasonably high, or outrageously or unreasonably low.

The second matter I say to every jury is: please, I beg you, if you come to damages, do not pay the slightest attention to any other case or the result of any other case you may have read about or heard about. The facts and the legal considerations are like[ly] to have been completely different. There is no league of damages in defamation cases. There is no first division, there is no fourth division, there is no Vauxhall conference, if any of you are interested in football.

So, members of the jury, please forget other cases. Use your own common sense about it. How do you translate what I have said into money terms? By our rules and procedure, members of the jury, counsel can use, and a judge can use, words like 'very substantial' or 'very small', but we do not either of us, counsel or judges, mention figures. Some people again, who have not really considered the matter very carefully, wonder about that, and they say juries should be given guidance, and I say to you what I say to every jury in these cases, it would not be a great deal of help for you, because inevitably, it is human nature and it would be their duty - counsel for the plaintiff would be at the top end of the scale and perhaps in some cases, I do not suggest this one, off the clock, and counsel for the defendant would be at the bottom end of the scale in the basement. Now, that would not be much good to anybody. As for the Judge, well the jury might think - you may have an exactly opposite view - a jury might think: 'Well, on the whole, whatever other people say about this particular Judge in this case, we think he tried to be fair, why doesn't he suggest a figure to us?'

Supposing a Judge, myself in this case, were to suggest a figure to you, or a bracket between so and so and so and so, there would be two possibilities: one is that you would ignore what I said and either go higher than my figure or bracket, or much lower, in which case of course the losing party that did not like it would be off to the Court of Appeal saying: 'Look, the Judge suggested a figure and the jury went above it or below it.'

Supposing you accepted my suggestion, and gave a figure that I recommended, or close to it. Well, all I can say is that you would have been wasting your valuable time in considering the matter of damages because you would just have been acting as a rubber stamp for me, or the Judge, whoever it was. So we do not have that over-bidding or under-bidding, as the Court of Appeal has called it, by counsel, and we do not have Judges trying to lay down to juries what they should award, and I do not hesitate to say, whatever other people say, I hope and pray, for the sake of our law and our court, we never get the day when Judges dictate to juries so that they become rubber stamps.

I am, however, allowed - indeed encouraged - by the Court of Appeal just to say a little bit more. I say it not perhaps in the words of the Court of Appeal, but in my own way, which may be too homely for some, but I say to you that you must remember what money is. You do not deal in Mickey Mouse money just reeling off noughts because they sound good, I know you will not. You have got to consider money in real terms. Sometimes it is said 'Well, how much would a house cost of a certain kind', and if you are giving a plaintiff as compensation so much money how many houses is he going to buy? I do not mean to suggest that Lord Aldington or any other plaintiff would take his damages and go and buy a house or a row of houses, but that relates it to the sort of thing, if you will allow me to say, you and I do know something about, because most of us have a pretty good idea how much houses are worth. So remember that."

12. In its unanimous verdict of 30 November 1989, the jury answered the questions put by Mr Justice Davies as follows:

"1. Have [the applicant] and Mr Watts proved that the statements of fact in the pamphlet are substantially true?

... No.

2. Does the pamphlet contain expressions of opinion?

... Yes.

3. Have [the applicant] and Mr Watts proved that those expressions of opinion are fair, in the sense that they are such as a fair-minded man could honestly make on the facts proved to be true?

... No.

4. (1) Do you find for Lord Aldington or for Mr Watts?

... Lord Aldington.

(2) Do you find for Lord Aldington or for [the applicant]?

... Lord Aldington.

5. What sum in damages do you award Lord Aldington?

... £1,500,000."

Accordingly, Mr Justice Davies directed that judgment should be entered against the applicant and Mr Watts for the above-mentioned sum, which was approximately three times the largest amount previously awarded by an English libel jury. In addition he granted an application by Lord Aldington for an injunction (section 37 of the Supreme Court Act 1981) restraining, inter alios, the defendants from publishing or causing or permitting to be published or assisting or participating in or conniving at the publication of the words contained in the impugned pamphlet or

"any other words or allegations (however expressed) to the following or any similar effect namely that the Plaintiff [Lord Aldington] in connection with the handover in 1945 to

Soviet or Yugoslav forces of military or civilian personnel was guilty of disobedience or deception or criminal or dishonourable or inhumane or other improper or unauthorised conduct or was responsible for the subsequent treatment of any such personnel by the Soviets or the Yugoslavs the said defendants being at liberty to apply to vary or discharge this injunction."

The applicant was also ordered to pay Lord Aldington's costs.

2. Proceedings in the Court of Appeal

13. The applicant (but not Mr Watts) gave notice of appeal to the Court of Appeal setting out a number of grounds, several of which went to the fairness of the proceedings. He criticised Mr Justice Davies among other things for having displayed overt animosity towards the defendants and for his continual interruption, sarcasm and abuse of defence counsel. The Judge had, he alleged, insulted and disparaged the defence witnesses. Throughout his summing-up he had wholly or largely suppressed or ignored many of the most important aspects of the case for the defence and had misled the jury on issues central to the defendants' arguments. When directing the jury on the question of damages, the tenor of the judge's remarks had been in large part to urge the jury to award high damages to the plaintiff and to discount the alternatives which had been reasonably available on the evidence; the damages had in any event been unreasonable and excessive.

14. On 9 January 1990 Lord Aldington applied to the Court of Appeal for an order requiring the applicant, under Order 59, Rule 10 (5) of the 1965 Rules of the Supreme Court, to give security in an amount which would cover the costs of his opponent's representation if the appeal were to be unsuccessful. It was not disputed that the applicant would be unable to pay the relevant costs.

15. In an open letter of 2 February 1990, Lord Aldington offered not to enforce £1,200,000 of the damages awarded. In his reply the applicant confirmed that he was unable to provide any security for Lord Aldington's costs in the appeal proceedings and, maintaining that the trial had been a travesty of justice, declined the offer.

16. In a twenty-two-page judgment of 18 May 1990 the Registrar of the Court of Appeal examined the facts raised by the applicant and rejected the application for security for costs. The Registrar stated that impecuniosity was a ground for awarding security for costs in respect of the costs of an appeal to the Court of Appeal. In exercising its discretion in this regard, the Court of Appeal would attach particular weight to the merits, or otherwise, of the appeal concerned. If the appeal had little or no merit, a security for costs order would normally be made against an impecunious appellant. If the appeal had reasonable prospects of success, the court would be reluctant to order security for costs.

The Registrar pointed out that he had not found it easy to decide whether the applicant's appeal on liability had sufficient strength to justify allowing him to proceed without furnishing security for costs, given that, if his appeal failed, he would not have the funds to pay Lord Aldington's costs of the appeal. He added that, with some hesitation, he found that on several specific points the appeal had just enough strength to lead him to conclude that security for costs should not be awarded in this case. There was a possibility that if the applicant succeeded in convincing the Court of Appeal that he had

not had a fair trial, and his case had not been fairly and clearly put to the jury, the Court of Appeal would conclude that a new trial had to be ordered, notwithstanding the fact that the chances of his succeeding on the new trial were slim.

In view of the above conclusion the Registrar did not find it necessary to deal with an argument made by counsel for Lord Aldington that the appeal on quantum would be academic because of his offer of 2 February 1990 (see paragraph 15 above).

17. Lord Aldington appealed successfully against the Registrar's decision to the full Court of Appeal, which heard the matter for six days between 9 and 17 July 1990 and gave judgment on 19 July 1990. The members of the Court of Appeal gave, in summary, the following reasons.

(a) The President, Sir Stephen Brown

The Court of Appeal had to consider the application afresh and decide whether to order security would amount to a denial of justice to the applicant, having regard to the merits of his appeal. The criticism made in the applicant's grounds of appeal did not concern Mr Justice Davies's directions on the law but, in particular, what the applicant characterised as bias and partiality on the part of the judge towards Lord Aldington and the way in which the judge had dealt with three particular issues of fact. The criticism was however not justified. Mr Justice Davies had clearly left to the jury the decision on the facts of the case and all the major matters had been dealt with fully and fairly. The judge's summing-up had quite clearly brought to the jury's minds the matters which the defence had contended were of primary significance. Counsel had been given full opportunities to raise matters of alleged error, and when they had deemed it necessary they had done so. Furthermore the principal witnesses had been in the witness-box for some thirteen days in all. Lord Aldington, who had been the central witness in the case in the sense that it was his conduct which was the subject of examination, had been in the witness box for no less than six and a half days. It was inconceivable that the jury had not taken full account of and acted on the evidence of the principal witnesses who had been so comprehensively examined and cross-examined upon all the material issues in the case.

The case had been an entirely appropriate one for a jury and had duly been tried by a jury. In this connection Sir Stephen noted that at a preliminary stage, when Lord Aldington had asked for the case to be tried by a judge alone, the applicant had resisted his application.

The new evidence adduced by the applicant did not carry any weight in the light of all the evidence which had been given at the trial.

The applicant's submission that Lord Aldington was supported by Sun Alliance Insurance Company was irrelevant.

In the result, on the issue of liability there was no merit in the appeal.

Sir Stephen Brown added:

"The quantum of damage is a very large sum. However, there is no doubt that the learned judge gave an impeccable direction on damages. [The applicant] has argued that the judge invited the

jury to give excessive damages. A correct reading of the transcript shows that he did just the opposite. There is no merit in that submission.

The award was entirely within the jury's discretion and they received a very full direction about it. I have no doubt that it was meant to mark their view of the enormity of the gross libel which had been published and persisted in.

[The applicant] has however made it clear that he is not really interested so much in the question of the amount of damages as in the issue of liability. He wishes to continue to pursue Lord Aldington if he can and to persist in his allegation at a new trial. In fact he was offered a substantial reduction in the damages to the extent of £1.2 million. This he rejected. This move was not a concession by the plaintiff's solicitors that the award was too high, but was made recognising that the plaintiff was unlikely to receive the amount awarded and was content with the fact that the jury had by their verdict rejected in an overwhelming manner the truth of the libel which had been published."

(b) Lord Justice Russell

"The court will be very slow to interfere with the jury's verdict unless there has been some material irregularity in the proceedings which renders the verdict unsafe or unsatisfactory, or it can properly be said that the verdict is perverse. Much the same considerations must apply in the instant case.

As to any irregularity in the proceedings, I detect none ...

This case, and the jury's verdict, depended essentially upon the veracity of Lord Aldington. No document or documents were produced which on their face could destroy Lord Aldington's credibility. If the jury had disbelieved Lord Aldington, there would have been an end of his case. The fact that the jury found in his favour and awarded him the damages that they did demonstrates that upon the vital issues of the case they must have accepted the plaintiff's evidence. Was that a course which was open to the jury? In my judgment, it plainly was ...

There is not in my judgment the remotest chance of the Court of Appeal interfering with the jury's finding in the plaintiff's favour and directing a retrial of that issue, either on the basis that the verdict cannot stand or on the basis of fresh evidence which [the applicant] seeks to introduce.

...

Finally, upon the issue of damages, [the applicant] had been offered in an open letter the substitution of £300,000 for the one and a half million pounds awarded by the jury. The libel remains as serious a libel as it is possible to imagine. Any appeal upon quantum alone would be no more than an academic exercise. [The applicant] wishes to reopen the whole case. In my judgment, the defendant being impecunious, justice demands that he should provide security for the plaintiff's costs of any appeal."

(c) Lord Justice Beldam

"It would be difficult to conjecture an allegation more calculated to bring the respondent into the hatred and contempt of his fellow men and the evidence showed that it was deliberately circulated with the aim of encouraging the respondent to sue him, thus giving the appellant the opportunity to challenge in public the respondent's conduct 45 years ago ...

It is not for this court to grant a retrial after the verdict of a jury, even if it thought that a reasonable jury ought to have found differently. The test which, on the hearing of the appeal, this court would have to apply is whether the finding of the jury is so absolutely unreasonable that it can be said that they have not performed the judicial duty cast upon them. Again I have listened to the skilful development of the facts and evidence by the appellant. He has failed to satisfy me that he has any reasonable chance of success in this appeal. Even if he persuaded the court to grant a retrial on the issue of the amount of the damages, I would regard as negligible the prospect of any jury, doing their judicial duty, awarding the respondent [Lord Aldington] less than the sum which he has in reality already offered to accept in compromise of this appeal. The appellant has therefore failed to satisfy me that he has any such real and substantial grounds of appeal as would justify this court in saying that the special circumstances of his inability to pay the respondent's costs if he fails can be disregarded."

18. The Court of Appeal ordered the applicant to provide security for Lord Aldington's costs in respect of the appeal in the sum of £124,900 within fourteen days, failing which the appeal would stand dismissed. It rejected a request by the applicant for more than fourteen days to attempt to raise the money. In addition the Court of Appeal ordered the applicant to pay Lord Aldington's costs (£22,000) in the security for costs proceedings. The judgment runs to twenty-three pages.

The applicant did not furnish the required security and his appeal was dismissed on 3 August 1990.

19. No part of the damages or costs have to date been paid by the applicant to Lord Aldington.

C. Proceedings pending before the domestic courts

20. In 1993 the applicant applied to the Court of Appeal for leave to appeal out of time against the High Court's judgment of 30 November 1989 and for leave to adduce new evidence. The Registrar informed him in September 1993 that the Court of Appeal had no jurisdiction since the subject-matter was the same as an appeal which had already been dismissed.

On 21 February 1994 the applicant issued a writ against Lord Aldington in the High Court, applying for an order that the judgment of 30 November 1989 be set aside on the grounds of fraud. He also sought damages and other relief. Lord Aldington applied to strike out the action as an abuse of process and as being vexatious and frivolous.

By judgment of 14 October 1994, Mr Justice Collins struck the case out as being an abuse of the process of the court, on the ground

that the applicant was unable to establish a reasonable possibility that the new evidence might show that Lord Aldington had committed perjury. In a judgment of 30 November 1994 Mr Justice Collins ordered the applicant's solicitors, who had funded the new action by acting without a fee, to pay 60% of Lord Aldington's costs in the proceedings. An appeal by the applicant to the Court of Appeal is pending.

II. Relevant domestic law

A. Liability and damages in defamation cases

21. Under English law the actions of libel and slander are private legal remedies, the object of which is to vindicate the plaintiff's reputation and to make reparation for the injury done by the wrongful publication to a third person or persons of defamatory statements concerning the plaintiff. The defendant in these actions may prove the truth of the defamatory matter and thus show that the plaintiff has received no injury. Although there may be damage accruing from the publication if the facts published are true, the law gives no remedy by action (see Halsbury's Laws of England, Fourth Edition, vol. 28, paragraph 1).

22. A strict liability rule applies to the tort of libel:

> "A man in good faith may publish a libel believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action, however excellent his intention." (Lord Loreburn LC in Hulton v. Jones [1910] Appeal Cases 20 (House of Lords), at pp. 23-24)

The law presumes in the plaintiff's favour that the words are false, unless and until the defendant proves to the contrary (Gatley, Libel and Slander, Eighth Edition, paragraph 5, p. 6).

If the defendant attempts unsuccessfully to prove that the words are true, this is likely to increase the damages (Duncan and Neill on defamation, Second Edition, paragraph 18.14, p. 129).

23. The purpose of damages in the law of libel is as stated by Lord Hailsham in Broome v. Cassell & Co. Ltd ([1972] Appeal Cases 1027, at p. 1071, quoted by Lord Donaldson in Sutcliffe v. Pressdram Ltd [1991] 1 Queen's Bench 153, p. 189):

> "In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitutio in integrum has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before his wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge. `... [A] man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - as a vindication of the plaintiff to the public and as

> consolation to him for a wrong done.' ... Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant ..."

B. Functions of judge and jury in the High Court in defamation cases

24. If the words in question are reasonably capable of being understood in a defamatory sense, the judge must leave it to the jury to say whether they did, in fact, defame the plaintiff. If not, he must give judgment for the defendant without leaving the case to the jury.

The proper course to adopt for the judge in civil proceedings for libel or slander, or criminal proceedings, where there is a case to go to the jury, is to define what is libel in point of law, and leave it to the jury to decide as a matter of fact whether the particular publication falls within that definition or not.

The assessment of damages is peculiarly the province of the jury, and the judge, unless sitting alone, must not himself decide the amount. He should direct the jury as to the relevant factors, such as the extent of publication, the degree to which the words would be believed or the range of persons having special knowledge needed to perceive an innuendo meaning, the position and standing of the plaintiff, the conduct of the plaintiff and of the defendant and all the circumstances of the case (see Halsbury's Laws of England, Fourth Edition, vol. 28, paragraphs 225, 227 and 232).

25. There is no upper or lower limit to the sum of damages which a jury in a libel trial may award. In the above-mentioned case of Sutcliffe v. Pressdram Ltd, Lord Donaldson stressed that referring juries to other cases would confuse rather than assist the jury and that any attempt by counsel or the judge to discuss figures would lead to unhelpful overbidding and underbidding and would risk usurping the true function of the jury. However, the judge might give some guidance to a jury to assist it in appreciating the real value of very large sums of money, for example by inviting it to consider what regular income could be obtained if the sum was invested (see the above-mentioned case of Sutcliffe v. Pressdram Ltd, Lord Donaldson, p. 178; see also Lord Nourse, p. 186, and Lord Russell, pp. 190-91).

C. Court of Appeal's powers to review a jury's award of damages

26. At the relevant time, under Order 59, Rule 11, of the Rules of the Supreme Court 1965, the Court of Appeal had power to set aside a High Court judgment and order a new trial. Rule 11 (1)-(3) read:

> "(1) On the hearing of any appeal the Court of Appeal may, if it thinks fit, make any such order as could be made in pursuance of an application for a new trial or to set aside a verdict, finding or judgment of the court below.
>
> (2) The Court of Appeal shall not be bound to order a new trial on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby

occasioned.

(3) A new trial may be ordered on any question without interfering with the finding or decision on any other question; and if it appears to the Court of Appeal that any such wrong or miscarriage as is mentioned in paragraph 2 affects part only of the matter in controversy, or one or some only of the parties, the court may order a new trial as to that party only, or as to that party or those parties only, and give final judgment as to the remainder.

(4) ..."

As to what test the Court of Appeal should apply in exercising its powers to set aside a jury's verdict on damages, Lord Kilbrandon in Broome v. Cassell & Co. Ltd ([1972] Appeal Cases 1027, p. 1135) stated that it was not sufficient for the court to conclude that the award was excessive; it had to ask whether the award could have been made by sensible people, or whether it must have been arrived at capriciously, unconscionably or irrationally.

27. According to Rule 11 (4), as in force at the material time, the Court of Appeal had no power, in lieu of ordering a new trial, to reduce or increase the damages awarded by the jury, unless the party or parties concerned consented.

Since the entry into force on 1 February 1991 of the Courts and Legal Services Act 1990, the Court of Appeal has a power under section 8 (2) of that Act to substitute its own assessment of damages for that of the jury irrespective of whether the parties agree or not. Order 59, Rule 11 (4), as amended in the light of the above section 8, provides:

"In any case where the Court of Appeal has power to order a new trial on the ground that damages awarded by a jury are excessive or inadequate, the court may, instead of ordering a new trial, substitute for the sum awarded by the jury such sum as appears to the court to be proper, but except as aforesaid the Court of Appeal shall not have power to reduce or increase the damages awarded by a jury."

28. In the case of Rantzen v. Mirror Group Newspapers (1986) Ltd ([1993] 3 Weekly Law Reports, p. 953) the Court of Appeal exercised its powers under section 8 of the Courts and Legal Services Act 1990 and under the new Order 59, Rule 11 (4). In interpreting its power to order a new trial or to substitute another award on the ground that the damages awarded by the jury were excessive, the Court of Appeal observed that the grant of an almost limitless discretion to a jury failed to provide a satisfactory measurement for deciding what is "necessary in a democratic society" or "justified by a pressing social need" for the purposes of Article 10 (art. 10) of the European Convention on Human Rights. The common law, if properly understood, required the courts to subject large awards of damages to a more searching scrutiny than had been customary in the past. It followed that what had been regarded as the barrier against intervention should be lowered. The question became:

"Could a reasonable jury have thought that this award was necessary to compensate the plaintiff and to re-establish his reputation?"

As to what guidance the judge could give to the jury, the Court of Appeal was not persuaded that the time had come to make references to awards by juries in previous libel cases. Nor was there any satisfactory way in which awards made in actions involving serious personal injuries could be taken into account. It was to be hoped that in the course of time a series of decisions of the Court of Appeal, taken under section 8 of the Courts and Legal Services Act 1990, would establish some standards as to what would be "proper" awards. In the meantime the jury should be invited to consider the purchasing power of any award which they may make and to ensure that any award they make is proportionate to the damage which the plaintiff has suffered and is a sum which it is necessary to award him to provide adequate compensation and to re-establish his reputation.

The Court of Appeal concluded that although a very substantial award was clearly justified in the case, judged by any objective standards of reasonable compensation or necessity or proportionality, the award of £250,000 was excessive. It substituted the sum of £110,000.

PROCEEDINGS BEFORE THE COMMISSION

29. In his application of 18 December 1990 (no. 18139/91) to the Commission, Count Tolstoy complained that he had not had a fair hearing by an impartial tribunal as required under Article 6 para. 1 (art. 6-1) of the Convention. Moreover, invoking Article 13 (art. 13) of the Convention (right to an effective remedy) initially, but subsequently relying on Article 6 para. 1 (art. 6-1), the applicant further alleged that the Court of Appeal's order making his right to appeal conditional upon his paying £124,900 as security for Lord Aldington's costs gave rise to a breach of his right of access to court. Finally, he claimed that the award of £1,500,000 and injunction ordered by the High Court constituted a violation of his right to freedom of expression as guaranteed by Article 10 (art. 10) of the Convention.

30. On 20 February 1992 the Commission declared inadmissible the complaint that the proceedings had been unfair; on 12 May 1993 it declared the remainder of the application admissible. In its report of 6 December 1993 (Article 31) (art. 31) the Commission expressed the opinion that there had been no violation of the applicant's right of access to court under Article 6 para. 1 (art. 6-1) (by ten votes to five), but that there had been a breach of his right to freedom of expression under Article 10 (art. 10) (unanimously). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment (1).

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1. Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 316-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS MADE TO THE COURT

31. At the public hearing on 21 January 1995 the Government, as they had done in their memorial, invited the Court to hold that the facts disclosed no violation of Article 6 (art. 6) or Article 10 (art. 10) of the Convention in the present case.

32. On the same occasion the applicant likewise maintained the requests to the Court stated in his memorial to decide that there had been violations of Articles 6 and 10 (art. 6, art. 10) and to award him just satisfaction under Article 50 (art. 50) of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10) OF THE CONVENTION

33. The applicant alleged a violation of Article 10 (art. 10) of the Convention, which reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

He maintained that the quantum of the damages awarded against him could not be considered to have been "prescribed by law". In addition, the size of the award and the breadth of the injunction had been disproportionate to the aim of protecting Lord Aldington's "reputation or rights" and had thus not been "necessary in a democratic society".

34. The Government disputed these contentions. The Commission shared the applicant's view that the award was disproportionate but did not state any opinion on his other complaints.

35. The Court observes in the first place that the case before it is limited solely to a complaint concerning the amount of damages awarded and the court's injunction. In this regard it is unlike the defamation cases it has examined hitherto (see, for instance, the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, pp. 24-28, paras. 34-47; the Castells v. Spain judgment of 23 April 1992, Series A no. 236, pp. 20-24, paras. 33-50; and the Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239, pp. 24-28, paras. 55-70), which have concerned either the decision determining liability alone or both that and the sanction.

Both the award of damages and the injunction clearly constituted an interference with the exercise by the applicant of his right to freedom of expression, as guaranteed by paragraph 1 of Article 10 (art. 10-1) and this was not disputed before the Court. Such an interference entails a violation of Article 10 (art. 10) unless it was "prescribed by law", pursued an aim or aims that is or are legitimate under Article 10 para. 2 (art. 10-2) and was "necessary in a democratic society" to attain the aforesaid aim or aims.

A. Was the award "prescribed by law"?

36. As regards the amount of damages awarded, the applicant complained that it was not "prescribed by law".

1. General principles

37. The expression "prescribed by law" in Article 10 para. 2 (art. 10-2) must be interpreted in the light of the general principles concerning the corresponding words "in accordance with the law" in Article 8 para. 2 (art. 8-2) (see the Sunday Times v. the United Kingdom (no. 1) judgment of 26 April 1979, Series A no. 30, pp. 30-31, paras. 48-49; cf. the Malone v. the United Kingdom judgment of 2 August 1984, Series A no. 82, p. 31, para. 66), which have been summarised in the Margareta and Roger Andersson v. Sweden judgment of 25 February 1992 (Series A no. 226-A, p. 25, para. 75), as follows:

> "... the expression ... requires firstly that the impugned measures should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them - if need be, with appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. A law which confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference."

The Court further reiterates that the word "law" covers not only statute but also common law (see the above-mentioned Sunday Times judgment, p. 30, para. 47).

2. Application of the above principles

38. The applicant did not deny that the award had a basis in domestic law. However, he complained that the law in question did not enable him to foresee to a reasonable degree that the amount would be as high as £1.5 million.

At English common law there was no upper or lower limit on the amount of damages. The extent to which a judge could give guidance was strictly circumscribed. No specific figures could be suggested and awards of damages in other libel cases or even in personal injury cases had to be disregarded for the purposes of comparison. Guidance could only be given to help the jury to appreciate the real value of large sums of money, for instance by inviting them to reflect on the value of a house (see paragraph 25 above). At the material time, there had been no principle recognised in English law that required the award to be proportionate to the aim of repairing the damage to the plaintiff's reputation. The jury gave no reasons for its decision and the award could be overturned by the Court of Appeal only if it was so unreasonable that it could not have been made by sensible people but must have been arrived at capriciously, unconscionably or irrationally (see paragraphs 24, 26 and 28 above).

The applicant pointed out that, as a result of the above, in his case the trial judge had not directed the jury to ensure that the award

was proportionate to the damage that Lord Aldington had suffered. The jury had, on the contrary, been encouraged to consider "enormous damages" and had been informed by the judge that "there is no league of damages in defamation cases" (see paragraph 11 above). The award made, although it had supposedly not included any punitive damages, had been three times the largest amount previously awarded by an English libel jury (see paragraph 12 above) and had been substantially greater than the sum that would be awarded to a plaintiff suffering permanent and extremely severe physical or mental disablement in a personal injury action. It would have been impossible for the applicant's legal advisers to predict that an award of the magnitude in question would be made.

39. The Government argued that a remedy such as the libel award made in the applicant's case needed to be flexible to accommodate the facts of each individual case, especially the facts of so exceptional a case as the present one. Only by maintaining such flexibility could the law achieve the purpose of compensation under the law of libel, namely to empower the jury to award, in the light of the relevant criteria at common law (see paragraph 23 above), the sum that it considered to be appropriate in the circumstances. In any event, it was not for the Court to assess English libel law in the abstract.

40. The Court notes in the first place that the libel as found by the jury was of an exceptionally serious nature. Indeed, during the hearing at the High Court, counsel for the applicant and the applicant himself had accepted that, if libel were to be established, the jury would have to award a very substantial sum in damages (see paragraph 11 above).

41. The Court accepts that national laws concerning the calculation of damages for injury to reputation must make allowance for an open-ended variety of factual situations. A considerable degree of flexibility may be called for to enable juries to assess damages tailored to the facts of the particular case. Indeed, this is reflected in the trial judge's summing-up to the jury in the present case (see paragraph 11 above). It follows that the absence of specific guidelines in the legal rules governing the assessment of damages must be seen as an inherent feature of the law of damages in this area.

Accordingly, it cannot be a requirement of the notion of "prescribed by law" in Article 10 (art. 10) of the Convention that the applicant, even with appropriate legal advice, could anticipate with any degree of certainty the quantum of damages that could be awarded in his particular case.

42. It is further observed that the discretion enjoyed by the jury in the assessment of damages was not unfettered. A jury was bound to take into account such factors as injury to feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, the reaffirmation of the truth of the matters complained of, vindication of the plaintiff's reputation (see paragraph 23 above). It was for the trial judge to direct the jury on the law. In addition, the Court of Appeal had power to set aside an award, inter alia on the ground of irrationality and to order a new trial. It therefore appears that, although the principle of proportionality as such may not have been recognised under the relevant national law, decisions on awards were subject to a number of limitations and safeguards.

43. In jury trials, the lack of reasoning for awards of damages is

the norm and is to a large extent unavoidable. The applicant's submission to the effect that the absence of reasons affected the foreseeability of a particularly high award being made in his case is thus not persuasive. Moreover, the argument could apply to any award whatever the magnitude and concerns less the size of the award than the very nature of the jury system itself.

44. Having regard to the fact that a high degree of flexibility may be justified in this area (see paragraph 41 above), the various criteria to be taken into account by juries in the assessment of damages as well as the review exercised by the Court of Appeal, the Court reaches the conclusion that the relevant legal rules concerning damages for libel were formulated with sufficient precision. In short, the award was "prescribed by law".

B. Did the award and the injunction pursue a legitimate aim?

45. The award and the injunction clearly pursued the legitimate aim of protecting the "reputation or rights of others". This was not disputed.

C. Were the award and the injunction "necessary in a democratic society"?

1. The award

46. The applicant and the Commission were of the view that the amount of damages awarded - £1.5 million - was disproportionate to the legitimate aim of protecting Lord Aldington's reputation or rights. The applicant pointed out that, at the relevant time, judicial control over the award of damages in defamation cases had been insufficient to ensure that such awards were proportionate.

He further emphasised that the jury had not been directed to consider, in mitigation of damages, that the libellous criticism had concerned acts performed by Lord Aldington as a public officer acting in an official capacity, and had raised matters of very great public interest. These factors, which militated in favour of the allowance of wide limits to acceptable criticism, were not relevant under English law.

The jury had also been directed that an attempt to justify the allegations aggravated the damage suffered. This principle, in conjunction with the strict liability rule in libel cases, resulted in the imposition of a harsher penalty on a defendant who made his allegations in good faith but who failed to prove them to be true, than on a defendant who spoke knowing himself to be lying and did not attempt to defend his allegations (see paragraph 22 above).

47. The Government maintained that there was a reasonable relationship of proportionality between the amount of the award and the aim of compensating the damage done to Lord Aldington and restoring his reputation. They pointed out that Article 10 (art. 10) imposed "duties and responsibilities". The applicant's pamphlet had been false and unfair and had been expressly designed to provoke a libel action. Although no reasons had been given by the jury, it was, as noted by the Court of Appeal, obvious that the jury awarded so large a sum by way of damages because of the enormity of the libel. The Court of Appeal had been satisfied that the award of £1.5 million had been a rational response by the jury to the exceptional circumstances of the libel

which they were considering. Otherwise, as amply demonstrated by its ruling in Sutcliffe v. Pressdram Ltd, the Court of Appeal would have been able to set the award aside and order a new trial.

The Government further submitted that in the Court of Appeal's opinion the jury had received a very full direction from the trial judge (see paragraph 17 above). Moreover, as explained by the judge to the jury, it would have been inappropriate and unhelpful to the jury for him to refer to other cases, because the facts and circumstances were so different, or refer to specific sums of money, since the quantum of damages was exclusively a matter for the jury (see paragraph 11 above).

In addition, before the High Court both counsel for the applicant and the applicant himself had acknowledged that if Lord Aldington won his libel action, he must receive a very substantial sum (see paragraph 11 above). In the Court of Appeal the applicant had been unconcerned about the size of the damages award and he had earlier declined Lord Aldington's offer to accept £300,000 (see paragraphs 15 and 17 above). The offer remained open and the applicant could at any time reduce his liability by £1.2 million if he really wished to do so.

48. The Court recalls at the outset that its review is confined to the award as it was assessed by the jury, in the circumstances of judicial control existing at the time, and does not extend to the jury's finding of libel. It follows that its assessment of the facts is even more circumscribed than would have been the case had the complaint also concerned the latter.

In this connection, it should also be observed that perceptions as to what would be an appropriate response by society to speech which does not or is not claimed to enjoy the protection of Article 10 (art. 10) of the Convention may differ greatly from one Contracting State to another. The competent national authorities are better placed than the European Court to assess the matter and should therefore enjoy a wide margin of appreciation in this respect.

49. On the other hand, the fact that the applicant declined to accept Lord Aldington's offer to settle for a lesser sum (see paragraph 15 above) does not diminish the United Kingdom's responsibility under the Convention in respect of the contested damages award.

However, the Court takes note of the fact that the applicant himself and his counsel accepted that if the jury were to find libel, it would have to make a very substantial award of damages (see paragraph 11 above). While this is an important element to be borne in mind it does not mean that the jury was free to make any award it saw fit since, under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.

The jury had been directed not to punish the applicant but only to award an amount that would compensate the non-pecuniary damage to Lord Aldington (see paragraph 11 above). The sum awarded was three times the size of the highest libel award previously made in England (see paragraph 12 above) and no comparable award has been made since. An award of the present size must be particularly open to question where the substantive national law applicable at the time fails itself to provide a requirement of proportionality.

50. In this regard it should be noted that, at the material time, the national law allowed a great latitude to the jury. The Court of Appeal could not set aside an award simply on the grounds that it was excessive but only if the award was so unreasonable that it could not have been made by sensible people and must have been arrived at capriciously, unconscionably or irrationally (see paragraph 26 above). In a more recent case, Rantzen v. Mirror Group Newspapers Ltd, the Court of Appeal itself observed that to grant an almost limitless discretion to a jury failed to provide a satisfactory measurement for deciding what was "necessary in a democratic society" for the purposes of Article 10 (art. 10) of the Convention. It noted that the common law - if properly understood - required the courts to subject large awards of damages to a more searching scrutiny than had been customary. As to what guidance the judge could give to the jury, the Court of Appeal stated that it was to be hoped that in the course of time a series of decisions of the Court of Appeal, taken under section 8 of the Courts and Legal Services Act 1990, would establish some standards as to what would be "proper" awards. In the meantime the jury should be invited to consider the purchasing power of any award which they might make and to ensure that any award they made was proportionate to the damage which the plaintiff had suffered and was a sum which it was necessary to award him to provide adequate compensation and to re-establish his reputation (see paragraph 28 above).

The Court cannot but endorse the above observations by the Court of Appeal to the effect that the scope of judicial control, at the trial and on appeal, at the time of the applicant's case did not offer adequate and effective safeguards against a disproportionately large award.

51. Accordingly, having regard to the size of the award in the applicant's case in conjunction with the lack of adequate and effective safeguards at the relevant time against a disproportionately large award, the Court finds that there has been a violation of the applicant's rights under Article 10 (art. 10) of the Convention.

2. The injunction

52. The applicant further alleged that the injunction (see paragraph 12 above) was disproportionate to the aim of protecting Lord Aldington's reputation or rights. It was sweepingly broad and was ordered as a consequence of a verdict of the jury for which no reasons were given and which the judge had interpreted in the widest possible way. It prevented any comment on the role of Lord Aldington in relation to the handover of Cossacks and Yugoslavs, and the publication of any critical comment on the activities of 5 Corps which would reflect adversely on Lord Aldington, whether he was named or not. In the absence of a successful appeal, an application to vary or discharge the injunction could never have succeeded, given the state of English law. It constituted a permanent and serious interference with the applicant's opportunity to carry on his profession as a historian, preventing him from publishing the fruits of his research on the events in question.

At any rate, the injunction was disproportionate if considered together with the award, as the measures served in part the same function. The jury was not aware when it made the award that the judge would order an injunction. It was thus very likely that the award was intended not only to compensate Lord Aldington but also to deter the applicant from publishing in the future.

53. The Government contested these allegations. They maintained that in the light of the jury's verdict the judge had been entitled to prevent future repetition of the libel by the applicant and this had been the purpose of the injunction. Although the applicant's counsel at the trial had been given the opportunity to comment on the wording of the injunction, no objections had been made at the trial, or thereafter. The applicant had not availed himself of the possibility, which is still open to him, of asking for the injunction to be varied or discharged; nor had he lodged an appeal against it. In these circumstances the Court should not entertain the complaint.

As to the applicant's argument that the injunction overlapped with the damages award, the Government stressed that, whilst the former measure was aimed at preventing future injury, the latter was designed only to compensate for the past loss and to vindicate Lord Aldington's reputation.

54. As the Court has already observed, it is not claimed that the jury's finding of libel was incompatible with Article 10 (art. 10). The injunction was only a logical consequence of this finding and was framed precisely to prevent the applicant from repeating the libellous allegations against Lord Aldington. There is nothing to indicate that the injunction went beyond this purpose. Nor is there any other ground for holding that the measure, either taken alone or in conjunction with the award, amounted to a disproportionate interference with the applicant's right to freedom of expression as guaranteed by Article 10 (art. 10).

D. Recapitulation

55. In sum, the Court concludes that the award was "prescribed by law" but was not "necessary in a democratic society" as there was not, having regard to its size in conjunction with the state of national law at the relevant time, the assurance of a reasonable relationship of proportionality to the legitimate aim pursued. Accordingly, on the latter point, there has been a violation of Article 10 (art. 10). On the other hand, the injunction, either taken alone or together with the award, did not give rise to any breach of that Article (art. 10).

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

56. The applicant maintained, in addition, that there had been a violation of his right of access to a court as guaranteed by Article 6 para. 1 (art. 6-1) of the Convention on account of the order by the Court of Appeal requiring him to pay £124,900 as security for Lord Aldington's costs in the appeal as a condition for the applicant's appeal to be heard by that court. In so far as is relevant Article 6 para. 1 (art. 6-1) provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law ..."

57. The Government and the Commission disagreed with the above contention.

A. Applicability of Article 6 para. 1 (art. 6-1)

58. Notwithstanding the fact that the issue was not in dispute before it, the Court must ascertain whether Article 6 para. 1 (art. 6-1) is applicable in the instant case. The previous defamation cases dealt with by the Court under Article 6 para. 1 (art. 6-1) have all concerned applicants who have sought to protect their own reputation by bringing proceedings before a court. According to established case-law, the provision (art. 6-1) applies to such proceedings, the right to enjoy a good reputation being a "civil right" within the meaning of Article 6 para. 1 (art. 6-1) (see, for instance, the Helmers v. Sweden judgment of 29 October 1991, Series A no. 212-A, p. 14, para. 27). Article 6 (art. 6) must also apply in relation to a defendant in such proceedings, where the outcome is directly decisive for his or her "civil obligations" vis-à-vis the plaintiff.

Accordingly, Article 6 para. 1 (art. 6-1) applies to the present case.

B. Compliance with Article 6 para. 1 (art. 6-1)

59. The Court reiterates that the right of access to the courts secured by Article 6 para. 1 (art. 6-1) may be subject to limitations in the form of regulation by the State. In this respect the State enjoys a certain margin of appreciation. However, the Court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, for instance, the Fayed v. the United Kingdom judgment of 21 September 1994, Series A no. 294-B, pp. 49-50, para. 65).

It follows from established case-law that Article 6 para. 1 (art. 6-1) does not guarantee a right of appeal. Nevertheless, a Contracting State which sets up an appeal system is required to ensure that persons within its jurisdiction enjoy before appellate courts the fundamental guarantees in Article 6 (art. 6) (see, in particular, the Delcourt v. Belgium judgment of 17 January 1970, Series A no. 11, pp. 14-15, para. 25). However, the manner of application of Article 6 (art. 6) to proceedings before such courts depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (see, for instance, the Monnell and Morris v. the United Kingdom judgment of 2 March 1987, Series A no. 115, p. 22, para. 56; and the above-mentioned Helmers judgment, p. 15, para. 31).

The Court's task is not to substitute itself for the competent British authorities in determining the most appropriate policy for regulating access to the Court of Appeal in libel cases, nor to assess the facts which led that court to adopt one decision rather than another. The Court's role is to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see in particular the above-mentioned Fayed judgment, p. 55, para. 81; and, mutatis mutandis, the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, para. 34).

60. The applicant submitted that the requirement that he pay £124,900 within a mere fourteen days had amounted to a total bar on his access

to the Court of Appeal (see paragraph 18 above). It had impaired the essence of his right of access to that court and was disproportionate.

In the first place, the court had not been prepared to allow him more than fourteen days to pay the sum and had thereby denied him any realistic opportunity to raise the money and to pursue the appeal.

Furthermore, it had placed on the applicant the onus of showing that he had real and substantial grounds upon which to challenge the judgment against him, rather than requiring Lord Aldington, the party seeking the order which would effectively bar the right of appeal, to show that the appeal was frivolous or had no prospect of success. Also, the Court of Appeal should not have taken into account Lord Aldington's offer to settle for a lesser sum (see paragraph 17 above).

Moreover, the Court of Appeal had failed to have regard to the following factors. Legal aid was not available in libel actions, even to defendants, like the applicant, who were defending their fundamental right to freedom of expression. Lord Aldington's need for protection was diminished in that the costs in the High Court had in large part been covered by Sun Alliance Insurance Company, a well-endowed corporation (see paragraph 17 above).

Finally, the fact that the case had been heard at first instance was irrelevant to the question of effective access to the Court of Appeal. Nor was it significant that it had heard arguments from the parties before concluding that security should be required; it was the Court of Appeal's decision which had evinced the lack of proportionality complained of.

61. The Court considers that the security for costs order clearly pursued a legitimate aim, namely to protect Lord Aldington from being faced with an irrecoverable bill for legal costs if the applicant were unsuccessful in the appeal. This was not disputed. Further, since regard was also had to the lack of prospects of success of the applicant's appeal, the requirement could also, as argued by the Government, be said to have been imposed in the interests of a fair administration of justice (see paragraph 17 above).

62. Like the Government and the Commission, the Court is unable to share the applicant's view that the security for costs order impaired the very essence of his right of access to court and was disproportionate for the purposes of Article 6 (art. 6).

63. In the first place, the case had been heard for some forty days at first instance before the High Court, in the course of which Lord Aldington gave evidence for more than six days and was cross-examined, the applicant gave evidence for more than five days and a number of witnesses were called (see paragraphs 11 and 17 above). It is undisputed that the applicant enjoyed full access to court in those proceedings. It is true that he initially complained about their lack of fairness. However, that complaint was declared inadmissible by the Commission as being manifestly ill-founded.

The Court attaches great weight to the above considerations in its assessment of the compatibility with Article 6 (art. 6) of the restrictions on the applicant's access to the Court of Appeal. Indeed, as indicated earlier, the entirety of the proceedings must be taken into account.

64. Admittedly, the sum required - £124,900 - was very substantial and the time-limit - fourteen days - for providing the money was relatively short. However, there is nothing to suggest that the figure was an unreasonable estimate of Lord Aldington's costs before the Court of Appeal or that the applicant would have been able to raise the money had he been given more time.

65. According to the relevant practice in the Court of Appeal, impecuniosity was a ground for awarding security for costs of an appeal to that court, but only on certain conditions. In exercising its discretion as to whether to grant an application for such an order, the Court of Appeal would consider whether the measure would amount to a denial of justice to the defendant, in particular having regard to the merits of the appeal (see paragraphs 16 and 17 above). If it had reasonable prospects of success, the Court of Appeal would be reluctant to order security for costs.

The disagreement between the applicant and Lord Aldington in the security for costs proceedings concerned the merits or lack of merits of the appeal. The Registrar of the Court of Appeal, with hesitation, decided that the appeal had just enough strength to allow the applicant to proceed without furnishing security for costs. This decision was subsequently reversed by the Court of Appeal because the applicant had failed to show real and substantial grounds for his appeal, both on liability and on damages. On the point of damages, the Court of Appeal observed, inter alia, that the applicant was not so interested in that issue as in the question of liability and that he had declined to accept Lord Aldington's offer to settle for £300,000. Therefore, an appeal on damages only would have been no more than an academic exercise (see paragraphs 16 and 17 above).

The Court does not find that the justification given by the Court of Appeal for ordering security for costs disclosed any arbitrariness.

66. Moreover, the security for costs issue was first examined by the Registrar of the Court of Appeal and then heard by the court for six days (see paragraphs 16 and 17 above). The Court of Appeal's decision was thus based on a full and thorough evaluation of the relevant factors (see the above-mentioned Monnell and Morris judgment, p. 25, para. 69).

67. In the light of the foregoing, the Court does not find that the national authorities overstepped their margin of appreciation in setting the conditions which they did for the applicant to pursue his appeal in the Court of Appeal. It cannot be said that those conditions impaired the essence of the applicant's right of access to court or were disproportionate for the purposes of Article 6 para. 1 (art. 6-1).

Accordingly, there has been no violation of that provision (art. 6-1).

III. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

68. Count Tolstoy Miloslavsky sought just satisfaction under Article 50 (art. 50) of the Convention, according to which:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising

from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Request for a "declaratory" judgment

69. The applicant did not claim compensation for non-pecuniary damage but requested the Court to give a "declaratory" judgment that would ensure that he was liable, if at all, to pay to Lord Aldington only such damages as were necessary to provide adequate compensation and to re-establish the latter's reputation and that the Government would indemnify the applicant for any greater sum which he was liable to pay Lord Aldington.

70. The Government considered that because the applicant had not paid any sums by way of compensation to Lord Aldington, no further remedy was required.

71. The Delegate of the Commission did not offer any comments on this point.

72. The Court is not empowered under Article 50 (art. 50) of the Convention to make a declaration such as that requested by the applicant (see, for instance, the Philis v. Greece judgment of 27 August 1991, Series A no. 209, p. 27, para. 79; the Pelladoah v. the Netherlands judgment of 22 September 1994, Series A no. 297-B, p. 36, para. 44; and the Allenet de Ribemont v. France judgment of 10 February 1995, Series A no. 308, p. 23, para. 65). Accordingly, the applicant's request under this head must be rejected.

B. Pecuniary damage

73. The applicant also asked the Court to award him compensation in an appropriate amount for his loss of opportunity to earn a living as a historian by reason of the effects of the permanent injunction.

74. The Court does not find it established that there existed a causal link between the matter found to constitute a violation (see paragraph 55 above) and any loss or damage which the applicant may have suffered as a result of the injunction. Therefore, his claim under this head must also be dismissed.

C. Costs and expenses

75. The applicant further claimed reimbursement of costs and expenses, totalling 104,000 Swiss francs (CHF) and £149,878.24, in respect of the following items:

(a) CHF 70,000 for work (200 hours at SF 350 per hour) from December 1990 to August 1992 by Mr C.F. O'Neall (resident in Switzerland), in connection with the preparation and filing of the initial application and written observations to the Commission;

(b) CHF 22,800 in respect of expenses incurred by Mr O'Neall in travelling to London for consultation and preparation of the above written observations to the Commission;

(c) CHF 11,200 for telephone, fax, postage, photocopying and binding

in connection with the above;

(d) £144,492.67 for Theodore Goddard, Solicitors, and counsel's work from August 1992 to 23 January 1995 with the applicant's written and oral pleadings to the Commission and Court;

(e) £2,621.40 for travel and subsistence expenses in connection with the appearances of the aforementioned representatives before the Commission and Court;

(f) £2,764.17 for photocopying and miscellaneous expenses (including fax charges and fares) incurred between August 1992 and 23 January 1995.

76. The Government and the Delegate were of the view that the amounts claimed under items (a) and (d) in respect of fees were excessive. The Delegate of the Commission invited the Court to consider adoption of a uniform approach, irrespective of national standards. The Government did not object to any of the other claims, although they invited the Court to take a critical look at the amount of costs claimed.

77. The Court will consider the above claims in the light of the criteria laid down in its case-law, namely whether the costs and expenses were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum.

On the point raised by the Delegate of the Commission, concerning the reasonableness of lawyers' fees, the Court reiterates that it does not consider itself bound by domestic scales and practices, although it may derive some assistance from them (see the König v. Germany judgment of 10 March 1980, Series A no. 36, pp. 18-19, paras. 22-23 and 25; the Sunday Times v. the United Kingdom (no. 1) judgment of 6 November 1980, Series A no. 38, p. 17, para. 41; and the Silver and Others v. the United Kingdom judgment of 24 October 1983, Series A no. 67, p. 10, para. 20). On the other hand, given the great differences at present in rates of fees from one Contracting State to another, a uniform approach to the assessment of fees under Article 50 (art. 50) of the Convention does not seem appropriate.

78. Turning to the applicant's claims, the Court is not satisfied that all the costs and expenses were necessarily incurred. Considering also that the applicant has succeeded only in respect of one of his complaints under the Convention (see paragraph 55 above) and deciding on an equitable basis, it awards CHF 40,000 with respect to items (a), (b) and (c) and £70,000 with regard to items (d), (e) and (f).

FOR THESE REASONS, THE COURT

1. Holds unanimously that the award was "prescribed by law" within the meaning of Article 10 (art. 10) of the Convention;

2. Holds unanimously that the award, having regard to its size taken in conjunction with the state of national law at the relevant time was not "necessary in a democratic society" and thus constituted a violation of the applicant's rights under Article 10 (art. 10);

3. Holds unanimously that the injunction, either taken alone or together with the award, did not give rise to a breach of

Article 10 (art. 10);

4. Holds unanimously that Article 6 para. 1 (art. 6-1) of the Convention was applicable to the proceedings in the Court of Appeal;

5. Holds by eight votes to one that there has been no violation of the applicant's right of access to court as guaranteed by Article 6 para. 1 (art. 6-1) on account of the security for costs order by the Court of Appeal;

6. Holds unanimously that the United Kingdom is to pay to the applicant, within three months, in compensation for fees and expenses 40,000 (forty thousand) Swiss francs and £70,000 (seventy thousand);

7. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 13 July 1995.

Signed: Rolv RYSSDAL
President

For the Registrar
Signed: Vincent BERGER
Head of Division
in the registry of the Court

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the partly dissenting opinion of Mr Jambrek is annexed to this judgment.

Initialled: R. R.

Initialled: V. B.

PARTLY DISSENTING OPINION OF JUDGE JAMBREK

1. According to the Court's case-law, the manner of application of Article 6 para. 1 (art. 6-1) of the Convention to proceedings before appellate courts depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein.

I agree with the majority that the order by the Court of Appeal requiring the applicant to pay £124,900 as security for Lord Aldington's costs in the appeal as a condition for the applicant's appeal to be heard by that court, pursued a legitimate aim for the purposes of Article 6 para. 1 (art. 6-1) of the Convention, namely to protect Lord Aldington from being faced with an irrecoverable bill for legal costs if the applicant were unsuccessful in the appeal (see paragraph 61 of the judgment).

However, I am not convinced that the legitimacy of the above aim in itself justified the restrictions imposed on the applicant's access to the Court of Appeal. In my view the security for costs order impaired the very essence of the applicant's right of access to court

as guaranteed by Article 6 para. 1 (art. 6-1) and was disproportionate to the aim pursued (see paragraphs 61 to 67 of the judgment). Therefore, unlike the majority, I find that there has been a violation of this provision (art. 6-1).

2. As to the aims pursued, I agree with the applicant that, where a security for costs order results in a party being denied access to an appellate court because of poverty, it should only be made where the appeal can be shown to be frivolous, vexatious or otherwise unreasonable, or to be an abuse of the process of the court. The applicant's appeal could not be said to fall within that category.

3. In the first place it is to be noted that, whilst the Court of Appeal found that the appeal had no merit, the Registrar of that court had previously concluded that five of the seven grounds of the appeal had "just enough strength ... that security for costs should not be awarded" (see paragraphs 16 and 17 of the judgment). This difference of opinion clearly provides reason for doubting that the security for costs order, the effect of which was to bar the applicant's access to the Court of Appeal, was proportionate.

4. Moreover, I find it difficult to follow the Court of Appeal's reasoning that, in view of the applicant's rejection of Lord Aldington's offer to settle for £300,000, his appeal on quantum was "academic" (see paragraphs 15 and 17 of the judgment). The subject-matter of the applicant's appeal on damages was evidently the award of £1.5 million and not the sum of £300,000. Indeed, as also noted by the Court of Appeal, the offer "was not a concession by the plaintiff's solicitors that the award was too high ..." So, the fact that the applicant declined to accept the offer cannot be taken to mean that he was disinterested in the issue of damages. On the contrary, it suggests that he was aware of the fact that under English libel law the questions of liability and damages are interlinked. As stated by Lord Hailsham in Broome v. Cassell & Co. Ltd, the purpose of damages in the law of libel is that someone "must be able to point to a sum ... sufficient to convince a bystander of the baselessness of the charge" (see paragraph 23 of the judgment).

5. Furthermore, in examining this issue, regard must be had to the grounds on which we found a violation of Article 10 (art. 10), namely the size of the award taken in conjunction with the lack of adequate and effective safeguards at the relevant time against a disproportionately large award (see paragraphs 49 to 51 of the judgment). In this connection, I attach importance not only to the limited scope of judicial control of jury awards but also to the absence of reasoning for such awards and the resultant difficulty in challenging their reasonableness. These factors, in my view, militate strongly in favour of the conclusion that the restrictions placed on the applicant's access to the Court of Appeal were disproportionate for the purposes of Article 6 (art. 6).

6. In addition, the Court of Appeal failed to take into account that in appealing from the High Court's judgment the applicant was seeking to defend his fundamental right to freedom of expression, a right which is protected by Article 10 (art. 10) of the Convention and which constitutes one of the essential foundations of a democratic society (see, for instance, the Sunday Times v. the United Kingdom judgment (no. 2) of 26 November 1991, Series A no. 217, pp. 28-29, para. 50). It is essential that Article 6 para. 1 (art. 6-1) be construed in such a way as to guarantee a real and effective access to court for a person

who wishes to challenge an interference with the exercise of his or her right to freedom of expression.

7. In any event, I do not consider that the Court of Appeal's refusal to grant the applicant an extension of the fourteen days' time-limit for providing the amount of security was justified (see paragraph 18 of the judgment). The applicant's interests in pursuing his appeal clearly outweighed those referred to by the Court of Appeal in support of the refusal, namely to avoid considerable time-constraints in relation to the timescale for the hearing of the appeal. Also, I respectfully disagree with the majority that "there is nothing to suggest ... that the applicant would have been able to raise the money had he been given more time" (see paragraph 64 of the judgment). It was implicit in his request for an extension that he was willing to furnish the security or at least make efforts to do so, but the Court of Appeal gave the applicant no realistic opportunity to show that he would be able to raise the required sum if given more time.

8. For these reasons, I reach a different conclusion from that of the majority. Notwithstanding the fact that the case had been extensively heard in the High Court, the conditions set for the applicant to pursue his appeal to the Court of Appeal exceeded the respondent's State's margin of appreciation; they impaired the very essence of the applicant's right of access to court and were disproportionate for the purposes of Article 6 para. 1 (art. 6-1). Consequently, I find that there has been a violation of Article 6 para. 1 (art. 6-1).

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

FORMER SECOND SECTION

CASE OF UKRAINIAN MEDIA GROUP v. UKRAINE

(Application no. 72713/01)

JUDGMENT

STRASBOURG

29 March 2005

FINAL

12/10/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ukrainian Media Group v. Ukraine,

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

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 18 May 2004 and 8 March 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 72713/01) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a company, the Ukrainian Media Group ("the applicant"), on 12 December 2000.

2. The Ukrainian Government ("the Government") were represented by their Agents, Ms Valeria Lutkovska, succeeded by Ms Zoryana Bortnovska.

3. By a decision of 18 May 2004, the Court declared the application partly admissible.

4. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that a hearing on the merits was required (Rule 59 § 3 *in fine*). The hearing was scheduled for 6 July 2004.

5. On 2 July 2004 the parties submitted a friendly settlement proposal to the Court.

6. On 5 July 2004 the Court adjourned the hearing in order to examine the settlement reached by the parties.

7. On 5 October 2004 the Court decided to dispense with a hearing in the case and to reject the settlement proposed by the parties, as it considered that respect for human rights, as defined in the Convention, required the further examination of the case, pursuant to Articles 37 § 1 *in fine* and 38 § 1(b) of the Convention.

8. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). However, it was decided that this case should remain with the Former Second Section (Rule 52 § 1).

THE FACTS

9. The applicant, the CJSC "Ukrainian Media Group" (ЗАТ "*Українська Прес-Група*"), is a privately owned legal entity, registered and situated in Kyiv, Ukraine. It owns a daily newspaper *The Day* (*газета "День"*).

I. THE CIRCUMSTANCES OF THE CASE

10. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Proceedings in respect of the publication of 21 August 1999

11. On 21 August 1999 *The Day* published an article by Ms Tetyana E. Korobova entitled "Is this a second Yurik for poor Yoriks, or a Ukrainian version of Lebed?" The article read as follows:

> "Epigraph: All of this is about her, our Natasha as well as yours. About the position that a progressive socialist, Natalia Vitrenko, may or may not hold - depending on which of the scenarios from Bankova [the name of the street where the President's Administration is situated] will eventually win the "tender" offered by office No. 1. Certainly, allowing for a certain margin of error, it will be possible to forecast which of the nominees would be easier to manipulate from the said office.
>
> The first version [concerning her position] was predicted by *The Day* as far back as the spring, and was based on the assumption that, from the point of view of Bankova, Petro Symonenko [leader of the Communist Party] was not "nice or bright" enough for the role of "a scarecrow" in the pre-election scenario *à la russe*: "the reformer against the red threat". Natalia Vitrenko, with her "Uranium mines", and Volodymyr Marchenko are much more impressive and the best political scientists and sociologists told us, therefore, that she was the only person able to defeat Kuchma in the second round of the elections with a predicted 33 % of the poll. Political scientists and sociologists were soon proved wrong and Natalia Vitrenko's rating substantially decreased. However, this is due perhaps to the freedom of scientific debate and discord around the main body [that of the President] rather than Ms Vitrenko's real ratings. Of course, it is hard to believe that one third of the country's population, watching a TV programme where Natasha battered a deputy who had been knocked to the floor with the help of Marchenko's fists, would choose not to call an ambulance and medical help, but instead would race to vote for "progressive socialism". It is evident, however, that the "Zhirinovsky percentage" of 10-11% is a normal result in a normal country, but not one where the society is mainly composed of sick people and beggars ... Natalia Vitrenko's special role was confirmed by the "painful" recounting of the number of signatures in support of her [registration as a candidate] at the Central Electoral Committee (CEC). Today the highly respected President of the CEC, Mr Mykhaylo Ryabets, told us how wrong the Supreme Court was when it ignored the required one million signatures and compelled the CEC to register the nominated candidates for the position of President in neglect of this norm. But only recently the same Ryabets shared his insights with the public which, if translated from the confidential-emotional language used, could sound like this: all the candidates

registered by the CEC (acting on its own!) should not have been registered, because if the signatures submitted by the nominees had been subjected to serious scrutiny, none of the candidates, including Kuchma, would have withstood verification. What then was the criterion? Was it a presumption on the part of the CEC and its President about which scenario would be the best at the pre-election stage? For the CEC as well, apparently, it is not a secret which discussions preceded the decision of Bankova to register Natalia Mykhaylivna, who had problems for various reasons. Perhaps Vadym Rabinovych, who left our country prematurely and in a very untimely manner, might be able to disclose the details? Or maybe Kuchma's election agent, Mr Volkov, who fought for and won Natasha's registration?

As was discovered, it was not the apprehension, in the event of her failure to register, of having Vitrenko as a wild force that could break loose which influenced the final decision of Bankova, but the scenario "Kuchma v. Symonenko", which is urgently being modified because of Petro Mykolayovych's [Symonenko's] alleged unreliability. The issue concerns the certainty repeatedly demonstrated by the Speaker [of Parliament] Tkachenko, that they [Bankova] would manage to agree with Symonenko, and the steady position of the Communist Party (CPU) ideologists who believe that the CPU does not want a clear loss, or a clean victory (referring to Bulgaria). This provoked even more commotion in Bankova. The Russian scenario that was used in the past is rusting away, and there is nothing else! Therefore an improved scenario was introduced: taking Natalia Vitrenko to the second round, nominating her against Kuchma - with the certainty that the fear of having Vitrenko and Marchenko managing the country would line everyone up to vote for Kuchma, including the left-wing.

The boys at Bankova are desperate gamblers because their venture might be answered adequately. For instance, the headquarters of all the main candidates who have already dropped out of the competition might negotiate and decide to let their supporters vote freely. Of course, they would not ask them to support Vitrenko, but to work in such a way that the motto "Anyone but Kuchma!" would be as topical as ever. Ultimately, it is no less immoral than the scenarios of Kuchma's headquarters. And if our "green" democracy has to have "the mumps", the earlier the better: the acquired immunity would be stronger, as children's diseases have to be contracted in childhood.

In a country under President Vitrenko it would be both frightful and enjoyable, but not for long. Like in the Crimea under Yurik Meshkov. And what country-wide insanity that was /.../ At the beginning it was bizarre and then funny. He would come out, yell in front of the people, so self-assured, artistic, his voice so confident, metallic, everything clear, elderly ladies screaming and sobbing, trying to kiss his hands... And not a single institution obeying him. He seized an automatic gun and rushed to replace the head of the police. [He] replaced him. But nobody cared about the new one. Then he rushed to the SBU [Security Service of Ukraine]. And here they spoke to him politely, and they threw the people he had just appointed down the stairs and promised they would have something torn out ... Time flies and the differently coloured opposition is becoming united, the gangsters who left are returning, public servants from housing maintenance offices up to Government officials are sabotaging [him], the *Verkhovna Rada* [Parliament] is imposing restrictions on presidential powers - all of them are gathering against Yurik, life is not getting any better, his personal charisma is falling to pieces, people are sobering up. Some people say: this was the Crimea, it was backed by Kyiv. But we are not going to dwell upon the matter of who backed it and when they appeared. However, the point is that Autonomy is not the State. Had there been an army, everything would have been over sooner, citizens...

Marchenko of course will seek to order General Kuzmuk about and make him resign. This would be something worth seeing... And the *Verkhovna Rada* will become such a friendly body, and constitutional amendments will be adopted without delays! The heyday of parliamentarism! Are pre-term presidential elections likely to be held in spring? Natalia Mykhaylivna, may God give her health, will finally put an end to disputes about whether the Ukrainian soil can bear its own "Newtons" in skirts. And the only prospective evil as a result of this experiment might be the complexities that will confront Yulia Tymoshenko as a female candidate during the next elections... Some people say: and what about the country and the people!? Ladies and gentlemen, do not prevent people from exercising their own sacred right to vote, if you are democrats. And do not prevent the same people from facing the consequences of their choice and their responsibility for it ...

However, we are unlikely to see the full extent of the people's joy or our Natasha's triumph, as long as there remain a few "real raving madmen" in Bankova. As a result, apparently, the blueprint of the Russian headquarters will be developed directly along the lines of the "Russian scenario". And here we will discover great news about who can claim the role of the Russian Lebed in our country, who had been appointed to the Security Council prior to the elections and later surrendered to the incumbent President [Yeltsin], and thus largely determining the latter's victory during the new elections. According to an information source, the scenario of "the homegrown Lebed" emerging before the first round of the elections is as follows. At the end of August it is planned to launch a mass media campaign supporting the idea of setting up a People's Audit Committee (Alas! But Natalia Mykhaylivna seems to have already mentioned the need to revive this structure). In the first half of September, at the numerous requests of the workers, the President will issue a decree setting up this committee. It will start functioning immediately. One of the events that will be widely covered by the media is to be held in conjunction with the CEC and is to prevent violations of electoral law. At the same time, the media will launch an anti-Vitrenko campaign (only the pro-presidential media will move with this idea and they will be fully involved in it). And then the President, in accordance with the plan, should make a speech sternly demanding that the dirty propaganda campaign against the people's defender be terminated. The people will applaud the President and then, at the end of September, he will appoint the grateful Natalia Mykhaylivna as the Head of the People's Audit Committee. This would be followed by an official statement of candidates - Kuchma and Vitrenko - as a result of which only one candidate will remain. Natalia Mykhaylivna will be dancing Saint-Sense. It means that she is still unlikely to hear the "swan song" of her political career, but the Russian script writers are rubbing their hands with glee, waiting for the electoral campaign to be over with a feeling that their strategic duty has been completely fulfilled. One should admit that the scenario is not weak. The matter to be addressed is the extent to which Natalia Mykhaylivna is ready for the originality of those who are using her, and to what extent she is aware of the level of cynicism of the system that has been preparing the background for five years to allow this progressive socialist to demonstrate her brilliant abilities in accounting and auditing on behalf of the people? The chain is getting tighter and the leash is getting shorter... However, the Berezovsky-guided Lebed was quickly dismissed from his post and he eventually landed, with his [Berezovsky's] help, in rich territory. The headquarters' script writers, commissioned by the Russian oligarch, are unlikely to have the same long-term and prospective intentions for our Natasha. However, it is quite possible that, even perceiving the danger of this for herself, Natalia Mykhaylivna will be compelled to understand that she has been made an offer she cannot refuse. It is hardly a coincidence that the Sumy governor, Volodymyr Scherban, is telling the media that he financially supported the

PSPU's [Progressive Socialist Party of Ukraine] Congress. Then Mr Pinchuk will also recollect how he promoted Ms Vitrenko in Dnipropetrovsk. And here Mr Rabinovych, who started work on Mr Moroz's ratings ("Rabinovych v. Moroz" ... despite the feelings that Rabinovych may arouse in the majority of the population), following the advice from the Presidential Administration, will recollect the PSPU's prospects ... And then it will be corroborated that Bankova had been helping Natalia Mykhaylivna not only because their family and that of Mr Razumkov were on friendly terms. It is possible that no one will have any more doubts that the cool opposition member is just "a loudspeaker" of the administration of the President of Ukraine, whose role is that of the Russian Zhirinovsky (as some slanderers would say) and is employed and paid personally. The role is simple: you might say whatever you like, but act "correctly", without making the Father [the President] grieve, whilst undermining his enemies.

So, if the theme of the "People's audit" is outlined, the Russian plan will be launched. And Kuchma's competitor will be Petro Symonenko. The electoral palette will increasingly gain more clear-cut contours. Kostenko and Onopenko [MPs] have initiated another electoral block, an alliance that constitutes an alternative to that of the "three whales": Marchuk - Moroz - Tkachenko – the reasons are quite understandable. However, Kostenko's "Rukh" [Ukrainian Political Party] appears and disappears now and then. But definitely there are still Zayets [MP] and other loyal followers of the tactics of Chornovil [leader of another fraction of the "Rukh" at the time], even though they were knocked down [by Kostenko's "Rukh"]. Fidgeting behind the State authorities on an ideological underlay with anti-left colouring. It will be determined here, today, which one of the "Rukhs" is better prepared for defending the national-patriotic masses. Poor Onopenko who is used to various kinds of "*kydalovo*" (deception) could not possibly answer the question: "If they promise you the PM's office, will you go against Kuchma?" After the centre-right had been joined by the "green" Kononov [a member of the Green Party] whose main idea was to avoid Kuchma's anger while not working for him, there were no more doubts that the ideology of the block lies in self-preservation. And Oliynyk, an "unidentified object" who joined them, has crafty ideas himself. The general perception has not therefore changed.

Thus, only the "triple alliance" of Marchuk - Moroz - Tkachenko joined by "an active bayonet," Yuri Karmazin, still remains within Bankova's firing line, and on this alliance depends how successful all the candidates will be in Bankova's game aimed at Kuchma's victory. ... Sometimes it really seems that our country deserves Kuchma-2, or another Yurik ... Are we poor Yoriks indeed? And had there not been the fear that the election results might be declared null and void - such fears being unanimously expressed by the pro-presidential people - it might have been possible to think that they were all right ..."

12. On 21 August 1999 Ms Natalia M. Vitrenko (leader of the PSPU) lodged a complaint with the Minsky District Court of Kyiv against *The Day*, seeking compensation for pecuniary and non-pecuniary damage because the information contained in the article published on 21 August 1999 was untrue and damaged her dignity and reputation as a Member of Parliament. On 3 March 2000 the Minsky District Court of Kyiv allowed her claims in part and ordered *The Day* to pay Ms Vitrenko UAH 2,000[1] in compensation for non-pecuniary damage. It also found that the whole article published in

1. EUR 369.68.

The Day was untruthful, since the applicant had failed to prove the truth of the information which it had published. It further ordered the newspaper to publish rectification of this information, within a month, in one of the forthcoming issues of *The Day*, alongside the operative part of the judgment of 3 March 2000. In particular, the court held:

> "... the court disagrees with the arguments raised by the defendants, since the information disseminated by them in *The Day* of 21 August 1999 was untrue. This article was published on page 4 in the column entitled "Details" and "Prognosis". However it was not specified to the reader of the newspaper how he or she could distinguish "the prognosis for the future" from the facts and, moreover, the "details" ...
>
> ... the above-mentioned section 42 of the Printed Mass Media (Press) Act has a specific list of circumstances which exempt the editorial board from liability. This list does not include a "prognosis with the details", and therefore the liability of the defendants is engaged regardless of "whether they intended to evaluate the developments in the course of the previous presidential elections in Ukraine ...
>
> ... the expressions "a second Yurik for poor Yoriks or a Ukrainian version of Lebed", "our and your Natasha", "a scarecrow (*strashylka*)", "a loudspeaker of the Administration of the President, acting as Zhirinovsky in Ukraine", as used by the author, may be [regarded as] ... the author's imagination and are not "generally accepted political rhetoric". They are, moreover, the author's own "value judgments"...
>
> ... Also, the court disagrees ... that this article pertains to Natalia Vitrenko as a candidate for the Presidency of Ukraine, but not to [her] private life ... The article pertains not to Vitrenko herself but deals with the existence of certain plans of the "Bankova" [the administration of the President of Ukraine] and how Natalia Vitrenko could be manipulated by it ... The court considers that the personal life of the plaintiff as a person, a human being, is closely connected with her political views and beliefs and with her role in the political structure of society. Therefore the role of a "scarecrow" which, according to the prognosis of the defendant, Ms Tetiana E. Korobova, was planned by the Administration of the President of Ukraine, is untruthful. The court considers this to be the product of the author's imagination ...
>
> The court considers that such "value judgments" defame the honour and dignity of the plaintiff and her reputation, whereas she is the leader of the PSPU, ... a member of the *Verkhovna Rada*, and a candidate for the position of President... This means that the article concerns her both as a public and a private person. ..."

13. On 12 July 2000 the Kyiv City Court upheld this decision. In particular, it stated that the findings of the Minsky District Court of Kyiv were correct since the appellants had failed to prove, and the court did not establish, that the disseminated information was true.

B. Proceedings in respect of the publication of 14 September 1999

14. On 14 September 1999 *The Day* published an article by Ms Tetiana E. Korobova entitled "*On the Sacred Cow and the Little*

Sparrow: Leader of the CPU as Kuchma's Last Hope". The relevant extracts of the article read as follows:

> "... Petro Mykolayovych was allegedly visited by a person resembling Oleksandr Volkov, Kuchma's election agent, who allegedly told the CPU leader: "If you withdraw from the race [presidential elections], you will lose your head. You withdraw your name from the list [of candidates] today - you will be buried tomorrow...
>
> ... they are ready to go to the very "end", following the resolutions of the Congress [of the Communist Party] and after Kuchma's election, to collaborate with him and have the Government delivered to them as a present for their services ...
>
> ... Petro Mykolayovych might be offended by *The Day* again. In vain. Here a parable has just dawned on me. In bitter weather a little sparrow was frozen while flying and collapsed. A cow was passing by and a cowpat fell directly onto the little sparrow. He warmed up, put his little head out and started chirping, in a gleeful mood. And at this point a cat enters, sneaks up on him and there is no more little sparrow. The moral: if you get into dung, just sit there and do not chirp. And remember, not everyone who excretes on you is your enemy and not everyone who pulls you out of the dung is your friend. I apologise for being so straightforward."

15. In December 1999 Mr Petro M. Symonenko (the leader of the Communist Party) lodged a complaint with the Minsky District Court of Kyiv against *The Day* and Ms Tetiana E. Korobova, alleging that the information contained in the publication was untrue. He also sought to defend his honour, dignity and reputation and to obtain compensation for non-pecuniary damage. On 8 June 2000 the Minsky District Court of Kyiv partly allowed Mr Symonenko's complaints and ordered *The Day* to pay him UAH 1,000[1] in compensation for non-pecuniary damage. It also ordered the newspaper to publish a rectification of the information found to be untrue alongside the operative part of the judgment of 8 June 2000. In particular, it held that:

> "... in examining this case, account has to be taken of the fact that Mr Petro M. Symonenko is a political leader and the article relates to the area of his activity as a politician, and not that of an average citizen. ...
>
> As to the other extracts from the article referred to by the plaintiff in his claim, the court considers that they were found to be untrue during the court hearing, since the defendant could not provide the court with evidence proving the truth of the information contained in the publication. ...
>
> The defendant's representative maintained during the hearing that these extracts were merely presumptions of the author of the article. However, he failed to confirm this. The court is sceptical, since from the text of the article it cannot be understood that the journalist refers to her statements as presumptions and that the reader has to identify the text as a presumption. The comparison of the plaintiff to "a little sparrow" is in his [the plaintiff's] opinion humiliating. Moreover, there was no evidence of an

1. EUR 184.84.

existing agreement before the elections between Mr Petro M. Symonenko and the officials in office as implied by the headline of the article "The Leader of the CPU as Kuchma's Last Hope".

... this [non-pecuniary] damage resulted from the fact that the article was published before the presidential elections, in which the plaintiff was also a candidate. Therefore ... he was compelled to explain to the electorate the issues raised in the article. ... The applicant considers that this article accused him of betraying his party members, colleagues and the electorate. Damage was inflicted on him as a man of honour, taking into account the metaphors that the author used in her article. Thus, the CJSC Ukrainian Media Group published information that it had not verified and disseminated data that was untrue ... and Ms Tetiana E. Korobova invented information that was not true and disseminated it...."

16. The court also concluded that the following should be adjudged untrue:

"... the headline of the article on the first page "On the Sacred Cow and the Little Sparrow: The leader of the CPU as Kuchma's last hope."

... that Petro Mykolayovych was allegedly visited by a person resembling Oleksandr Volkov, Kuchma's election agent, who allegedly told the CPU leader: "If you withdraw from the race [presidential elections], you will lose your head. You withdraw your name from the list [of candidates] today - you will be buried tomorrow" ...

... they are ready to go to the very "end", following the resolutions of the Congress [of the Communist Party] and after Kuchma's election, to collaborate with him and have the Government delivered to them as a present for their services. ..."

17. On 16 August 2000 the Kyiv City Court upheld this decision. In particular, it stated that the Minsky District Court of Kyiv came to the correct conclusion that the respondent in this case had not proved the truth of the information disseminated about Mr Petro M. Symonenko. It also held that the conclusions of the court were based on the case file and complied with the legislation in force.

II. RELEVANT INTERNATIONAL LAW

A. Recent Recommendations of the Parliamentary Assembly of the Council of Europe

18. The recent Parliamentary Assembly Recommendation "Freedom of Expression in the Media in Europe" (No. 1589 (2003)) concerned the persecution of the media and journalists in Ukraine following publications criticising politicians and officials in power.

B. Parliamentary Assembly Resolution 1346 (2003): honouring of obligations and commitments by Ukraine

19. The relevant extracts from the PACE Resolution No. 1346 read as follows:

> "1. The Parliamentary Assembly refers to its Resolutions 1179 (1999), 1194 (1999), 1239 (2001), 1244 (2001) and in particular to Resolution 1262 (2001) on the honouring of obligations and commitments by Ukraine, adopted by the Assembly on 27 September 2001. ...
>
> 11. The Assembly condemns the very high incidence of violence against journalists (the most prominent among them being the killings of Georgiy Gongadze in 2000 and Ihor Alexandrov in 2001), and the low number of such crimes which have been solved. It is also concerned by the continued abuse of power, particularly in the provinces, with regard to taxation, regulations and police powers in order to intimidate opposition media. It reiterates its call on the Ukrainian authorities to conduct their media policy in a way which will convincingly demonstrate respect for the freedom of expression in the country. ...
>
> 12. The Assembly is concerned about the presidential administration's attempts to establish ever tighter control over the State-run, oligarch-controlled and independent media. In this respect it welcomes the resolution adopted by the *Verkhovna Rada* on 16 January 2003 on the issue of political censorship in Ukraine and, in particular, the amendments adopted on 3 April 2003 concerning a number of laws dealing with freedom of expression, as the aim of these amendments is to offer better legal protection to journalists, particularly in relation to the question of their liability for the dissemination of information and their access to official documents. It expresses the firm hope that these provisions will be effectively implemented at all levels of administration (national, regional and local)."

C. European Parliament Resolution on Ukraine (2004)

20. Relevant extracts from the Resolution of the European Parliament read as follows:

> "... E. whereas freedom of expression in Ukraine is coming under further threat, and an increasing number of serious violations against independent media and journalists are taking place, such as direct pressure and intervention from official services against certain media, arbitrary administrative and legal actions against television stations and other media outlets and harassment of, and violence against, journalists,
>
> ... 2. Calls on the Government of Ukraine to respect freedom of expression and undertake sustained and effective measures to prevent and punish interventions against a free and independent media, arbitrary administrative and legal actions against television stations and other media outlets and harassment of, and violence against, journalists ..."

D. Report of the Committee of Ministers of the Council of Europe, Secretariat's Information and Assistance Mission to Kyiv of 16-19 March 2004 on "Compliance with commitments and obligations: the situation in Ukraine" (SG/Inf(2004)12, 8 April 2004)

21. The relevant extracts from the Report of 8 April 2004 concerning freedom of expression read as follows:

> "47. Freedom of expression and media freedom in Ukraine, which have already been the subject of expert reports and comments by the Ukrainian authorities ..., remain a matter of major concern. ...
>
> ... 55. Some of the new provisions of the new Civil Code that came into force at the beginning of 2004 (text not available) also seem to pose problems with regard to freedom of expression and information, according to information gathered by the Secretariat Delegation. This concerns in particular Article 277, which stipulates that "negative information shall be deemed to be false" and Article 302, which provides that "information communicated by the State organs is truthful". These provisions could lead journalists to engage in self-censorship in order to avoid prosecution under them. This is another cause for concern, even though Ukrainian courts have not yet ruled on the provisions, given the recent entry into force of the new Civil Code.
>
> Specific recommendations: ... The Ukrainian authorities should implement the Council of Europe's recommendations aimed at aligning the Ukrainian laws concerning the media with the relevant Council of Europe standards. They should ensure that any draft law dealing with freedom of expression and information strictly respects the standards, as set out in particular in Article 10 of the European Convention on Human Rights."

III. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Ukraine of 28 June 1996

22. Relevant extracts from the Constitution read as follows:

Article 32

> "... Everyone is guaranteed judicial protection of the right to rectify incorrect information about himself or herself and members of his or her family, and of the right to demand that any type of information be rectified, and also the right to compensation for material and moral damage inflicted by the collection, storage, use and dissemination of such incorrect information."

Article 34

> "Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs.

Everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice.

The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or crime, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or maintaining the authority and impartiality of justice."

B. Civil Code of 1963

23. Relevant extracts from the Civil Code read as follows:

Article 7

Protection of honour, dignity and reputation

"A citizen or an organisation shall be entitled to demand in a court of law that information be refuted if it is not true or is set out untruthfully, degrades their honour and dignity or reputation, or causes damage to their interests, unless the person who disseminated the information proves that it is truthful.

... Information disseminated about a citizen or an organisation that does not conform to the truth and causes damage to their interests, honour, dignity or reputation shall be subject to rectification, and pecuniary and non-pecuniary damage can be recovered. A limitation period of one year shall apply to claims concerning rectification of such data and compensation."

C. Civil Code of 2003

24. Relevant extracts from the new Civil Code read as follows:

Article 23

Compensation for moral damage

"1. A person shall have the right to compensation for moral damage in the event of an infringement of his/her rights."

Article 277

Rectification of untruthful information

"... 3. Any kind of negative information disseminated about a person shall be considered untruthful.

... 6. A person, whose rights were infringed ... shall have the right to a response and rectification of information in the same mass media source and in accordance with the procedure established by the law.

... Rectification of untruthful information shall not depend on the actual guilt of the person that disseminated it.

7. The untrue information shall be rectified in the same manner as it was disseminated."

D. Data Act

25. Relevant extracts from the Data Act provide:

Section 47

Liability for the infringement of data legislation

"... Liability for the infringement of data legislation shall be borne by the persons found guilty of infringements such as:

... dissemination of information that does not correspond to the truth;

... dissemination of information that is untrue or defames a person's honour and dignity; ..."

E. Printed Media (Press) Act

26. Relevant extracts from the Printed Media (Press) Act provide:

Section 26

The rights and obligations of journalists

"... A journalist is obliged to:

... 2) provide objective and truthful information for publication; ..."

Section 37

Rectification of information

"Citizens, legal entities and State bodies and their legal representatives have the right to demand rectification of information published about them or data that does not correspond to the truth or defames their honour and dignity.

If the editorial board does not have any evidence of the fact that the information published by it corresponds to the truth, it has to rectify this information at the request of the plaintiff in the next issue of the printed media or to publish a rectification on its own initiative. ..."

Section 42

Indemnity from liability

"The editorial board and journalists are not liable for the publication of information that is untrue, defames the honour and dignity of citizens and organisations, infringes their rights and lawful interests or constitutes abuse of the freedom of activity of the media and the rights of journalists if:

1) this information was received from the news agencies or from the media owner (co-owners);

2) the information contains responses to a formal request for access to official documents or to a request for written or oral information, provided in accordance with the Data Act;

3) the information is a verbatim reproduction of any official address of the officials of State bodies, organisations and the citizens' unions;

4) the information is a verbatim reproduction of materials published by other printed media which refer to that information;

5) the information contains secrets that are specifically protected by law, but the journalist received this information lawfully."

F. Practice of the Supreme Court

27. The relevant extract from Resolution No. 4 of the Plenary Supreme Court of 31 March 1995 "on the Court Practice in Cases of Compensation for Moral (non-pecuniary) Damage" reads as follows:

"...11. ... The critical assessment of certain facts ... could not serve as a basis for allowing claims for compensation for non-pecuniary damage. However, if other rights of a person protected by law were violated (for instance confidential information was disseminated without his/her consent), then this could lead to the award of compensation for moral damage [by the court]..."

28. The relevant extract from Resolution No. 7 of the Plenary Supreme Court of 28 September 1990 "on the Application of the Legislation Regulating the Protection of the Honour, Dignity and Business Reputation of Citizens and Organisations" reads as follows:

"... 17. In accordance with Article 7 of the Civil Code the defendant [in a defamation case] has to prove that the information disseminated by him corresponds to the truth. The plaintiff only has the obligation to prove that the defendant has disseminated defamatory information about him. The plaintiff also has a right to provide evidence of the untruthfulness of such information."

29. The relevant extract from the ruling of the Supreme Court of 11 September 2002 in the case of S. v the newspaper *Simya ta Dim* (*"Family and House"*) reads as follows:

> "...when considering cases that concern the protection of honour and dignity [the courts] have to take into account that the critical assessment of facts and deficiencies, thoughts and opinions, [or] critical reviews of works of art, cannot serve as a basis for allowing compensation claims for moral damage."

G. Domestic court decisions provided by the Government

30. The Government have provided the Court with the following domestic court decisions that from their point of view contained an assessment of value judgments:

- judgment of 18 October 2000 of the Starokyivsky District Court of Kyiv;
- judgment of 25 October 2000 of the Radiansky District Court of Kyiv;
- judgment of 20 November 2000 of the Shevchenkivsky District Court of Kyiv;
- judgment of 21 January 2001 of the Lubny District Court of the Poltava Region;
- judgment of 22 June 2001 of the Artemovsk City Court of the Donetsk Region (upheld by the Donetsk Regional Court of Appeal on 17 December 2001);
- judgment of 24 July 2001 of the Minsky District Court of Kyiv;
- judgment of 18 September 2001 of the Volodarske City Court;
- judgment of 28 September 2001 of the Shevchenkivsky District Court of Kyiv;
- judgment of 23 April 2003 of the Tsentralny District Court of Mykolayiv;
- judgment of 15 May 2003 of the Leninsky District Court of Sevastopol;
- extracts from the judgments with regard to the application of Article 10 of the Convention by the domestic courts, as referred to in the book of the Deputy President of the Mykolayiv Regional Court of Appeal, Judge V.P. Paliyuk, "Application of the ECHR by the Ukrainian courts" (pp. 146-212).

H. Extract from the judicial statistics as published by the Supreme Court

31. The relevant extract from the Supreme Court's statistics for 2002 reads as follows:

"In 2002 there were about 6,177 cases that concerned the protection of honour, dignity and business reputation. Of these, 1,978 applications were considered on the merits, which constitute 49.4% of the total number of cases in which the proceedings were terminated; the claims were allowed in 1,116 cases, or in 56.4% (59.9%) of the total number of cases, with a decision being adopted. Approximately UAH 4,224,000 were awarded to the plaintiffs in these cases. There were approximately 1,109 claims lodged with the courts against mass media sources, of which 356 cases were considered on their merits, 223 claims were allowed, or 62.6% (61%) of the cases considered, and ... judgments were delivered in these cases. The total amount of the claims allowed was UAH 1,191,000."

32. The relevant extract from the Supreme Court's statistics for 2003 reads as follows:

"In 2003 there were approximately 6,200 cases that concerned the protection of honour, dignity and business reputation considered by the courts; 2,000 cases were considered on the merits and the proceedings terminated. In 1,100 cases the claims were allowed (53.5% [56.4%] of the total number of cases) and judgment adopted. The total amount of claims allowed came to UAH 8,419,000. Among the aforementioned cases, there were 927 cases initiated on the basis of the claims lodged against the mass media, that is 16.4% less than in the previous year. Of these claims, 308 cases were considered and 187 applications were allowed, that is approximately 60.7% [62.6%] of the cases that were considered. The total amount of the claims allowed was UAH 4,535,000."

IV. RELEVANT REPORTS ON THE STATE OF FREEDOM OF EXPRESSION IN UKRAINE

A. Human Rights Watch Report of March 2003

33. The systematic "legal harassment" of the Ukrainian media by the Government and the latter's attempts to control the media, and information disseminated by the media, are mentioned in the report of the Human Rights Watch (March 2003, Vol. 15, No. 2(D)).

B. Report of the United States (US) Department of State on the Media Situation in Ukraine (2003)

34. Relevant extracts from the Report of the US Department of State provide:

"a. Freedom of Speech and Press

... The NGO Freedom House has downgraded the country's rating from "partly free" to "not free" because of the State censorship of television broadcasts, continued harassment and disruption of independent media, and the failure of authorities to adequately investigate attacks against journalists.

... The use or threat of civil libel suits continued to inhibit freedom of the press, but the number of cases during the year reportedly decreased.

... On 3 April, the *Rada* passed a law that set limits on the amount of damages that can be claimed in lawsuits for libel. The law requires that the plaintiff deposit a payment of 1 to 10 percent of claimed damages in the form of collateral, which is forfeited if the plaintiff loses the lawsuit. Additionally, the law waives press responsibility for inoffensive, non-factual judgments, including criticism. Despite these measures, the Office of the Ombudsman indicated concern over the "astronomical" damages awarded for alleged libel.

... Government entities used criminal libel cases or civil suits based on alleged damage to a "person's honour and integrity" to influence or intimidate the press. According to the Mass Media Institute (IMI), 46 actions were brought against the mass media and journalists for libel during the year. IMI estimated that government officials initiated 90 percent of these suits. Article 7 of the Civil Code allows anyone, including public officials, to sue for damages if circulated information is untrue or insults a person's honour or dignity.

The new Civil Code, enacted during the year and scheduled to take effect in 2004, provides that negative information about a person shall be considered untrue unless the person who spread the information proves to the contrary. Journalists and legal analysts have expressed concern that this Code will have a negative impact on freedom of speech and the press."

C. Pressure, Politics and the Press (extract from the Report of Article 19 on Freedom of the Press in Ukraine)

35. Relevant extracts from the Report of Article 19 on Freedom of the Press in Ukraine (paragraph 3.6 "Freedom of expression and defamation") read as follows:

"4.1.3. Ukraine: ... In 1999 there were 2,258 suits against the media, for more than UAH 90 billion, of which approximately 55 per cent were brought by public officials. Reportedly 70 per cent of these cases were bogus and brought to influence the media's output. In 2001 it was reported that *Den' [The Day]* newspaper had been sued 45 times for a total of UAH 3.5 million. The situation was not dissimilar in 2002. Some lower courts still order that newspapers' accounts be frozen pending a trial in civil defamation cases, and newspapers' assets may well be confiscated to coerce the media into paying fines.

... Consequently, many journalists publish anonymously, using a pseudonym to avoid being personally targeted when addressing politically sensitive issues. In particular, journalists feel that, although criticism of the *Verkhovna Rada* and the Cabinet of Ministers is relatively safe, the opposite is true for criticism of the President.

Article 8(3) of the Civil Code ... defamation contains the double requirement that a statement be false and harms one's reputation in order to be regarded as defamatory, in compliance with international standards on defamation. However, it also includes protection against harm to other "interests", which is too vague and therefore open to

interpretation and possible abuse: other interests, such as privacy, should be protected through specific provisions, while the exact scope of a defamation law needs to be clearly and narrowly defined.

... Moreover, Article 37 of the Press Law states that refutation in defamation cases can be claimed if a statement is false *or* lowers one's reputation ...

... Instead, in order to exercise the right of reply in a defamation case, the information has to be false *and* harm one's reputation. ... Article 440(1), on compensation of moral damage', states that: "Moral damage caused to citizens or organisations by another person who violated their legal rights is paid by the person who caused the damage if this person cannot prove that moral damage was not his/her fault. Moral damage is compensated in pecuniary or other material form according to the ruling of the court irrespective of compensation of property damage. ... The provision places the burden of proof on the person who disseminates the information.

A positive development has been the passing of the Law "on the Introduction of Changes to Certain Laws of Ukraine which Guarantee the Freedom of Speech", stating that public bodies which take defamation suits can only claim refutation of false information but not compensation. The same law introduced a provision "on State Support of Mass Media", stating that, in cases taken by public officials against the media, moral damages may be imposed only when malicious intent by a journalist is proven, and that non-pecuniary remedies, such as refutation, should have priority over pecuniary ones. It is clearly stated that journalists should benefit from a defence of reasonable publication.

Journalists have been receiving better legal representation in court and have therefore been able to win more cases, also thanks to the legal training received from international organisations.

... Article 277 of the new Civil Code of Ukraine ... to come into force on 1 January 2004, establishes that "negative information disseminated about a person shall be considered false". "Negative information" is to be understood as any form of criticism or description of a person in a negative light.

This provision is not only a breach of the right to freedom of expression but turns reality on its head to the extent that something that is true but negative will be considered false. It cannot possibly be justified as necessary, since it will often be a matter of great public interest to disseminate negative facts, as well as opinions, about people. The exposure of corruption, for example, may well require both.

... To conclude, the situation remains critical ... Ukraine have achieved some progress towards media freedom, yet journalists face immense challenges on a daily basis, which can make engaging in professional journalism a dangerous endeavour. Coalitions and solidarity among members of the journalistic profession, media groups and civil society, with the support of international institutions, are vital in strengthening the democratic processes and for the creation of an environment in which the media can flourish. Cross-border regional initiatives can be instrumental in this context, by facilitating the transfer of experience and know-how, so as to mutually strengthen democratisation movements."

THE LAW

I. THE CONTINUED EXAMINATION OF THE APPLICATION

36. The Government and the applicant reached a settlement (see paragraph 7 above), which was rejected by the Court on 5 October 2004. In this connection, the Court took note of the serious nature of the complaints made in the case regarding the alleged interference with the applicant's freedom of expression. Because of this, the Court did not find it appropriate to strike the application out of the list of its cases. It considered that there are special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the further examination of the application on its merits (Articles 37 § 1 *in fine* and 38 § 1(b) of the Convention).

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

37. The applicant complained that the domestic courts failed to apply the case law of the Strasbourg Court concerning Article 10 of the Convention, in particular the case of *Lingens v. Austria* (judgment of 8 July 1986, Series A no. 103), in the assessment of their value judgments. The applicant also complained that the domestic courts found that the publications at issue did not correspond to the truth. It maintained that the courts were not able to distinguish between the "value judgments" and "facts" contained in the impugned publications of 19 August 1999 and 14 September 1999. The applicant also alleged that the court decisions interfered with its right to impart information freely. The applicant invoked Article 10 of the Convention, which provides, insofar as relevant, as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others, ..."

A. The Court's case law

38. The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas

on all matters of public interest (see *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 233-34, § 37). Not only does it have the task of imparting such information and ideas, the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, p. 28, § 63).

39. The Court recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or debates on questions of public interest (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV). Moreover, the limit of acceptable criticism is wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance. A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of the open discussion of political issues (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 42).

40. Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Oberschlick v. Austria (No. 1)*, judgment of 23 May 1991, Series A no. 204, p. 25, § 57). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria (no. 1)*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38). Subject to Article 10 § 2, the right to impart information freely is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49).

41. In its case law the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see *Lingens*, cited above, p. 28, § 46).

42. However, even where a statement amounts to a value judgment, the proportionality of the interference may depend on whether there exists a sufficient factual basis for the impugned statement. Looked at against the background of a particular case, the statement that amounts to a value

judgment may be excessive, in the absence of any factual basis (see the aforementioned *De Haes and Gijsels v. Belgium* judgment, p. 236, § 47).

43. The Court's task in exercising its supervisory function is not to take the place of the national authorities, but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation. In particular, it must determine whether the interference at issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see *Jerusalem v. Austria*, no. 26958/95, § 33, ECHR 2001-II).

B. Application of the Court's case law to the instant case

1. Whether there was an interference

44. The Government conceded that there was an interference with the applicant's rights under Article 10 of the Convention. However, they maintained that this interference was justified.

45. The Court reiterates that such an interference will entail a "violation" of Article 10 if it does not fall within one of the exceptions provided for in Article 10 § 2 (see *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 21, § 43). The Court therefore has to examine in turn whether the interference in the present case was "prescribed by law", whether it had an aim or aims that is or are legitimate under Article 10 § 1 and whether it was "necessary in a democratic society" for the aforesaid aim or aims.

2. Whether the interference was justified

a. Whether the interference was prescribed by law

46. The applicant submitted that the interference at issue was not prescribed by law. The interference was not foreseeable because the provisions of the Civil Code 1963 and the Section 42 of the Media Act (paragraphs 23 and 26 above) could be interpreted in a number of different ways. In the present case, the Ukrainian courts qualified the statements in the impugned articles as statements of fact although, in accordance with the case law of the European Court of Human Rights, they should have qualified them as value judgments.

47. The Government for their part asserted that the Article 7 of the Civil Code and Section 47 of the Data Act (paragraphs 23 and 25 above) formed

the legal basis for declaring the impugned information untruthful and for the applicant's liability towards the alleged victims. These provisions and the case law developed by the Ukrainian courts were sufficiently accessible and rendered their application foreseeable. Furthermore, they maintained that the domestic courts acted in compliance with Convention case law in reviewing the proportionality of the interference with freedom of expression, and balancing it correctly against the protection of the honour, dignity and reputation of persons in public life.

48. The Court observes that one of the requirements flowing from the expression "prescribed by law" is the foreseeability of the measure concerned. A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, for example, *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III, and *Feldek v. Slovakia*, no. 29032/95, § 56, ECHR 2001-VIII).

49. The degree of precision depends to a considerable degree on the content of the instrument at issue, the field it is designed to cover, and the number and status of those to whom it is addressed (see *Groppera Radio AG and Others v. Switzerland,* judgment of 28 March 1990, Series A no. 173, p. 26, § 68).

50. The Court notes that the mere allegation that the case law of the Ukrainian courts or the part concerning these issues was, in the applicant's view, not in conformity with the Court's case law may be criticised, but does not affect the issue of "foreseeability". Furthermore, in the Court's view, the applicants' arguments as to the quality of the law concern the issue of whether the interference was "necessary in a democratic society", a matter which the Court will examine below. Having regard to its own case law on the requirements of clarity and foreseeability (see *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, judgment of 20 November 1989, Series A no. 165, p. 18, § 30; *Müller and Others v. Switzerland*, judgment of 24 May 1988, Series A no. 133 p. 20, § 29), and to the fact that considerable domestic case law existed on the issue (paragraphs 27-31 above), the Court considers that the interference with the applicant's rights was prescribed by law within the meaning of Article 10 § 2 of the Convention.

b. Whether the interference pursued a legitimate aim

51. The applicant submitted that the interference at issue did not pursue a legitimate aim, as required by Article 10 § 2 of the Convention, as the domestic courts could not clearly distinguish between value judgments and facts. The applicant maintained that it had criticised Mr Symonenko and

Ms Vitrenko in respect of their activities as public persons and had not touched upon their private lives.

52. In the Government's view, there existed a legitimate aim, namely the protection of the reputation and rights of others.

53. The Court agrees with the Government and finds that the interference at issue was intended to pursue a legitimate aim - the protection of the reputation and rights of others, namely Mr Symonenko and Ms Vitrenko. The question remains, however, whether it was necessary.

c. Whether the interference was necessary in a democratic society and proportionate to the legitimate aim pursued

54. The case is limited to the applicant's complaint that the judgments given by the Ukrainian courts, which obliged the applicant to acknowledge the untruthfulness of certain statements made about Mr Symonenko and Ms Vitrenko, to rectify these statements and to pay the plaintiffs in the domestic proceedings compensation for non-pecuniary damage, were in violation of Article 10 of the Convention.

55. The Court considers that the complaint has two related aspects:

- *firstly*, whether the domestic law and practice was in itself compatible with Convention law and practice under Article 10 § 2; and

- *secondly*, whether, as a consequence in the present case, the domestic courts failed to ensure the applicant's freedom of expression.

56. The Court will consider these elements in turn.

(i). The compatibility of domestic law and practice

(a). The parties' submissions

57. The Government submitted that the quality of the law and the domestic courts' practice prove that there was no violation of Article 10 of the Convention, as the standards established by the Ukrainian law and practice (see paragraphs 22-31 above) are in full compliance with the case law of the Court as concerns freedom of expression.

58. The applicant disagreed. It stated in particular that the law and the domestic practice were unpredictable as regards the assessment of value judgments.

(b). The Court's assessment

59. The Court observes that the Ukrainian law on defamation made no distinction, at the material time, between value judgments and statements of fact (see “Relevant reports on the state of freedom of expression in Ukraine”, paragraphs 34-36 above) in that it referred uniformly to “statements” (*відомості*) and proceeded from an assumption that any statement was amenable to proof in civil proceedings. The Court also takes note of the recent Recommendations of the Parliamentary Assembly of the

Council of Europe (paragraphs 18-19 above), the Resolution of the European Parliament (paragraph 20 above), the Reports of the Committee of Ministers of the Council of Europe (paragraph 21 above), the Human Rights Watch (paragraph 34 above), the US State Department (paragraph 35 above) and "Article 19" (paragraph 36 above) in respect of freedom of expression in Ukraine.

60. The Court finds that, under Article 7 of the Civil Code, the "person who disseminated the [contested] information has to prove its truthfulness" (see the Plenary Supreme Court's Resolution of 28 September 1990, paragraph 27 above). The same burden of proof is required for published value judgments. This approach is consolidated by section 37 of the Printed Mass Media (Press) Act: the media have to rectify disseminated statements if they are not proved to be true (paragraph 26 above). Article 23 of the new Civil Code, introduced in June 2003 after the events in the present case and which as a consequence has little importance to the present case, established liability for non-pecuniary damage caused by defamation. Under Article 277 § 3 of the new Code, "any negative information disseminated about a person shall be considered untruthful" (paragraph 24 above). However, Article 277 § 6 has transferred the burden of proof with respect to the untruthfulness or defamatory nature of such information to the plaintiff. At the material time the burden of proof of the truthfulness of the disseminated information lay with the defendant.

61. The Court notes that, in general, the domestic courts have adopted the approach of the Convention case law that "the critical assessment of facts ... cannot serve as a basis for allowing compensation claims for moral damage" (see, for example, *Marasli v. Turkey*, no. 40077/98, judgment of 9 November 2004, §§ 17-19*).* However, if the right to a good reputation of a person is violated, even though a defamatory statement was a value judgment, the courts can award compensation for non-pecuniary damage. Thus the domestic law presumes that the protection of the honour, dignity and reputation of a public person outweighs the possibility of openly criticising him or her (paragraphs 25, 27 and 34-35 above).

62. It concludes, therefore, that the Ukrainian law and practice clearly prevented the courts in the applicant's case from making distinctions between value-judgments, fair comment or statements that were not susceptible of proof. Thus, the domestic law and practice contained inflexible elements which in their application could engender decisions incompatible with Article 10 of the Convention.

(ii). The consequences for the present case

(a). The parties' submissions

63. The Government maintained that the "interference" complained of was necessary in a democratic society as it corresponded to a "pressing

social need". They further stated that it was proportionate to the legitimate aim pursued and the reasons given by the national authorities to justify the interference were relevant and sufficient.

64. The applicant disagreed. It considered that the interference was not necessary because the articles referred not to facts, but to value judgments, which were not susceptible of proof. The courts' decisions were in fact a form of political censorship of the opinion of the journalist and were aimed at removing it from the political discussion of persons in public life. Furthermore, the sanctions imposed were aimed at preventing it from acting as a source of information and a control mechanism over public power. The applicant maintained that the assessment of the personal and managerial qualities of the candidates for presidency and of their ability to form a team of like-minded persons, to deliver what they had promised and to provide moral and intellectual leadership for the benefit of the nation, was at the core of the issues discussed in the impugned publications. Furthermore, open criticism of politicians and discussion of their qualities were necessary preconditions for the holding of free and democratic elections. It therefore concluded that the fundamental guarantees enshrined in Article 10 of the Convention had been infringed.

(b). The Court's assessment

65. The Court notes that both of the impugned articles contained critical statements about Ms Natalia Vitrenko and Mr Petro Symonenko (the "plaintiffs"), the leaders of the Progressive Socialist Party and the Communist Party respectively. Both of them were candidates during the presidential elections in 1999 and both of them were, and still are, active politicians. The articles mainly focussed on the arrangements allegedly made by the Administration of President Kuchma with these politicians in the course of the election campaign and criticise them as political figures.

66. As to the first article entitled "Is this a Second Yurik..." (paragraph 11 above), the Court observes that the whole text was found to be defamatory by the domestic courts despite the fact that the domestic courts had decided that the statements made therein by the journalist were value judgments. The Court considers that the statements made in this article with such expressions as "a second Yurik for poor Yoriks and a Ukrainian version of Lebed", "our and your Natasha", "a scarecrow", "a loudspeaker of the Administration of the President, acting as Zhirinovsky in Ukraine" are value judgments used in the course of political rhetoric which are not susceptible of proof. Whilst the domestic court considered that Ms Vitrenko's public and private life were defamed thereby, the Court notes that the claim was limited to damage allegedly caused to her reputation as a Member of Parliament (paragraph 13 above). Moreover, the context of the article clearly concerned her professional activities. As to the second article entitled "On the Sacred Cow..." (paragraph 15 above), the Court notes that

the domestic court also found this title and other elements untruthful and defamatory of the plaintiff, Mr Petro Symonenko, albeit recognising their nature as value judgments. However, the Court again finds that these matters fall within the scope of value judgment of a journalist in the form of political rhetoric which is not amenable to proof.

67. The Court observes that the publications contained criticism of the two politicians in strong, polemical, sarcastic language. No doubt the plaintiffs were offended thereby, and may have even been shocked. However, in choosing their profession, they laid themselves open to robust criticism and scrutiny; such is the burden which must be accepted by politicians in a democratic society (paragraphs 40-41 above).

68. Considering the relevant texts as a whole and balancing the conflicting interests, the Court finds that the Ukrainian courts overstepped the margin of appreciation afforded to the domestic authorities under the Convention. The finding of the applicant's guilt in defamation was clearly disproportionate to the aim pursued.

69. The Court concludes that the interference complained of did not correspond to a pressing social need outweighing the public interest in the legitimate political discussion of the electoral campaign and the political figures involved in it. Moreover, the standards applied by the Ukrainian courts in the present case were not compatible with the principles embodied in Article 10, and the reasons which they adduced to justify the interference cannot be regarded as “sufficient”.

70. It follows that there has been a breach of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

71. Article 41 of the Convention provides:

> “If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

72. The applicant claimed that the pecuniary damage amounted to the sums that it had to pay to the plaintiffs as a result of the domestic courts' judgments. It sought UAH 3,000 (EUR 588.12) in compensation for pecuniary damage.

73. The applicant further claimed EUR 33,000 in compensation for non-pecuniary damage. It alleged that, as a result of the judgments given by the Ukrainian courts, the newspaper's editorial staff and journalists were

subjected to pressure and censorship as they could not express freely their views on major social and political events in Ukraine. Accordingly, the newspaper lost its sharpness and deep analytical commitment. As a consequence, the newspaper's circulation decreased and a number of leading journalists and employees left the newspaper. Moreover, having rendered such judgments, the courts implied that the applicant published untrue information, which had a negative impact on its media reputation.

74. The Government did not comment on these claims.

75. The Court finds that there is a causal link between the violation found and the pecuniary damage suffered by the applicant as a result of a violation of its rights under Article 10 of the Convention. Consequently, it awards the applicant its full claim of UAH 3,000 (EUR 588.12) in compensation for pecuniary damage. Furthermore, ruling on an equitable basis and having regard to all the circumstances of the case, it awards the applicant EUR 33,000 for non-pecuniary damage.

B. Costs and expenses

76. The applicant claimed EUR 8,337.07 in costs and expenses incurred in the course of the domestic proceedings and the proceedings before the Court, for which claim it provided a detailed breakdown.

77. The Government again did not contest the applicant's claim.

78. The Court is satisfied that the costs and expenses were actually and necessarily incurred in order to obtain redress for or prevent the matter found to constitute a violation of the Convention and were reasonable as to quantum. In accordance with the criteria laid down in its case law, it awards the applicant the totality of the sum claimed under this head, excluding the sum claimed for the expenses relating to its eventual participation at a hearing before the Court (EUR 2,816), which ultimately did not take place. It therefore awards the applicant EUR 5,521.07 under this head.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;

2. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 588.12 (five hundred and eighty-eight euros and twelve cents) for pecuniary damage, EUR 33,000 (thirty three thousand euros) for non-pecuniary damage and EUR 5,521.07 (five thousand five hundred and twenty-one euros and seven cents) for costs and expenses, to

be converted into the national currency of Ukraine at the rate applicable on the date of adoption of the present judgment, together with any taxes which may be payable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 March 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

COURT (CHAMBER)

CASE OF VERENIGING WEEKBLAD BLUF! v. THE NETHERLANDS

(Application no. 16616/90)

JUDGMENT

STRASBOURG

09 February 1995

In the case of Vereniging Weekblad Bluf! v. the Netherlands[1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr F. MATSCHER,
Mr C. RUSSO,
Mr A. SPIELMANN,
Mr S.K. MARTENS,
Mrs E. PALM,
Sir John FREELAND,
Mr D. GOTCHEV,
Mr K. JUNGWIERT,

and also of Mr H. PETZOLD, *Registrar*,

Having deliberated in private on 25 August 1994 and 27 January 1995,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 December 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 16616/90) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) by an association under Netherlands law, Vereniging Weekblad Bluf!, on 4 May 1988.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Netherlands recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) of the Convention.

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[1] The case is numbered 44/1993/439/518. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant association stated that it wished to take part in the proceedings and designated the lawyer who would represent it (Rule 30). The lawyer was given leave by the President to use the Dutch language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr S.K. Martens, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 January 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Matscher, Mr C. Russo, Mr A. Spielmann, Mrs E. Palm, Sir John Freeland, Mr D. Gotchev and Mr K. Jungwiert (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Netherlands Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant association's memorial on 17 May 1994 and the Government's memorial on 26 May. On 3 August the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 4 July 1994 the Commission had produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 August 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government
  Mr K. de VEY MESTDAGH, Ministry of Foreign Affairs, *Agent*,
  Mrs M.L.S.H. GROOTHUISJE, Ministry of Justice,
  Mrs M.J.T.M. VIJGEN, Ministry of Justice, *Advisers*;
- for the Commission
  Mr H. DANELIUS, *Delegate*;
- for the applicant association
  Mrs E. PRAKKEN, advocaat, *Counsel*,
  Mr R.E. de WINTER, Assistant Lecturer,
  University of Maastricht, *Adviser*.

The Court heard addresses by Mr de Vey Mestdagh, Mr Danelius, Mrs Prakken and Mr de Winter.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

7. The applicant is an association based in Amsterdam and at the material time it published a weekly called Bluf! for a left-wing readership. Since then the periodical has ceased publication.

8. In the spring of 1987 the editorial staff of Bluf! came into possession of a quarterly report by the internal security service (Binnenlandse Veiligheidsdienst - "the BVD"). Dated 1981 and marked "Confidential", it was designed mainly to inform BVD staff and other officials who carried out work for the BVD about the organisation's activities. It showed that at that time the BVD was interested in, among other groups, the Communist Party of the Netherlands and the anti-nuclear movement. It also mentioned the Arab League's plan to open an office in The Hague and gave information about the Polish, Czechoslovakian and Romanian security services' activities in the Netherlands.

The editor of Bluf! proposed to publish the report with a commentary as a supplement to issue no. 267 of the journal on 29 April 1987.

A. The seizure

9. On 29 April 1987, before the journal was published or sent out to subscribers, the director of the BVD informed the public prosecutor (Officier van Justitie) of the plan to publish the report and pointed out that its dissemination was likely to infringe Article 98a paras. 1 and 3 and Article 98c para. 1 of the Criminal Code (Wetboek van Strafrecht - see paragraph 20 below). In his letter he stated:

> "Although, in my opinion, the various contributions taken separately do not (or do not any longer) contain any State secrets, they do - taken together and read in conjunction - amount to information whose confidentiality is necessary in the interests of the State or its allies. This is because the juxtaposition of the facts gives an overview, in the various sectors of interest, of the information available to the security service and of the BVD's activities and method of operation."

1. The preliminary judicial investigation

10. On the same day a preliminary judicial investigation (gerechtelijk vooronderzoek) in respect of a person or persons unknown was commenced on an application by the public prosecutor. The investigating judge (rechter-commissaris) of the Amsterdam Regional Court (arrondissementsrechtbank) ordered the applicant association's premises to be searched and had the entire print run of issue no. 267 of Bluf!, including the supplement, seized.

The police apparently did not take away the offset plates remaining on the printing presses. Three people were arrested but released the following day.

11. During the night of 29 April 1987, unknown to the authorities, the staff of the applicant association managed to reprint the issue that had been seized. Some 2,500 copies were sold in the streets of Amsterdam the next day, which was the Queen's birthday and a national holiday. The authorities decided not to put a stop to this so as not to cause any public disorder.

12. On 6 May 1987 the investigating judge closed the investigation on the ground that he had no basis on which to continue it. In a letter of 2 June 1987 the public prosecutor informed the applicant association that proceedings against the three people arrested during the seizure were being dropped, as the evidence against two of them was insufficient and the third had played a minimal role.

2. The complaints by the applicant association

13. In the meantime, on 1 May 1987, the applicant association had complained of the seizure to the Review Division of the Amsterdam Regional Court under Article 552a of the Code of Criminal Procedure (Wetboek van Strafvordering - see paragraph 21 below), seeking the return of the confiscated copies, their supplements and the wrappers so that they could be sent out to subscribers in time.

This application was dismissed on the same day in so far as it related to the copies of the journal and supplement. The court considered that, in view of their content, it was not "highly unlikely" that in the criminal proceedings an order would be made for the periodical's withdrawal from circulation (onttrekking aan het verkeer). The court did, however, order the return of an insert entitled "A Contribution to the Jewish History Museum" and the wrappers.

14. In a judgment of 17 November 1987 (Nederlandse Jurisprudentie (NJ) 1988, 394) the Supreme Court dismissed appeals on points of law that the applicant association and the public prosecutor lodged against that decision. In respect of the applicant association's ground of appeal based on a violation of Article 7 of the Constitution (see paragraph 19 below), the court held that the right secured in that provision was limited by the phrase "subject to each person's liability under the law" and that the seizure of the printed matter to be distributed was among the measures capable of safeguarding the interests which Articles 98 and 98a of the Criminal Code were intended to protect.

15. In the interval, on 12 May 1987, the applicant association had lodged a second complaint with the Review Division of the Amsterdam Regional Court. Relying on Article 10 (art. 10) of the Convention, it challenged the lawfulness (rechtmatigheid) of the seizure. In the alternative, it sought the return of the confiscated items on the ground that as the

judicial investigation had been terminated, the measure had ceased to be justified.

On 11 January 1988 the court dismissed the complaint. It ruled that it was identical with the one of 1 May 1987 and that no new factor justified returning the property. Relying on the statement from the public prosecutor's office to the effect that it would make an application to have the journal withdrawn from circulation as soon as the Supreme Court had given judgment on the appeal on points of law against the decision of 1 May, the court held that it was still not to be excluded that such a measure might be taken. Consequently, it rejected the applicant association's submission based on the decision not to prosecute (see paragraph 12 above).

B. The withdrawal from circulation

16. On 25 March 1988 the public prosecutor applied to the Amsterdam Regional Court for an order that issue no. 267 of Bluf! should be withdrawn from circulation.

17. On 21 June 1988 the court allowed the application on the basis of Articles 36b and 36c of the Criminal Code (see paragraph 20 below). It held that as the seized items were designed to commit the offence set out in Article 98 and/or Article 98a para. 1 taken together with para. 3 of the Criminal Code, the unsupervised possession of them was contrary to the law and the public interest. Moreover, the measure was justified under Article 10 (art. 10) of the Convention on the grounds of maintaining "national security".

18. In a judgment of 18 September 1989 (NJ 1990, 94) the Supreme Court dismissed an appeal on points of law by the applicant association.

It held that the court below had clearly established that an offence covered either by Article 98a para. 1 taken together with para. 3 or by Article 98 had been committed and that it did not have to choose between the provisions indicated. Articles 36b para. 1 (4) and 36c para. 1 (5) were applicable even though neither the applicant association nor any other person had had to answer for their actions in the criminal proceedings. The reprinting and distribution of the issue in dispute after the seizure was no bar either, since the fact of making information public, covered by Article 98, did not necessarily have the consequence that secrecy should not be preserved. Articles 98 and 98a contained statutory provisions envisaged in Article 7 of the Constitution and Article 10 (art. 10) of the Convention; since the seizure and withdrawal from circulation were designed to safeguard the interests protected by Articles 98 and 98a, they fell within the permitted restrictions on the right to freedom of expression. In referring to national security, the court below had clearly shown that what was in issue in the instant case was information whose secrecy was necessary in the interests of the State. Lastly, the seizure and withdrawal from circulation

could not be equated with imposing a condition of "prior authorisation", even though the public could not acquaint itself with the opinions and ideas contained in the printed matter.

II. RELEVANT DOMESTIC LAW

A. The Constitution

19. Article 7 para. 1 of the Constitution provides:

"No one shall need prior authorisation in order to express his opinions or ideas through the press, subject to each person's liability under the law."

B. The Criminal Code

20. At the material time the relevant provisions of the Criminal Code read as follows:

Article 36b para. 1

"An order for the withdrawal of seized items from circulation may be made

(1) in a judgment in which a person is convicted of a criminal offence and a sentence is imposed;

...

(4) in a separate judicial order made on an application by the public prosecutor."

Article 36c

"Any of the following items are liable to be withdrawn from circulation:

...

(5) those made or intended for the commission of the offence; in so far as they are of such a nature that the unsupervised possession of them is contrary to the law or the public interest."

Article 98

"1. Anyone who deliberately communicates or puts at the disposal of a person or organisation not authorised to have knowledge of it any information whose secrecy is necessary in the interests of the State or its allies, or any item from which it is possible to extract such information, shall, if he knows or should reasonably suspect that the

information is of this kind, be liable to imprisonment for a period not exceeding six years or a fine of the fifth category.

2. A person shall be liable to the same penalty if he deliberately communicates, or makes available to a person or organisation not authorised to have knowledge of it, any information from a prohibited locality and relating to the security of the State or of its allies, or any item from which it is possible to extract such information, if he knows or should reasonably suspect that the information is of this kind."

Article 98a

"1. Any person who deliberately divulges information of the kind referred to in Article 98 ... shall, if he knows or should reasonably suspect that the information is of this kind, be liable to imprisonment for a period not exceeding fifteen years or a fine of the fifth category.

2. ...

3. The acts carried out in preparation of an offence as defined in the foregoing paragraphs shall be punishable with imprisonment for a period not exceeding six years or a fine of the fifth category."

Article 98c

"1. The following shall be liable to imprisonment for a period not exceeding six years or a fine of the fifth category:

(1) anyone who, without having been so authorised, takes or keeps in his possession any information referred to in Article 98;

..."

C. The Code of Criminal Procedure

21. The main provisions of the Code of Criminal Procedure mentioned in this case are the following:

Article 94

"Any items which may serve to establish the truth or whose confiscation or withdrawal from circulation can be ordered shall be liable to be seized."

Article 104 para. 1

"During the preliminary judicial investigation the investigating judge shall be empowered to seize any items liable to confiscation."

Article 552a para. 1

"The parties concerned shall be able by way of application to make a complaint in respect of seizures, the use made of confiscated items or delay in ordering the return [of such items] ..."

PROCEEDINGS BEFORE THE COMMISSION

22. Vereniging Weekblad Bluf! applied to the Commission on 4 May 1988. Relying on Article 10 (art. 10) of the Convention, it complained of the seizure and the subsequent withdrawal from circulation of issue no. 267 of its periodical Bluf!. It also complained of a breach of Article 6 paras. 1, 2 and 3 (a) (art. 6-1, art. 6-2, art. 6-3-a) of the Convention and Article 1 of Protocol No. 1 (P1-1) in that as the judicial investigation had been closed, it had not had an opportunity to defend itself against the charge underlying the foregoing two measures and had been deprived of its property without due process.

23. On 29 March 1993 the Commission declared the application (no. 16616/90) admissible as to the first complaint and inadmissible as to the remainder. In its report of 9 September 1993 (Article 31) (art. 31), it expressed the opinion by sixteen votes to two that there had been a breach of Article 10 (art. 10). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[3].

FINAL SUBMISSIONS BY THE GOVERNMENT TO THE COURT

24. In their memorial the Government expressed the opinion that

"the requirements of Article 10 para. 2 (art. 10-2) of the Convention [had been] met in [the] case, so that there [was] no question of there having been any contravention of Article 10 (art. 10) of the Convention".

[3] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 306-A of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10) OF THE CONVENTION

25. The applicant association maintained that the seizure and subsequent withdrawal from circulation of issue no. 267 of Bluf! had infringed its right to freedom of expression. It relied on Article 10 (art. 10) of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

26. The Government disputed this submission, while the Commission accepted it as regards the withdrawal from circulation.

A. Whether there were "interferences"

27. The Court notes that the impugned measures amounted to interferences by a public authority in the applicant association’s exercise of its freedom to impart information and ideas. None of those appearing before it contested this.

B. Justification for the interferences

28. Such interferences infringe Article 10 (art. 10) unless they were "prescribed by law", pursued a legitimate aim under Article 10 para. 2 (art. 10-2) and were "necessary in a democratic society" to achieve it.

1. "Prescribed by law"

29. The Government considered that the basis for the seizure was provided by Articles 94 and 104 of the Code of Criminal Procedure (see paragraph 21 above) and for the withdrawal from circulation by Articles 36b para. 1 (4) and 36c (5) of the Criminal Code (see paragraph 20 above).

Issue no. 267 of Bluf! imparted information whose secrecy was necessary in the interests of the State, an offence under Articles 98 and 98a of the Criminal Code (see paragraph 20 above).

30. In the applicant association's submission, the seizure of printed matter such as the weekly in question and its withdrawal from circulation only conformed to the fundamental principle of the rule of law contained in the concept "prescribed by law" if they were ordered in the context of criminal proceedings. Given the importance of the right to freedom of expression, only such proceedings afforded sufficient safeguards. In the instant case, however, that condition had not been satisfied, so that the public prosecutor's office obtained the order for seizure and withdrawal without having had to prove in adversarial proceedings that the information in issue had to be kept secret.

Furthermore, it said, the proceedings had contravened Netherlands law, among other reasons because the guilt of the party concerned had never been established and Article 7 of the Constitution prohibited preventive measures where a publication was concerned. Lastly, the seizure and withdrawal were not penalties within the meaning of paragraph 2 of Article 10 (art. 10-2) but measures of expediency.

31. The Commission considered it sufficient that the impugned measures were based on Articles 98a and 98c of the Criminal Code.

32. The Court cannot accept the argument that Article 10 (art. 10) precludes ordering the seizure and withdrawal from circulation of printed matter other than in criminal proceedings. National authorities must be able to take such measures solely in order to prevent punishable disclosure of a secret without taking criminal proceedings against the party concerned, provided that national law affords that party sufficient procedural safeguards. Netherlands law satisfies that condition by allowing the party concerned to complain both of a seizure and of a withdrawal from circulation (see paragraph 21 above) - opportunities of which the applicant association availed itself.

As to the applicant association's second allegation, the Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among other authorities, the Chorherr v. Austria judgment of 25 August 1993, Series A no. 266-B, p. 36, para. 25). In the instant case the Supreme Court considered and rejected the applicant association's submissions on two occasions (see paragraphs 14 and 18 above). The European Court sees no reason to suppose that Netherlands law was not correctly applied.

In conclusion, the interferences were "prescribed by law".

2. "Legitimate aim"

33. The applicant association conceded that at the time of the seizure the ban on publishing the quarterly report might in theory have served the

purpose of "national security". It asserted, on the other hand, that as soon as the reprint of issue no. 267 had been distributed, the same was no longer true as the material was no longer secret.

34. In the Government's submission, persons and groups representing a threat to national security could have discovered, by reading the report, whether and to what extent the BVD was aware of their subversive activities. The way in which the information had been presented could also have given them an insight into the secret services' methods and activities. They had thus had a chance of using this information to the detriment of national security.

35. The Court recognises that the proper functioning of a democratic society based on the rule of law may call for institutions like the BVD which, in order to be effective, must operate in secret and be afforded the necessary protection. In this way a State may protect itself against the activities of individuals and groups attempting to undermine the basic values of a democratic society.

36. In view of the particular circumstances of the case and the actual terms of the decisions of the relevant courts, the interferences were unquestionably designed to protect national security, a legitimate aim under Article 10 para. 2 (art. 10-2).

3. "Necessary in a democratic society"

37. The applicant association submitted that the seizure and withdrawal to prevent distribution of issue no. 267 of Bluf! were not necessary in a democratic society for the protection of national security, as the six-year-old report had been given the lowest confidentiality rating when it appeared in 1981. Furthermore, the measures had become pointless after the reprint of the issue had been distributed, since the confidentiality of the information had been breached. In refraining from intervening, the State had recognised that its confidentiality was not of the first importance. In any event, account had to be taken of the applicant association's manifest intention of contributing, by publishing the material, to the public debate then under way in the Netherlands on the BVD's activities.

38. The Government maintained that as the seizure complied with the requirements of Article 10 para. 2 (art. 10-2), the same was true of its prolongation and of the subsequent withdrawal from circulation, since these were designed to prevent the report from falling into the hands of unauthorised persons. The information should have remained confidential. It was for the State to decide whether it was necessary to impose and preserve such confidentiality. The State was also in the best position to assess the use that might be made of the information by subversive elements to the detriment of national security. Against that background, it should be allowed a wide margin of appreciation.

The Netherlands authorities had refrained from preventing distribution of the reprint solely for fear of causing serious public disorder in view of the vast crowds on the streets of Amsterdam on 30 April 1987, the Queen's birthday. The withdrawal from circulation remained in force after that date because the journal had been distributed only locally and in limited quantities. The figure of 2,500 copies sold, advanced by the applicant association, was exaggerated. Moreover, to hold that the measures were no longer effective following distribution of the periodical would be tantamount to accepting that "crime pays".

Lastly, the instant case differed from the cases of Weber v. Switzerland (judgment of 22 May 1990, Series A no. 177, p. 23, para. 51), The Sunday Times v. the United Kingdom (no. 2) (judgment of 26 November 1991, Series A no. 217, p. 30, para. 54) and Open Door and Dublin Well Woman v. Ireland (judgment of 29 October 1992, Series A no. 246-A, p. 31, para. 76). In this instance, unlike the situation in the first of those cases, the Netherlands authorities had brought proceedings to prevent publication; and, unlike the situation in the other two cases, the information in the report could not be obtained by other means.

39. In the light of these submissions, it must be ascertained whether there were sufficient reasons under the Convention to justify the seizure and withdrawal.

40. Because of the nature of the duties performed by the internal security service, whose value is not disputed, the Court, like the Commission, accepts that such an institution must enjoy a high degree of protection where the disclosure of information about its activities is concerned.

41. Nevertheless, it is open to question whether the information in the report was sufficiently sensitive to justify preventing its distribution. The document in question was six years old at the time of the seizure. Further, it was of a fairly general nature, the head of the security service having himself admitted that in 1987 the various items of information, taken separately, were no longer State secrets (see paragraph 9 above). Lastly, the report was marked simply "Confidential", which represents a low degree of secrecy. It was in fact a document intended for BVD staff and other officials who carried out work for the BVD (see paragraph 8 above).

42. Like the Commission, the Court does not consider that it must determine whether the seizure carried out on 29 April 1987, taken alone, could be regarded as "necessary".

43. The withdrawal from circulation, on the other hand, must be considered in the light of the events as a whole. After the newspaper had been seized, the publishers reprinted a large number of copies and sold them in the streets of Amsterdam, which were very crowded (see paragraphs 11 and 38 above).

Consequently, the information in question had already been widely distributed when the journal was withdrawn from circulation. Admittedly, the figure of 2,500 copies advanced by the applicant association was disputed by the Government. Nevertheless, the Court sees no reason to doubt that, at all events, a large number were sold and that the BVD's report was made widely known.

44. In this latter connection, the Court points out that it has already held that it was unnecessary to prevent the disclosure of certain information seeing that it had already been made public (see the Weber judgment previously cited, pp. 22-23, para. 49) or had ceased to be confidential (see the Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 33-35, paras. 66-70, and the Sunday Times (no. 2) judgment previously cited, pp. 30-31, paras. 52-56).

45. Admittedly, in the instant case the extent of publicity was different. However, the information in question was made accessible to a large number of people, who were able in their turn to communicate it to others. Furthermore, the events were commented on by the media. That being so, the protection of the information as a State secret was no longer justified and the withdrawal of issue no. 267 of Bluf! no longer appeared necessary to achieve the legitimate aim pursued. It would have been quite possible, however, to prosecute the offenders.

46. In short, as the measure was not necessary in a democratic society, there has been a breach of Article 10 (art. 10).

II. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

47. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

48. The applicant association's claim was solely for reimbursement of the costs and expenses relating to the proceedings in the national courts and thereafter before the Convention institutions. Once the sums received in legal aid in the Netherlands and before the Commission have been deducted, they amounted to 77,773 Netherlands guilders (NLG) plus NLG 13,052 in value-added tax (VAT).

49. The Government pointed out that the applicant association had received legal aid both in the national proceedings and before the Convention institutions. They considered that only the expenses and fees before those institutions could be taken into account and they drew attention to the very large amounts sought.

50. The Delegate of the Commission expressed no view.

51. Having regard to its case-law and to the sum paid in legal aid, the Court assesses the amount to be paid on an equitable basis for costs and expenses at NLG 60,000 inclusive of VAT.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a breach of Article 10 (art. 10) of the Convention;

2. Holds that the respondent State is to pay the applicant association, within three months, 60,000 (sixty thousand) Netherlands guilders for costs and expenses;

3. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 9 February 1995.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

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

SECOND SECTION

CASE OF VgT VEREIN GEGEN TIERFABRIKEN v. SWITZERLAND

(Application no. 24699/94)

JUDGMENT

STRASBOURG

28 June 2001

FINAL

28/09/2001

In the case of VgT Verein gegen Tierfabriken v. Switzerland,

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

Mr C.L. ROZAKIS, *President*,
Mr A.B. BAKA,
Mr L. WILDHABER,
Mr G. BONELLO,
Mr P. LORENZEN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr E. LEVITS, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 6 April 2000 and on 7 June 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 24699/94) against the Swiss Confederation lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by VgT Verein gegen Tierfabriken, an association registered in Switzerland ("the applicant association"), on 13 July 1994.

2. The applicant association was represented by Mr L.A. Minelli, a lawyer practising in Forch, Switzerland. The Swiss Government ("the Government") were represented by their Agent, Mr P. Boillat, Head of the International Affairs Division of the Federal Office of Justice.

3. The applicant association alleged that the refusal to broadcast a commercial had breached Article 10 of the Convention. It further complained that it had no effective remedy within the meaning of Article 13 at its disposal to complain about this refusal. The applicant association also complained of discrimination contrary to Article 14 in that the meat industry was permitted to broadcast commercials.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 6 April 2000 the Court declared the application partly admissible [*Note by the Registry.* The Court's decision is obtainable from the Registry].

7. The applicant association and the Government each filed observations on the merits (Rule 59 § 1). After consulting the parties, the Chamber decided that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The aim of the applicant association is the protection of animals, with particular emphasis on animal experiments and industrial animal production.

9. As a reaction to various television commercials of the meat industry, the applicant association prepared a television commercial lasting fifty-five seconds and consisting of two scenes.

10. The first scene of the film showed a sow building a shelter for her piglets in the forest. Soft orchestrated music was played in the background, and the accompanying voice referred, *inter alia*, to the sense of family which sows had. The second scene showed a noisy hall with pigs in small pens, gnawing nervously at the iron bars. The accompanying voice stated, *inter alia*, that the rearing of pigs in such circumstances resembled concentration camps, and that the animals were pumped full of medicaments. The film concluded with the exhortation: "Eat less meat, for the sake of your health, the animals and the environment!"

11. On 3 January 1994 the applicant association, wishing this film to be broadcast in the programmes of the Swiss Radio and Television Company (*Schweizerische Radio- und Fernsehgesellschaft*), sent a videocassette to the then Commercial Television Company (AG für das Werbefernsehen, now called Publisuisse) responsible for television advertising.

12. On 10 January 1994 the Commercial Television Company informed the applicant association that it would not broadcast the commercial in view of its "clear political character". The company pointed out that an alternative solution would be a film showing the merits of a decent rearing of animals and informing viewers that they were free to enquire into the origin of the meat which they were buying.

13. By a letter of 10 January 1994 the applicant association requested a decision against which it could file an appeal. On 13 January 1994 the Commercial Television Company replied that it was not an official authority giving decisions which could be contested. Nevertheless, it would

be willing to convene a meeting to discuss other possibilities in the presence of a legal adviser.

14. By a letter of 14 January 1994 the applicant association stated that it was not prepared to accept changes to its commercial. It requested a statement of the reasons for the decision and information as to the supervisory authority with which an appeal could be filed.

15. By a letter of 24 January 1994 the Commercial Television Company declined the applicant association's requests as follows:

> "As you have refused the discussion which we have proposed, we see no reason to enter into your propositions as set out in your letters of 14 and 20 January 1994. We regret this development as it serves neither you nor us. We confirm that we cannot broadcast your commercial in the proposed form as it breaches section 14 of the Radio and Television Ordinance [*Radio- und Fernsehverordnung*] as well as our general conditions of business [*Allgemeine Geschäftsbedingungen*]. In addition, the Commercial Television Company cannot be obliged to broadcast commercials which damage its business interests and involve its editorial rights."

16. On 4 February 1994 the applicant association filed a complaint with the Independent Radio and Television Appeal Board (*Unabhängige Beschwerdeinstanz für Radio und Fernsehen*), complaining of the refusal to broadcast the commercial. The latter informed the applicant association on 10 February 1994 that it could only deal with appeals complaining about programmes which had already been broadcast, but that it would transmit the complaint to the Federal Office of Communication (*Bundesamt für Kommunikation*). The Federal Office informed the applicant association on 25 April 1994 that within the framework of the broadcasting provisions the Commercial Television Company was free to purchase commercials and choose its contractual partners as it wished. It further stated that it considered the complaint to be a disciplinary report, and that it saw no reason to take proceedings against the Swiss Radio and Television Company.

17. On 6 July 1994 the applicant association filed a complaint with the Federal Department of Transport, Communications and Energy (*Eidgenössisches Verkehrs- und Energiewirtschaftsdepartement*), which was dismissed on 22 May 1996. In its decision, it found, *inter alia*, that the Swiss Radio and Television Company was the sole institution to provide information in respect of home news (*Inlandsberichterstattung*). In respect of commercial broadcasts, however, the company was in competition with local, regional and foreign broadcasters, and the applicant association was not obliged to have its commercial broadcast over the channels of the company. Moreover, the company acted in matters of advertising as a private entity and did not fulfil a duty of public law when it broadcast commercials. The Federal Department concluded that the Swiss Radio and Television Company could not be ordered to broadcast the commercial at issue.

18. The applicant association's administrative-law appeal (*Verwaltungsgerichtsbeschwerde*), filed by a lawyer and dated 18 June 1996, was dismissed by the Federal Court (*Bundesgericht*) on 20 August 1997. The court noted, with reference to Article 13 of the Convention, that the Federal Office of Communication should have formally afforded the applicant association the opportunity to institute complaints proceedings which, if necessary, could have remedied the matter. As the case was ready for decision, the Federal Court undertook the decision itself. It then balanced the various issues at stake.

19. The judgment proceeded to explain the position of the Swiss Radio and Television Company in Swiss law. The company no longer enjoyed a monopoly and was increasingly subject to foreign competition. However, this did not alter the fact that, according to the applicable law, the Swiss Radio and Television Company continued to operate in the area of programming within the framework of public-law duties with which it was entrusted. The law itself granted it a licence for the broadcasting of national and linguistic regional programmes.

20. The Federal Court further considered that Article 55 *bis* § 3 of the Federal Constitution (*Bundesverfassung*); in the version applicable at the relevant time, ensured the independence of radio and television broadcasting as well as autonomy in programming. However, advertising fell outside the programming obligations of the Swiss Radio and Television Company, the programming activity presupposing an assessment of the informative content by an editor. Only programming activities were covered by Article 55 *bis* of the Federal Constitution and section 4 of the Federal Radio and Television Act (*Bundesgesetz über Radio und Fernsehen*). Viewers should not be influenced in their opinions by one-sided, unobjective or insufficiently varied contributions which disregarded journalistic obligations. Commercials, on the other hand, were by their very nature one-sided as they were in the interest of the advertiser, and were by definition excluded from a critical assessment. For this reason, pursuant to section 18(1) of the Federal Radio and Television Act, they had to be clearly separated from programmes and recognisable as such. Indeed, the Federal Radio and Television Act dealt with advertising and financing, rather than with programming. Furthermore, no right to broadcast a commercial could be derived from the principle of the diversity of programmes or the fact that a competitor's commercial had already been authorised. The judgment continued:

> "Until 1964 [advertising] was completely prohibited on radio and television. Subsequently, it was allowed on television, although it was subject to restrictions in the interests of an optimal implementation of programming duties and to protect other important public interests (youth, health, diversity of the press). Section 18 of the Federal Radio and Television Act today assumes in principle that advertising is admissible but subject to certain limitations. Thus, section 18(5) of the Federal Radio and Television Act prohibits religious and political advertising as well as advertising

> for alcoholic beverages, tobacco and medicaments. The Federal Council may enact further advertising prohibitions for the protection of juveniles and the environment ... On this basis, section 18 of the Federal Radio and Television Act was given a more concrete form in sections 10 et seq. of the Radio and Television Ordinance. These provisions contain no obligation whatsoever to broadcast commercials, and do not declare that advertising is a public-law duty of the broadcaster."

21. In respect of the applicant association's complaint under Article 10 of the Convention, the Federal Court found that the prohibition of political advertising laid down in section 18(5) of the Federal Radio and Television Act served various purposes:

> "It should prevent financially powerful groups from obtaining a competitive political advantage. In the interest of the democratic process it is designed to protect the formation of public opinion from undue commercial influence and to bring about a certain equality of opportunity among the different forces of society. The prohibition contributes towards the independence of the radio and television broadcasters in editorial matters, which could be endangered by powerful political advertising sponsors. According to the Swiss law on communication the press remains the most important means for paid political advertising. Already, financially powerful groups are in a position to secure themselves more space; admitting political advertising on radio and television would reinforce this tendency and substantially influence the democratic process of opinion-forming – all the more so as it is established that with its dissemination and its immediacy television will have a stronger effect on the public than the other means of communication ... Reserving political advertising to the print media secures for them a certain part of the advertising market and thereby contributes to their financing; this in turn counteracts an undesirable concentration of the press and thus indirectly contributes to the pluralistic system of media required under Article 10 of the Convention ..."

22. The Federal Court observed that the applicant association had other means of disseminating its political ideas, for instance in foreign programmes which were broadcast in Switzerland, or in the cinema and the press. The Commercial Television Company had offered the applicant association other possibilities and was also willing to convene a meeting to discuss them with it in the presence of a legal adviser.

23. In respect of the applicant association's complaint about discrimination, the Federal Court found that it was complaining of two situations which were not comparable with each other. Promotions by the meat industry were economic in nature in that they aimed at increasing turnover and were not related to animal protection. On the other hand, the applicant association's commercial, exhorting reduced meat consumption and containing shocking pictures, was directed against industrial animal production. The applicant association was frequently active in the media in order to pursue its aims. In 1992 it had filed a disciplinary complaint in this respect with the Swiss Federal Parliament. The matter became a political issue early in 1994 when the Swiss Federal Council commented on the matter.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. General regulations on radio and television

24. Article 55 *bis* of the Swiss Federal Constitution, in the version applicable at the relevant time, provided:

> "1. Legislation on radio and television ... comes within the jurisdiction of the Confederation.
>
> 2. Radio and television shall contribute to cultural development and the free expression of opinions as well as to the entertainment of the audience. They shall consider the particularities of the country and the requirements of the cantons. They shall describe facts objectively and fairly reflect the variety of views.
>
> 3. Within the framework of paragraph 2, the impartiality of radio and television as well as autonomy in the creation of programmes shall be guaranteed. ..."

25. These provisions have been enshrined in Article 93 of the Federal Constitution currently in force.

26. The Federal Radio and Television Act, referring to Article 55 *bis*, in principle requires a licence to broadcast radio and television programmes. Section 26 of the Act grants the licence for national and linguistic regional programmes to the Swiss Radio and Television Company. Section 4 stipulates that the programmes shall be objective and fairly reflect the plurality of events and opinions.

27. The Swiss Radio and Television Company has transferred all aspects of the acquisition and organisation of television advertising to the Commercial Television Company (now called Publisuisse), which is a company established under private law whose activities do not depend on a licence.

B. Regulations on television advertising

28. Commercials are broadcast between programmes at various times of the day. In respect of advertising, the Federal Radio and Television Act provides as follows:

> "Section 18 Advertising
>
> 1. Advertising shall be clearly separated from the rest of the programme and shall be clearly recognisable as such. The permanent programme staff of the broadcaster shall not participate in the broadcasting of commercials ...
>
> 5. Religious and political advertising is prohibited, as is advertising for alcoholic beverages, tobacco and medicaments. To protect juveniles and the environment, the Federal Council may ban other advertisements."

29. In its message (*Botschaft*) of 28 September 1987 to the Swiss Parliament, the Federal Council explained that the prohibition of political advertising "should prevent financially powerful groups from obtaining a competitive political advantage" (*Bundesblatt* 1987, vol. III, p. 734).

30. Section 15 of the Radio and Television Ordinance provides as follows:

> "Section 15 Prohibited advertising
>
> The following shall be prohibited:
>
> (a) religious and political advertising;
>
> (b) advertising for alcoholic beverages and tobacco;
>
> (c) advertising for medicaments in respect of which public advertising is not authorised by medical law;
>
> (d) untrue or misleading advertising or advertising which constitutes unfair competition;
>
> (e) advertising which profits from the natural credulity of children or the lack of experience of youth or abuses their feelings of attachment;
>
> (f) subliminal advertising ..."

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

31. The Government claimed, as they had before the Commission, that the applicant association had abused its right of application within the meaning of Article 35 § 3 of the Convention. Thus, when introducing its application it had stated that an administrative-law appeal was not open; yet at the same time it had filed precisely such an appeal with the Federal Court, which in fact led to that court's decision of 20 August 1997.

32. The Court notes that the applicant association filed its application with the Commission on 13 July 1994, complaining of the refusal to broadcast a commercial. Shortly before, on 18 June 1994, it had raised essentially the same complaint by means of an administrative-law appeal before the Federal Court, which handed down its decision on 20 August 1997.

33. The Court recalls its case-law according to which it is not excluded that supplements to an initial application may relate in particular to proof

that the applicant has complied with the conditions of Article 35 § 1 of the Convention, even if he has done so after the lodging of the application, as long as he does so before the decision on admissibility (see *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, pp. 37-38, §§ 89-93). The Court finds no reason to reconsider these issues.

34. It follows that the Government's preliminary objection must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

35. The applicant association complained that the refusal to broadcast its commercial had infringed Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

36. The Government contested that submission.

A. Responsibility of the respondent State

37. Before the substance of the matter can be examined, the Court must consider whether responsibility can be attributed to the respondent State.

1. The parties' submissions

38. The applicant association submitted that the State is not permitted to delegate functions to private persons in such a way that fundamental rights are undermined by the resulting "privatisation". As radio and television programmes in Switzerland can be broadcast only under a licence granted by the State, the latter is obliged when drafting the law governing such licences to ensure respect for freedom of expression. This view was already considered, at the time, as part of unwritten Swiss constitutional law. The Government have not been released from the obligation to try to ensure that freedom of information is implemented in this particular area.

39. The applicant association further argued that the different legal bases governing the activities of the Swiss Radio and Television Company, on the one hand, and of the Commercial Television Company, on the other, did not

sufficiently ensure respect for its right to freedom of expression within the meaning of Article 10 of the Convention. The separation of private and public law took too little account of the fact that in certain cases freedom of expression gave a person the right to voice an opinion on social issues in the part of a television programme paid for by advertisers, that is to say, the so-called "commercial break". With reference to *Artico v. Italy*, the applicant association pointed out that the Convention was intended to guarantee, not rights that were theoretical or illusory, but rights which were practical and effective (judgment of 13 May 1980, Series A no. 37, pp. 15-16, § 33).

40. The Government submitted that Article 10 of the Convention was not applicable in the present case. The question arose whether this provision encompassed a "right to broadcast", that is, a right of access to a particular medium controlled by a third person. Even if this were to be the case, the Commercial Television Company's refusal to broadcast the commercial did not render the Swiss authorities liable. The latter exercised no supervision over the Commercial Television Company, which was a company established under and governed by private law, and they did not prevent the company from broadcasting commercials. Moreover, section 18(5) of the Federal Radio and Television Act could not serve as a basis to establish the responsibility in the present case of the Swiss authorities. Thus, the reasons given by the Company in its letter of 24 January 1994 when refusing the commercial were of a personal nature, *inter alia*, that it could not be obliged to broadcast commercials which damaged its business interests and involved its editors' rights. With reference to *Gustafsson v. Sweden* (judgment of 25 April 1996, *Reports of Judgments and Decisions* 1996-II, p. 658, § 60), the Government considered that the present case involved relations between private associations, the Commercial Television Company and the applicant association. Even if Article 10 of the Convention were applicable, the Swiss authorities would be responsible only in respect of their positive obligations under this provision.

41. The Government further submitted that the Swiss Radio and Television Company was not exercising a public service when broadcasting advertising and could in this respect rely on the constitutionally guaranteed freedom of trade as well as of contract. This was not altered by the fact that that company had delegated the acquisition of advertising to the Commercial Television Company, although regard had to be had to international and domestic law, including the provisions on the prohibition of advertising in the Federal Radio and Television Act. Both companies were governed by private law. As a result, under private law the question that arose was whether the Swiss authorities were under any positive obligation effectively to ensure freedom of expression among private persons. Under public law the issue that arose concerned the compatibility with Article 10 of the Convention of the prohibition of advertising under section 18(5) of the Federal Radio and Television Act.

42. In respect of the public-law issue in the present case, the Government considered that the requirements under Article 10 of the Convention were fulfilled. Attention was drawn to the Federal Court's decision of 20 August 1997 according to which the applicant association could rely before it on the rights under Article 10 of the Convention, although there was no "right to broadcast". The Federal Court did indeed examine the applicant association's complaints under Article 10, *inter alia*, in the light of the Strasbourg case-law.

43. In respect of the issue under private law, the Government pointed out the leading case-law of the Federal Court according to which constitutional as well as Convention rights shall also apply "horizontally" in relations between private persons. This case-law had meanwhile been enshrined in Article 35 of the Swiss Federal Constitution currently in force. Thus, individuals' rights were guaranteed judicially and by legislation. In the present case, the Federal Court found that the matter was first to be resolved at the level of private law. In fact, the refusal of the Commercial Television Company fell to be examined by an antitrust commission which undoubtedly would have examined the "horizontal" effects of basic rights between private persons.

2. The Court's assessment

44. It is not in dispute between the parties that the Commercial Television Company is a company established under Swiss private law. The issue arises, therefore, whether the company's refusal to broadcast the applicant association's commercial fell within the respondent State's jurisdiction. In this respect, the Court notes in particular the Government's submission according to which the Commercial Television Company, when deciding whether or not to acquire advertising, was acting as a private party enjoying contractual freedom.

45. Under Article 1 of the Convention, each Contracting State "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention". As the Court stated in *Marckx v. Belgium* (judgment of 13 June 1979, Series A no. 31, pp. 14-15, § 31; see also *Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A no. 44, p. 20, § 49), in addition to the primarily negative undertaking of a State to abstain from interference in Convention guarantees, "there may be positive obligations inherent" in such guarantees. The responsibility of a State may then be engaged as a result of not observing its obligation to enact domestic legislation.

46. The Court does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals *inter se*.

47. Suffice it to state that in the instant case the Commercial Television Company and later the Federal Court in its decision of 20 August 1997, when examining the applicant association's request to broadcast the commercial at issue, both relied on section 18 of the Swiss Federal Radio and Television Act, which prohibits "political advertising". Domestic law, as interpreted in the last resort by the Federal Court, therefore made lawful the treatment of which the applicant association complained (see *Marckx* and *Young, James and Webster*, cited above). In effect, political speech by the applicant association was prohibited. In the circumstances of the case, the Court finds that the responsibility of the respondent State within the meaning of Article 1 of the Convention for any resultant breach of Article 10 may be engaged on this basis.

B. Whether there was an interference with the applicant association's rights under Article 10 of the Convention

48. The responsibility of the respondent State having been established, the refusal to broadcast the applicant association's commercial amounted to an "interference by public authority" in the exercise of the rights guaranteed by Article 10.

49. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It is therefore necessary to determine whether it was "prescribed by law", motivated by one or more of the legitimate aims set out in that paragraph, and "necessary in a democratic society" to achieve them.

C. Whether the interference was "prescribed by law"

50. The applicant association submitted that there was no sufficient legal basis for the interference in its rights by the Commercial Television Company. The commercial which it intended to broadcast could not be considered as "political". It merely contained pictures without any linguistic elements explaining how pigs behaved in natural surroundings and how, in contrast to this, they were kept by human beings, in cramped pens. At most, this qualified as information. The fact that such information could lead to political consequences did not make it political advertising. The primary task of information was to enlighten and to disseminate knowledge that ultimately led to the correct political decisions.

51. The Government contended that any interference with the applicant association's rights was "prescribed by law" within the meaning of Article 10 § 2 of the Convention in that it was based on section 18(5) of the Federal Radio and Television Act, the latter having been duly published and, therefore, accessible to the applicant association. While the term "political" was somewhat vague, absolute precision was unnecessary, and it

fell to the national authorities to dissipate any doubts as to the interpretation of the provisions concerned. In the present case, the Federal Court in its decision of 20 August 1997 considered that the commercial at issue, denouncing the meat industry, was not of a commercial character and in fact had to be placed in the more general framework of the applicant association's militancy in favour of the protection of animals.

52. The Court recalls its case-law according to which the expression "prescribed by the law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see *Amann v. Switzerland* [GC], no. 27798/95, ECHR 2000-II). However, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see *Kopp v. Switzerland*, judgment of 25 March 1998, *Reports* 1998-II, p. 541, § 59, and *Kruslin v. France*, judgment of 24 April 1990, Series A no. 176-A, pp. 21-22, § 29).

53. In the present case, the Federal Court in its judgment of 20 August 1997 relied as a legal basis for the refusal to broadcast the applicant association's commercial on section 18(5) of the Federal Radio and Television Act prohibiting "political advertising". Section 15 of the Radio and Television Ordinance reiterates this prohibition.

54. It is not in dispute between the parties that these laws, duly published, were accessible to the applicant association. The issue arises, however, whether the rules were foreseeable as to their effects.

55. The Court reiterates that a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Again, whilst certainty is desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see, for example, *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, pp. 2325-26, § 35, and *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82, pp. 31-32, § 66).

56. In the present case, it falls to be examined whether the term "political advertising" in section 18(5) of the Federal Radio and Television Act was formulated in a manner such as to enable the applicant association to foresee that it would serve to prohibit the broadcasting of the proposed television commercial. The latter depicted pigs in a forest as well as in pens in a noisy hall. The accompanying voice compared this situation with

concentration camps and exhorted television viewers to "eat less meat, for the sake of [their] health, the animals and the environment".

57. In the Court's opinion the commercial indubitably fell outside the regular commercial context inciting the public to purchase a particular product. Rather, with its concern for the protection of animals, expressed partly in dramatic pictures, and its exhortation to reduce meat consumption, the commercial reflected controversial opinions pertaining to modern society in general and also lying at the heart of various political debates. Indeed, as the Federal Court pointed out in its judgment of 20 August 1997 (see paragraph 23 above), the applicant association had filed a disciplinary complaint with the Swiss Federal Parliament in respect of these matters.

58. As such, the commercial could be regarded as "political" within the meaning of section 18(5) of the Federal Radio and Television Act. It was, therefore, "foreseeable" for the applicant association that its commercial would not be broadcast on these grounds. It follows that the interference was thus "prescribed by law" within the meaning of Article 10 § 2 of the Convention.

D. Whether the interference pursued a legitimate aim

59. The applicant association further maintained that there was no legitimate aim which justified the interference with its rights.

60. The Government submitted that the refusal to broadcast the commercial at issue aimed at enabling the formation of public opinion protected from the pressures of powerful financial groups, while at the same time promoting equal opportunities for the different components of society. The refusal also secured for the press a segment of the advertising market, thus contributing towards its financial autonomy. In the Government's opinion, therefore, the measure was justified "for the protection of the ... rights of others" within the meaning of Article 10 § 2 of the Convention.

61. The Court notes the Federal Council's message to the Swiss Federal Parliament in which it was explained that the prohibition of political advertising in section 18(5) of the Swiss Radio and Television Act served to prevent financially powerful groups from obtaining a competitive political advantage. The Federal Court in its judgment of 20 August 1997 considered that the prohibition served, in addition, to ensure the independence of broadcasters, spare the political process from undue commercial influence, provide for a degree of equality of opportunity among the different forces of society and to support the press, which remained free to publish political advertisements.

62. The Court is, therefore, satisfied that the measure aimed at the "protection of the ... rights of others" within the meaning of Article 10 § 2 of the Convention.

E. Whether the interference was "necessary in a democratic society"

63. The applicant association submitted that the measure had not been proportionate, as it did not have other valid means at its disposal to broadcast the commercial at issue. The television programmes of the Swiss Radio and Television Company were the only ones to be broadcast and seen throughout Switzerland. The evening news programme and the subsequent national weather forecasts had the highest ratings, namely between 50% and 70% of all viewers. Even with the use of considerable financial resources it would not be possible to reach so many persons via the private regional channels or the foreign channels which could be received in Switzerland.

64. The Government considered that the measure was proportionate as being "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention. It was not up to the Court to take the place of the national authorities; indeed, Contracting States remained free to choose the measures which they considered appropriate, and the Court could not be oblivious of the substantive or procedural features of their respective domestic laws (see *Worm v. Austria*, judgment of 29 August 1997, *Reports* 1997-V, p. 1551, § 49). In the present case, the Federal Court in its judgment of 20 August 1997 was called upon to examine conflicting interests protected by the same basic right: namely the freedom of the applicant association to broadcast its ideas, and the freedom of the Commercial Television Company and the Swiss Radio and Television Company to communicate information. To admit the applicant association's point of view would be to grant a "right to broadcast", which right would substantially interfere with the right of the Commercial Television Company and the Swiss Radio and Television Company to decide which information they chose to bring to the attention of the public. In fact, Article 10 would then oblige a third party to broadcast information which it did not wish to. Finally, the public had to be protected from untimely interruptions in television programmes by commercials.

65. In this respect the Government pointed out the various other possibilities open to the applicant association to broadcast the information at issue, namely by means of local radio and television stations, the print media and internet. Moreover, the Commercial Television Company had offered the applicant association the possibility of discussing the conditions for broadcasting its commercials, but this had been categorically refused by the latter.

66. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such

are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions. Such exceptions must, however, be construed strictly, and the need for any restrictions must be established convincingly, particularly where the nature of the speech is political rather than commercial (see, *inter alia*, *Hertel*, cited above, pp. 2329-30, § 46, and *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49).

67. Under the Court's case-law, the adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

68. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see The Sunday Times *v. the United Kingdom (no. 2)*, judgment of 26 November 1991, Series A no. 217, pp. 28-29, § 50). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts (see *Hertel*, cited above).

69. It follows that the Swiss authorities had a certain margin of appreciation to decide whether there was a "pressing social need" to refuse the broadcasting of the commercial. Such a margin of appreciation is particularly essential in commercial matters, especially in an area as complex and fluctuating as that of advertising (see *markt intern Verlag GmbH and Klaus Beermann v. Germany*, judgment of 20 November 1989, Series A no. 165, pp. 19-20, § 33, and *Jacubowski v. Germany*, judgment of 23 June 1994, Series A no. 291-A, p. 14, § 26).

70. However, the Court has found above that the applicant association's film fell outside the regular commercial context inciting the public to purchase a particular product. Rather, it reflected controversial opinions pertaining to modern society in general (see paragraph 57 above). The Swiss authorities themselves regarded the content of the applicant association's

commercial as being "political" within the meaning of section 18(5) of the Federal Radio and Television Act. Indeed, it cannot be denied that in many European societies there was, and is, an ongoing general debate on the protection of animals and the manner in which they are reared.

71. As a result, in the present case the extent of the margin of appreciation is reduced, since what is at stake is not a given individual's purely "commercial" interests, but his participation in a debate affecting the general interest (see *Hertel*, cited above).

72. The Court will consequently examine carefully whether the measure in issue was proportionate to the aim pursued. In that regard, it must balance the applicant association's freedom of expression, on the one hand, with the reasons adduced by the Swiss authorities for the prohibition of political advertising, on the other, namely to protect public opinion from the pressures of powerful financial groups and from undue commercial influence; to provide for a certain equality of opportunity among the different forces of society; to ensure the independence of broadcasters in editorial matters from powerful sponsors; and to support the press.

73. It is true that powerful financial groups can obtain competitive advantages in the area of commercial advertising and may thereby exercise pressure on, and eventually curtail the freedom of, the radio and television stations broadcasting the commercials. Such situations undermine the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely (see *Informationsverein Lentia and Others v. Austria (no. 1)*, judgment of 24 November 1993, Series A no. 276, p. 16, § 38).

74. In the present case, the contested measure, namely the prohibition of political advertising as provided in section 18(5) of the Federal Radio and Television Act, was applied only to radio and television broadcasts, and not to other media such as the press. The Federal Court explained in this respect in its judgment of 20 August 1997 that television had a stronger effect on the public on account of its dissemination and immediacy. In the Court's opinion, however, while the domestic authorities may have had valid reasons for this differential treatment, a prohibition of political advertising which applies only to certain media, and not to others, does not appear to be of a particularly pressing nature.

75. Moreover, it has not been argued that the applicant association itself constituted a powerful financial group which, with its proposed commercial, aimed at endangering the independence of the broadcaster; at unduly influencing public opinion or at endangering equality of opportunity among

the different forces of society. Indeed, rather than abusing a competitive advantage, all the applicant association intended to do with its commercial was to participate in an ongoing general debate on animal protection and the rearing of animals. The Court cannot exclude that a prohibition of "political advertising" may be compatible with the requirements of Article 10 of the Convention in certain situations. Nevertheless, the reasons must be "relevant" and "sufficient" in respect of the particular interference with the rights under Article 10. In the present case, the Federal Court, in its judgment of 20 August 1997, discussed at length the general reasons which justified a prohibition of "political advertising". In the Court's opinion, however, the domestic authorities have not demonstrated in a "relevant and sufficient" manner why the grounds generally advanced in support of the prohibition of political advertising also served to justify the interference in the particular circumstances of the applicant association's case.

76. The domestic authorities did not adduce the disturbing nature of any particular sequence, or of any particular words, of the commercial as a ground for refusing to broadcast it. It therefore mattered little that the pictures and words employed in the commercial at issue may have appeared provocative or even disagreeable.

77. In so far as the Government pointed out that there were various other possibilities to broadcast the information at issue, the Court observes that the applicant association, aiming at reaching the entire Swiss public, had no other means than the national television programmes of the Swiss Radio and Television Company at its disposal, since these programmes were the only ones broadcast throughout Switzerland. The Commercial Television Company was the sole instance responsible for the broadcasting of commercials within these national programmes. Private regional television channels and foreign television stations cannot be received throughout Switzerland.

78. The Government have also submitted that admitting the applicant association's claim would be to accept a "right to broadcast" which in turn would substantially interfere with the rights of the Commercial Television Company to communicate information. Reference was further made to the danger of untimely interruptions in television programmes by means of commercials. The Court recalls that its judgment is essentially declaratory. Its task is to determine whether the Contracting States have achieved the result called for by the Convention. Various possibilities are conceivable as regards the organisation of broadcasting television commercials; the Swiss authorities have entrusted the responsibility in respect of national programmes to one sole private company. It is not the Court's task to indicate which means a State should utilise in order to perform its obligations under the Convention (see *De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, p. 20, § 35).

79. In the light of the foregoing, the measure in issue cannot be considered as "necessary in a democratic society". Consequently, there has been a violation of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

80. In the applicant association's submission, it had no effective remedy at its disposal to complain about the refusal to broadcast its commercial. It relied on Article 13 of the Convention, which states:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

81. The Government replied that the Federal Court as the highest domestic instance had dealt with the applicant association's complaint.

82. The Court notes that, upon the applicant association's administrative-law appeal, the Federal Court, in its decision of 20 August 1997, dealt extensively and in substance with the complaints which it raised before the Court. The applicant association therefore had at its disposal a remedy within the meaning of Article 13 of the Convention.

83. It follows that there has been no breach of Article 13 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

84. The applicant association also complained under Article 14 of the Convention, taken in conjunction with Article 10, of discrimination in that its commercial had not been broadcast, whereas the meat industry was regularly permitted to broadcast commercials. Article 14 of the Convention states:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

85. The Government submitted that the situations complained of were not comparable. Otherwise, for every commercial praising one product, another commercial for another product would have to be broadcast. The difficulties would be even greater in the political sphere.

86. Under the Court's case-law, Article 14 safeguards individuals, or groups of individuals, placed in comparable situations, from all discrimination in the enjoyment of the rights and freedoms set forth in the other normative provisions of the Convention and its Protocols (see The Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 43, § 70).

87. In the present case, the Court notes the decision of the Federal Court of 20 August 1997 according to which promotions of the meat industry were economic in nature in that they aimed at increasing turnover, whereas the applicant association's commercial, exhorting reduced meat consumption, was directed against industrial animal production and related to animal protection.

88. As a result, the applicant association and the meat industry cannot be considered to be "placed in comparable situations" as their commercials differed in their aims.

89. There has thus been no violation of Article 14 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

90. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Costs and expenses

91. Under this head the applicant association claimed a total of 22,694.80 Swiss francs (CHF), namely CHF 9,957.60, for the lawyer's costs incurred in the domestic proceedings and CHF 9,371.20 for the lawyer's costs in the Strasbourg proceedings, as well as CHF 3,366 for the costs of the domestic proceedings. If the Government were to dispute these amounts, the applicant association requested the Court to find that the matter was not yet ready for decision. This would enable the applicant association to institute proceedings and to claim these amounts before the domestic courts.

92. The Government considered that the amounts claimed by the applicant association were reasonable. In respect of the lawyer's costs in the Strasbourg proceedings, the Government nevertheless recalled that in its admissibility decision of 6 April 2000 the Court declared the applicant association's complaint under Article 6 § 1 of the Convention inadmissible. As a result, the Government considered the sum of CHF 20,000 adequate for the costs and expenses incurred by the applicant association.

93. The Court is of the opinion that the matter is ready for decision. In accordance with its case-law it will consider whether the costs and expenses claimed were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for instance, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII).

94. The Court agrees with the Government that the award of costs and expenses should take into account the fact that part of the applicant association's complaints was declared inadmissible. On this basis, the Court finds the sum of CHF 20,000 reasonable, and awards it to the applicant association.

B. Default interest

95. According to the information available to the Court, the statutory rate of interest applicable in Switzerland at the date of adoption of the present judgment is 5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that there has been no violation of Article 13 of the Convention;

4. *Holds* that there has been no violation of Article 14 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicant association, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, for costs and expenses, CHF 20,000 (twenty thousand Swiss francs);
   (b) that simple interest at an annual rate of 5% shall be payable from the expiry of the above-mentioned three months until settlement;

6. *Dismisses* the remainder of the applicant association's claims for just satisfaction.

Done in English, and notified in writing on 28 June 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President

In the case of Vogt v. Germany (1),

The European Court of Human Rights, sitting, in accordance with Rule 51 of Rules of Court A (2), as a Grand Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr R. Bernhardt,
Mr F. Gölcüklü,
Mr F. Matscher,
Mr L.-E. Pettiti,
Mr R. Macdonald,
Mr A. Spielmann,
Mr J. De Meyer,
Mr S.K. Martens,
Mrs E. Palm,
Mr I. Foighel,
Mr A.N. Loizou,
Mr J.M. Morenilla,
Mr M.A. Lopes Rocha,
Mr G. Mifsud Bonnici,
Mr D. Gotchev,
Mr P. Jambrek,
Mr K. Jungwiert,
Mr P. Kuris,

and also of Mr H. Petzold, Registrar,

Having deliberated in private on 25 February and 2 September 1995,

Delivers the following judgment, which was adopted on the last-mentioned date:

_____

Notes by the Registrar

1. The case is numbered 7/1994/454/535. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 March 1994 and by the German Government ("the Government") on 29 March 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 17851/91) against the Federal Republic of Germany

lodged with the Commission under Article 25 (art. 25) by a German national, Mrs Dorothea Vogt, on 13 February 1991.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 10 and 11 (art. 10, art. 11) of the Convention and also, in the case of the Commission's request, of Article 14 (art. 14).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that she wished to take part in the proceedings and designated the lawyers who would represent her (Rule 30); the President gave her lawyers leave to use the German language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 March 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Matscher, Mr L.-E. Pettiti, Mr S.K. Martens, Mr J.M. Morenilla, Mr G. Mifsud Bonnici, Mr P. Jambrek and Mr K. Jungwiert (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's observations on 9 and 11 August 1994 and the Government's memorial on 17 August 1994.

On 19 August 1994 the Commission produced various documents, as requested by the Registrar on the President's instructions.

5. By a letter of 4 November 1994 the Agent of the Government sought leave to submit an additional memorial and requested that the hearing initially set down for 23 November be postponed. After once again consulting - through the Registrar - the Agent of the Government, the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rule 38), Mr Ryssdal granted these requests. Pursuant to the order made on 16 November 1994, the Registrar received the Government's additional memorial on 5 January 1995 and the applicant's observations in reply on 3 February 1995. On 15 February 1995 the Secretary to the Commission informed the Registrar that the Delegate would make his submissions at the hearing.

6. On 26 January 1995 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51). The Grand Chamber comprised as ex officio members the President and the Vice-President, Mr Bernhardt, who in this case was already sitting as national judge, together with the other members of the Chamber. The names of the remaining ten judges were drawn by lot by the President in the presence of the Registrar on 27 January 1995, namely Mr F. Gölcüklü,

Mr R. Macdonald, Mr A. Spielmann, Mr J. De Meyer, Mr I. Foighel, Mr A.N. Loizou, Mr F. Bigi, Mr M.A. Lopes Rocha, Mr D. Gotchev and Mr P. Kuris (Rule 51 para. 2 (a) to (c)). Subsequently, Mrs E. Palm replaced Mr Bigi, who was unable to take part in the further consideration of the case.

7. In accordance with the decision of the President, who had given the Agent of the Government too leave to use the German language (Rule 27 para. 2), the hearing took place in public in the Human Rights Building, Strasbourg, on 22 February 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr J. Meyer-Ladewig, Ministerialdirigent,
Federal Ministry of Justice, Agent,
Mr H. Wurm, Ministerialrat,
Federal Ministry of the Interior,
Mr B. Feuerherm, Ministerialrat, Ministry for
Cultural Affairs of the Land of Lower Saxony, Advisers;

(b) for the Commission

Mr S. Trechsel, Delegate;

(c) for the applicant

Mr K. Damman,
Mr P. Becker,
Mr O. Jäckel, Rechtsanwälte, Counsel.

The Court heard addresses by Mr Trechsel, Mr Becker, Mr Jäckel, Mr Damman and Mr Meyer-Ladewig, and replies to a question put by it.

AS TO THE FACTS

I. Particular circumstances of the case

8. Mrs Dorothea Vogt, a German national born in 1949, lives in Jever in the Land of Lower Saxony.

9. After studying literature and languages at the University of Marburg/Lahn for six years, during which time she became a member of the German Communist Party (Deutsche Kommunistische Partei - "DKP"), in November 1975 she sat the examination to become a secondary-school teacher (wissenschaftliche Prüfung für das Lehramt an Gymnasien). She did her teaching practice (Vorbereitungsdienst für das Lehramt) from February 1976 to June 1977 at Fulda in the Land of Hesse. In June 1977 she sat the second State examination to become a secondary-school teacher (zweite Staatsprüfung für das Lehramt an Gymnasien) and obtained a post from 1 August 1977 as a teacher (Studienrätin), with the status of probationary civil servant (Beamtenverhältnis auf Probe), in a State secondary school in Jever. On 1 February 1979, before the end of her probationary period, she was appointed a permanent civil servant (Beamtin auf Lebenszeit).

10. Mrs Vogt taught German and French. In an assessment report drawn up in March 1981 her capabilities and work were described as entirely

satisfactory and it was stated that she was held in high regard by her pupils and their parents and by her colleagues.

A. Disciplinary proceedings

1. Before the Weser-Ems regional council

11. After a preliminary investigation, the Weser-Ems regional council (Bezirksregierung Weser-Ems) issued an order (Verfügung) on 13 July 1982 instituting disciplinary proceedings against the applicant on the ground that she had failed to comply with the duty of loyalty to the Constitution ("duty of political loyalty" - politische Treuepflicht) that she owed as a civil servant under section 61 (2) of the Lower Saxony Civil Service Act (Niedersächsisches Beamtengesetz - see paragraph 28 below). She had, it was said, engaged in various political activities on behalf of the DKP since the autumn of 1980 and in particular had stood as the DKP candidate in the 1982 elections to the Parliament (Landtag) of the Land of Lower Saxony.

12. The "indictment" (Anschuldigungsschrift) of 22 November 1983, drawn up in connection with the disciplinary proceedings, specified eleven public, political activities that the applicant had engaged in for the DKP, such as distributing pamphlets, representing the DKP at political meetings, being a party official in a constituency and standing in the federal elections of 6 March 1983.

13. On 15 July 1985 the proceedings were stayed in order to widen the investigations to include further instances of the applicant's political activity that had come to light in the meantime.

14. In a supplementary "indictment" of 5 February 1986 Mrs Vogt was accused of also failing to comply with her duties as a civil servant in that:

(a) she had been a member of the "Executive Committee" (Vorstand) of the Bremen/North Lower Saxony regional branch (Bezirksorganisation) of the DKP since the end of 1983; and

(b) she had taken part in and addressed the DKP's 7th party congress, held from 6 to 8 January 1984 in Nuremberg, as Chairperson (Kreisvorsitzende) of the Wilhelmshaven/Friesland local branch of the party.

15. After a further stay of proceedings on 23 June 1986, a second supplementary "indictment" was drawn up on 2 December 1986, which specified four other political activities considered incompatible with the applicant's civil-servant status, namely:

(a) her candidature for the DKP in the elections to the Parliament of the Land of Lower Saxony on 15 June 1986;

(b) the fact that she was still a member of the "Executive Committee" of the Bremen/North Lower Saxony regional branch of the DKP;

(c) the fact that she was still Chairperson of the Wilhemshaven/Friesland local branch of the DKP; and

(d) her participation in the DKP's 8th party congress from 2 to 4 May 1986 in Hamburg as a party delegate.

16. By an order of 12 August 1986 the Weser-Ems regional council notified the applicant that she had been temporarily suspended from her post, stating in particular as follows:

> "Although you knew the views of your superiors and the case-law of the disciplinary courts you have nevertheless, over a considerable period of time, deliberately violated your duty of loyalty. For a permanent civil servant that is an extraordinarily serious breach of duty. Civil servants, whose status is founded on a special relationship of trust with the State and who, by taking the oath, have vowed to uphold the law and freedom, destroy this basis of trust, which is essential for the continuation of their relationship with their employer [Dienstverhältnis], if they deliberately support a party whose aims are incompatible with the free democratic constitutional system. This is the position in the present case."

17. From October 1986 Mrs Vogt was paid only 60 per cent of her salary (Dienstbezüge).

2. Before the Disciplinary Division of the Oldenburg Administrative Court

18. Before the Disciplinary Division of the Oldenburg Administrative Court (Disziplinarkammer des Verwaltungsgerichts) the applicant, who by her own account has been a member of the DKP since 1972, argued that her conduct could not amount to a failure to fulfil her duties as a civil servant. By being a member of the party and carrying out activities on its behalf she had availed herself of the right of all citizens to engage in political activity. She had always carried out such activity within the law and within the limits laid down in the Constitution. Her action to promote peace within the Federal Republic of Germany and in its external relations and her combat against neo-fascism were in no way indicative of an anti-constitutional stance. The DKP, whose aims had always been wrongly alleged (but never proven) to be anti-constitutional, took part lawfully in the process of forming political opinion in the Federal Republic of Germany. Lastly, according to a report issued by a Commission of Inquiry of the International Labour Office on 20 February 1987, the institution of disciplinary proceedings against civil servants on account of their political activities on behalf of a party that had not been banned breached International Labour Organisation (ILO) Convention No. 111 concerning discrimination in respect of employment and occupation. It also violated Article 10 (art. 10) of the European Convention on Human Rights.

19. In its judgment of 15 October 1987 the Disciplinary Division dismissed applications by Mrs Vogt to have the proceedings stayed and witnesses examined. The division ordered that all the "charges" against Mrs Vogt be dropped except those concerning her membership, as such, of the DKP and of the "Executive Committee" of the Bremen/North Lower Saxony regional branch, her chairing of the Wilhelmshaven branch of the DKP and her candidature in the elections to the Lower Saxony Land Parliament on 15 June 1986.

20. On the merits, the Disciplinary Division held that the applicant had failed to comply with her duty of political loyalty and ordered her dismissal as a disciplinary measure. It granted her a sum equivalent to 75 per cent of her pension entitlement at that date, to be paid for a six-month period.

The division found in the first place that neither ILO Convention No. 111 nor the recommendations made in the Commission of Inquiry's report of 20 February 1987 constituted a bar to the opening of disciplinary proceedings.

It considered that active membership of a political party that pursued anti-constitutional aims was incompatible with a civil servant's duty of political loyalty. The DKP's aims, as described in the Mannheim programme of 21 October 1978 (see paragraph 22 below), were clearly opposed to the free democratic constitutional system of the Federal Republic of Germany. A party could be held to be anti-constitutional even if it had not been banned by the Federal Constitutional Court (Bundesverfassungsgericht) under Article 21 para. 2 of the Basic Law (Grundgesetz - see paragraph 25 below). Through the active role which she played within the DKP the applicant had therefore clearly supported aims that were contrary to the Constitution.

The Disciplinary Division added that the rule, laid down in the first sentence of Article 48 para. 2 of the Basic Law (see paragraph 25 below), according to which no one may be prevented from taking office as a member of parliament, could not justify the applicant's standing as the DKP candidate in regional elections. This rule did not apply to measures, such as disciplinary proceedings, which initially had a different purpose and restricted the freedom to stand for election to, and to sit as a member of, parliament only as an indirect and unavoidable consequence of their implementation.

The duty of political loyalty, which admittedly restricted civil servants' fundamental rights, was one of the traditional principles of the civil service and had constitutional status by virtue of Article 33 para. 5 of the Basic Law (see paragraph 25 below). It followed that this duty took precedence over the provisions of international instruments such as the European Convention.

The applicant had moreover carried out her political activities despite being familiar with the case-law establishing that active membership of the DKP was incompatible with the duty of political loyalty. She must have been aware, at the latest once the Lower Saxony Disciplinary Court (Niedersächsischer Disziplinarhof) had delivered its judgment of 24 June 1985, which was published in an official education-authority circular and was brought to the attention of the applicant in person, that her conduct was in breach of her duties (pflichtwidriges Verhalten). Mrs Vogt had accordingly to be dismissed for having betrayed the relationship of trust between herself and her employer. Throughout the disciplinary proceedings she had moreover repeatedly indicated that she intended to continue her political activities for the DKP despite the warnings she had received. The fact that she had done her work satisfactorily for many years and that she had been held in high regard by her pupils and their parents alike was immaterial.

The Disciplinary Division finally ordered that Mrs Vogt should be paid 75 per cent of her pension allowance for a period of six months. It did so in recognition of the fact that apart from her breach of the duty of loyalty Mrs Vogt had always performed her duties unexceptionably and enthusiastically and needed some income to be protected from immediate hardship.

3. In the Lower Saxony Disciplinary Court

21. On 18 March 1988 the applicant lodged an appeal against the above judgment with the Lower Saxony Disciplinary Court, reiterating her previous arguments (see paragraph 18 above).

22. In a judgment of 31 October 1989 the Disciplinary Court dismissed Mrs Vogt's appeal and upheld the Administrative Court's judgment in all respects.

It pointed out that, by carrying out activities on behalf of the DKP, the applicant had breached the duty of political loyalty that she owed in accordance with Article 33 para. 5 of the Basic Law, taken together with section 61 (2) of the Lower Saxony Civil Service Act. Under those provisions, civil servants must at all times bear witness to the free democratic constitutional system within the meaning of the Basic Law and uphold that system. They must unequivocally dissociate themselves from groups who criticise, campaign against and cast aspersions on the State, its institutions and the existing constitutional system. As a result of her activities as a member of the DKP the applicant had failed to satisfy these requirements. The DKP's political aims were incompatible with that system.

The fact that the Constitutional Court had not banned the DKP did not prevent other courts from finding that the party was anti-constitutional, as the Federal Administrative Court and the Disciplinary Court itself had done convincingly in judgments of 1 February 1989 and 20 July 1989. An analysis of the still current Mannheim programme made by Mies and Gerns in their book on the DKP's methods and objectives (Weg und Ziel der DKP, 2nd edition, 1981) showed that the party, which aimed to establish a regime similar to that existing in the communist countries around 1980, continued to be guided by the principles of Marx, Engels and Lenin.

Article 48 para. 2 of the Basic Law and the corresponding legislation of the Land of Lower Saxony securing the right to take office as a member of parliament did not set limits on the duty of political loyalty, since those provisions were not applicable to impediments resulting from disciplinary proceedings.

The court held that the applicant's reference to Article 5 para. 1 of the Basic Law, which secured the right to freedom of expression, was not relevant as the provisions governing the civil service mentioned in Article 33 para. 5 of the Basic Law had to be regarded as general laws within the meaning of Article 5 para. 2 of the Basic Law (see paragraph 25 below). Similarly, the European Court of Human Rights had ruled that a decision by a competent authority relating to admission to the civil service did not amount to an interference with freedom of expression. The same approach applied in cases where a person had already been appointed to a permanent civil service post.

Mrs Vogt's conduct had been unlawful. By holding such a senior political post within the DKP, she necessarily espoused anti-constitutional aims and had therefore to be considered to be opposed to the Constitution herself, although she proclaimed her attachment to the Basic Law. It was not possible to support both systems at the same time.

Even though Mrs Vogt sought above all to achieve some of the

DKP's short-term objectives such as reducing unemployment, promoting peace and eliminating so-called Berufsverbote (prohibitions on pursuing various occupations), this did not mean that her conduct was not culpable. The DKP's aims were admittedly not all anti-constitutional; some of them were compatible with the Basic Law. However, civil servants could not, as a means of furthering their own political objectives, make use of a party with anti-constitutional aims and help it to come to power. In this connection the Disciplinary Court referred to the following observations made by the Federal Administrative Court (Bundesverwaltungsgericht) in a judgment of 20 January 1987, adding that it adopted them as it was convinced that exactly the same reasoning applied to the case before it:

> "It is admittedly possible to accept the view of the Federal Disciplinary Court [Bundesdisziplinargericht] that the official in question does not seek to change the system of government of the Federal Republic of Germany by the use of force and that this declaration cannot be dismissed as mere 'lip-service'. It is also possible to accept his claim that he is mainly concerned with correcting what he perceives to be a discrepancy between the principles laid down in the Constitution and their application in practice in the Federal Republic of Germany and that he is profoundly sincere in his wish to establish a society that is more just, particularly in the economic sphere. However, contrary to the view taken by the Federal Disciplinary Court, this does not mean that he is entitled to see in the DKP the political grouping through which he believes he can achieve his ideal political order. It appears doubtful whether the view of the Constitution espoused by the official and described above reflects accurately the principles enshrined in the Basic Law. It is not necessary to resolve that question here. In its judgment banning the former Communist Party (KPD) (BVerfGE 5, p. 85), the Federal Constitutional Court held that not only the 'tactics of conflict' employed by the former KPD but also the different phases of the process leading to attainment of its final objective of 'socialist rule' [sozialistische Herrschaft], namely proletarian revolution by peaceful or violent means and the triumph of the working class ..., were incompatible with the free democratic constitutional system. [It] also stated that intensive propaganda and persistent unrest aimed at establishing - even if this was not to be achieved in the near future - a political regime that was clearly contrary to the free democratic constitutional system inevitably caused direct and immediate harm to that system ... The Federal Constitutional Court thus also unquestionably held that the transitional stages of this process, which were of indefinite duration [and which the party sought to impose] through intensive propaganda and persistent unrest were incompatible with the free democratic constitutional system (BVerwGE 47, pp. 365 and 374). Hence, contrary to the view taken by the Federal Disciplinary Court, the civil servant's assertion that he did not intend to change the Federal Republic of Germany's political system by violent means, which is moreover consistent with many statements made by his party, is of no legal significance (BVerwGE 76, p. 157)."

The court also considered that the applicant's commitment to changing the DKP's policies could not exculpate her. The political loyalty owed by civil servants entailed a duty for them to dissociate themselves unequivocally from groups which criticised or cast aspersions on the State and the existing constitutional system. The

attitude of civil servants who, even if they campaigned within the DKP for the renunciation of aims that were contrary to the Constitution, showed outside the party, through the political offices they held, that they unreservedly supported its programme and policy, was incompatible with such a duty. For as long as the DKP had not abandoned its anti-constitutional aims, civil servants' duty of political loyalty prevented them from actively working for it. This remained valid even where it was their intention to bring the party closer to democratic values. Moreover, during the disciplinary proceedings the applicant had declared her unconditional support for the DKP's aims, as set out in the Mannheim programme.

Like the Administrative Court, the Disciplinary Court found that Mrs Vogt had knowingly breached her professional obligations. Although she was aware of the case-law and her superiors' views on the subject, she had continued and even stepped up her activities on behalf of the DKP. Her dismissal had therefore been justified, since a civil servant who thus persisted in breaching her duties and refusing to see reason (unbelehrbar) was no longer capable of serving the State, which must be able to rely on its servants' loyalty to the Constitution. The court added that such a breach of duty was especially serious in the case of a teacher, who was supposed to teach the children entrusted to her care the fundamental values of the Constitution. Parents, who because of compulsory education had to send their children to State schools, were entitled to expect the State to employ only those teachers who unreservedly supported the free democratic constitutional system. The State was under a duty to dismiss teachers who played an active role in an anti-constitutional organisation.

The court added that a radical change in a civil servant's attitude could affect its assessment of the seriousness of professional misconduct. However, throughout the disciplinary proceedings, far from cutting down on her activities on behalf of the DKP, the applicant had in fact increased them. It followed that a more lenient disciplinary measure, aimed at persuading her to abandon her political activities within the DKP, was bound to fail. Accordingly, it was impossible to continue to employ her as a civil servant and her dismissal was inevitable. Her otherwise blameless conduct in carrying out her teaching tasks did not change the situation in any way, since the basis of trust that was essential for her to continue as a civil servant was lacking.

B. Proceedings in the Federal Constitutional Court

23. On 22 December 1989 the applicant lodged a constitutional complaint (Verfassungsbeschwerde) with the Federal Constitutional Court.

Sitting as a panel of three judges, the court decided on 7 August 1990 not to entertain the constitutional complaint, on the ground that it had insufficient prospects of success.

In the Constitutional Court's view, the competent courts' analysis was based on the conviction that, by her membership of the DKP and her active role within that party, the applicant had breached her duties as a civil servant. This conclusion was well-founded and in no way arbitrary. After the commencement of the disciplinary proceedings, Mrs Vogt had herself stated that there was no point, section or part of the DKP's programme of which she disapproved, thus endorsing unconditionally the party's aims set out in the Mannheim programme.

The disciplinary tribunals had been entitled to find that the DKP's aims were anti-constitutional, notwithstanding the provisions of Article 21 para. 2 of the Basic Law. Regard being had to the applicant's intractability in respect of her political loyalty, the disciplinary courts had rightly considered that the basis of trust necessary for Mrs Vogt to continue to work as a civil servant was lacking, despite the fact that she had declared herself to be in favour of a change in the party's policy and had otherwise carried out her teaching tasks in a way that was irreproachable. The applicant's dismissal had therefore not amounted to a breach of the principle of proportionality as regards her constitutional rights. Accordingly, there had been no violation of Article 33 paras. 2, 3 and 5 of the Basic Law.

C. Subsequent developments

24. From 1987 to 1991 the applicant worked as a playwright and drama teacher at the North Lower Saxony regional theatre (Landesbühne) in Wilhelmshaven.

From 1 February 1991 she was reinstated in her post as a teacher for the Lower Saxony education authority. The Land government had beforehand repealed the decree on the employment of extremists in the Lower Saxony civil service (Ministerpräsidentenbeschluß - also known as the Radikalenerlaß - see paragraph 32 below) and had published regulations for dealing with "earlier cases" (see paragraph 33 below).

II. Relevant domestic law

A. The Basic Law

25. The following provisions of the Basic Law (Grundgesetz) are relevant to the instant case:

Article 5

"(1) Everyone shall have the right freely to express and disseminate his or her opinions in speech, writing and pictures and freely to obtain information from generally accessible sources. Freedom of the press and freedom of reporting on the radio and in films shall be guaranteed. There shall be no censorship.

(2) These rights shall be subject to the limitations laid down by the provisions of the general laws and by statutory provisions aimed at protecting young people and to the obligation to respect personal honour.

(3) There shall be freedom of art, science, research and teaching. Freedom of teaching shall not release citizens from their duty of loyalty to the Constitution."

Article 21

"(1) Political parties shall take part in forming the political opinion of the people. They may be freely set up. Their internal organisation must comply with democratic principles. They must render public account of the origin of their income and their assets and of their expenditure.

(2) Parties which, through their aims or the conduct of their members, seek to damage or overthrow the free democratic constitutional system or to endanger the existence of the Federal Republic of Germany shall be held to be anti-constitutional. The Federal Constitutional Court shall determine the question of anti-constitutionality.

(3) Detailed rules shall be laid down by federal laws."

Article 33

"...

(2) All Germans shall have an equal right of admission to the civil service according to their suitability, capabilities and professional qualifications.

(3) Enjoyment of civil and political rights, admission to the civil service and the rights acquired within the civil service shall not be contingent on religious belief. No one shall be placed at a disadvantage on account of his or her 'adherence or non-adherence' to a religious persuasion [Bekenntnis] or to an 'ideology' [Weltanschauung].

...

(5) The provisions governing the civil service must take into account its traditional principles."

Article 48 para. 2

"No one shall be prevented from taking office as a member of parliament or from performing the duties attaching thereto. No employment contract may be terminated and no one may be dismissed from employment on this ground."

B. Legislation governing the civil service

26. By virtue of section 7 (1) (2) of the Federal Civil Service Act (Bundesbeamtengesetz) and section 4 (1) (2) of the Civil Service (General Principles) Act (Beamtenrechtsrahmengesetz) for the Länder, appointments to the civil service are subject to the requirement that the persons concerned "satisfy the authorities that they will at all times uphold the free democratic constitutional system within the meaning of the Basic Law".

27. According to section 52 (2) of the Federal Civil Service Act and section 35 (1), third sentence, of the Civil Service (General Principles) Act for the Länder, "civil servants must by their entire conduct bear witness to the free democratic constitutional system within the meaning of the Basic Law and act to uphold it".

28. These provisions have been reproduced in the civil service legislation of the Länder, and in particular in section 61 (2) of the Lower Saxony Civil Service Act (Niedersächsisches Beamtengesetz), which likewise provides that "civil servants must by their entire conduct bear witness to the free democratic constitutional system within the meaning of the Basic Law and act to uphold it".

29. The Lower Saxony Disciplinary Code (Niedersächsische

Disziplinarordnung) contains the following relevant provisions:

Article 2 para. 1

"Under this law, measures may be taken against:

(1) officials who have breached their professional duty while having the status of a civil servant ..."

Article 5 para. 1

"The disciplinary measures shall be: ... dismissal ..."

Article 11 para. 1

"Dismissal shall also entail loss of the right to a salary and of pension rights ..."

C. Decree on employment of extremists in the civil service

30. On 28 January 1972 the Federal Chancellor and the Prime Ministers of the Länder adopted the decree on employment of extremists in the civil service (Ministerpräsidentenbeschluß) (Bulletin of the Government of the Federal Republic of Germany no. 15 of 3 February 1972, p. 142), which reiterated civil servants' duty of loyalty to the free democratic constitutional system and provided as follows:

"... civil servants' membership of parties or organisations that oppose the constitutional system - and any support given to such parties or organisations - shall ... as a general rule lead to a conflict of loyalty. If this results in a breach of duty [Pflichtverstoß], it shall be for the employer to decide in each case what measures are to be taken."

31. In order to implement the decree, the Government of the Land of Lower Saxony adopted, in particular on 10 July 1972, provisions on "political activity by applicants for civil-service posts and by civil servants directed against the free democratic constitutional system".

32. Similar legislation was initially adopted in all the Länder. However, from 1979 it was no longer or only partially applied; in some Länder the relevant legislation was even repealed.

In 1990, as part of their coalition agreement on the formation of a new Government for the Land of Lower Saxony, the Social Democrat and "Green" parties decided to repeal the decree on employment of extremists in the civil service; the decree was repealed by a ministerial decision of 26 June 1990.

33. On 28 August 1990 the Land government took a number of measures relating to the treatment of "earlier cases", that is to say cases of persons who had been excluded from the civil service or refused admission to it on account of their political activities. The decision made it possible - and this happened in the present case (see paragraph 24 above) - for civil servants who had been dismissed following disciplinary proceedings to be reinstated in their posts, provided that they satisfied the recruitment and qualification requirements, without, however, entitling them to compensation or to arrears of salary.

D. Case-law on the civil service

34. In a leading case of 22 May 1975 the Federal Constitutional Court clarified the special duty of loyalty owed by German civil servants to the State and its Constitution:

> "...
>
> The tasks of a modern State administration are as varied as they are complex and they must be accomplished in an adequate, effective and prompt manner if the political and social system is to function and groups, minorities and individuals are to be able to lead a decent life. That administration must be able to count on a body of civil servants which is united and loyal, which faithfully performs its duties and is thoroughly dedicated to the State and the Constitution. If civil servants cannot be relied upon, society and State have no chance in situations of crisis.
>
> ...
>
> It is sufficient to observe that the duty of political loyalty owed by civil servants is the core of civil servants' duty of loyalty. It does not mean a duty to identify with the aims or a particular policy of the Government in power. It means being prepared to identify with the idea of the State which the official has to serve and with the free democratic constitutional order of that State based on the rule of law and social justice.
>
> ...
>
> It cannot be in the interests of the State and society to have civil servants who are entirely uncritical. It is, however, essential that a civil servant approves the State - notwithstanding its defects - and the existing constitutional order as it is in force and that he or she recognises that they merit protection, bears witness to them accordingly and is active on their behalf.
>
> ...
>
> The duty of political loyalty - loyalty to the State and to the Constitution - requires more than an attitude which while formally correct is in fact uninterested, indifferent and, at heart, distant in relation to the State and the Constitution. It entails, inter alia, the duty for civil servants to dissociate themselves unequivocally from groups and movements that criticise, campaign against and cast aspersions on that State, its institutions and the existing constitutional system.
>
> ...
>
> [The duty of loyalty owed by a civil servant] applies to every type of appointment in the civil service, an appointment of fixed duration, an appointment on probation and an appointment subject to revocation as well as an appointment to a permanent post. Nor can there be any difference of treatment in this respect according to the nature of the civil servant's duties.
>
> ...

> The fact that the Federal Constitutional Court has not exercised its power to declare a party anti-constitutional does not mean that it is impossible to have the conviction - and to express that conviction - that the party in question pursues anti-constitutional aims and must therefore be challenged in the political arena. A party which for instance advocates in its manifesto the dictatorship of the proletariat or approves recourse to force in order to overthrow the constitutional system if the conditions are right, pursues anti-constitutional aims ...
>
> ..."

35. In judgments of 29 October 1981 and 10 May 1984 the Federal Administrative Court held that civil servants who played an active role in the DKP, for example by holding a post in the party or by standing as its candidate in elections, would be in breach of their duty of political loyalty, because they would necessarily be identifying with the anti-constitutional aims of that party. It followed the same line of reasoning in a judgment of 20 January 1987 (see paragraph 22 above).

E. Report of the Commission of Inquiry of the International Labour Office

36. In its report of 20 February 1987 the majority of the Commission of Inquiry of the International Labour Office concluded that "the measures taken in application of the duty of faithfulness to the free democratic basic order have in various respects not remained within the limits of the restrictions authorised by Article 1, paragraph 2, of [the Discrimination (Employment and Occupation)] Convention No. 111". It also formulated a number of recommendations.

In reply to this report, the German Government maintained that the measures taken to ensure that civil servants remained loyal to the Constitution were not contrary to the relevant provisions of Convention No. 111 and that in any case the recommendations made by the Commission of Inquiry were not binding on the German State for the purposes of domestic law.

PROCEEDINGS BEFORE THE COMMISSION

37. Mrs Vogt's application was lodged with the Commission on 13 February 1991. Relying on Articles 10 and 11 (art. 10, art. 11) of the Convention, and on Article 14 taken together with Article 10 (art. 14+10), she complained that her right to freedom of expression and to freedom of association had been infringed.

38. The Commission declared the application (no. 17851/91) admissible on 19 October 1992. In its report of 30 November 1993 (Article 31) (art. 31), it expressed the opinion by thirteen votes to one that there had been a violation of Articles 10 and 11 (art. 10, art. 11) of the Convention and that it was unnecessary to examine the application also under Article 14 (art. 14) of the Convention. The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment (1).

_____

1. Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 323 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT

39. In their memorial the Government requested the Court to find

> "that in this case the Federal Republic of Germany did not violate Articles 10 and 11 (art. 10, art. 11) of the Convention, [or] Article 14 taken together with Article 10 (art. 14+10)".

40. The applicant asked the Court

> "to find that there has been a violation of Articles 10 and 11 (art. 10, art. 11) of the Convention".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10) OF THE CONVENTION

41. Mrs Vogt maintained that her dismissal from the civil service on account of her political activities as a member of the DKP had infringed her right to freedom of expression secured under Article 10 (art. 10) of the Convention, which is worded as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Whether there was an interference

42. The Government did not dispute the applicability of Article 10 (art. 10). However, at the hearing they requested the Court to re-examine this issue carefully.

43. The Court reiterates that the right of recruitment to the civil service was deliberately omitted from the Convention. Consequently, the refusal to appoint a person as a civil servant cannot as such provide the basis for a complaint under the Convention. This does not mean, however, that a person who has been appointed as a civil servant cannot complain on being dismissed if that dismissal violates one of his or her rights under the Convention. Civil servants do not fall outside the scope of the Convention. In Articles 1 and 14 (art. 1, art. 14), the Convention stipulates that "everyone within [the] jurisdiction" of the Contracting States must enjoy the rights and freedoms in Section I "without discrimination on any ground". Moreover Article 11 para. 2 (art. 11-2) in fine, which allows States to impose

special restrictions on the exercise of the freedoms of assembly and association by "members of the armed forces, of the police or of the administration of the State", confirms that as a general rule the guarantees in the Convention extend to civil servants (see the Glasenapp and Kosiek v. Germany judgments of 28 August 1986, Series A nos. 104, p. 26, para. 49, and 105, p. 20, para. 35). Accordingly, the status of permanent civil servant that Mrs Vogt had obtained when she was appointed a secondary-school teacher did not deprive her of the protection of Article 10 (art. 10).

44. The Court considers, like the Commission, that the present case is to be distinguished from the cases of Glasenapp and Kosiek. In those cases the Court analysed the authorities' action as a refusal to grant the applicants access to the civil service on the ground that they did not possess one of the necessary qualifications. Access to the civil service had therefore been at the heart of the issue submitted to the Court, which accordingly concluded that there had been no interference with the right protected under paragraph 1 of Article 10 (art. 10-1) (see the previously cited Glasenapp and Kosiek judgments, p. 27, para. 53, and p. 21, para. 39).

Mrs Vogt, for her part, had been a permanent civil servant since February 1979. She was suspended in August 1986 and dismissed in 1987 (see paragraphs 16 and 20 above), as a disciplinary penalty, for allegedly having failed to comply with the duty owed by every civil servant to uphold the free democratic system within the meaning of the Basic Law. According to the authorities, she had by her activities on behalf of the DKP and by her refusal to dissociate herself from that party expressed views inimical to the above-mentioned system. It follows that there was indeed an interference with the exercise of the right protected by Article 10 (art. 10) of the Convention.

B. Whether the interference was justified

45. Such interference constitutes a breach of Article 10 (art. 10) unless it was "prescribed by law", pursued one or more legitimate aim or aims as defined in paragraph 2 (art. 10-2) and was "necessary in a democratic society" to attain them.

1. "Prescribed by law"

46. The Government agreed with the Commission that the interference had been based on section 61 (2) of the Lower Saxony Civil Service Act (see paragraph 28 above), as construed in the case-law of the relevant courts and had therefore been prescribed by law.

47. The applicant took the contrary view. She argued that it was in no way implicit in the duty of political loyalty required by section 61 (2) of the Lower Saxony Civil Service Act that civil servants could be dismissed, as she had been, on account of political activities. Neither the case-law nor the legislation was sufficiently clear and foreseeable on this point. As regards the case-law, the applicant sought to show that the Constitutional Court's judgment of 22 May 1975 (see paragraph 34 above) had by no means established the necessary clarity for those concerned since that judgment had been construed quite differently by the Federal Administrative Court and the Federal Labour Court. As to the legislation, the mere fact that, although the law had not been changed, she had been reinstated in 1991 (see paragraph 24 above) while still a member of the DKP showed that the formulation of the legislation was far from attaining a sufficient

degree of precision. Her dismissal had in reality been based on a political decision taken by the Federal Chancellor and the Prime Ministers of the Länder in the form of the Decree of 28 January 1972 on the employment of extremists in the civil service (see paragraph 30 above).

48. The Court reiterates that the level of precision required of domestic legislation - which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed. It is moreover primarily for the national authorities to interpret and apply domestic law (see the Chorherr v. Austria judgment of 25 August 1993, Series A no. 266-B, pp. 35-36, para. 25). In this instance the Federal Constitutional Court and the Federal Administrative Court had clearly defined the duty of political loyalty imposed on all civil servants by the relevant provisions of federal legislation and the legislation of the Länder, including section 61 (2) of the Lower Saxony Civil Service Act (see paragraphs 26 to 28 above). They had held, inter alia, that any active commitment on the part of a civil servant to a political party with anti-constitutional aims such as the DKP was incompatible with that duty. At the material time - that is during the disciplinary proceedings at the latest - Mrs Vogt must have been aware of that case-law. She was therefore in a position to foresee the risks that she was running as a result of her political activities on behalf of the DKP and her refusal to dissociate herself from that party. Even if there was, as alleged, a divergence of opinion between the Federal Administrative Court and the Federal Labour Court - a divergence, moreover, whose existence the Court has not been able to establish - it would not have been material since the disciplinary courts had to follow and demonstrably followed the Federal Administrative Court's case-law. As to Mrs Vogt's argument based on her reinstatement, the latter measure does not warrant the conclusion that she seeks to draw from it, as the mere fact that a legal provision is capable of more than one construction does not mean that it does not meet the requirement implied in the notion "prescribed by law".

The Court accordingly shares the view of the Government and the Commission that the interference was "prescribed by law".

2. Legitimate aim

49. Like the Commission, the Government were of the opinion that the interference pursued a legitimate aim. The Government contended that the restriction on the freedom of expression deriving from civil servants' duty of political loyalty was aimed at protecting national security, preventing disorder and protecting the rights of others.

50. The applicant did not express an opinion on this point.

51. The Court notes that a number of Contracting States impose a duty of discretion on their civil servants. In this case the obligation imposed on German civil servants to bear witness to and actively uphold at all times the free democratic constitutional system within the meaning of the Basic Law (see paragraphs 26-28 above) is founded on the notion that the civil service is the guarantor of the Constitution and democracy. This notion has a special importance in Germany because of that country's experience under the Weimar Republic, which, when the Federal Republic was founded after the nightmare of nazism, led to its constitution being based on the principle of a "democracy capable of

defending itself" (wehrhafte Demokratie). Against this background the Court cannot but conclude that the applicant's dismissal pursued a legitimate aim within the meaning of paragraph 2 of Article 10 (art. 10-2).

3. "Necessary in a democratic society"

(a) General principles

52. The Court reiterates the basic principles laid down in its judgments concerning Article 10 (art. 10):

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established (see the following judgments: Handyside v. the United Kingdom, 7 December 1976, Series A no. 24, p. 23, para. 49; Lingens v. Austria, 8 July 1986, Series A no. 103, p. 26, para. 41; and Jersild v. Denmark, 23 September 1994, Series A no. 298, p. 26, para. 37).

(ii) The adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (art. 10).

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 (art. 10) the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see the Sunday Times v. the United Kingdom (no. 2) judgment of 26 November 1991, Series A no. 217, p. 29, para. 50). In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 (art. 10) and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see the above-mentioned Jersild judgment, p. 26, para. 31).

53. These principles apply also to civil servants. Although it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 (art. 10) of the

Convention. It therefore falls to the Court, having regard to the circumstances of each case, to determine whether a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10 para. 2 (art. 10-2). In carrying out this review, the Court will bear in mind that whenever civil servants' right to freedom of expression is in issue the "duties and responsibilities" referred to in Article 10 para. 2 (art. 10-2) assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim.

(b) Application in the present case of the above-mentioned principles

54. According to the Government, the breadth of the margin of appreciation enjoyed by the State in the present case must be assessed with reference to the deliberate intention on the part of the Contracting States not to recognise in the Convention or its Protocols a right of recruitment to the civil service. They maintained that the conditions which a candidate for the civil service had to satisfy were closely linked to those applying to a civil servant who had already been appointed to a permanent post. The Federal Republic of Germany had a special responsibility in the fight against all forms of extremism, whether right-wing or left-wing. It was precisely for that reason and in the light of the experience of the Weimar Republic that the duty of political loyalty had been introduced for civil servants. The civil service was the cornerstone of a "democracy capable of defending itself". Its members could not therefore play an active role in parties, such as the DKP, that pursued anti-constitutional aims. Mrs Vogt had held senior posts in this party, whose objective at the material time had been the overthrow of the free democratic order in the Federal Republic of Germany and which received its instructions from the East German and Soviet communist parties. Even though no criticism had been levelled at the way she actually performed her duties, she had had, nevertheless, as a teacher, a special responsibility in the transmission of the fundamental values of democracy. Despite the warnings she had been given, the applicant had continually stepped up her activities within the DKP. That was why the German authorities had had no choice but to suspend her from her duties.

55. The applicant disputed the necessity of the interference. Since the DKP had not been banned by the Federal Constitutional Court, her activities on behalf of that party, which had been the basis of the "charges" brought against her (see paragraph 19 above), had been lawful political activities for a lawful party and could not therefore amount to a failure to fulfil her duty of political loyalty. Compliance with that obligation had to be assessed not in terms of the abstract aims of a party, but with reference to individual conduct. From this point of view she had always been beyond reproach, both in the performance of her duties, in the course of which she had never sought to indoctrinate her pupils, and outside her professional activities, where she had never made any statement that could have been considered anti-constitutional. On the contrary, her activity within the DKP reflected her desire to work for peace both inside and outside the Federal Republic of Germany and to fight neo-fascism. She was firmly convinced that she could best serve the cause of democracy and human rights by her political activities on behalf of the DKP; requiring her

to renounce that conviction on the ground that the State authorities held otherwise went against the very core of the freedom to hold opinions and to express them. In any event, the imposition of the heaviest sanction had been totally disproportionate. Moreover, the very protracted nature of the disciplinary proceedings in this case and significant differences in the way the provisions concerning civil servants' duty of political loyalty had been applied from Land to Land showed that it could not be said that there were pressing reasons for dismissing her.

56. The Commission essentially took the same view as the applicant. In its view what should have been decisive was whether the personal conduct and personal statements of the applicant were contrary to the constitutional order. Disciplinary punishment of such severity as dismissal had to be justified with reference to the personal attitude of the civil servant concerned.

57. In the present case the Court's task is to determine whether Mrs Vogt's dismissal corresponded to a "pressing social need" and whether it was "proportionate to the legitimate aim pursued". To this end, the Court will examine the circumstances of the case in the light of the situation existing in the Federal Republic of Germany at the material time.

58. Mrs Vogt became a member of the DKP in 1972. It has not been disputed that this was known to the authorities when, in 1979, even before the end of her probationary period, she was appointed a permanent civil servant. However, after investigations into her political activities, disciplinary proceedings were opened against her in 1982 (see paragraph 11 above). These proceedings were suspended several times pending further investigations, but Mrs Vogt was eventually dismissed on 15 October 1987 for breach of her duty of political loyalty. The criticisms levelled against her concerned her various political activities within the DKP, the posts she had held in that party and her candidature in the elections for the Parliament of the Land (see paragraph 19 above).

The duty of political loyalty to which German civil servants are subject, as it was defined by the Federal Constitutional Court in its judgment of 22 May 1975, entails for all civil servants the duty to dissociate themselves unequivocally from groups that attack and cast aspersions on the State and the existing constitutional system. At the material time the German courts had held - on the basis of the DKP's own official programme - that its aims were the overthrow of the social structures and the constitutional order of the Federal Republic of Germany and the establishment of a political system similar to that of the German Democratic Republic.

59. The Court proceeds on the basis that a democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded. In this connection it takes into account Germany's experience under the Weimar Republic and during the bitter period that followed the collapse of that regime up to the adoption of the Basic Law in 1949. Germany wished to avoid a repetition of those experiences by founding its new State on the idea that it should be a "democracy capable of defending itself". Nor should Germany's position in the political context of the time be forgotten. These circumstances understandably lent extra weight to this underlying notion and to the corresponding duty of political loyalty imposed on civil servants.

Even so, the absolute nature of that duty as construed by the German courts is striking. It is owed equally by every civil servant, regardless of his or her function and rank. It implies that every civil servant, whatever his or her own opinion on the matter, must unambiguously renounce all groups and movements which the competent authorities hold to be inimical to the Constitution. It does not allow for distinctions between service and private life; the duty is always owed, in every context.

Another relevant consideration is that at the material time a similarly strict duty of loyalty does not seem to have been imposed in any other member State of the Council of Europe, whilst even within Germany the duty was not construed and implemented in the same manner throughout the country; a considerable number of Länder did not consider activities such as are in issue here incompatible with that duty.

60. However, the Court is not called upon to assess the system as such. It will accordingly concentrate on Mrs Vogt's dismissal.

In this connection it notes at the outset that there are several reasons for considering dismissal of a secondary-school teacher by way of disciplinary sanction for breach of duty to be a very severe measure. This is firstly because of the effect that such a measure has on the reputation of the person concerned and secondly because secondary-school teachers dismissed in this way lose their livelihood, at least in principle, as the disciplinary court may allow them to keep part of their salary. Finally, secondary-school teachers in this situation may find it well nigh impossible to find another job as a teacher, since in Germany teaching posts outside the civil service are scarce. Consequently, they will almost certainly be deprived of the opportunity to exercise the sole profession for which they have a calling, for which they have been trained and in which they have acquired skills and experience.

A second aspect that should be noted is that Mrs Vogt was a teacher of German and French in a secondary school, a post which did not intrinsically involve any security risks.

The risk lay in the possibility that, contrary to the special duties and responsibilities incumbent on teachers, she would take advantage of her position to indoctrinate or exert improper influence in another way on her pupils during lessons. Yet no criticism was levelled at her on this point. On the contrary, the applicant's work at school had been considered wholly satisfactory by her superiors and she was held in high regard by her pupils and their parents and also by her colleagues (see paragraph 10 above); the disciplinary courts recognised that she had always carried out her duties in a way that was beyond reproach (see paragraphs 20 and 22 above). Indeed the authorities only suspended the applicant more than four years after instituting disciplinary proceedings (see paragraphs 11 to 16 above), thereby showing that they did not consider the need to remove the pupils from her influence to be a very pressing one.

Since teachers are figures of authority to their pupils, their special duties and responsibilities to a certain extent also apply to their activities outside school. However, there is no evidence that Mrs Vogt herself, even outside her work at school, actually made anti-constitutional statements or personally adopted an

anti-constitutional stance. The only criticisms retained against her concerned her active membership of the DKP, the posts she had held in that party and her candidature in the elections for the Parliament of the Land. Mrs Vogt consistently maintained her personal conviction that these activities were compatible with upholding the principles of the German constitutional order. The disciplinary courts recognised that her conviction was genuine and sincere, while considering it to be of no legal significance (see paragraph 22 above), and indeed not even the prolonged investigations lasting several years were apparently capable of yielding any instance where Mrs Vogt had actually made specific pronouncements belying her emphatic assertion that she upheld the values of the German constitutional order.

A final consideration to be borne in mind is that the DKP had not been banned by the Federal Constitutional Court and that, consequently, the applicant's activities on its behalf were entirely lawful.

61. In the light of all the foregoing, the Court concludes that, although the reasons put forward by the Government in order to justify their interference with Mrs Vogt's right to freedom of expression are certainly relevant, they are not sufficient to establish convincingly that it was necessary in a democratic society to dismiss her. Even allowing for a certain margin of appreciation, the conclusion must be that to dismiss Mrs Vogt by way of disciplinary sanction from her post as secondary-school teacher was disproportionate to the legitimate aim pursued. There has accordingly been a violation of Article 10 (art. 10).

II. ALLEGED VIOLATION OF ARTICLE 11 (art. 11) OF THE CONVENTION

62. The applicant also complained of a breach of her right to the freedom of association guaranteed under Article 11 (art. 11) of the Convention, which is worded as follows:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article (art. 11) shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

A. Whether there was an interference

63. As was the case with Article 10 (art. 10), the Government did not contest the applicability of Article 11 (art. 11), although at the hearing they requested the Court to re-examine this issue carefully.

64. Notwithstanding its autonomous role and particular sphere of application, Article 11 (art. 11) must in the present case also be considered in the light of Article 10 (art. 10) (see the Young, James and Webster v. the United Kingdom judgment of 13 August 1981, Series A no. 44, p. 23, para. 57, and the Ezelin v. France judgment of

26 April 1991, Series A no. 202, p. 20, para. 37). The protection of personal opinions, secured by Article 10 (art. 10), is one of the objectives of the freedoms of assembly and association as enshrined in Article 11 (art. 11).

65. With reference to the principles set forth in respect of Article 10 (art. 10) (see paragraphs 43 and 44 above), Mrs Vogt, as a permanent civil servant, also qualified for the protection of Article 11 (art. 11).

The applicant was dismissed from her post as a civil servant for having persistently refused to dissociate herself from the DKP on the ground that in her personal opinion membership of that party was not incompatible with her duty of loyalty.

There has accordingly been an interference with the exercise of the right protected by paragraph 1 of Article 11 (art. 11-1).

B. Whether the interference was justified

66. Such interference constitutes a breach of Article 11 (art. 11) unless it satisfies the requirements of paragraph 2 (art. 11-2), which are identical to those laid down in paragraph 2 of Article 10 (art. 10-2), the only exception being where the last sentence of paragraph 2 of Article 11 (art. 11-2) is applicable.

67. In this respect the Court agrees with the Commission that the notion of "administration of the State" should be interpreted narrowly, in the light of the post held by the official concerned.

68. However, even if teachers are to be regarded as being part of the "administration of the State" for the purposes of Article 11 para. 2 (art. 11-2) - a question which the Court does not consider it necessary to determine in the instant case -, Mrs Vogt's dismissal was, for the reasons previously given in relation to Article 10 (art. 10) (see paragraphs 51 to 60 above), disproportionate to the legitimate aim pursued.

There has accordingly also been a violation of Article 11 (art. 11).

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 10 (art. 14+10)

69. Before the Commission the applicant complained of a violation of Article 14 of the Convention taken in conjunction with Article 10 (art. 14+10), but she did not raise this complaint before the Court.

70. The Court does not consider it necessary to examine the question of its own motion.

IV. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

71. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the

consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

72. Mrs Vogt submitted claims for compensation in respect of pecuniary and non-pecuniary damage and for the reimbursement of her costs and expenses.

73. The Government and the Delegate of the Commission regarded most of the sums claimed as excessive.

74. In the Court's opinion, the question is not ready for decision. It is accordingly necessary to reserve it and to fix the further procedure, account being taken of the possibility of an agreement between the respondent State and the applicant (Rule 54 paras. 1 and 4 of Rules of Court A).

FOR THESE REASONS, THE COURT

1. Holds by seventeen votes to two that Article 10 (art. 10) of the Convention is applicable in the present case;

2. Holds by ten votes to nine that there has been a violation of Article 10 (art. 10);

3. Holds unanimously that Article 11 (art. 11) of the Convention is applicable in the present case;

4. Holds by ten votes to nine that there has been a violation of Article 11 (art. 11);

5. Holds unanimously that it is not necessary to examine the case under Article 14 of the Convention taken in conjunction with Article 10 (art. 14+10);

6. Holds by seventeen votes to two that the question of the application of Article 50 (art. 50) of the Convention is not ready for decision; and

consequently,

(a) reserves the said question;

(b) invites the Government and the applicant to submit, within the forthcoming six months, their written observations on the matter and, in particular, to notify the Court of any agreement they may reach;

(c) reserves the further procedure and delegates to the President the power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 September 1995.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) joint dissenting opinion of Mr Bernhardt, Mr Gölcüklü, Mr Matscher, Mr Loizou, Mr Mifsud Bonnici, Mr Gotchev, Mr Jungwiert and Mr Kuris;

(b) supplementary dissenting opinion of Mr Gotchev;

(c) dissenting opinion of Mr Jambrek.

A statement by Mr Mifsud Bonnici is also appended.

Initialled: R. R.

Initialled: H. P.

JOINT DISSENTING OPINION OF JUDGES BERNHARDT, GÖLCÜKLÜ, MATSCHER, LOIZOU, MIFSUD BONNICI, GOTCHEV, JUNGWIERT AND KURIS

We are of the opinion that the disciplinary measures against Mrs Vogt, taken or approved by all the German authorities and courts concerned, do not violate Article 10 or Article 11 (art. 10, art. 11) of the Convention. Her dismissal as a teacher in public service was not only prescribed by law and ordered in pursuit of a legitimate aim; it was also proportionate and could be considered necessary in a democratic society. It falls within the margin of appreciation which must be left to the national authorities.

1. The circumstances surrounding the dismissal call, in our view, for a different emphasis from that contained in the present judgment of the Grand Chamber. Mrs Vogt had been a member of the Communist Party (DKP) since 1972, but she was nevertheless appointed to a permanent post in 1979. This can be easily explained by the German practice according to which formal membership of an extremist party is in itself in general not an obstacle to becoming or remaining a civil servant. It was only after her appointment was made permanent that Mrs Vogt intensified her activities on behalf of the DKP (see paragraphs 11-23 of the judgment). It is obvious that activities of this kind are bound to become known in a school and among the pupils even if the teacher concerned does not disseminate his or her political convictions in the classroom.

It is in our view equally beyond doubt that the programme of the DKP and the constitutional order of the Federal Republic of Germany as enshrined in the Basic Law were incompatible with each other. If a person like Mrs Vogt professes to support all the points of the DKP's programme and affirms at the same time his or her respect for the constitutional order, these assertions are equally incompatible with each other.

2. Throughout the period from the institution of the disciplinary proceedings against Mrs Vogt until her final dismissal, the DKP was supported by the communist regime and its governing party in East Germany (at the time the German Democratic Republic), and the DKP itself always considered the East German constitutional and political order to be fundamentally different from and superior to that of the Federal Republic. It can also hardly be denied that at the relevant time the East-West confrontation and the antagonism between the

communist regime on the one side and the West German democratic order on the other made it necessary to strengthen the democratic order and not to allow it to be undermined.

In such a situation and bearing in mind Germany's special history, in particular the destruction of the democratic Constitution of Weimar, the State must be entitled to dismiss civil servants, including school teachers, who are actively engaged in activities on behalf of anti-democratic parties. This must be valid for all extremist parties whether they belong to the left or the right of the political spectrum.

3. Mrs Vogt's dismissal could therefore be considered by the German authorities to be necessary in a democratic society in conformity with Articles 10 and 11 (art. 10, art. 11). The civil service is of the utmost importance in nearly all States for a proper functioning of the democratic order, and States must accordingly enjoy a considerable margin of appreciation when recruiting or dismissing public servants. States must be entitled to require their officials either to renounce their active and prominent support for an extremist party or to leave the civil service.

SUPPLEMENTARY DISSENTING OPINION OF JUDGE GOTCHEV

I voted for no violation because it is my firm opinion that Article 10 (art. 10) of the Convention was not applicable.

The judgment (paragraph 43) confirms that access to the civil service is not one of the rights protected under the Convention. However, according to the Court's case-law, if denial of access to the civil service results in a breach of some other provision of the Convention, that provision (art. 10) is applicable, so where, as in this case, the refusal of access to, or dismissal from, the civil service constitutes at the same time a violation of Article 10 (art. 10), that Article (art. 10) will be applicable.

I cannot agree with this reasoning. Mrs Vogt was not dismissed from her post as a teacher because she expressed an opinion or an idea. According to the court's decision she was in fact dismissed because of her membership of the DKP, her membership of the regional branch executive committee, being Chairperson of the local branch and her candidacy in the parliamentary election as a DKP candidate. No mention was made of any declaration or publication or any other kind of expression of opinion.

In both the cases cited in the judgment - Glasenapp and Kosiek - the dismissal was the consequence of the expression of an opinion - a letter sent by the applicant to a newspaper in the first case and two books published by the applicant in the second.

Even so in both cases our Court took the view that there had been no violation of Article 10 (art. 10).

DISSENTING OPINION OF JUDGE JAMBREK

1. I agree with the majority that both Articles 10 and 11 (art. 10, art. 11) of the Convention apply to the instant case and that there was an interference. I came to a different conclusion from the majority, however, when considering whether the impugned interference was necessary in a democratic society and whether it was proportionate to

the legitimate aim pursued. As a consequence I found that the restriction was reconcilable with the respective freedoms. I also fully agree with the joint dissenting opinion of my colleagues, but wish to add to their reasoning the following points.

2. In order to strike a fair balance between the rights of Mrs Vogt and the duty of the Federal Republic of Germany at the material time to ensure that its State schools in addition to their normal functions also properly furthered the legitimate interests of national security, territorial integrity or public safety and the protection of rights of others, I will examine the circumstances of the case firstly in the light of the situation existing in the Federal Republic of Germany, and then in the light of the choices available to Mrs Vogt, in both cases at the material time.

3. The majority took account of Germany`s "bitter period that followed the collapse of" the Weimar Republic, and also its "position in the political context of the time". It also noted that "the nightmare of nazism ... led to its constitution being based on the principle of `a democracy capable of defending itself`". May I add that this constitutional principle also represented at the time material for the present case a legitimate aim justifying the duty imposed on civil servants of loyalty to the values of democracy and the rule of law.

The situation of the Federal Republic of Germany in Western Europe from 1945 to 1990 was specific and unique in comparison with other member States of the Council of Europe. It was an amputated State with a divided people, in the front line facing the countries of the former Communist Bloc. Therefore it was inevitably more vulnerable and exposed in terms of its national security, territorial integrity and public safety; in particular it was exposed to the risk of infiltration by agents and to political propaganda inimical to its constitutional order. I have no reason to doubt in this respect the facts supplied in the Government's memorial and in the oral presentation by their Agent.

Nor do I see any reason to doubt the facts provided and assessments made by the Agent of the Government as to the character and the role of the German Communist Party (DKP), of which Mrs Vogt was an active member and official. It is in my view correct to presume that this party at the material time aimed to overthrow the democratic constitutional order of the Federal Republic of Germany in order to introduce there a communist system fashioned after the model of the former German Democratic Republic. Moreover, the DKP had the means at its disposal to implement its political goals: it was financed by its East German counterpart (SED), DKP members were trained by the SED, while about 200 members of the DKP received instruction from the SED in sabotage and terrorism; it was only in 1989 that this group was dissolved. Mr P. Becker, who spoke on the applicant's behalf, stated at the hearing that "It was not State repression which caused the DKP to fail to attract people but rather the collapse of the socialist regimes".

4. Mrs Vogt had been a member of the German Communist Party since 1972. She was appointed a permanent civil servant on 1 February 1979. Only subsequently, from the autumn of 1980, did she take an active role in the DKP and began engaging in the various political activities recorded in the file of the case. And on 13 June 1982 disciplinary proceedings were instituted against her on the ground that she had

failed to comply with the duty of loyalty to the Constitution. On 31 October 1989 the Disciplinary Court of Lower Saxony rejected Mrs Vogt's appeal against the disciplinary sanction of dismissal imposed upon her by the Disciplinary Division of the Oldenburg Administrative Court. Thereafter various other proceedings took place and finally the Federal Constitutional Court rejected her constitutional complaint on 7 August 1990.

I refer to the above facts in order to place in their proper context the following points:

- Mrs Vogt was appointed a permanent civil servant according to the established practice that mere membership of the DKP did not constitute a breach of loyalty;
- disciplinary proceedings against her were only instituted after she engaged in more prominent political activities;
- it is wrong to assume that the length of the proceedings, during which Mrs Vogt was permitted to continue teaching, indicated an absence of a "pressing social need" to halt her unconstitutional activities;
- on the contrary, the German courts made it clear that they expected her to abandon her activities within the DKP; see, inter alia, the Lower Saxony Disciplinary Court's opinion, "that a radical change in a civil servant's attitude could affect its assessment of the seriousness of professional misconduct" (paragraph 22 in fine);
- after the institution of proceedings against her, Mrs Vogt had ample time to make at least two other choices in order to meet official requirements: she could either continue with her active involvement in the DKP and seek other employment outside the German civil service, or else she could retain her job there and remain a member of the DKP while lowering the intensity of her activities in the party to the pre-1979 level.

5. The next key point is whether Mrs Vogt's dismissal (the "interference") was really necessary in the sense that it represented "a pressing social need", in view of the relationship between the way she performed her job and her political activities. In this respect, two opposing hypotheses may be defined and defended.

According to the first, Mrs Vogt's work was apolitical and purely academic in substance and could be performed in a way that did not involve the expression of values. The distinction between professional and private (including political) life thus eliminated the danger that Mrs Vogt's political role would have such consequences for her teaching role as to justify the pressing social need to dismiss her from her job.

The German authorities gave the alternative assessment. Using a different wording, they claimed that the connection between the two roles was strong enough to justify the interference. In this respect the notion of the general "role model" of a teacher to her pupils may also be considered, the various "subtle" and "hidden" ways in which political and moral values "creep into" academic language and logic, the possibilities for extra-curricular communication between teacher and pupils, the expectation of professional loyalty to the civil service, reflected by adherence to the ethics and esprit de corps of the professional community, etc. Mrs Vogt, in her address to the Court herself stated that she always tried to communicate her fundamental beliefs "as a teacher and a human being. I have tried to do so within school and outside".

In my view, the picture is blurred and even in a concrete situation it is difficult to give a "yes or no answer". Therefore, I came to the conclusion that the German authorities and judges in this respect of the case were in a better position to assess whether the interference was necessary in defence of democracy, that being one of the main reasons justifying restrictions in the interests of national security, and should therefore be given a wider discretion within their margin of appreciation than that recognised by the majority.

6. The majority in the Chamber depicted the system of the duty of political loyalty to which German civil servants are subject as "absolute in nature". (Mr Trechsel, speaking on behalf of the Commission in this connection, referred to "the famous Deutsche Gründlichkeit".) This is, in my view, a distorted description, quite far from the reality revealed by the facts in the file of the present case.

Mr Becker informed the Court that only 1 to 1.5% of officially known extreme left-wing civil servants had actually been dismissed. If the system were really "absolute", then the relevant proportion would have to be approximately 100%.

Secondly, the threshold for breaching the minimal duty of loyalty was set relatively high and even then rather flexibly, to be ascertained on a case by case basis. Again, if the system were "absolute", mere membership of the DKP would probably imply a breach.

Thirdly, as the Vogt case itself indicates, the final sanction was only imposed after active and repetitious conduct classified as disloyal. It may even be inferred from the disciplinary and judicial proceedings against Mrs Vogt, that "the system" acted with great restraint. It seemed to issue a number of "advance warnings" to the accused, to the point of aiming "[to persuade] her to abandon her political activities within the DKP" (paragraph 22 in fine). Dismissal in my view was a sanction of last resort, after it became clear that all other measures were bound to fail.

Fourthly, "the system" appears flexible from the time perspective. It was changing to adapt to new political circumstances, of which one of the most dramatic was the fall of the Berlin wall: in the Land of Lower Saxony, the decree on employment of extremists in the civil service was repealed by a ministerial decision of 26 June 1990 and on 1 February 1991 the applicant was reinstated in her post as a teacher at the Lower Saxony educational authority.

And fifthly, the disputed regional differences in the implementation in my view do not testify to the "absolute" or "thorough" nature of "the system".

The misperception on the part of the majority of the nature of the disputed system and its implementation in my view seriously influenced the degree of discretion allowed to the German authorities, including the courts, in this sphere.

The majority in my view probably fell into the following fallacy: given that German authorities acted within a narrowly defined and rigid system, the application of that system in the form of interference with human rights protected under the Convention must be considered predetermined, unreasoned, and lacking the necessary discretion. Therefore, control by the European Court appears ever more desirable.

I drew the opposite conclusion from the facts of the case: "the system", as derived from the broad constitutional principle and as defined by the German Constitutional Court, rests on a broad legal doctrine and has its roots in German political history. It is also capable of responding to present-day exigencies and is implemented in a rational and flexible way. The Vogt case does not represent a departure from this approach.

7. In the Kosiek case, whose facts come closest of the Article 10 (art. 10) cases, to the present one, the applicant complained of dismissal from a lectureship - to which he had been appointed with the status of probationary civil servant - on account of his political activities for the Nationaldemokratische Partei Deutschlands (NPD) and of the content of the two books he had written; he claimed to be the victim of a breach of Article 10 (art. 10) of the Convention. In order to decide the case, the Court inquired first whether the disputed dismissal amounted to an "interference" with the exercise of the applicant's freedom of expression as protected by Article 10 (art. 10) - in the form of a formality, condition, restriction or penalty - or whether the measure lay within the sphere of the right of access to the civil service, a right that is not secured in the Convention.

The Court noted that one of the personal qualifications required by anyone seeking a post as a civil servant in the Federal Republic of Germany is to prove himself by being prepared to consistently uphold the free democratic system within the meaning of the Basic Law. The Court further found that "this requirement applies to recruitment to the civil service, a matter that was deliberately omitted from the Convention, and it cannot in itself be considered incompatible with the Convention" (Kosiek v. Germany judgment of 28 August 1986, Series A no. 105, p. 21, para. 38). The European Court noted that the Ministry dismissed him because he was "a prominent NPD official", the aims of that party "were inimical to the Constitution" and that the domestic courts had adopted essentially the same approach, and added: "It is not for the European Court to review the correctness of their findings".

The Court then decided, that "access to the civil service [lay] at the heart of the issue submitted to the Court" and for this reason found no breach of Article 10 (art. 10).

I voted in favour of the applicability of Article 10 (art. 10) in the present case, being aware that this decision implies a departure from the Court`s established case-law, inter alia, the Kosiek case. Therefore I wish by way of a concurring opinion to state that I do not agree with the majority's reason for distinguishing the cases of Glasenapp (1) and Kosiek (paragraph 44 of the present judgment), where they state that in the previous cases "the Court analysed the authorities' action as a refusal to grant the applicants access to the civil service", while Mrs Vogt was dismissed after being appointed a permanent civil servant. In addition, in the former cases the necessary qualification for access was to be prepared "to uphold the free democratic system within the meaning of the Basic Law", while the present applicant`s dismissal was a disciplinary penalty for having breached the duty owed by everyone already appointed.

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1. Glasenapp v. Germany judgment of 28 August 1986, Series A no. 104.

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The distinction is not persuasive. For the purposes of

Article 10 (art. 10) the Court must answer two questions:

First, did the applicant exercise any of the freedoms protected by Article 10 para. 1 (art. 10-1) or not? In all three cases (Glasenapp, Kosiek, Vogt) the answer is affirmative.

Second, was the exercise of the said freedoms subject to any formalities, conditions, restrictions or penalties? In my view, the acts of the authorities in all three cases fall under the same heading of either a condition, restriction or penalty to which the exercise of the respective freedoms was subjected. Mr Kosiek was dismissed from his post as a probationary civil servant, while Mrs Vogt was dismissed from her post as a permanent civil servant - for the same reasons, while it must be of no consequence for the Court that in the former case the views expressed were of the extreme right, and in the latter of the extreme left persuasion.

It would in my view be more appropriate if the Court acknowledged in a straightforward manner the change in judicial policy that occurred between the Kosiek and the Vogt cases, instead of arguing, in my view with little success, that it maintained the same principle with different results due to differences in the factual situations.

It would then be the duty of the Court to retain in the latter judgment the relevant substantive arguments of the former, at least in the modified form to fit them to the reasoning of the present case: if access to the civil service no longer "lies at the heart of the issue", then it should at least be given extra weight in the balancing exercise. And if the radical position that "it is not for the European Court to review the correctness of (the domestic courts`) findings" may no longer be maintained, than, at least their extra wide margin of appreciation should be recognised in matters of recruitment to the civil service, including access and dismissal.

8. In conclusion, I attributed different weight from that attributed by the majority to the following key ingredients in the necessity and the proportionality tests carried out in the instant case:

- specific situation of Germany in Western Europe from 1945-1990 with a divided people, facing countries of the former Communist Bloc, which made it vulnerable and exposed in terms of its national security (including defence of democratic values), territorial integrity and public safety;
- the role of the DKP as a means of infiltration and dissemination of communist propaganda in Germany;
- the applicant's active political involvement on behalf of that party from autumn 1980 onwards;
- the restrained and flexible way in which the duty of political loyalty was implemented by the German authorities;
- complicated links between private life in politics and professional life in the civil service;
- the importance of the wide margin of appreciation to be afforded to domestic courts when dealing with matters of recruitment to the civil service.

I therefore find that the disciplinary measures taken against Mrs Vogt were proportionate and could be considered necessary in a democratic society.

I voted against finding Article 10 (art. 10) applicable in this case, but the majority took the opposite view. In my opinion only Article 11 (art. 11) is applicable. I joined the joint dissenting opinion because it covers that Article (art. 11) as well.

In the case of Wingrove v. the United Kingdom (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Bernhardt, President,
Mr Thór Vilhjálmsson,
Mr L.-E. Pettiti,
Mr J. De Meyer,
Mr J.M. Morenilla,
Sir John Freeland,
Mr G. Mifsud Bonnici,
Mr D. Gotchev,
Mr U. Lohmus,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 29 March, 27 September and 22 October 1996,

Delivers the following judgment, which was adopted on the last-mentioned date:

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Notes by the Registrar

1. The case is numbered 19/1995/525/611. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 1 March 1995 and by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") on 22 March 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 17419/90) against the United Kingdom lodged with the Commission under Article 25 (art. 25) by a British national, Mr Nigel Wingrove, on 18 June 1990.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). The object of the request and of the application was to

obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention (art. 10).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 5 May 1995, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr R. Macdonald, Mr J. De Meyer, Mr J.M. Morenilla, Mr G. Mifsud Bonnici, Mr D. Gotchev and Mr U. Lohmus (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently, Mr Thór Vilhjálmsson, substitute judge, replaced Mr Macdonald, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's and the applicant's memorials on 24 November 1995. The Secretary to the Commission subsequently informed the Registrar that the Delegate did not wish to reply in writing to the memorials filed.

5. On 17 November 1995, the President, having consulted the Chamber, had granted leave to Rights International, a New York-based non-governmental human rights organisation, to submit written comments on specified aspects of the case (Rule 37 para. 2). Leave was also granted on the same date, subject to certain conditions, to two London-based non-governmental human rights organisations, namely Interights and Article 19, to submit joint written comments. The comments were received between 2 and 5 January 1996. On 1 February 1996 the applicant submitted an explanatory statement on the origins and meaning of his video work.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 27 March 1996. Beforehand, the Court had held a preparatory meeting and had viewed the video recording in issue in the presence of the applicant and his representatives.

There appeared before the Court:

(a) for the Government

Mr M.R. Eaton, Deputy Legal Adviser, Foreign and Commonwealth Office, Agent,
Sir Derek Spencer, Solicitor-General,
Mr P. Havers QC,
Mr N. Lavender, Counsel,
Mr C. Whomersley, Legal Secretariat to the Law Officers,
Mr R. Clayton, Home Office,

Mr L. Hughes, Home Office, Advisers;

(b) for the Commission

Mr N. Bratza, Delegate;

(c) for the applicant

Mr G. Robertson, QC, Counsel,
Mr M. Stephens,
Mr P. Chinnery, Solicitors.

The Court heard addresses by Mr Bratza, Mr Robertson and Sir Derek Spencer.

AS TO THE FACTS

I. Circumstances of the case

7. The applicant, Mr Nigel Wingrove, is a film director. He was born in 1957 and resides in London.

8. Mr Wingrove wrote the shooting script for, and directed the making of, a video work entitled Visions of Ecstasy. Its running time is approximately eighteen minutes, and it contains no dialogue, only music and moving images. According to the applicant, the idea for the film was derived from the life and writings of St Teresa of Avila, the sixteenth-century Carmelite nun and founder of many convents, who experienced powerful ecstatic visions of Jesus Christ.

9. The action of the film centres upon a youthful actress dressed as a nun and intended to represent St Teresa. It begins with the nun, dressed loosely in a black habit, stabbing her own hand with a large nail and spreading her blood over her naked breasts and clothing. In her writhing, she spills a chalice of communion wine and proceeds to lick it up from the ground. She loses consciousness. This sequence takes up approximately half of the running time of the video. The second part shows St Teresa dressed in a white habit standing with her arms held above her head by a white cord which is suspended from above and tied around her wrists. The near-naked form of a second female, said to represent St Teresa's psyche, slowly crawls her way along the ground towards her. Upon reaching St Teresa's feet, the psyche begins to caress her feet and legs, then her midriff, then her breasts, and finally exchanges passionate kisses with her. Throughout this sequence, St Teresa appears to be writhing in exquisite erotic sensation. This sequence is intercut at frequent intervals with a second sequence in which one sees the body of Christ, fastened to the cross which is lying upon the ground. St Teresa first kisses the stigmata of his feet before moving up his body and kissing or licking the gaping wound in his right side. Then she sits astride him, seemingly naked under her habit, all the while moving in a motion reflecting intense erotic arousal, and kisses his lips. For a few seconds, it appears that he responds to her kisses. This action is intercut with the passionate kisses of the psyche already described. Finally, St Teresa runs her hand down to the fixed hand of Christ and entwines his fingers in hers. As she does so, the fingers of Christ seem to curl upwards to hold with hers, whereupon the video ends.

10. Apart from the cast list which appears on the screen for a few seconds, the viewer has no means of knowing from the film itself that

the person dressed as a nun in the video is intended to be St Teresa or that the other woman who appears is intended to be her psyche. No attempt is made in the video to explain its historical background.

11. Visions of Ecstasy was submitted to the British Board of Film Classification ("the Board"), being the authority designated by the Home Secretary under section 4 (1) of the Video Recordings Act 1984 ("the 1984 Act" - see paragraph 24 below) as

> "the authority responsible for making arrangements
>
> (a) for determining, for the purposes of [the] Act whether or not video works are suitable for classification certificates to be issued in respect of them, having special regard to the likelihood of video works in respect of which such certificates have been issued being viewed in the home,
>
> (b) in the case of works which are determined in accordance with the arrangements to be so suitable
>
> (i) for making such other determinations as are required for the issue of classification certificates, and
>
> (ii) for issuing such certificates ...
>
> ..."

12. The applicant submitted the video to the Board in order that it might lawfully be sold, hired out or otherwise supplied to the general public or a section thereof.

13. The Board rejected the application for a classification certificate on 18 September 1989 in the following terms:

> "Further to your application for a classification certificate ..., you are already aware that under the Video Recordings Act 1984 the Board must determine first of all whether or not a video work is suitable for such a certificate to be issued to it, having special regard to the likelihood of video works being viewed in the home. In making this judgment, the Board must have regard to the Home Secretary's Letter of Designation in which we are enjoined to `continue to seek to avoid classifying works which are obscene within the meaning of the Obscene Publications Acts 1959 and 1964 or which infringe other provisions of the criminal law'.
>
> Amongst these provisions is the criminal law of blasphemy, as tested recently in the House of Lords in R. v. Lemon (1979), commonly known as the Gay News case. The definition of blasphemy cited therein is 'any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible ... It is not blasphemous to speak or publish opinions hostile to the Christian religion' if the publication is 'decent and temperate'. The question is not one of the matter expressed, but of its manner, i.e. `the tone, style and spirit', in which it is presented.
>
> The video work submitted by you depicts the mingling of

religious ecstasy and sexual passion, a matter which may be of legitimate concern to the artist. It becomes subject to the law of blasphemy, however, if the manner of its presentation is bound to give rise to outrage at the unacceptable treatment of a sacred subject. Because the wounded body of the crucified Christ is presented solely as the focus of, and at certain moments a participant in, the erotic desire of St Teresa, with no attempt to explore the meaning of the imagery beyond engaging the viewer in an erotic experience, it is the Board's view, and that of its legal advisers, that a reasonable jury properly directed would find that the work infringes the criminal law of blasphemy.

To summarise, it is not the case that the sexual imagery in Visions of Ecstasy lies beyond the parameters of the `18' category; it is simply that for a major proportion of the work's duration that sexual imagery is focused on the figure of the crucified Christ. If the male figure were not Christ, the problem would not arise. Cuts of a fairly radical nature in the overt expressions of sexuality between St Teresa and the Christ figure might be practicable, but I understand that you do not wish to attempt this course of action. In consequence, we have concluded that it would not be suitable for a classification certificate to be issued to this video work."

14. The applicant appealed against the Board's determination to the Video Appeals Committee ("the VAC" - see paragraph 25 below), established pursuant to section 4 (3) of the 1984 Act. His notice of appeal, prepared by his legal representatives at the time, contained the following grounds:

"(i) that the Board was wrong to conclude that the video infringes the criminal law of blasphemy, and that a reasonable jury properly directed would so find;

(ii) in particular, the Appellant will contend that upon a proper understanding of the serious nature of the video as an artistic and imaginative interpretation of the `ecstasy' or `rapture' of the sixteenth-century Carmelite nun, St Teresa of Avila, it would not be taken by a reasonable person as contemptuous, reviling, scurrilous or ludicrous or otherwise disparaging in relation to God, Jesus Christ or the Bible. The appeal will raise the question of mixed fact and law, namely whether publication of the video, even to a restricted degree, would contravene the existing criminal law of blasphemy."

15. The Board submitted a formal reply to the VAC explaining its decision in relation to its functions under section 4 of the 1984 Act:

"The Act does not expressly set out the principles to be applied by the authority in determining whether or not a video work is suitable for a classification certificate to be issued in respect of it. In these circumstances, the Board has exercised its discretion to formulate principles for classifying video works in a manner which it believes to be both reasonable and suited to carrying out the broad objectives of the Act. Amongst these principles, the Board has concluded that an overriding test of suitability for classification is

the determination that the video work in question does not infringe the criminal law. In formulating and applying this principle, the Board has consistently had regard to the Home Secretary's Letter of Designation under the Video Recordings Act ...

The Board has concluded on the advice of leading Counsel that the video work in question infringes the criminal law of blasphemy and that a reasonable jury properly directed on the law would convict accordingly. The Board submits and is advised that in Britain the offence of blasphemy is committed if a video work treats a religious subject (in particular God, Jesus Christ or the Bible) in such a manner as to be calculated (that is, bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented.

The video work under appeal purports to depict the erotic fantasies of a character described in the credits as St Teresa of Avila. The 14-minute second section of the video work portrays 'St Teresa' having an erotic fantasy involving the crucified figure of Christ, and also a Lesbian erotic fantasy involving the 'Psyche of St Teresa'. No attempt is made to place what is shown in any historical, religious or dramatic context: the figures of St Teresa and her psyche are both clearly modern in appearance and the erotic images are accompanied by a rock music backing. The work contains no dialogue or evidence of an interest in exploring the psychology or even the sexuality of the character purporting to be St Teresa of Avila. Instead, this character and her supposed fantasies about lesbianism and the body and blood of Christ are presented as the occasion for a series of erotic images of a kind familiar from 'soft-core' pornography.

In support of its contentions, the Board refers to an interview given by the appellant and published in Midweek magazine on 14 September 1989. In this interview, the appellant attempts to draw a distinction between pornography and 'erotica', denying that the video work in question is pornographic but stating that `all my own work is actually erotica'. Further on, the interviewer comments:

> `In many ways, though, Visions calls upon the standard lexicon of lust found in down market porn: nuns, lesbianism, women tied up (Gay Nuns in Bondage could have been an alternative title in fact). Nigel Wingrove flashes a wicked grin. `That's right, and I'm not denying it. I don't know what it is about nuns, it's the same sort of thing as white stocking tops I suppose.' So why does he not consider Visions to be pornography, or at least soft porn? `I hope it is gentler, subtler than that. I suppose most people think pornography shows the sex act, and this doesn't.'

It is clear from the appellant's own admissions that, whether or not the video work can rightly be described as pornographic, it is solely erotic in content, and it focuses this erotic imagery for much of its duration on the body and blood of

Christ, who is even shown to respond to the sexual attentions of the principal character. Moreover, the manner in which such imagery is treated places the focus of the work less on the erotic feelings of the character than on those of the audience, which is the primary function of pornography whether or not it shows the sex act explicitly. Because there is no attempt, in the Board's view, to explore the meaning of the imagery beyond engaging the viewer in a voyeuristic erotic experience, the Board considers that the public distribution of such a video work would outrage and insult the feelings of believing Christians ...

...

The Board ... submits that the appeal should be dismissed and its determination upheld."

16. The applicant then made further representations to the VAC, stating, inter alia:

"The definition of the offence of blasphemy set out in ... the reply is too wide, being significantly wider than the test approved in the only modern authority - see Lemon & Gay News Ltd v. Whitehouse [1979] Appeal Cases 617, per Lord Scarman at 665. For example, there is no uniform law of blasphemy in Britain; the last recorded prosecution for blasphemy under the law of Scotland was in 1843 - see Thos Paterson [1843] I Brown 629. Nor is any religious subject protected - the reviling matter must be in relation to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established.

In the Appellant's contention, these limitations are of the utmost significance in this case since the video is not concerned with anything which God or Jesus Christ did, or thought or might have approved of. It is about the erotic visions and imaginings of a sixteenth-century Carmelite nun - namely St Teresa of Avila. It is quite plain that the Christ figure exists in her fantasy as the Board expressly accepts ... The scurrilous and/or erotic treatment of religious subject matter has received the Board's classification without attempted prosecution in recent years, e.g. Monty Python's Life of Brian and Mr Scorsese's The Last Temptation of Christ.

... The Board argues that the video is purely erotic or 'soft-core' pornographic, without historical, religious, dramatic or other artistic merit. The implication is that, had it possessed such merit the Board's decision might very well have been otherwise. The Appellant will seek to argue and call evidence to the effect that the video work is a serious treatment of the subject of the ecstatic raptures of St Teresa (well chronicled in her own works and those of commentators) from a twentieth-century point of view.

The so-called 'rock music backing' was in fact specially commissioned from the respected composer Steven Severin, after discussion of the Director's desired artistic and emotional impact. The Board has based its decision upon the narrowest, most disparaging, critical appreciation of the work. The

Appellant will contend that a very much more favourable assessment of his aims and achievement in making Visions of Ecstasy is, at the very least, tenable and that the Board ought not to refuse a certificate on a mere matter of interpretation.

The Appellant takes objection to the Board's quotation ... of comments attributed to him from an article by one Rob Ryan published in Midweek magazine 14th September 1989. The remarks are pure hearsay so far as the Board is concerned. That aside, the piece quoted is in large part the comments of the author of the article. An entirely misleading impression of what the Appellant said to the author is conveyed by the interpolation of the words attributed to him, and by taking this passage out of context.

Above all, the Appellant disputes the key assertion by the Board that the video work is solely erotic in content."

17. The appeal was heard by a five-member panel of the VAC ("the Panel") on 6 and 7 December 1989; oral and affidavit evidence was submitted. By a majority of three to two, a written decision rejecting the appeal was given on 23 December 1989. The Panel also considered itself bound by the criteria set out in the designation notice (see paragraph 24 below). It had difficulty, however, in ascertaining and applying the present law of blasphemy. It commented as follows:

"The authorities on this Common Law offence were reviewed by the House of Lords in the case of Lemon and Gay News Ltd v. Whitehouse which concerned a magazine called Gay News, the readership of which consisted mainly of homosexuals although it was on sale to the general public at some bookstalls. One edition contained a poem entitled The Love that Dares to Speak its Name accompanied by a drawing illustrating its subject matter.

In his judgment Lord Scarman said that it was unnecessary to speculate whether an outraged Christian would feel provoked by the words and illustration to commit a breach of the peace, the true test being whether the words are calculated to outrage and insult the Christian's religious feelings, the material in question being contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England. It should perhaps be added that the word `calculated' should be read in the dictionary sense of `estimated' or `likely' as it was decided that intent (other than an intent to publish) is not an element in the offence.

In the same case Lord Diplock said that the material must be `likely to arouse a sense of outrage among those who believe in or respect the Christian faith'.

In the present case the Board's Director ... said in evidence that the Board's view was that the video was `contemptuous of the divinity of Christ'. He added that although the Board's decision was based upon its view that the video is blasphemous (blasphemy being an offence which relates only to the Christian religion), it would take just the same stance if it were asked to grant a Certificate to a video which, for

instance, was contemptuous of Mohammed or Buddha."

18. The Panel went on to review the content of the video and accepted that the applicant had in mind St Teresa, a nun, "who is known to have had ecstatic visions of Christ although, incidentally, these did not start until she was 39 years of age - in marked contrast to the obvious youthfulness of the actress who plays the part".

19. The Panel reached the following conclusion:

> "From the writings of St Teresa herself, and the subsequent writings of others, there seems no reason to doubt that some of her visions were of seeing the glorified body of Christ and being shown his wounds but, even so, it seems clear that Mr Wingrove has taken considerable artistic licence with his subject.
>
> Apart from the age discrepancy - a comparatively minor matter - we were made aware of nothing which would suggest that Teresa ever did anything to injure her hand or that any element of lesbianism ever entered into her visions. More importantly, there seems nothing to suggest that Teresa, in her visions, ever saw herself as being in any bodily contact with the glorified Christ. As one author, Mr Stephen Clissold, puts it `Teresa experienced ecstasy as a form of prayer in which she herself played almost no part'.
>
> So, in view of the extent of the artistic licence, we think it would be reasonable to look upon the video as centring upon any nun of any century who, like many others down the ages, had ecstatic visions.
>
> There is also another reason for taking this stance: unless the viewer happens to read the cast list which appears on the screen for a few seconds, he or she has no means of knowing that the nun is supposed to be St Teresa, nor that the figure of the second woman is supposed to be her psyche. And he or she in any event may well be unaware that Teresa was a real-life nun who had ecstatic visions.
>
> It is true that Mr Wingrove says that it is intended that the sleeve or jacket for the video will provide 'basic historical information to assist the viewer', but we feel bound to regard this as irrelevant. Firstly because it by no means follows that every viewer will read any such description; and secondly because the Board's and the Appeal Panel's decision must be based solely upon the video itself, quite apart from the fact that at the time of making a decision the sleeve or jacket is usually - as in the present instance - not even in existence.
>
> However, although we have thought it proper to dwell at some length with the 'St Teresa' aspect, we are of the opinion that in practice, when considering whether or not the video is blasphemous, it makes little or no difference whether one looks upon the central character as being St Teresa or any other nun.
>
> The appellant, in his written statement, lays stress upon the undoubted fact that the whole of the second half consists of Teresa's vision or dream. Hence he says the video says nothing about Christ, his figure being used only as a projection of

St Teresa's mind, nor was it his intention to make that figure an active participant in any overt sexual act.

He goes on to say `Rather the very mild responses are those of St Teresa's conjecture: the kiss, hand clasp and ultimately the tears of Christ. To show no response to a creation of her own mind would be nonsense; no woman (nor man) whose deep love could cause such visions/ecstasies would imagine the object of that love coldly to ignore their caresses'.

Although we quite appreciate the logic of this point of view, we have reservations about the extent to which a vision or dream sequence can affect the question of whether what is pictured or said is blasphemous.

It would, for instance, be possible to produce a film or video which was most extremely contemptuous, reviling, scurrilous or ludicrous in relation to Christ, all dressed up in the context of someone's imaginings. In such circumstances we find it hard to envisage that, by such a simple device, it could reasonably be said that no offence had been committed. If in our opinion the viewer, after making proper allowance for the scene being in the form of a dream, nevertheless reasonably feels that it would cause a sense of outrage and insult to a Christian's feelings, the offence would be established.

We should perhaps also deal, albeit briefly, with a further submission made on behalf of the appellant, namely that the crime of blasphemy may extend only to the written or spoken word and hence that a court might rule that no film or video, and perhaps nothing shown on television, could become the subject of such a charge. Suffice it to say that in our view this is too unlikely to cause it to be taken into account by the Board or a panel of the Appeals Committee when reaching a decision.

In the opinion of a majority of the Panel the video did not, as the appellant claims, explore St Teresa's struggles against her visions but exploited a devotion to Christ in purely carnal terms. Furthermore they considered that it lacked the seriousness and depth of The Last Temptation of Christ with which Counsel for the appellant sought to compare it.

Indeed the majority took the view that the video's message was that the nun was moved not by religious ecstasy but rather by sexual ecstasy, this ecstasy being of a perverse kind - full of images of blood, sado-masochism, lesbianism (or perhaps auto-erotism) and bondage. Although there was evidence of some element of repressed sexuality in St Teresa's devotion to Christ, they did not consider that this gave any ground for portraying her as taking the initiative in indulged sexuality.

They considered the over-all tone and spirit of the video to be indecent and had little doubt that all the above factors, coupled with the motions of the nun whilst astride the body of Christ and the response to her kisses and the intertwining of the fingers would outrage the feelings of Christians, who would reasonably look upon it as being contemptuous of the divinity of Christ.

In these circumstances the majority were satisfied that the video is blasphemous, that a reasonable and properly directed jury would be likely to convict and therefore that the Board was right to refuse to grant a Certificate. Hence this appeal is accordingly dismissed.

It should perhaps be added that the minority on the Panel, whilst being in no doubt that many people would find the video to be extremely distasteful, would have allowed the appeal because in their view it is unlikely that a reasonable and properly directed jury would convict."

20. As a result of the Board's determination, as upheld by the Panel, the applicant would commit an offence under section 9 of the 1984 Act (see paragraph 23 below) if he were to supply the video in any manner, whether or not for reward.

21. The applicant received legal advice that his case was not suitable for judicial review (see paragraphs 30-31 below) on the grounds that the formulation of the law of blasphemy, as accepted by the Panel, was an "accurate statement of the present law".

II. Situation of the video industry in the United Kingdom

22. According to statistics submitted by the Government, in 1994 there were 21.5 million video-recorders in the United Kingdom. Out of approximately 20.75 million households in the United Kingdom, 18 million contained at least one video-recorder.

There were approximately 15,000 video outlets in the United Kingdom. Videos were available for hire in between 4,000 and 5,000 video rental shops. They were also available for sale in 3,000 "high street" shops and in between 7,000 and 8,000 "secondary" outlets such as supermarkets, corner shops and petrol stations.

In 1994 there were 194 million video rentals and 66 million video purchases in the United Kingdom. It is estimated that a further 65 million illegal copies ("pirate videos") were distributed during that year.

III. Relevant domestic law

A. The regulation of video works

23. The Video Recordings Act 1984 ("the 1984 Act") regulates the distribution of video works. Subject to certain exemptions, it is an offence under section 9 (1) of that Act for a person to supply or offer to supply a video work in respect of which no classification certificate has been issued. Under section 7 there are three categories of classification: works deemed suitable for general viewing (and to which a parental guidance reference may be added); works for which the viewing is restricted to people who have attained a specified age; and works which may only be supplied by licensed sex shops. The Secretary of State for the Home Department may require that the content of certain works be labelled (section 8). It is an offence to ignore such conditions, for example by supplying someone under 18 years of age with an "18" classified work (section 11).

24. Under section 4 (1) of the 1984 Act the Secretary of State may by notice designate any person or body as the authority for making arrangements for determining whether or not video works are suitable for classification certificates to be issued in respect of them (having special regard to the likelihood of certified video works being viewed in the home). By a notice dated 26 July 1985 the British Board of Film Classification was so designated. In the case of works which are determined in accordance with the arrangements described above to be suitable for classification certificates, the Board is responsible under section 4 (1) for making arrangements for the issue of certificates and making other determinations relating to their use. The Secretary of State's notice enjoined the Board "to continue to seek to avoid classifying works which are obscene within the meaning of the Obscene Publications Acts 1959 and 1964 or which infringe other provisions of the criminal law".

25. Pursuant to section 4 (3) of the 1984 Act arrangements were made for the establishment of the Video Appeals Committee to determine appeals against decisions by the Board.

B. The law of blasphemy

26. Blasphemy and blasphemous libel are common law offences triable on indictment and punishable by fine or imprisonment. Blasphemy consists in speaking and blasphemous libel in otherwise publishing blasphemous matter. Libel involves a publication in a permanent form, but that form may consist of moving pictures.

27. In the case of Whitehouse v. Gay News Ltd and Lemon [1979] Appeal Cases 617 at 665, which concerned the law of blasphemy in England, Lord Scarman held that the modern law of blasphemy was correctly formulated in Article 214 of Stephen's Digest of the Criminal Law, 9th edition (1950). This states as follows:

> "Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not to the substance of the doctrines themselves."

The House of Lords in that case also decided that the mental element in the offence (mens rea) did not depend upon the accused having an intent to blaspheme. It was sufficient for the prosecution to prove that the publication had been intentional and that the matter published was blasphemous.

The Gay News case, which had been brought by a private prosecutor, had been the first prosecution for blasphemy since 1922.

28. As stated above, the law of blasphemy only protects the Christian religion and, more specifically, the established Church of England. This was confirmed by the Divisional Court in 1991. Ruling on an application for judicial review of a magistrate's refusal to issue a summons for blasphemy against Salman Rushdie and the publishers of The Satanic Verses, Lord Watkins stated:

> "We have no doubt that as the law now stands it does not extend to religions other than Christianity ...
>
> ...
>
> We think it right to say that, were it open to us to extend the law to cover religions other than Christianity, we should refrain from doing so. Considerations of public policy are extremely difficult and complex. It would be virtually impossible by judicial decision to set sufficiently clear limits to the offence, and other problems involved are formidable." (R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury [1991] 1 All England Law Reports 306 at 318)

29. On 4 July 1989 the then Minister of State at the Home Department, Mr John Patten, had sent a letter to a number of influential British Muslims, in which he stated inter alia that:

> "Many Muslims have argued that the law of blasphemy should be amended to take books such as [The Satanic Verses] outside the boundary of what is legally acceptable. We have considered their arguments carefully and reached the conclusion that it would be unwise for a variety of reasons to amend the law of blasphemy, not the least the clear lack of agreement over whether the law should be reformed or repealed.
>
> ...
>
> ... an alteration in the law could lead to a rush of litigation which would damage relations between faiths.
>
> I hope you can appreciate how divisive and how damaging such litigation might be, and how inappropriate our legal mechanisms are for dealing with matters of faith and individual belief. Indeed, the Christian faith no longer relies on it, preferring to recognise that the strength of their own belief is the best armour against mockers and blasphemers."

C. The availability of judicial review as a remedy

30. Decisions by public bodies which have consequences which affect some person or body of persons are susceptible to challenge in the High Court on an application for judicial review. Amongst the grounds on which such a challenge may be brought is that the body in question misdirected itself on a point of law. The Video Appeals Committee is such a public body because it is established pursuant to an Act of Parliament (see paragraph 25 above). Furthermore, its decisions affect the rights of persons who make video works because confirmation of a decision that a video work cannot receive a classification certificate would mean that copies of that work could not be lawfully supplied to members of the public.

31. On an application for judicial review a court would not normally look at the merits of any decision made by such a body, except where the decision was so unreasonable that no reasonable body, properly instructed, could have reached it. However, where the decision is based on a point of law and it is alleged that the body has misdirected itself on that point, the decision could be challenged by an application for judicial review. In the case of C.C.S.U.

v. Minister for the Civil Service [1984] 3 All England Law Reports at 950, Lord Diplock, in the House of Lords, classified under three heads the grounds on which administrative action is subject to control by judicial review. He called the first ground "illegality" and described it as follows:

> "By `illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the State is exercisable."

PROCEEDINGS BEFORE THE COMMISSION

32. Mr Wingrove applied to the Commission on 18 June 1990. He relied on Article 10 of the Convention (art. 10), complaining that the refusal of a classification certificate for his video work Visions of Ecstasy was in breach of his freedom of expression.

33. The Commission declared the application (no. 17419/90) admissible on 8 March 1994. In its report of 10 January 1995 (Article 31) (art. 31), it expressed the opinion, by fourteen votes to two, that there had been a violation of Article 10 of the Convention (art. 10). The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment (1).

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Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-V), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS TO THE COURT

34. In their final submissions, the Government requested the Court to declare that the facts of the present case disclose no violation of Article 10 of the Convention (art. 10).

The applicant, for his part, invited the Court to "produce a judgment which declares the British blasphemy laws as unnecessary in theory as they are in practice in any multi-cultural democracy".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION (art. 10)

35. The applicant alleged a violation of his right to freedom of expression, as guaranteed by Article 10 of the Convention (art. 10), which, in so far as relevant, provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...
>
> 2. The exercise of these freedoms, since it carries with it

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

36. The refusal by the British Board of Film Classification to grant a certificate for the applicant's video work Visions of Ecstasy, seen in conjunction with the statutory provisions making it a criminal offence to distribute a video work without this certificate (see paragraph 23 above), amounted to an interference by a public authority with the applicant's right to impart ideas. This was common ground between the participants in the proceedings.

To determine whether such an interference entails a violation of the Convention, the Court must examine whether or not it was justified under Article 10 para. 2 (art. 10-2) by reason of being a restriction "prescribed by law", which pursued an aim that was legitimate under that provision (art. 10-2) and was "necessary in a democratic society".

A. Whether the interference was "prescribed by law"

37. The applicant considered that the law of blasphemy was so uncertain that it was inordinately difficult to establish in advance whether in the eyes of a jury a particular publication would constitute an offence. Moreover, it was practically impossible to know what predictions an administrative body - the British Board of Film Classification - would make as to the outcome of a hypothetical prosecution. In these circumstances, the applicant could not reasonably be expected to foresee the result of the Board's speculations. The requirement of foreseeability which flows from the expression "prescribed by law" was therefore not fulfilled.

38. The Government contested this claim: it was a feature common to most laws and legal systems that tribunals may reach different conclusions even when applying the same law to the same facts. This did not necessarily make these laws inaccessible or unforeseeable. Given the infinite variety of ways of publishing "contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible" (see paragraph 27 above), it would not be appropriate for the law to seek to define in detail which images would or would not be potentially blasphemous.

39. The Commission, noting that considerable legal advice was available to the applicant, was of the view that he could reasonably have foreseen the restrictions to which his video work was liable.

40. The Court reiterates that, according to its case-law, the relevant national "law", which includes both statute and common law (see, inter alia, the Sunday Times v. the United Kingdom (no. 1) judgment of 26 April 1979, Series A no. 30, p. 30, para. 47), must be formulated with sufficient precision to enable those concerned - if need be, with appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. A law that confers a discretion is not in itself

inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see, for instance, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, pp. 71-72, para. 37, and the Goodwin v. the United Kingdom judgment of 27 March 1996, Reports of Judgments and Decisions 1996-II, pp. 496-97, para. 31).

41. It is observed that, in refusing a certificate for distribution of the applicant's video on the basis that it infringed a provision of the criminal law of blasphemy, the British Board of Film Classification acted within its powers under section 4 (1) of the 1984 Act (see paragraph 24 above).

42. The Court recognises that the offence of blasphemy cannot by its very nature lend itself to precise legal definition. National authorities must therefore be afforded a degree of flexibility in assessing whether the facts of a particular case fall within the accepted definition of the offence (see, mutatis mutandis, the Tolstoy Miloslavsky judgment cited above at paragraph 40, p. 73, para. 41).

43. There appears to be no general uncertainty or disagreement between those appearing before the Court as to the definition in English law of the offence of blasphemy, as formulated by the House of Lords in the case of Whitehouse v. Gay News Ltd and Lemon (see paragraph 27 above). Having seen for itself the content of the video work, the Court is satisfied that the applicant could reasonably have foreseen with appropriate legal advice that the film, particularly those scenes involving the crucified figure of Christ, could fall within the scope of the offence of blasphemy.

The above conclusion is borne out by the applicant's decision not to initiate proceedings for judicial review on the basis of counsel's advice that the Panel's formulation of the law of blasphemy represented an accurate statement of the law (see, mutatis mutandis, the Open Door and Dublin Well Woman v. Ireland judgment of 29 October 1992, Series A no. 246-A, p. 27, para. 60).

44. Against this background it cannot be said that the law in question did not afford the applicant adequate protection against arbitrary interference. The Court therefore concludes that the impugned restriction was "prescribed by law".

B. Whether the interference pursued a legitimate aim

45. The applicant contested the Government's assertion that his video work was refused a certificate for distribution in order to "protect the right of citizens not to be offended in their religious feelings". In his submission, the expression "rights of others" in the present context only refers to an actual, positive right not to be offended. It does not include a hypothetical right held by some Christians to avoid disturbance at the prospect of other people's viewing the video work without being shocked.

In any event - the applicant further submitted - the restriction on the film's distribution could not pursue a legitimate aim since it was based on a discriminatory law, limited to the protection of Christians, and specifically, those of the

Anglican faith.

46. The Government referred to the case of Otto-Preminger-Institut v. Austria (judgment of 20 September 1994, Series A no. 295-A, pp. 17-18, paras. 47-48) where the Court had accepted that respect for the religious feelings of believers can move a State legitimately to restrict the publication of provocative portrayals of objects of religious veneration.

47. The Commission considered that the English law of blasphemy is intended to suppress behaviour directed against objects of religious veneration that is likely to cause justified indignation amongst believing Christians. It follows that the application of this law in the present case was intended to protect the right of citizens not to be insulted in their religious feelings.

48. The Court notes at the outset that, as stated by the Board, the aim of the interference was to protect against the treatment of a religious subject in such a manner "as to be calculated (that is, bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented" (see paragraph 15 above).

This is an aim which undoubtedly corresponds to that of the protection of "the rights of others" within the meaning of paragraph 2 of Article 10 (art. 10-2). It is also fully consonant with the aim of the protections afforded by Article 9 (art. 9) to religious freedom.

49. Whether or not there was a real need for protection against exposure to the film in question is a matter which must be addressed below when assessing the "necessity" of the interference.

50. It is true that the English law of blasphemy only extends to the Christian faith. Indeed the anomaly of this state of affairs in a multidenominational society was recognised by the Divisional Court in R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury [1991] 1 All England Law Reports 306 at 317 (see paragraph 28 above). However, it is not for the European Court to rule in abstracto as to the compatibility of domestic law with the Convention. The extent to which English law protects other beliefs is not in issue before the Court which must confine its attention to the case before it (see, for example, the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 18, para. 33).

The uncontested fact that the law of blasphemy does not treat on an equal footing the different religions practised in the United Kingdom does not detract from the legitimacy of the aim pursued in the present context.

51. The refusal to grant a certificate for the distribution of Visions of Ecstasy consequently had a legitimate aim under Article 10 para. 2 (art. 10-2).

C. Whether the interference was "necessary in a democratic society"

52. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society. As paragraph 2

of Article 10 (art. 10-2) expressly recognises, however, the exercise of that freedom carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, may legitimately be included a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profanatory (see the Otto-Preminger-Institut judgment cited above at paragraph 46, pp. 18-19, paras. 47 and 49).

53. No restriction on freedom of expression, whether in the context of religious beliefs or in any other, can be compatible with Article 10 (art. 10) unless it satisfies, inter alia, the test of necessity as required by the second paragraph of that Article (art. 10-2). In examining whether restrictions to the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society" the Court has, however, consistently held that the Contracting States enjoy a certain but not unlimited margin of appreciation. It is, in any event, for the European Court to give a final ruling on the restriction's compatibility with the Convention and it will do so by assessing in the circumstances of a particular case, inter alia, whether the interference corresponded to a "pressing social need" and whether it was "proportionate to the legitimate aim pursued" (see, mutatis mutandis, among many other authorities, the Goodwin judgment cited above at paragraph 40, pp. 500-01, para. 40).

54. According to the applicant, there was no "pressing social need" to ban a video work on the uncertain assumption that it would breach the law of blasphemy; indeed, the overriding social need was to allow it to be distributed. Furthermore, since adequate protection was already provided by a panoply of laws - concerning, inter alia, obscenity, public order and disturbances to places of religious worship - blasphemy laws, which are incompatible with the European idea of freedom of expression, were also superfluous in practice. In any event, the complete prohibition of a video work that contained no obscenity, no pornography and no element of vilification of Christ was disproportionate to the aim pursued.

55. For the Commission, the fact that Visions of Ecstasy was a short video work and not a feature film meant that its distribution would have been more limited and less likely to attract publicity. The Commission came to the same conclusion as the applicant.

56. The Government contended that the applicant's video work was clearly a provocative and indecent portrayal of an object of religious veneration, that its distribution would have been sufficiently public and widespread to cause offence and that it amounted to an attack on the religious beliefs of Christians which was insulting and offensive. In those circumstances, in refusing to grant a classification certificate for the applicant's video work, the national authorities only acted within their margin of appreciation.

57. The Court observes that the refusal to grant Visions of Ecstasy a distribution certificate was intended to protect "the rights of others", and more specifically to provide protection against seriously offensive attacks on matters regarded as sacred by Christians (see paragraph 48 above). The laws to which the applicant made reference (see paragraph 54 above) and which pursue related but distinct aims are thus not relevant in this context.

As the observations filed by the intervenors (see paragraph 5 above) show, blasphemy legislation is still in force in various

European countries. It is true that the application of these laws has become increasingly rare and that several States have recently repealed them altogether. In the United Kingdom only two prosecutions concerning blasphemy have been brought in the last seventy years (see paragraph 27 above). Strong arguments have been advanced in favour of the abolition of blasphemy laws, for example, that such laws may discriminate against different faiths or denominations - as put forward by the applicant - or that legal mechanisms are inadequate to deal with matters of faith or individual belief - as recognised by the Minister of State at the Home Department in his letter of 4 July 1989 (see paragraph 29 above). However, the fact remains that there is as yet not sufficient common ground in the legal and social orders of the member States of the Council of Europe to conclude that a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incompatible with the Convention (see, mutatis mutandis, the Otto-Preminger-Institut judgment cited above at paragraph 46, p. 19, para. 49).

58. Whereas there is little scope under Article 10 para. 2 of the Convention (art. 10-2) for restrictions on political speech or on debate of questions of public interest (see, mutatis mutandis, among many other authorities, the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, p. 26, para. 42; the Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 23, para. 43; and the Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239, p. 27, para. 63), a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the "necessity" of a "restriction" intended to protect from such material those whose deepest feelings and convictions would be seriously offended (see, mutatis mutandis, the Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133, p. 22, para. 35).

This does not of course exclude final European supervision. Such supervision is all the more necessary given the breadth and open-endedness of the notion of blasphemy and the risks of arbitrary or excessive interferences with freedom of expression under the guise of action taken against allegedly blasphemous material. In this regard the scope of the offence of blasphemy and the safeguards inherent in the legislation are especially important. Moreover the fact that the present case involves prior restraint calls for special scrutiny by the Court (see, mutatis mutandis, the Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, p. 30, para. 60).

59. The Court's task in this case is to determine whether the

reasons relied on by the national authorities to justify the measures interfering with the applicant's freedom of expression are relevant and sufficient for the purposes of Article 10 para. 2 of the Convention (art. 10-2).

60. As regards the content of the law itself, the Court observes that the English law of blasphemy does not prohibit the expression, in any form, of views hostile to the Christian religion. Nor can it be said that opinions which are offensive to Christians necessarily fall within its ambit. As the English courts have indicated (see paragraph 27 above), it is the manner in which views are advocated rather than the views themselves which the law seeks to control. The extent of insult to religious feelings must be significant, as is clear from the use by the courts of the adjectives "contemptuous", "reviling", "scurrilous", "ludicrous" to depict material of a sufficient degree of offensiveness.

The high degree of profanation that must be attained constitutes, in itself, a safeguard against arbitrariness. It is against this background that the asserted justification under Article 10 para. 2 (art. 10-2) in the decisions of the national authorities must be considered.

61. Visions of Ecstasy portrays, inter alia, a female character astride the recumbent body of the crucified Christ engaged in an act of an overtly sexual nature (see paragraph 9 above). The national authorities, using powers that are not themselves incompatible with the Convention (see paragraph 57 above), considered that the manner in which such imagery was treated placed the focus of the work "less on the erotic feelings of the character than on those of the audience, which is the primary function of pornography" (see paragraph 15 above). They further held that since no attempt was made in the film to explore the meaning of the imagery beyond engaging the viewer in a "voyeuristic erotic experience", the public distribution of such a video could outrage and insult the feelings of believing Christians and constitute the criminal offence of blasphemy. This view was reached by both the Board of Film Classification and the Video Appeals Committee following a careful consideration of the arguments in defence of his work presented by the applicant in the course of two sets of proceedings. Moreover, it was open to the applicant to challenge the decision of the Appeals Committee in proceedings for judicial review (see paragraph 30 above).

Bearing in mind the safeguard of the high threshold of profanation embodied in the definition of the offence of blasphemy under English law as well as the State's margin of appreciation in this area (see paragraph 58 above), the reasons given to justify the measures taken can be considered as both relevant and sufficient for the purposes of Article 10 para. 2 (art. 10-2). Furthermore, having viewed the film for itself, the Court is satisfied that the decisions by the national authorities cannot be said to be arbitrary or excessive.

62. It was submitted by both the applicant and the Delegate of the Commission that a short experimental video work would reach a smaller audience than a major feature film, such as the one at issue in the Otto-Preminger-Institut case (cited above at paragraph 46). The risk that any Christian would unwittingly view the video was therefore substantially reduced and so was the need to impose restrictions on its distribution. Furthermore, this risk could have been reduced further

by restricting the distribution of the film to licensed sex shops (see paragraph 23 above). Since the film would have been dispensed in video boxes which would have included a description of its content, only consenting adults would ever have been confronted with it.

63. The Court notes, however, that it is in the nature of video works that once they become available on the market they can, in practice, be copied, lent, rented, sold and viewed in different homes, thereby easily escaping any form of control by the authorities.

In these circumstances, it was not unreasonable for the national authorities, bearing in mind the development of the video industry in the United Kingdom (see paragraph 22 above), to consider that the film could have reached a public to whom it would have caused offence. The use of a box including a warning as to the film's content (see paragraph 62 above) would have had only limited efficiency given the varied forms of transmission of video works mentioned above. In any event, here too the national authorities are in a better position than the European Court to make an assessment as to the likely impact of such a video, taking into account the difficulties in protecting the public.

64. It is true that the measures taken by the authorities amounted to a complete ban on the film's distribution. However, this was an understandable consequence of the opinion of the competent authorities that the distribution of the video would infringe the criminal law and of the refusal of the applicant to amend or cut out the objectionable sequences (see paragraph 13 above). Having reached the conclusion that they did as to the blasphemous content of the film it cannot be said that the authorities overstepped their margin of appreciation.

D. Conclusion

65. Against this background the national authorities were entitled to consider that the impugned measure was justified as being necessary in a democratic society within the meaning of paragraph 2 of Article 10 (art. 10-2). There has therefore been no violation of Article 10 of the Convention (art. 10).

FOR THESE REASONS, THE COURT

Holds by seven votes to two that there has been no breach of Article 10 of the Convention (art. 10).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 November 1996.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Bernhardt;
(b) concurring opinion of Mr Pettiti;
(c) dissenting opinion of Mr De Meyer;

(d) dissenting opinion of Mr Lohmus.

Initialled: R. B.

Initialled: H. P.

CONCURRING OPINION OF JUDGE BERNHARDT

Personally, I am not convinced that the video film Visions of Ecstasy should have been banned by the refusal of a classification certificate, and this conviction is, inter alia, based on my impression when seeing the film. But it is the essence of the national margin of appreciation that, when different opinions are possible and do exist, the international judge should only intervene if the national decision cannot be reasonably justified.

I have finally voted with the majority for the following reasons:

(1) A prior control and classification of video films is not excluded in this most sensitive area and in view of the dangers involved, especially for young persons and the rights of others.

(2) Such a control requires a proper procedure and a careful weighing of the interests involved whenever a classification certificate is refused. In this respect, the present judgment describes in detail (paragraphs 11-19) the considerations and reasons in the decisions of the British authorities.

(3) In respect of the question whether the interference was "necessary in a democratic society", I am convinced that the national authorities have a considerable margin of appreciation, and they have made use of it in the present case in a manner acceptable under Convention standards.

CONCURRING OPINION OF JUDGE PETTITI

(Translation)

I voted with the majority, but for reasons which are substantially different in structure and content from those given in the judgment; I have not followed the reasoning in the Otto-Preminger-Institut case (judgment of 20 September 1994, Series A no. 295-A).

The first problem considered concerned the British legislation making blasphemy a criminal offence.

Admittedly, it is regrettable that the protection afforded by this legislation does not apply to other religions, for such a limitation makes no sense in 1996 now that we have the United Nations and UNESCO instruments on tolerance. However, the European Convention on Human Rights does not, on the one hand, prohibit legislation of this type, which is found in a number of member States, and, on the other hand, it leaves scope for review under Article 14 (art. 14). In the present case no complaint had been made to the European Court under that Article (art. 14).

The Court had to decide the case under Article 10 (art. 10). To my mind, the law on blasphemy provides a basis for consideration of

the case under paragraph 2 of Article 10 (art. 10-2) and cannot automatically justify a ban on distribution.

Article 9 (art. 9) is not in issue in the instant case and cannot be invoked. Certainly the Court rightly based its analysis under Article 10 (art. 10) on the rights of others and did not, as it had done in the Otto-Preminger-Institut judgment combine Articles 9 and 10 (art. 9, art. 10), morals and the rights of others, for which it had been criticised by legal writers. However, the wording adopted by the Chamber in paragraphs 50 and 53 creates, in my opinion, too direct a link between the law of blasphemy and the criteria justifying a ban or restriction on the distribution of video-cassettes.

The fact that under the legislation on blasphemy, profanation or defamation may give rise to a prosecution does not in itself justify, under Article 10 (art. 10) of the European Convention, a total ban on the distribution of a book or video.

In my view, the Court ought to have made that clear. There can be no automatic response where freedom of expression is concerned.

The Court should, I think, have set out in its reasoning the facts that led the Video Appeals Committee - to which the applicant appealed against the determination of the British Board of Film Classification - to prohibit distribution of the video.

I consider that the same decision could have been reached under paragraph 2 of Article 10 (art. 10-2) on grounds other than blasphemy, for example the profanation of symbols, including secular ones (the national flag) or jeopardising or prejudicing public order (but not for the benefit of a religious majority in the territory concerned).

The reasoning should, in my opinion have been expressed in terms both of religious beliefs and of philosophical convictions. It is only in paragraph 53 of the judgment that the words "any other" are cited.

Profanation and serious attacks on the deeply held feelings of others or on religious or secular ideals can be relied on under Article 10 para. 2 (art. 10-2) in addition to blasphemy.

What was particularly shocking in the Wingrove case was the combination of an ostensibly philosophical message and wholly irrelevant obscene or pornographic images.

In this case, the use of obscenity for commercial ends may justify restrictions under Article 10 para. 2 (art. 10-2); but the use of a figure of symbolic value as a great thinker in the history of mankind (such as Moses, Dante or Tolstoy) in a portrayal which seriously offends the deeply held feelings of those who respect their works or thought may, in some cases, justify judicial supervision so that the public can be alerted through the reporting of court decisions.

But the possibility of prosecution does not suffice to make a total ban legitimate. That question has been raised recently: can a breach of rules of professional conduct (medical confidentiality) in itself justify a total ban on a book?

Mr Wingrove's own argument and the contradictions it contained

could even have been used to supplement the Court's reasoning.

In his application he claimed that intellectual works should be protected against censorship on exclusively moral or religious grounds. In an article which is not reproduced in the video Mr Wingrove indicated that he was seeking to interpret St Teresa's writings explaining her ecstasies. In his submission, they amounted practically to a Voltairean work or one having anti-religious connotations. The film is quite different. Mr Wingrove did not even agree to cut (which he was entitled to do as the film-maker) the "simulated copulation" scene which was quite unnecessary, even in the context of the film. Indeed, he acknowledged that as the video stood, it could have been called Gay Nuns in Bondage, like a pornographic film (see the Commission's report, decision on admissibility, p. 32).

The use of the word "ecstasy" in the title was a source of ambiguity, as much for people interested in literary works as for those interested in pornography. The sale in hypermarkets and supermarkets of videos inciting pornographic or obscene behaviour is even more dangerous than the sale of books, as it is more difficult to ensure that the public are protected.

The recent world-wide conference in Stockholm on the protection of children highlighted the harmful social consequences of distributing millions of copies of obscene or pornographic videos to the public without even minimal checking of their identification marks. Disguising content is a commercial technique that is used to circumvent bans (for example, videos for paedophiles that use adolescent girls, who have only just attained their majority, dressed up as little girls).

Admittedly, before it was edited, Mr Wingrove's film was presented as having literary rather than obscene ambitions, but its maker chose not to dispel the ambiguity he had created. Nor did he seek judicial review, as it was open to him to do, of the Video Appeals Committee's dismissal of his appeal against the Board of Film Classification's refusal to grant a classification certificate.

It is true that section 7 of the Video Recordings Act 1984 contains a variety of provisions regulating the grant and use of certificates, ranging from outright bans to restrictions on viewing, identification requirements (in sales centres and on the cover) or measures to protect minors. On this point, British and North American case-law, particularly in Canada, contains a wealth of definitions of the boundaries between literature, obscenity and pornography (see the Revue du Barreau du Québec and the Supreme Court's case-law review).

The majority of the Video Appeals Committee took the view that the imagery led not to a religious perception, but to a perverse one, the ecstasy being furthermore of a perverse kind. That analysis was in conformity with the approach of the House of Lords, which moreover did not discuss the author's intention with respect to the moral element of the offence. The Board's Director said that it would have taken just the same stance in respect of a film that was contemptuous of Mohammed or Buddha.

The decision not to grant a certificate might possibly have been justifiable and justified if, instead of St Teresa's ecstasies, what had been in issue had been a video showing, for example, the

anti-clerical Voltaire having sexual relations with some prince or king. In such a case, the decision of the European Court might well have been similar to that in the Wingrove case. The rights of others under Article 10 para. 2 (art. 10-2) cannot be restricted solely to the protection of the rights of others in a single category of religious believers or philosophers, or a majority of them.

The Court was quite right to base its decision on the protection of the rights of others pursuant to Article 10 (art. 10), but to my mind it could have done so on broader grounds, inspired to a greater extent by the concern to protect the context of religious beliefs "or ... any other", as is rightly pointed out in paragraph 53 of the judgment.

In the difficult balancing exercise that has to be carried out in these situations where religious and philosophical sensibilities are confronted by freedom of expression, it is important that the inspiration provided by the European Convention and its interpretation should be based both on pluralism and a sense of values.

DISSENTING OPINION OF JUDGE DE MEYER

1. This was a pure case of prior restraint, a form of interference which is, in my view, unacceptable in the field of freedom of expression.

What I have written on that subject, with four other judges, in the case of Observer and Guardian v. the United Kingdom (1) applies not only to the press, but also, mutatis mutandis, to other forms of expression, including video works.

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1. Judgment of 26 November 1991, Series A no. 216, p. 46.

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2. It is quite legitimate that those wishing to supply video works be obliged to obtain from some administrative authority a classification certificate stating whether the works concerned may be supplied to the general public or only to persons who have attained a specified age, and whether, in the latter case, they are to be supplied only in certain places (2).

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2. Section 7 of the Video Recordings Act 1984.

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Of course, anything so decided by such authority needs reasonable justification and must not be arbitrary. It must, if contested, be subject to judicial review, and it must not have the effect of preventing the courts from deciding, as the case may be, whether the work concerned deserves, or does not deserve, any sanction under existing law.

3. Under the system established by the Video Recordings Act 1984 the British Board of Film Classification and the Video Appeals Committee may determine that certain video works are not suitable for being classified in any of its three categories (3), and they can thus ban them absolutely ab initio.

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3. Section 4 of the Act.

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This was indeed what actually happened in respect of the piece in issue in the present case.

It certainly goes too far.

4. To the extent that the criminal law of blasphemy might have been infringed by the applicant, I would observe that the necessity of such laws is very much open to question.

I would rather join Mr Patten's remark that for the faithful "the strength of their own belief is the best armour against mockers and blasphemers" (4).

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4. See paragraph 29 of the present judgment.

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DISSENTING OPINION OF JUDGE LOHMUS

1. I am unable to agree with the conclusion of the majority that the interference with the applicant's right to freedom of expression was "necessary in a democratic society".

2. The British Board of Film Classification and the five-member panel of the VAC took the view that the applicant would commit an offence of blasphemy if his video work Visions of Ecstasy were to be distributed (see paragraph 20 of the judgment).

3. In cases of prior restraint (censorship) there is interference by the authorities with freedom of expression even though the members of the society whose feelings they seek to protect have not called for such interference. The interference is based on the opinion of the authorities that they understand correctly the feelings they claim to protect. The actual opinion of believers remains unknown. I think that this is why we cannot conclude that the interference corresponded to a "pressing social need".

4. The law of blasphemy only protects the Christian religion and, more specifically, the established Church of England (see paragraph 28 of the judgment). The aim of the interference was therefore to protect the Christian faith alone and not other beliefs. This in itself raises the question whether the interference was "necessary in a democratic society".

5. As the Court has consistently held, the guarantees enshrined in Article 10 (art. 10) apply not only to information or ideas that are favourably received or regarded as inoffensive, but also to those that shock or disturb. Artistic impressions are often conveyed through images and situations which may shock or disturb the feelings of a person of average sensitivity. In my view, the makers of the film in issue did not exceed the reasonable limit beyond which it can be said that objects of religious veneration have been reviled or ridiculed.

6. The majority has found that in the field of morals the national authorities have a wide margin of appreciation. As in that field, "there is no uniform European conception of the requirements of 'the protection of the rights of others' in relation to attacks on their religious convictions" (see paragraph 58 of the judgment). The Court makes distinctions within Article 10 (art. 10) when applying its doctrine on the States' margin of appreciation. Whereas, in some cases, the margin of appreciation applied is wide, in other cases it

is more limited. However, it is difficult to ascertain what principles determine the scope of that margin of appreciation.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

CASE OF ZANA v. TURKEY

(69/1996/688/880)

JUDGMENT

STRASBOURG

25 November 1997

List of Agents

Belgium: Etablissements Emile Bruylant (rue de la Régence 67, B-1000 Bruxelles)

Luxembourg: Librairie Promoculture (14, rue Duchscher (place de Paris), B.P. 1142, L-1011 Luxembourg-Gare)

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SUMMARY[1]

Judgment delivered by a Grand Chamber

Turkey – prison sentence imposed by Diyarbakır National Security Court on account of a statement to journalists (Articles 168 and 312 of the Criminal Code) – accused unable to appear at hearing in that court (Article 226 § 4 of the Code of Criminal Procedure in force at material time) – length of criminal proceedings against him

I. ARTICLE 10 OF THE CONVENTION

A. Government's preliminary objections

1. Lack of jurisdiction ratione temporis

Court could only take cognisance of facts subsequent to 22 January 1990, when Turkey's declaration (under Article 46 of the Convention) was deposited – in the instant case principal fact lay in applicant's conviction by Diyarbakır National Security Court on 26 March 1991 – question whether the Government, who had referred case to Court, were estopped from relying on Turkey's declaration had not been raised before Court and did not need to be determined.

Conclusion: objection dismissed (eighteen votes to two).

2. Failure to exhaust domestic remedies

Objection had not been raised at admissibility stage and there was therefore an estoppel.

Conclusion: objection dismissed (unanimously).

B. Merits of complaint

Applicant's conviction and sentence had amounted to an interference with his exercise of his freedom of expression.

The interference had been based on Articles 168 and 312 of the Criminal Code and had therefore been prescribed by law within the meaning of Article 10 § 2.

It had pursued legitimate aims under Article 10 § 2, since the statement in question could, at a time when serious disturbances were raging in south-east Turkey, have had an impact such as to justify the national authorities' taking a measure designed to maintain national security and public safety.

1. This summary by the registry does not bind the Court.

As to necessity of interference, Court first recapitulated its case-law.

Applicant's statement contained both a contradiction and an ambiguity – it could not, however, be looked at in isolation and had had a special significance in the circumstances of the case – interview had coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey – the support given to the PKK, described as a "national liberation movement", by former mayor of Diyarbakır in interview published in major national daily newspaper had had to be regarded as likely to exacerbate an already explosive situation in that region – penalty imposed could therefore reasonably have been regarded as answering a pressing social need, and reasons adduced by the national authorities were relevant and sufficient – at all events, applicant had served only one-fifth of his sentence in prison – interference in issue proportionate to legitimate aims pursued.

Conclusion: no violation (twelve votes to eight).

II. ARTICLE 6 OF THE CONVENTION

A. Government's preliminary objections (failure to exhaust domestic remedies)

Objection had not been raised at admissibility stage and there was therefore an estoppel.

Conclusion: objection dismissed (unanimously).

B. Merits of complaint

1. Article 6 §§ 1 and 3 (c) (fair trial)

Recapitulation of case-law.

Fact that applicant had raised procedural objections or wished to address court in Kurdish in no way signified that he had implicitly waived his right to appear before Diyarbakır National Security Court – in view of what had been at stake for the applicant, that court could not, if the trial was to be fair, give judgment without a direct assessment of the applicant's evidence – neither the "indirect" hearing by the Aydın Assize Court nor presence of applicant's lawyers at hearing before Diyarbakır National Security Court could compensate for absence of accused.

Conclusion: violation (seventeen votes to three).

2. Article 6 § 1 (length of proceedings)

(a) Period to be taken into consideration

Starting-point: deposit of Turkey's declaration.
End: date of service of Court of Cassation's judgment.
Total: one year and six months, but account had to be taken of fact that by date of deposit of Turkey's declaration the proceedings had already lasted two years and five months.

(b) Reasonableness of length of proceedings

To be assessed in light of circumstances of case, regard being had to criteria laid down in Court's case-law.

Proceedings complained of not particularly complex – applicant's conduct could not, on its own, explain such a length of time – during period in question Diyarbakır National Security Court had not delivered its judgment until nine months after hearing at Aydın Assize Court – earlier period of inactivity on part of judicial authorities, which Court could take into account in assessing whether "reasonable time" requirement had been satisfied – importance to applicant of what had been at stake in the case.

Conclusion: violation (nineteen votes to one).

III. ARTICLE 50 OF THE CONVENTION

A. Damage

Pecuniary damage: no causal link between violations found and alleged damage.

Non-pecuniary damage: compensation awarded.

Conclusion: respondent State to pay applicant specified sum for non-pecuniary damage (eighteen votes to two).

B. Costs and fees

Reimbursed on equitable basis.

Conclusion: respondent State to pay applicant specified sum for costs and fees (nineteen votes to one).

COURT'S CASE-LAW REFERRED TO

7.12.1976, Handyside v. the United Kingdom; 12.2.1985, Colozza v. Italy; 8.7.1986, Lingens v. Austria; 2.3.1987, Monnell and Morris v. the United Kingdom; 22.2.1989, Barfod v. Denmark; 23.9.1994, Jersild v. Denmark; 8.6.1995, Yagcı and Sargın v. Turkey; 8.6.1995, Mansur v. Turkey; 19.2.1996, Botten v. Norway; 25.3.1996, Mitap and Müftüoğlü v. Turkey; 27.6.1997, Philis v. Greece (no. 2)

In the case of Zana v. Turkey[1],

The European Court of Human Rights, sitting, in accordance with Rule 51 of Rules of Court A[2], as a Grand Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr R. BERNHARDT,
Mr THÓR VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr A. SPIELMANN,
Mrs E. PALM,
Mr A.N. LOIZOU,
Sir John FREELAND,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr G. MIFSUD BONNICI,
Mr D. GOTCHEV,
Mr P. JAMBREK,
Mr K. JUNGWIERT,
Mr P. KŪRIS,
Mr E. LEVITS,
Mr J. CASADEVALL,
Mr P. VAN DIJK,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 24 April, 23 June and 24 October 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 28 May 1996 and by the Turkish

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Notes by the Registrar

1. The case is numbered 69/1996/688/880. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

Government ("the Government") on 29 July 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 18954/91) against the Republic of Turkey lodged with the Commission under Article 25 by a Turkish national, Mr Mehdi Zana, on 30 September 1991.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (Article 46); the Government's application referred to Article 48. The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 §§ 1 and 3 (c) and Articles 9 and 10 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). The lawyer was given leave by the President to use the Turkish language in both the written and the oral proceedings (Rule 27 § 3).

3. The Chamber to be constituted included *ex officio* Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 10 June 1996, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Matscher, Mr S.K. Martens, Mme E. Palm, Mr M.A. Lopes Rocha, Mr G. Mifsud Bonnici and Mr P. Jambrek (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr K. Jungwiert, substitute judge, replaced Mr Martens, who had resigned (Rule 22 § 1).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 11 and 17 December 1996 respectively. On 23 December 1996 the Registrar also received the applicant's claims under Article 50, and on 10 February 1997 the Government's observations in reply.

On 20 December 1996 the Commission had produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 19 February 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr A. GÜNDÜZ, *Co-Agent,*
Mrs D. AKÇAY, *Adviser,*
Miss A. EMÜLER, *Expert*;

(b) *for the Commission*
Mr A. WEITZEL, *Delegate*;

(c) *for the applicant*
Mr M.S. TANRIKULU,
Mr R. TANRIKULU,
Mr S. YILMAZ, of the Diyarbakır Bar, *Counsel,*
Mr M. ZANA, *Applicant*.

The Court heard addresses by Mr Weitzel, Mr Zana, Mr M.S. Tanrikulu, Mr Gündüz and Mrs Akçay.

6. On 21 February 1997 the Chamber decided unanimously to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51).

7. The Grand Chamber to be constituted included *ex officio* Mr Ryssdal, the President of the Court, and Mr Bernhardt, the Vice-President, together with the members and the three substitutes of the original Chamber, the latter being Mr A.N. Loizou, Mr E. Levits and Mr R. Macdonald (Rule 51 § 2 (a) and (b)). On 25 February 1997, the President, in the presence of the Registrar, drew by lot the names of the eight additional judges needed to complete the Grand Chamber, namely Mr A Spielmann, Sir John Freeland, Mr A.B. Baka, Mr L. Wildhaber, Mr D. Gotchev, Mr P. Kūris, Mr J. Casadevall and Mr P. van Dijk (Rule 51 § 2 (c)). Subsequently Mr Macdonald, who was unable to take part in the further consideration of the case, was not replaced after the hearing (Rule 24 § 1 taken in conjunction with Rule 51 § 3).

8. On 25 February 1997 the President asked those who had appeared before the Court if they wanted a new hearing to be held. On 24 and 25 March and 9 April 1997 respectively the Government, the Delegate of the Commission and the applicant replied in the negative.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

9. Mr Mehdi Zana, a Turkish citizen born in 1940, is a former mayor of Diyarbakır, where he currently lives.

A. The situation in the south-east of Turkey

10. Since approximately 1985, serious disturbances have raged in the south-east of Turkey between the security forces and the members of the PKK (Workers' Party of Kurdistan). This confrontation has so far, according to the Government, claimed the lives of 4,036 civilians and 3,884 members of the security forces.

11. At the time of the Court's consideration of the case, ten of the eleven provinces of south-east Turkey had since 1987 been subjected to emergency rule.

B. The applicant's statement to journalists

12. In August 1987, while serving several sentences in Diyarbakır military prison, the applicant made the following remarks in an interview with journalists:

> "I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake …"
>
> *"... PKK'nın ulusal kurtuluş hareketini destekliyorum. Katliamlardan yana değiliz, yanlış şeyler her yerde olur. Kadın ve çocukları yanlışlıkla öldürüyorlar …"*

That statement was published in the national daily newspaper *Cumhuriyet* on 30 August 1987.

C. The criminal proceedings

13. On 30 August 1987 the "press offences" department of the Istanbul public prosecutor's office began a preliminary investigation in respect of the applicant among others, on the ground that he had "defended an act punishable by law as a serious crime", an offence under Article 312 of the Criminal Code (see paragraph 31 below).

14. On 28 September 1987 the Istanbul public prosecutor's office ruled that there was no case to answer in respect of the journalists and that it had no jurisdiction *ratione loci* to deal with Mr Zana's case. It sent the file to the Diyarbakır public prosecutor.

15. In an order of 22 October 1987 the Diyarbakır public prosecutor ruled that he had no jurisdiction, on the ground that the offence committed by the applicant was governed by Article 142 §§ 3–6 of the Criminal Code (a provision which makes it an offence to disseminate propaganda that is racist or calculated to weaken national sentiment). He forwarded the file to the public prosecutor at the Diyarbakır National Security Court.

16. On 4 November 1987 the latter likewise ruled that he had no jurisdiction, on the ground that when the applicant had made his statement to the journalists he was in custody in a military prison and therefore had military status in law. He forwarded the file to the Diyarbakır military prosecutor's office.

17. By means of an indictment dated 19 November 1987, the Diyarbakır military prosecutor's office instituted proceedings in the Diyarbakır Military Court against Mr Zana (among others) under Article 312 of the Criminal Code. The applicant was charged with supporting the activities of an armed organisation, the PKK, whose aim was to break up Turkey's national territory.

18. At a hearing before the Diyarbakır Military Court on 15 December 1987 the applicant argued that the court had no jurisdiction to hear his case and refused to put forward a defence on the merits.

19. At a hearing on 1 March 1988 counsel for Mr Zana asked the Military Court to rule that it had no jurisdiction as the offence with which his client was charged was not a military one and a military prison could not be regarded as military premises. The court dismissed that application on the same day.

20. On 28 July 1988 the applicant was transferred from Diyarbakır military prison to Eskişehir civilian prison.

21. The Eskişehir Air Force Court, acting under powers delegated to it by the Diyarbakır Military Court, summoned the applicant to submit his defence. The applicant, who was on hunger strike, did not appear at the hearing on 2 November 1988. He did appear at one held on 7 December 1988 but refused to address the court, as he considered that it had no jurisdiction to try him.

22. In a decision of 18 April 1989 the Diyarbakır Military Court held that it had no jurisdiction in the case and sent the file to the Diyarbakır National Security Court.

23. On 2 August 1989 Mr Zana was transferred to the high-security civilian prison at Aydın.

24. At a hearing held on 20 June 1990 by the Aydın Assize Court, acting under powers delegated by the Diyarbakır National Security Court, the applicant refused to speak Turkish and said in Kurdish that he wished to defend himself in his mother tongue. The Assize Court pointed out to him that, if he persisted in his refusal to defend himself, he would be deemed to have waived his right to do so. Since Mr Zana continued to speak in Kurdish, the court noted in the record of the hearing that he had not put forward a defence.

D. The judgment of the Diyarbakır National Security Court

25. The proceedings then continued before the Diyarbakır National Security Court, where the applicant was represented by his lawyers.

26. In a judgment of 26 March 1991 the Diyarbakır National Security Court sentenced the applicant to twelve months' imprisonment for having "defended an act punishable by law as a serious crime" and "endangering public safety". In accordance with the Act of 12 April 1991, he would have to serve one-fifth of the sentence (two months and twelve days) in custody and four-fifths on parole.

27. The National Security Court held that the PKK qualified as an "armed organisation" under Article 168 of the Criminal Code, that its aim was to bring about the secession of part of Turkey's territory and that it committed acts of violence such as murder, kidnapping and armed robbery. The court also held that Mr Zana's statement to the journalists, the exact terms of which had been established during the judicial investigation, amounted to an offence under Article 312 of the Criminal Code.

28. The applicant appealed on points of law on 3 April 1991. In a judgment of 19 June 1991, served on the applicant's representative on 18 July 1991, the Court of Cassation upheld the National Security Court's judgment.

29. In the meantime, on 16 April 1991, Mr Zana, who had just served the sentences imposed on him earlier, had been released.

30. On 26 February 1992 the Diyarbakır public prosecutor requested the applicant to report to Diyarbakır Prison in order to serve his latest sentence – one-fifth of the prison term, for the remainder of which he would be on parole.

II. RELEVANT DOMESTIC LAW

A. Substantive law

31. The relevant provisions of the Criminal Code at the material time provided:

Article 168

"It shall be an offence punishable by at least fifteen years' imprisonment to form an armed gang or organisation or to assume control or special responsibility within such a gang or organisation with the intention of committing any of the offences referred to in Articles 125 ...

It shall be an offence punishable by five to fifteen years' imprisonment to belong to such an organisation."

Article 312

"It shall be an offence, punishable by six months' to two years' imprisonment and a 'heavy' [ağ*ır*] fine of 6,000 to 30,000 liras publicly to praise or defend an act punishable by law as a serious crime or to urge the people to disobey the law.

It shall be an offence, punishable by one year's to three years' imprisonment and by a heavy fine of 9,000 to 36,000 liras, publicly to incite hatred or hostility between the different classes in society, thereby creating discrimination based on membership of a social class, race, religion, sect or region. Where such incitement endangers public safety, the sentence shall be increased by one-third to one-half.

..."

B. Procedure

32. Article 226 § 4 of the Code of Criminal Procedure at the material time provided:

"A person in custody in a prison situated outside the jurisdiction of the court which is to try him may be examined by other courts."

III. TURKEY'S DECLARATION OF 22 JANUARY 1990 UNDER ARTICLE 46 OF THE CONVENTION

33. On 22 January 1990 the Turkish Minister for Foreign Affairs deposited with the Secretary General of the Council of Europe the following declaration under Article 46 of the Convention:

"On behalf of the Government of the Republic of Turkey and acting in accordance with Article 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, I hereby declare as follows:

The Government of the Republic of Turkey acting in accordance with Article 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, hereby recognises as compulsory *ipso facto* and without special agreement the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention which relate to the exercise of jurisdiction within the meaning of Article 1 of the Convention, performed within the boundaries of the national territory of the Republic of Turkey, and provided further that such matters have previously been examined by the Commission within the power conferred upon it by Turkey.

This Declaration is made on condition of reciprocity, including reciprocity of obligations assumed under the Convention. It is valid for a period of 3 years as from the date of its deposit and extends to matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to the date of deposit of the present Declaration."

That declaration was renewed on 22 January 1993 for a period of three years and again on 22 January 1996, in slightly different terms, for two years.

PROCEEDINGS BEFORE THE COMMISSION

34. Mr Zana applied to the Commission on 30 September 1991. Relying on Article 6 §§ 1 and 3 and Articles 9 and 10 of the Convention, he complained of the length of the criminal proceedings, of an infringement of his right to a fair trial in that he had not been able to appear before the court which convicted him and had not been able to defend himself in his mother tongue (Kurdish), and of an interference with his freedom of thought and expression.

35. On 21 October 1993 the Commission declared the application (no. 18954/91) admissible as to the complaints concerning the length of the criminal proceedings, the applicant's absence from the hearing and the interference with his freedom of thought and expression and declared it inadmissible as to the remainder. In its report of 10 April 1996 (Article 31), it expressed the opinion that

(a) there had not been a violation of Article 10 of the Convention (fourteen votes to fourteen, with the President's casting vote);

(b) there had been a violation of Article 6 §§ 1 and 3 (c) of the Convention because the applicant had not been present at his trial (unanimously);

(c) there had been a violation of Article 6 § 1 of the Convention in that his case had not been heard within a reasonable time (twenty-three votes to five).

The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

36. In their memorial the Government requested the Court

> "(a) to declare that it has no jurisdiction *ratione temporis* as regards the complaint under Article 10 of the Convention;
>
> (b) to declare that domestic remedies have not been duly exhausted as regards the complaints under Article 6 of the Convention;
>
> in the alternative,
>
> (a) to declare that domestic remedies have not been duly exhausted as regards the complaints under Article 10 of the Convention;
>
> (b) to declare that there has not been a breach as regards the complaints under Article 6 of the Convention; and
>
> in the further alternative,
>
> to declare that there has been no breach of Article 10 of the Convention."

37. At the hearing, counsel for the applicant asked the Court to dismiss all the Government's preliminary objections and to rule that there had been breaches of Article 10 and Article 6 §§ 1 and 3 (c).

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

38. Mr Zana maintained that his conviction by the Diyarbakır National Security Court on account of his statement to journalists had infringed his

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1997), but a copy of the Commission's report is obtainable from the registry.

right to freedom of expression. He relied on Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

39. He also complained of an interference with his right to freedom of thought, guaranteed by Article 9 of the Convention. Like the Commission, the Court considers that this complaint is bound up with the one made under Article 10.

A. The Government's preliminary objections

40. The Government raised two preliminary objections, one based on lack of jurisdiction *ratione temporis* and the other on failure to exhaust domestic remedies.

1. Lack of jurisdiction ratione temporis

41. The Government maintained, as their primary submission, that the Court had no jurisdiction *ratione temporis* to entertain the applicant's complaint under Article 10 of the Convention, given that the principal fact lay in the applicant's declaration to journalists in August 1987 (see paragraph 12 above), that is to say before Turkey recognised the compulsory jurisdiction of the Court. When, on 22 January 1990, Turkey had recognised the Court's compulsory jurisdiction in "matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to" that date, its intention had been, they said, to remove from the ambit of the Court's review events that had taken place before the date on which the declaration made under Article 46 of the Convention was deposited and also judgments relating to such facts even if they had been delivered after that date.

42. The Court points out that Turkey accepted its jurisdiction only in respect of facts and events subsequent to 22 January 1990, when it deposited its declaration (see paragraph 33 above). In the instant case, however, the Court considers, like the Delegate of the Commission, that the principal fact lay not in Mr Zana's statement to the journalists but in the

Diyarbakır National Security Court's judgment of 26 March 1991, whereby the applicant was sentenced to twelve months' imprisonment for having "defended an act punishable by law as a serious crime" under Turkish legislation (see paragraph 26 above), a judgment that was upheld by the Court of Cassation on 26 June 1991 (see paragraph 28 above). It was that conviction and sentence, subsequent to Turkey's recognition of the Court's compulsory jurisdiction, which constituted the "interference" within the meaning of Article 10 of the Convention and whose justification under that Article the Court must determine. This preliminary objection must accordingly be dismissed.

The question whether the Government should, in the light of their reference of the case to the Court (see paragraph 1 above), be regarded as estopped from relying on the terms of the declaration of 22 January 1990 to exclude this complaint on grounds of incompetence *ratione temporis* was not raised before the Court and the Court does not consider it necessary, in the circumstances, to determine that question.

2. Failure to exhaust domestic remedies

43. In the alternative, the Government pleaded failure to exhaust domestic remedies. Mr Zana, they said, had omitted to raise in substance his complaint under Article 10 of the Convention in the Turkish courts.

44. Like the Delegate of the Commission, the Court notes that this objection was not raised when the admissibility of the application was being considered and that there is therefore an estoppel.

B. Merits of the complaint

45. As the Court has already pointed out (see paragraph 42 above), the applicant's conviction and sentence by the Turkish courts for remarks made to journalists indisputably amounted to an "interference" with his exercise of his freedom of expression. This point was, indeed, not contested.

46. The interference contravened Article 10 unless it was "prescribed by law", had one or more of the legitimate aims referred to in paragraph 2 of Article 10 and was "necessary in a democratic society" for achieving such an aim or aims.

1. "Prescribed by law"

47. The Court notes that the applicant's conviction and sentence were based on Articles 168 and 312 of the Turkish Criminal Code (see paragraph 31 above) and accordingly considers that the impugned interference was "prescribed by law". This point was likewise undisputed.

2. Legitimacy of the aims pursued

48. The Government maintained that the interference had pursued legitimate aims, namely the maintenance of national security and public safety, the preservation of territorial integrity and the prevention of crime. As the PKK was an illegal terrorist organisation, the application of Article 312 of the Turkish Criminal Code by the national courts in the case had had the aim of punishing any act calculated to afford support to that type of organisation.

49. In the Commission's view, such a statement from a person with some political standing – the applicant is a former mayor of Diyarbakır – could reasonably lead the national authorities to fear a stepping up of terrorist activities in the country. The authorities had therefore been entitled to consider that there was a threat to national security and public safety and that measures were necessary to preserve the country's territorial integrity and prevent crime.

50. The Court notes that in the interview he gave the journalists the applicant indicated that he supported "the PKK national liberation movement" (see paragraph 12 above) and, as the Commission noted, the applicant's statement coincided with the murders of civilians by PKK militants.

That being so, it considers that at a time when serious disturbances were raging in south-east Turkey (see paragraphs 10 and 11 above) such a statement – coming from a political figure well known in the region – could have an impact such as to justify the national authorities' taking a measure designed to maintain national security and public safety. The interference complained of therefore pursued legitimate aims under Article 10 § 2.

3. Necessity of the interference

(a) General principles

51. The Court reiterates the fundamental principles which emerge from its judgments relating to Article 10:

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see the following judgments: Handyside v. the

United Kingdom, 7 December 1976, Series A no. 24, p. 23, § 49; Lingens v. Austria, 8 July 1986, Series A no. 103, p. 26, § 41; and Jersild v. Denmark, 23 September1994, Series A no. 298, p. 26, § 37).

(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see the Lingens judgment cited above, p. 25, § 39).

(iii) In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see the Lingens judgment cited above, pp. 25–26, § 40; and the Barfod v. Denmark judgment of 22 February 1989, Series A no. 149, p. 12, § 28). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see the Jersild judgment cited above, p. 26, § 31).

(b) Application of the above principles to the instant case

52. Mr Zana submitted that his conviction and sentence were wholly unjustified. An activist in the Kurdish cause since the 1960s, he had always spoken out against violence. In maintaining that he was supporting the PKK's armed struggle, the Government had, he argued, misinterpreted what he had said. In reality he had told the journalists that he supported the national liberation movement but was opposed to violence, and he had condemned the massacres of women and children. At all events, he was not a member of the PKK and had been imprisoned for belonging to the "Path of Freedom" organisation, which had always advocated non-violent action.

53. The Government, on the other hand, maintained that the applicant's conviction and sentence were perfectly justified under paragraph 2 of Article 10. They emphasised the seriousness of what the applicant had said at a time when the PKK had carried out a number of murderous attacks in south-east Turkey. In their submission, a State faced with a terrorist situation that threatened its territorial integrity had to have a wider margin of appreciation than it would have if the situation in question had consequences only for individuals.

54. The Commission accepted the Government's views for the most part and expressed the opinion that there had been no violation of Article 10.

55. The Court considers that the principles set out in paragraph 51 above also apply to measures taken by national authorities to maintain national security and public safety as part of the fight against terrorism. In this connection, it must, with due regard to the circumstances of each case and a State's margin of appreciation, ascertain whether a fair balance has been struck between the individual's fundamental right to freedom of expression and a democratic society's legitimate right to protect itself against the activities of terrorist organisations.

56. In the instant case the Court must consequently assess whether Mr Zana's conviction and sentence answered a "pressing social need" and whether they were "proportionate to the legitimate aims pursued". To that end, it considers it important to analyse the content of the applicant's remarks in the light of the situation prevailing in south-east Turkey at the time.

57. The Court takes as a basis the applicant's statement as published in the national daily newspaper *Cumhuriyet* on 30 August 1987 (see paragraph 12 above), which the applicant did not contest in substance. The statement comprises two sentences. In the first of these the applicant expresses his support for the "PKK national liberation movement", while going on to say that he is not "in favour of massacres". In the second he says "Anyone can make mistakes, and the PKK kill women and children by mistake."

58. Those words could be interpreted in several ways but, at all events, they are both contradictory and ambiguous. They are contradictory because it would seem difficult simultaneously to support the PKK, a terrorist organisation which resorts to violence to achieve its ends, and to declare oneself opposed to massacres; they are ambiguous because whilst Mr Zana disapproves of the massacres of women and children, he at the same time describes them as "mistakes" that anybody could make.

59. The statement cannot, however, be looked at in isolation. It had a special significance in the circumstances of the case, as the applicant must have realised. As the Court noted earlier (see paragraph 50 above), the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time.

60. In those circumstances the support given to the PKK – described as a "national liberation movement" – by the former mayor of Diyarbakır, the most important city in south-east Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region.

61. The Court accordingly considers that the penalty imposed on the applicant could reasonably be regarded as answering a "pressing social need" and that the reasons adduced by the national authorities are "relevant and sufficient"; at all events, the applicant served only one-fifth of his sentence in prison (see paragraph 26 above).

62. Having regard to all these factors and to the margin of appreciation which national authorities have in such a case, the Court considers that the interference in issue was proportionate to the legitimate aims pursued. There has consequently been no breach of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

63. Mr Zana complained of an infringement of the principle of a fair trial as he had been unable to appear at the hearing before the Diyarbakır National Security Court, and also of the length of the criminal proceedings against him. He relied on Article 6 §§ 1 and 3 of the Convention, which provide:

> "1. In the determination of … any criminal charge against him, everyone is entitled to a fair … hearing within a reasonable time by [a] … tribunal …
>
> …
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> …
>
> (c) to defend himself in person …"

A. The Government's preliminary objection

64. The Government pleaded, as their principal submission, failure to exhaust domestic remedies. The applicant, they said, had omitted to raise in substance his complaints under Article 6 §§ 1 and 3 in the Turkish courts.

65. Like the Delegate of the Commission, the Court notes that this objection was not raised when the application's admissibility was considered and that there is therefore an estoppel.

B. Merits of the complaints

1. Article 6 §§ 1 and 3 (c) of the Convention (fair trial)

66. Mr Zana submitted that his absence from the hearing at the National Security Court had prevented him from defending himself effectively. Had he been present, he would have been able to explain to the judges what his intentions had been when he had made his statement to the journalists.

67. The Government maintained that the applicant had several times appeared before courts acting under delegated powers, as provided in Article 226 § 4 of the Code of Criminal Procedure (see paragraph 32 above). In doing no more than raise objections to jurisdiction and in refusing to speak Turkish at those different hearings, Mr Zana had deliberately waived his right to defend himself on the merits. Furthermore, the presence of his lawyers at the hearing before the Diyarbakır National Security Court had been sufficient to satisfy the requirements of Article 6 § 3 (c).

68. The Court reiterates that the object and purpose of Article 6 of the Convention taken as a whole show that a person charged with a criminal offence is entitled to take part in the hearing. Moreover, sub-paragraphs (c) and (d) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person" and "to examine or have examined witnesses", and it is difficult to see how these rights could be exercised without the person concerned being present (see the Colozza v. Italy judgment of 12 February 1985, Series A no. 89, p. 14, § 27; and the Monnell and Morris v. the United Kingdom judgment of 2 March 1987, Series A no. 115, p. 22, § 58).

69. In the instant case the Court notes that Mr Zana was not requested to attend the hearing before the Diyarbakır National Security Court, which sentenced him to a twelve-month prison term (see paragraph 26 above). In accordance with Article 226 § 4 of the Code of Criminal Procedure, the Aydın Assize Court had been asked to take evidence from him in his defence, under powers delegated by the National Security Court (see paragraphs 24 and 32 above).

70. Contrary to the Government's contention, the fact that the applicant raised procedural objections or wished to address the court in Kurdish, as he did at the hearing in the Aydın Assize Court, in no way signifies that he implicitly waived his right to defend himself and to appear before the Diyarbakır National Security Court. Waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner (see the Colozza judgment cited above, p. 14, § 28).

71. In view of what was at stake for Mr Zana, who had been sentenced to twelve months' imprisonment, the National Security Court could not, if the trial was to be fair, give judgment without a direct assessment of the applicant's evidence given in person (see, *mutatis mutandis*, the Botten v. Norway judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 145, § 53). If the applicant had been present at the hearing, he would have had an opportunity, in particular, to say what his intentions had been when he had made his statement and in what circumstances the interview had taken place, to summon journalists as witnesses or to seek production of the recording.

72. Neither the "indirect" hearing by the Aydın Assize Court nor the presence of the applicant's lawyers at the hearing before the Diyarbakır National Security Court can compensate for the absence of the accused.

73. The Court accordingly considers, as the Commission did, that such an interference with the rights of the defence cannot be justified, regard being had to the prominent place held in a democratic society by the right to a fair trial within the meaning of the Convention.

There has consequently been a breach of Article 6 §§ 1 and 3 (c) of the Convention.

2. Article 6 § 1 of the Convention (length of the proceedings)

(a) Period to be taken into consideration

74. The proceedings began on 30 August 1987, when the preliminary investigation in respect of the applicant was begun (see paragraph 13 above), and ended on 18 July 1991, when the Court of Cassation's judgment was served (see paragraph 28 above). They therefore lasted for almost three years and eleven months.

However, the Court can take cognisance of the complaint relating to the length of the criminal proceedings only from 22 January 1990, when the declaration whereby Turkey recognised the Court's compulsory jurisdiction was deposited (see paragraph 33 above). It must nevertheless take account of the state of the proceedings at the time when the aforementioned declaration was deposited (see, as the most recent authority, the Mitap and Müftüoğlü v. Turkey judgment of 25 March 1996, Reports 1996-II, p. 410, § 28). On the critical date the proceedings had already lasted two years and five months.

(b) Reasonableness of the length of the proceedings

75. The reasonableness of the length of proceedings is to be assessed in the light of the circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities. It is also

necessary to take account of what is at stake for the applicant in the litigation (see the Philis v. Greece (no. 2) judgment of 27 June 1997, Reports 1997-IV, p. 1083, § 35).

76. In Mr Zana's submission, the case had not been complex and the excessive length of the criminal proceedings had been due solely to the conduct of the judicial authorities: his case had been transferred from the civil courts to the National Security Court, then to the Military Court and finally back to the National Security Court, going from Istanbul to Diyarbakır, then to Eskişehir and Aydın and finally back to Diyarbakır.

77. The Government underlined the issues of jurisdiction *ratione loci* and *ratione materiae* which the national courts had had to determine in that the applicant had made his statement in Diyarbakır military prison and it had appeared in a daily newspaper published in Istanbul. Furthermore, the attempts to find a co-defendant on the run and the conduct of Mr Zana and his lawyers had contributed to prolonging the proceedings in question. Lastly, the Court of Cassation's judgment had been delivered two years and two months after the Diyarbakır Military Court's decision that it had no jurisdiction.

78. The Court considers, as the Commission did, that the proceedings complained of were not particularly complex, the facts of the case being straightforward, notwithstanding the issues of jurisdiction that could arise.

79. As to the applicant's conduct, the Court reiterates that Article 6 does not require a person charged with a criminal offence to cooperate actively with the judicial authorities (see, among other authorities, the Yağcı and Sargın v. Turkey judgment of 8 June 1995, Series A no. 319-A, p. 21, § 66). It considers, like the Commission, that the applicant's conduct, even if it may to some extent have slowed down the proceedings, cannot, on its own, explain such a length of time.

80. The Court also notes that between 22 January 1990, when the declaration whereby Turkey recognised the Court's compulsory jurisdiction was deposited (see paragraph 33 above), and 18 July 1991, when the Court of Cassation's judgment was served (see paragraph 28 above), one year and six months elapsed. In that period the Diyarbakır National Security Court did not deliver its judgment until 26 March 1991 (see paragraph 26 above), that it is to say nine months after the hearing of 20 June 1990 at the Aydın Assize Court (see paragraph 24 above), during which the applicant had refused to speak Turkish.

81. The Commission also noted a period of inactivity attributable to the judicial authorities between the hearing before the Diyarbakır Military Court on 15 December 1987 (see paragraph 18 above), during which the applicant raised an objection to that court's jurisdiction, and the Military Court's decision of 18 April 1989 in which the court declared it had no jurisdiction (see paragraph 22 above).

82. Even if this latter period does not, strictly speaking, come within the Court's jurisdiction *ratione temporis*, it may nonetheless be taken into account in assessing whether the "reasonable time" requirement was satisfied.

83. The Court reiterates in this connection that Article 6 § 1 of the Convention guarantees to everyone against whom criminal proceedings are brought the right to a final decision within a reasonable time on the charge against him. It is for the Contracting States to organise their legal systems in such a way that their courts can meet this requirement (see, among many other authorities, the Mansur v. Turkey judgment of 8 June 1995, Series A no. 319-B, p. 53, § 68).

84. Lastly, what was at stake in the case was important to the applicant as he was already in custody when he made his statement to the journalists and was sentenced to a further term of imprisonment by the Diyarbakır National Security Court (see paragraph 26 above).

85. In the light of all the circumstances of the case, the Court cannot regard the length of the proceedings complained of as reasonable.

There has consequently been a violation of Article 6 § 1 of the Convention in this respect.

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION

86. Article 50 of the Convention provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

87. Mr Zana sought 250,000 French francs (FRF) for pecuniary damage and FRF 1,000,000 for non-pecuniary damage. He pointed to the ill-treatment he had allegedly sustained during his unlawful detention, the after-effects of which he was still suffering; the excessive length of the criminal proceedings had, moreover, prevented him from being given concurrent sentences, as provided in Law no. 3713 on the prevention of terrorism.

88. Referring to their preliminary objections and to their observations on the merits, the Government requested the Court, as their main submission, to dismiss the claim. In the alternative, they maintained that any finding of a breach would constitute sufficient just satisfaction; in the further alternative,

there was no causal link between any violation of the Convention and the alleged damage.

89. The Delegate of the Commission was in favour of awarding the applicant, if a breach of Article 6 was found, compensation in the amount of FRF 40,000, half of it in respect of the applicant's absence from his trial and the other half in respect of the excessive length of the proceedings.

90. As regards pecuniary damage, the Court considers that there is no causal link between the breaches found of Article 6 and the alleged damage. It does, on the other hand, consider that Mr Zana sustained indisputable non-pecuniary damage, for which the findings of breaches in paragraphs 73 and 85 above cannot compensate on their own. Making its assessment on an equitable basis, it awards him the sum of FRF 40,000 under this head, to be converted into Turkish liras at the rate applicable at the date of settlement.

B. Costs and fees

91. The applicant also sought reimbursement of the costs incurred and fees paid for his defence in Turkey and before the Convention institutions, which he estimated at FRF 142,000 in all.

92. In the Government's submission, the amounts claimed were excessive and unjustified.

93. The Delegate of the Commission proposed awarding FRF 30,000 for lawyers' fees and allowing reimbursement of the costs to the extent that they appeared justified.

94. On the basis of its case-law and the information in its possession, the Court decides on an equitable basis to award Mr Zana the sum of FRF 30,000 to be converted into Turkish liras at the rate applicable at the date of settlement, less the sum of FRF 20,980 received from the Council of Europe in legal aid.

C. Default interest

95. The Court deems it appropriate to adopt the statutory rate applicable in France at the date of adoption of the present judgment, which is 3.87% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* by eighteen votes to two the objection to jurisdiction *ratione temporis* as regards the complaint under Article 10 of the Convention;
2. *Dismisses* unanimously the objection of failure to exhaust domestic remedies as regards the complaint under Article 10 of the Convention;

3. *Holds* by twelve votes to eight that there has not been a breach of Article 10 of the Convention;
4. *Dismisses* unanimously the objection of failure to exhaust domestic remedies as regards the complaints under Article 6 of the Convention;
5. *Holds* by seventeen votes to three that there has been a breach of Article 6 §§ 1 and 3 (c) of the Convention on account of the applicant's absence from his trial;
6. *Holds* by nineteen votes to one that there has been a breach of Article 6 § 1 of the Convention on account of the length of the criminal proceedings;
7. *Holds* by eighteen votes to two that the respondent State is to pay the applicant, within three months, 40,000 (forty thousand) French francs in respect of non-pecuniary damage, to be converted into Turkish liras at the rate applicable at the date of settlement;
8. *Holds* by nineteen votes to one that the respondent State is to pay the applicant, within three months, 30,000 (thirty thousand) French francs, less 20,980 (twenty thousand nine hundred and eighty) French francs, already received in legal aid, for costs and lawyers' fees, to be converted into Turkish liras at the rate applicable at the date of settlement;
9. *Holds* by nineteen votes to one that simple interest at an annual rate of 3.87% shall be payable on those sums from the expiry of the above-mentioned three months until settlement;
10. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 November 1997.

For the President

Signed: Rudolf BERNHARDT
Vice-President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Mr Matscher, joined by Mr Gölcüklü;
(b) partly dissenting opinion of Mr Lopes Rocha;
(c) partly dissenting opinion of Mr van Dijk, joined by Mrs Palm, Mr Loizou, Mr Mifsud Bonnici, Mr Jambrek, Mr Kūris and Mr Levits;
(d) dissenting opinion of Mr Thór Vilhjálmsson;
(e) dissenting opinion of Mr Gölcüklü.

Initialled: R. B.
Initialled: H. P.

PARTLY DISSENTING OPINION OF JUDGE MATSCHER, JOINED BY JUDGE GÖLCÜKLÜ

(*Translation*)

In my view, the wording of the relevant part of Turkey's declaration of 22 January 1990 under Article 46 of the Convention which says:

> "This Declaration … extends to matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to the date of deposit of the present Declaration."

is clear and its interpretation should not give rise to controversy. According to all the generally recognised rules of interpretation, the meaning of the text can only be the one given it by the respondent State's Government.

I accept that this reservation *ratione temporis* is somewhat unusual. It might also be asked whether it is to be regarded as valid, in view of its broad, general nature, but it cannot be denied that the text in itself is clear.

In the instant case the fact to which the text refers was the statement made by the applicant in August 1987, a few days before court proceedings were brought against him, on 30 August 1987. That being so, I consider it artificial and, accordingly, unsustainable to state (see paragraph 42 of the judgment) that "the principal fact" lay in the Diyarbakır National Security Court's judgment of 26 March 1991.

It follows that the complaints under Article 6 §§ 1 and 3 (c) (fair trial) and Article 10 fall outside the Court's jurisdiction *ratione temporis*.

PARTLY DISSENTING OPINION OF JUDGE LOPES ROCHA

(*Translation*)

I agree with all the conclusions of the majority of the Court, except for the finding of a breach of Article 6 §§ 1 and 3 (c) of the Convention. Primarily for reasons of consistency.

The Court holds, very properly, that there has been no breach of Article 10 of the Convention. In order to reach that conclusion the Court relied on a whole series of reasons, in particular ones relating to the content of Mr Zana's statement to the journalists from the daily newspaper *Cumhuriyet*, pointing out that this statement had a special significance in the circumstances of the case, as the applicant must have realised, and that the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time.

The Court also considers that the penalty imposed on the applicant could reasonably regarded as answering a "pressing social need" and that the reasons adduced by the national authorities are "relevant and sufficient", especially as the applicant served only one-fifth of his sentence in prison.

Lastly, the Court, having regard to all these factors and to the margin of appreciation which national authorities have in such a case, considers that the interference in issue was proportionate to the legitimate aims pursued.

That said, I have difficulty in understanding why the Court has ruled that there has been a breach of Article 6 § 3 (c) of the Convention on the basis of Mr Zana's absence from the hearing of the Diyarbakır National Security Court, at which he could have said what his intentions had been when he had made his statement and in what circumstances the interview had taken place and summoned journalists as witnesses.

Logically, therefore, the Court should have taken the view that the applicant's "intentions" and the "evidence" of the journalists were indispensable for a just decision from the point of view of analysing the issue of a possible violation of Article 10 of the Convention.

The Court has decided, however, that in the circumstances of the case the content alone of the statement is sufficient to justify the interference in the light of paragraph 2 of Article 10.

Furthermore, there is nothing to show that it was impossible for the applicant to explain, at his hearing before the Aydın Assize Court, which is a judicial body, the true intentions underlying his statement to the journalists and to indicate those journalists as witnesses for the defence.

Besides, looking at the *whole* of the proceedings, before the various courts, I am not persuaded that he was deprived of the opportunity of defending himself in person.

The fact that the Security Court asked for him to be "examined" by the Aydın Assize Court, acting under delegated powers in accordance with Article 226 § 4 of the Code of Criminal Procedure, does not seem to me a decisive argument for concluding that there was no right to a fair trial within the meaning of Article 6 of the Convention.

As to a *tribunal* belonging to the Turkish court system, I do not see that the applicant was deprived of the right of everyone charged with a criminal offence to be tried by an independent and impartial tribunal established by law, before which he could defend himself in person, and to indicate defence witnesses and also seek to have them called before the National Security Court.

For these reasons I consider that there are no grounds for finding that there has been a breach of Article 6 §§ 1 and 3 (c) of the Convention.

PARTLY DISSENTING OPINION OF JUDGE VAN DIJK, JOINED BY JUDGES PALM, LOIZOU, MIFSUD BONNICI, JAMBREK, KŪRIS AND LEVITS

I fully endorse the reasoning and conclusions of the majority concerning the jurisdiction of the Court *ratione temporis* and concerning the Government's being estopped from raising the objection of non-exhaustion of domestic remedies. I am equally in agreement with the majority that Article 6 of the Convention has been violated in this case on account both of the applicant's absence from his trial and of the length of the criminal proceedings. However, I do not find it possible to join the majority in concluding that there has not been a breach of Article 10 of the Convention.

In the judgment, the majority summarise the three fundamental principles which the Court has applied so far when determining whether interferences with freedom of expression were necessary in a democratic society (see paragraph 51 of the judgment). In my opinion, however, there are no solid grounds for concluding, as the majority do after applying those principles to the instant case, that here the interference was necessary, and in particular was proportionate to the aim of maintaining national security and public safety.

Even if one accepts – and in view of the circumstances prevailing in south-east Turkey at the relevant time I am prepared to do so – that the maintenance of national security and public safety constituted a legitimate aim for the purpose of taking measures in respect of the statement made by the applicant, his conviction and twelve-month prison sentence for making that statement cannot, in my opinion, be held to be proportionate to those aims, considering the content of the statement. If the Government were of the opinion that the statement constituted a threat to national security and public safety, they could have taken more effective and less intrusive measures to prevent or restrict such harm. The fact that the applicant had to serve only one-fifth of his sentence in prison does not suffice to convert me to a different view, since I would also find a sentence of two months' imprisonment disproportionate in the circumstances of the case.

I base my opinion mainly on the following considerations, which are largely to be found in the judgment also:

(i) Freedom of expression constitutes one of the essential foundations of a democratic society (see paragraph 51 of the judgment). Although relying on the situation in south-east Turkey at the moment when the applicant made his

statement, the Government did not claim that the statement was not made in a democratic society and that it deserved less protection on that account.

(ii) Article 10 also applies to information or ideas that offend, shock or disturb (see paragraph 51 of the judgment). The mere fact that in his statement the applicant indicated support for a political organisation whose aims and means the Government reject and combat cannot, therefore, be a sufficient reason for prosecuting and sentencing him.

(iii) In assessing whether the interference was necessary, the Court must take into consideration the content of the remarks held against the applicant and the context in which he made them (see paragraph 51 of the judgment). In his statement the applicant expresses support for the PKK but at the same time dissociates himself to some extent from the violence used by the PKK. According to the applicant, he was misinterpreted by the Government and had in reality told the journalists that he was opposed to violence. He claimed that, as an activist in the Kurdish cause since the 1960s, he had always spoken out against violence and referred to having been imprisoned for belonging to the "Path of Freedom" organisation, which had always advocated non-violent action (see paragraph 52 of the judgment). This claim by the applicant as to the content of his statement and the personal background against which it had to be interpreted, was not dealt with by the Government or discussed by the majority in the judgment.

(iv) I have to grant the majority that the applicant's statement as recorded in *Cumhuriyet* is partly contradictory and ambiguous (see paragraph 58 of the judgment). However – and this is my main point of disagreement with the majority – the Court should have taken into consideration that the Turkish court which ultimately examined the charges against the applicant and convicted and sentenced him did not offer him any opportunity to explain what he had actually said and had meant to say and against what background the statement had to be interpreted. Indeed, when discussing the alleged violation of Article 6 §§ 1 and 3, the Court makes the following observation: "If the applicant had been present at the hearing, he would have had an opportunity, in particular, to say what his intention had been when he made his statement and in what circumstances the interview had taken place, to summon journalists as witnesses or to seek production of the recording" (see paragraph 71 of the judgment). If the Court deems the fact that this opportunity was withheld from the applicant relevant to its examination under Article 6, why did it not also take that fact into consideration when looking at the content and context of the statement in order to determine the proportionality of the interference?

(v) Finally, the statement having been made by "the former mayor of Diyarbakır, the most important city in south-east Turkey" (see paragraph 60 of the judgment), the Court should, in order to determine the possible effect

the statement might have had in the "already explosive situation in that region" (ibid.), have expressly indicated what weight it attached to the fact that the interview was with a *former* mayor who, moreover, was in prison at the relevant time.

These considerations lead me to the conclusion that the interference with the applicant's freedom of expression was not proportionate and amounted to a breach of Article 10. I therefore do not find it possible to concur with the majority in this part of the judgment.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

In August 1987 the newspaper *Cumhuriyet*, which is published in Istanbul, printed the following remarks made by the applicant to journalists who visited him in prison in Diyarbakır in south-east Turkey:

> "I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake …"

The plain meaning of these words is that the applicant has the same opinion as the PKK on the question of the status of the territory where Kurds live in Turkey but he disapproves of the methods used by this organisation. I have to believe that this public statement is in breach of Turkish law. However, I do not see how these words, published in a newspaper in Istanbul, can be taken as a danger to national security or public safety or territorial integrity, let alone that they endorse criminal activities.

Accordingly, I am of the opinion that the restrictions and the penalty imposed did not pursue a legitimate aim and were not necessary in a democratic society.

I have therefore found a violation of Article 10 of the Convention.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Translation*)

As I have joined Mr Matscher's dissenting opinion concerning the validity of the limitation of the Court's jurisdiction *ratione temporis*, it is unnecessary for me to consider the case under Article 6 §§ 1 and 3 (c), but I would like all the same to emphasise certain relevant facts.

Thus, if the way the case proceeded is looked at, it can be seen that at the hearing before the Diyarbakır Military Court on 15 December 1987 the applicant refused to put forward a defence.

At the hearing on 1 March 1988 the applicant did not defend himself.

At the hearing on 2 November 1988 the applicant did not appear, because he was on hunger strike.

At the hearing on 7 December 1988 he appeared but refused to address the court.

At the hearing at Aydın Assize Court on 20 June 1990 the applicant refused to speak Turkish and insisted on addressing the court in his mother tongue, Kurdish (see paragraphs 18 et seq. of the judgment).

In those circumstances, can it be argued that the applicant was deprived of the opportunity of defending himself in person?

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

THIRD SECTION

CASE OF A.D.T. v. THE UNITED KINGDOM

(Application no. 35765/97)

JUDGMENT

STRASBOURG

31 July 2000

FINAL

31/10/2000

In the case of A.D.T. v. the United Kingdom,

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

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Mr P. KŪRIS,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 30 November 1999 and 11 July 2000,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 35765/97) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr A.D.T. ("the applicant"), on 25 March 1997. The applicant asked the Court not to reveal his identity.

2. On 23 October 1997 the Commission (First Chamber) decided to give notice of the application to the United Kingdom Government ("the Government") and invited them to submit observations on its admissibility and merits.

3. The Government submitted their observations on 20 February 1998. The applicant replied on 29 May 1998.

4. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998, and in accordance with the provisions of Article 5 § 2 thereof, the case falls to be examined by the Court.

5. In accordance with Rule 52 § 1 of the Rules of Court, the President of the Court, Mr L. Wildhaber, assigned the case to the Third Section.

6. On 16 March 1999 the Court declared the application admissible[1] and decided to invite the parties to a hearing on the merits.

7. The hearing took place in public in the Human Rights Building, Strasbourg, on 30 November 1999.

1 *Note by the Registry*. The Court's decision is obtainable from the Registry.

There appeared before the Court:

(a) *for the Government*
Mrs S. LANGRISH, Foreign and Commonwealth Office, *Agent*,
Mr N. GARNHAM, *Counsel*,
Ms S. CHAKRABARTI,
Ms D. GRICE, *Advisers*;

(b) *for the applicant*
Mr B. EMMERSON, *Counsel*,
Mr F. WHITEHEAD, *Solicitor*,
Ms A. MASON,
Ms A. HUDSON, *Advisers*.

The Court heard addresses by Mr Emmerson and Mr Garnham.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a practising homosexual. On 1 April 1996, at approximately 7.50 p.m., police officers conducted a search under warrant of the applicant's home. As a result of the search, various items were seized including photographs and a list of videotapes. The applicant was arrested at about 8.23 p.m. and taken to the local police station. A further search of the applicant's house was conducted the following day and further items, including videotapes, were seized.

9. The applicant was interviewed by the police on 2 April 1996. During the interview the applicant admitted that some of the videotapes found would contain footage of the applicant and up to four other adult men, engaging in acts, mainly of oral sex, in the applicant's home. On 2 April 1996 the applicant was charged with gross indecency between men contrary to section 13 of the Sexual Offences Act 1956 (“gross indecency”). The charge related to the commission of the sexual acts depicted in one of the videotapes, which consisted of oral sex and mutual masturbation. It did not relate to the making or distribution of the tapes themselves.

10. On 30 October 1996 the applicant appeared before a magistrates' court. The principal evidence adduced by the Crown consisted of a single specimen video containing footage of the applicant and up to four other men engaging in acts of oral sex and mutual masturbation. The acts which formed the basis of the charge involved consenting adult men, took place in

the applicant's home and were not visible to anyone other than the participants. There was no element of sado-masochism or physical harm involved in the activities depicted on the videotape. The applicant was convicted of the offence of gross indecency. On 20 November 1996 the applicant was sentenced and conditionally discharged for two years. An order was made for the confiscation and destruction of the seized material.

11. The applicant was subsequently advised by counsel that an appeal against conviction would enjoy no prospect of success since the provisions of the relevant legislation were clear and mandatory. The applicant did not appeal against the conviction.

II. RELEVANT DOMESTIC LAW AND PRACTICE

12. Section 13 of the Sexual Offences Act 1956 provides:

> "It is an offence for a man to commit an act of gross indecency with another man, whether in public or private, or to be a party to the commission by a man of an act of gross indecency with another man, or to procure the commission by a man of an act of gross indecency with another man."

13. By section 37 of, and paragraph 16 of the Second Schedule to, the Sexual Offences Act 1956, the offence of gross indecency between men is punishable on indictment by up to five years' imprisonment if committed by a man of, or over the age of, 21 with a man under the age of 18, and otherwise by a maximum of two years' imprisonment.

14. If, as in the present case, the offence is tried summarily by magistrates, the maximum penalty is six months' imprisonment and/or a fine of 5,000 pounds sterling (Magistrates' Courts Act 1980, sections 17 and 32 and Schedule 1, paragraph 23(b)).

15. There is no statutory definition of "gross indecency". However, in its 1957 report, the Committee on Homosexual Offences and Prostitution (Wolfenden Committee) noted:

> "104. 'Gross indecency' is not defined by statute. It appears, however, to cover any act involving sexual indecency between two male persons. If two male persons acting in concert behave in an indecent manner the offence is committed even though there has been no actual physical contact (*R. v. Hunt* 34 Cr App R 135).
>
> 105. From the police reports we have seen and the other evidence we have received it appears that the offence usually takes one of three forms; either there is mutual masturbation; or there is some form of intercrural contact; or oral-genital contact (with or without emission) takes place. Occasionally the offence may take a more recondite form; techniques in heterosexual relations vary considerably, and the same is true of homosexual relations."

16. The Sexual Offences Act 1967 introduced a qualification to the legislation regulating male homosexual conduct. It provided that homosexual acts in private between consenting adult men were no longer an offence. Homosexual acts are defined as buggery with another man or gross

indecency between men (section 1(7)). By virtue of section 1(2), an act is not done in private if, *inter alia*, more than two persons take part or are present.

17. Section 1 of the Sexual Offences Act 1967, in its relevant part, provides:

> "(1) Notwithstanding any statutory or common law provision, but subject to the provisos of the next following section, a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of eighteen years.
>
> (2) An act which would otherwise be treated for the purposes of this Act as being done in private shall not be so treated if done –
>
> (a) when more than two persons take part or are present; or
>
> (b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise. ...
>
> (7) For the purposes of this section a man shall be treated as doing a homosexual act if, and only if, he commits buggery with another man or commits an act of gross indecency with another man or is a party to the commission by a man of such an act."

18. There are no provisions under domestic law for the regulation of private homosexual acts between consenting adult women.

19. Likewise, there are no provisions under domestic legislation affecting heterosexual behaviour which correspond to section 13 of the Sexual Offences Act 1956. Thus, acts of oral sex and mutual masturbation between more than two consenting adult heterosexuals (as long as there are no homosexual acts between any two males) do not constitute an offence.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

20. The applicant complained that his conviction for gross indecency constituted a violation of his right to respect for his private life, protected by Article 8 of the Convention. Article 8 reads, in its relevant parts, as follows:

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

A. Whether there was an interference

21. By reference to the case of Laskey, Jaggard and Brown v. the United Kingdom (judgment of 19 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 131, § 36), the Government contend that there was no interference with the applicant's right to respect for his private life as the sexual activity in the present case fell outside the scope of "private life" within the meaning of Article 8 § 1 of the Convention. They point, firstly, to the number of individuals present and, secondly, to the fact that the sexual activities were recorded on videotape.

22. The applicant sees a dual interference with his right to respect for his private life. Firstly, he refers to the very existence of a criminal law which prohibits homosexual activity in a private place where it involves more than two participants and, secondly, he underlines that that law was applied in the criminal prosecution which was brought against him. On the facts, the applicant notes that there was neither organised activity nor any risk of injury in the present case and adds that, had it not been for the prosecution, the videotape would not have been distributed in any real sense whatever.

23. The Court recalls that the mere existence of legislation prohibiting male homosexual conduct in private may continuously and directly affect a person's private life (see, as the most recent Court case-law, the Modinos v. Cyprus judgment of 22 April 1993, Series A no. 259, p. 11, § 24).

24. The present applicant was aware that his conduct was in breach of the criminal law, and he was thus continuously and directly affected by the legislation. In addition, he was directly affected in that a criminal prosecution was brought against him which resulted in his conviction for a breach of section 13 of the Sexual Offences Act 1956.

25. As to the Government's comments in connection with the scope of "private life" within the meaning of Article 8 of the Convention, the Court recalls that there was no dispute between the parties in the case of Laskey, Jaggard and Brown as to the existence of an interference (loc. cit., p. 131, § 36). In that case, the Court's comments did not go beyond raising a question "whether the sexual activities of the applicants fell entirely within the notion of 'private life' ". The sole element in the present case which could give rise to any doubt about whether the applicants' private lives were involved is the video-recording of the activities. No evidence has been put before the Court to indicate that there was any actual likelihood of the contents of the tapes being rendered public, deliberately or inadvertently. In particular, the applicant's conviction related not to any offence involving the making or distribution of the tapes, but solely to the acts themselves. The Court finds it most unlikely that the applicant, who had gone to some lengths not to reveal his sexual orientation, and who has repeated his desire for anonymity before the Court, would knowingly be involved in any such publication.

26. The Court thus considers that the applicant has been the victim of an interference with his right to respect for his private life both as regards the existence of legislation prohibiting consensual sexual acts between more than two men in private and as regards the conviction for gross indecency.

B. Whether the interference was justified

27. The Government consider that any interference with the applicant's right to respect for his private life was in accordance with the law and necessary for the protection of morals or the rights and freedoms of others. They underline that a margin of appreciation is left to national authorities in assessing whether a pressing social need exists, and claim that the margin must be particularly broad where the protection of morals is at issue: the mere fact that intimate aspects of private life generally call for a narrower margin of appreciation cannot prevent the margin in the present case from being a significant one. They draw a distinction between intimate, private and therefore acceptable homosexual activity (between two men), and group, potentially public and therefore unacceptable homosexual activity (between more than two men). At the hearing before the Court, the Government accepted, in the light of a review of sex offences which is taking place in the United Kingdom, that the precise extent of permissible legislative interference with group activities is difficult to define, although they maintained that in the present case the prosecution was compatible with the Convention.

28. The applicant underlines that he was not prosecuted for recording his sexual activities on videotape or for distributing the tapes, but was prosecuted under a law which prohibits the sexual acts themselves, even though they were carried out in the privacy of the bedroom of his own home. The offence was committed not because it was videotaped, but because more than two people were participating in the sexual activities. The applicant repeats that there was no evidence to suggest that there was any risk of the tapes finding their way into the public domain.

29. An interference with the exercise of an Article 8 right will not be compatible with Article 8 § 2 unless it is “in accordance with the law”, has an aim or aims that is or are legitimate under that paragraph and is “necessary in a democratic society” for the aforesaid aim or aims (see the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, p. 19, § 43).

30. The applicant does not claim that the legislation in the present case was not “in accordance with the law”, or that its aims were not legitimate. The Court finds that the interference so far as it relates to the legislation was in accordance with the law, in that Section 13 of the 1956 Act and section 1(2) of the 1967 Act together prescribed the act which was prohibited and the relevant penalty, and that its aims, of protecting morals and protecting the rights and freedoms of others, were legitimate (see, in this context, the

Dudgeon judgment cited above, p. 20, § 47). The applicant does, however, submit that his prosecution for gross indecency pursued no legitimate aim, as the only aim put forward – the risk that the video-recording might be witnessed by the public at large – had nothing to do with the offence of gross indecency, which was committed regardless of the potential audience for the video. In the light of its conclusions below on the question of the proportionality of the interference with any aims pursued, the Court does not consider it necessary to determine this particular point.

31. The cardinal issue in the case is whether the existence of the legislation in question, and its application in the prosecution and conviction of the applicant, were "necessary in a democratic society" for these aims.

32. The Court recalls that in the Dudgeon case, in which it was considering the existence of legislation, it found no "pressing social need" for the criminalisation of homosexual acts between two consenting male adults over the age of 21, and that such justifications as there were for retaining the law were outweighed by the

> "detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved". (loc. cit., pp. 23-24, § 60)

33. Those principles were adopted and repeated in the subsequent cases of Norris v. Ireland (judgment of 26 October 1988, Series A no. 142, pp. 20-21, § 46), Modinos (judgment cited above, p. 12, § 25) and Marangos v. Cyprus (application no. 31106/96, Commission's report of 3 December 1997, unpublished).

34. There are differences between those decided cases and the present application. The principal point of distinction is that in the present case the sexual activities involved more than two men, and that the applicant was convicted for gross indecency as more than two men had been present.

35. The Government contend that where groups of men gather in order to engage in sexual activities, the possibility of such activities being publicised is inevitable, and that this applies all the more where the activities are videotaped. They claim that because of the less intimate nature of group activities, the margin of appreciation afforded to the national authorities is a significant one. The applicant underlines that the offence is committed whenever more than two people are present, and does not depend on the involvement of a large number of people.

36. It is not the Court's role to determine whether legislation complies with the Convention in the abstract. The Court will therefore consider the compatibility of the legislation in the present case with the Convention in the light of the circumstances of the case, that is, that the applicant wished to be

able to engage, in private, in non-violent sexual activities with up to four other men.

37. The Court can agree with the Government that, at some point, sexual activities can be carried out in such a manner that State interference may be justified, either as not amounting to an interference with the right to respect for private life, or as being justified for the protection, for example, of health or morals. The facts of the present case, however, do not indicate any such circumstances. The applicant was involved in sexual activities with a restricted number of friends in circumstances in which it was most unlikely that others would become aware of what was going on. It is true that the activities were recorded on videotape, but the Court notes that the applicant was prosecuted for the activities themselves, and not for the recording, or for any risk of it entering the public domain. The activities were therefore genuinely "private", and the approach of the Court must be to adopt the same narrow margin of appreciation as it found applicable in other cases involving intimate aspects of private life (as, for example, in the Dudgeon judgment cited above, p. 21, § 52).

38. Given the narrow margin of appreciation afforded to the national authorities in the case, the absence of any public-health considerations and the purely private nature of the behaviour in the present case, the Court finds that the reasons submitted for the maintenance in force of legislation criminalising homosexual acts between men in private, and *a fortiori* the prosecution and conviction in the present case, are not sufficient to justify the legislation and the prosecution.

39. There has therefore been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

40. The applicant alleged a violation of Article 14 of the Convention, taken together with Article 8, on the ground that no provision of domestic law regulated sexual acts between consenting adult heterosexuals or between lesbians. Article 14 of the Convention provides as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

41. The Court recalls that in its Dudgeon judgment cited above, having found a violation of Article 8 of the Convention, it did not deem it necessary to examine the case under Article 14 as well (p. 26, § 70). It reaches the same conclusion in the present case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

43. The applicant claimed a total of 10,929.05 pounds sterling (GBP) for pecuniary damage in respect of the costs of defending the criminal proceedings against him (GBP 1,887.05), travel expenses (GBP 21), prosecution costs (GBP 250) and items confiscated and destroyed at the end of the criminal proceedings (GBP 8,771). He also claimed GBP 10,000 in respect of non-pecuniary damage.

44. The Government were "content for just satisfaction to be set in accordance with the applicant's proposals".

45. The Court considers the sums claimed by the applicant to be reasonable and in accordance with the principles laid down by its own case-law under Article 41 of the Convention. It awards the applicant the sum of GBP 20,929.05.

B. Costs and expenses

46. The applicant also claimed a total of GBP 13,771.28 by way of costs and expenses, including value-added tax. Save for arithmetical comments (taken into account in that figure) the Government made no observations on the total.

47. The Court awards the applicant the sum of GBP 13,771.28.

C. Default interest

According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

2. *Holds* that it is not necessary to examine the case under Article 14 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in respect of damage, GBP 20,929.05 (twenty thousand nine hundred and twenty-nine pounds sterling five pence) and, for costs and expenses, GBP 13,771.28 (thirteen thousand seven hundred and seventy-one pounds sterling twenty-eight pence),
   (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement.

Done in English, and notified in writing on 31 July 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

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

GRAND CHAMBER

CASE OF BOSPHORUS HAVA YOLLARI TURİZM VE TİCARET ANONİM ŞİRKETİ v. IRELAND

(Application no. 45036/98)

JUDGMENT

STRASBOURG

30 June 2005

This judgment is final but it may be subject to editorial revision.

In the case of Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr C.L. ROZAKIS, *President*
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr I. CABRAL BARRETO,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr J. HEDIGAN,
Mr M. PELLONPÄÄ,
Mr K. TRAJA,
Mrs S. BOTOUCHAROVA,
Mr V. ZAGREBELSKY,
Mr L. GARLICKI,
Mrs A. GYULUMYAN, *judges*,
and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 29 September 2004 and 11 May 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 45036/98) against Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a company incorporated in Turkey, Bosphorus Hava Yolları Turizm ("the applicant"), on 25 March 1997.

2. The applicant was represented by Mr J. Doyle, a lawyer practising in Dublin, instructed by Mr M.I. Özbay, the applicant's managing director and majority shareholder. The Irish Government ("the Government") were represented by a Co-Agent, Ms D. McQuade, and by two successive Agents, Ms. P. O'Brien and Mr J. Kingston, all of the Department of Foreign Affairs.

3. The applicant alleged that the impounding of its leased aircraft by the respondent State breached its rights under Article 1 of Protocol No. 1.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. Following the communication of the case to the respondent, the Turkish Government confirmed that it did not intend to make submissions in the case (Rule 44 of the Rules of Court).

6. On 13 September 2001 the application was, following a hearing on the admissibility and merits, declared admissible by a Chamber composed of the following judges: Mr G. Ress, Mr I. Cabral Barreto, Mr V. Butkevych, Mrs N. Vajić, Mr J. Hedigan, Mr M. Pellonpää and Mrs S. Boutoucharova, and also of Mr V. Berger, Section Registrar.

7. On 30 January 2004 that Chamber relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected (Article 30 of the Convention and Rule 72 of the Rules).

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court.

9. The applicant and the Government each filed written observations on the merits, to which each responded at the oral hearing (Rule 44 § 5 of the Rules of Court). Written submissions were also received from the Governments of Italy and the United Kingdom and from the European Commission and the "*Institut de Formation en Droits de L'Homme Du Barreau de Paris*", which third parties were given leave by the President to intervene (Article 36 § 2 of the Convention and Rule 44 § 2). The European Commission also obtained leave to participate in the oral hearing.

10. The hearing took place in public in the Human Rights Building, Strasbourg, on 29 September 2004 (Rule 59 § 3). There appeared before the Court:

(a) *for the respondent Government*

Mr	J. KINGSTON,	*Agent*,
Ms	D. MCQUADE,	Co-*Agent*,
Mr	G. HOGAN. S.C.,	
Mr	R. O'HANLON. S.C.,	*Counsel*,
Mr	P. MOONEY,	Adviser;

(b) *for the applicant*

Mr	J. O'REILLY, S.C.,	
Mr	T. EICKE, B.L.,	*Counsel*,
Mr	J. DOYLE,	*Solicitor*;

Mr M.I. Özbay, managing director of the applicant company, also attended.

(c) *for the European Commission*
Mr G. MARENCO,
Ms S. FRIES,
Mr C. LADENBURGER, *Agents*.

The Court heard addresses by Messrs O'Reilly, Hogan and Marenco.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The lease between JAT and the applicant

11. The applicant is an airline charter company incorporated in Turkey in March 1992.

12. By agreement dated 17 April 1992, the applicant leased two Boeing 737-300 aircraft from Yugoslav Airlines ("JAT"), the national airline of the former Yugoslavia. These were, at all material times, the only two aircraft operated by the applicant. The lease agreement was a "dry lease without crew" for a period of 48 months from the dates of delivery of the two aircraft (22 April and 6 May 1992). According to the terms of the lease, the crew were to be the applicant's employees and the applicant was to control the destination of the aircraft. While ownership of the aircraft stayed with JAT, the applicant could enter the aircraft on the Turkish Civil Aviation Register once it noted JAT's ownership.

13. The applicant paid a lump sum of US$1,000,000 per aircraft on delivery and the monthly rental was US$150,000 per aircraft. On 11 and 29 May 1992 the two aircraft were registered in Turkey as foreseen by the lease. On 14 May 1992 the applicant obtained its airline licence.

B. Prior to the aircraft's arrival in Ireland

14. From 1991 onwards the United Nations ("UN") adopted, and the European Community ("EC") implemented, a series of sanctions against the former Federal Republic of Yugoslavia (Serbia and Montenegro) - "the FRY" - designed to address the armed conflict and human rights violations taking place in the former Yugoslavia.

15. In January 1993 the applicant began discussions with TEAM Aer Lingus ("TEAM") with a view to having maintenance work ("C-Check") done on one of its leased aircraft. TEAM was a limited liability company the principal business of which was aircraft maintenance. It was a subsidiary of two Irish airline companies in turn wholly owned by the Irish State. Memoranda of TEAM dated 8 and 18 January 1993 showed that TEAM considered, on the basis of information obtained, that the applicant was not in breach of the sanctions regime, TEAM noting that the applicant was doing business with many companies including Boeing, SABENA and SNECMA (a French aero-engine company). By letter of 2 March 1993 TEAM requested the opinion of the Department of Transport, Energy and Communications ("the Department of Transport") and included copies of its memoranda of January 1993. On 3 March 1993 the Department of Transport forwarded the request to the Department of Foreign Affairs.

16. On 17 April 1993 the Security Council of the UN adopted a Resolution - UNSC Resolution 820 (1993). It provided that States should impound, *inter alia*, all aircraft in their territories "in which a majority or controlling interest is held by a person or undertaking in or operating" from the FRY. That Resolution was implemented by EC Regulation 990/93 which entered into force on 28 April 1993 (paragraph 65 below).

17. On 5 May 1993 the Department of Foreign Affairs decided to refer the matter to the UN Sanctions Committee.

18. By letter of 6 May 1993 the Turkish Foreign Ministry indicated to the Turkish Ministry of Transport that it considered that the leased aircraft were not in breach of the sanctions regime and requested flight clearance pending the Sanctions Committee's decision. On 12 May 1993 Turkey sought the opinion of the Sanctions Committee.

C. The impounding of the aircraft

19. On 17 May 1993, one of the applicant's leased aircraft arrived in Dublin. A contract with TEAM was signed for the completion of C-Check.

20. On 18 May 1993 the Irish Permanent Mission to the UN indicated by facsimile to the Department of Transport that informal advice from the Secretary to the Sanctions Committee was to the effect that there was no problem with TEAM carrying out the work but an "informal opinion" from the "legal people in the secretariat" had been requested. On 19 May 1993 the Department of Transport explained this to TEAM by telephone.

21. On 21 May 1993 the Irish Permanent Mission confirmed to the Department of Foreign Affairs that the "informal legal advice" obtained from the "UN legal office" was to the effect that TEAM should seek the "guidance and approval" of the Sanctions Committee before signing any contract with the applicant. It was recommended that TEAM submit an application to the Committee with relevant transaction details: if the

applicant was to pay for the maintenance, it was unlikely that the Committee would have a problem with the transaction. On 24 May 1993 the Department of Transport received a copy of that facsimile, sent a copy to TEAM and TEAM was also informed by telephone. By letter dated 26 May 1993 the Irish Permanent Mission provided the Sanctions Committee with the required details and requested the latter's "guidance and approval".

22. On 21 May 1993 the Sanctions Committee disagreed with the Turkish Government's view that the aircraft could continue to operate, recalling UNSC Resolution 820 (1993). The Turkish Permanent Mission to the UN was informed of that opinion by letter dated 28 May 1993.

23. At noon on 28 May 1993 the applicant was informed by TEAM that C-Check was completed and that, on payment of US$250,000, the aircraft would be released. Later that day payment was received and the aircraft was released. While awaiting air traffic control clearance to take off, the aircraft was stopped. The report of the duty manager of Dublin airport noted that TEAM informed him that it had been advised by the Department of Transport that it would be "in breach of sanctions" for the aircraft to leave. It was also recorded that the aircraft had been scheduled to depart during that shift and that the airport police had been advised. TEAM informed the applicant accordingly. The Department of Transport later confirmed by letter (of 16 June 1993) its instructions of 28 May 1993:

> "... [TEAM] were advised by this Department that, in the circumstances, TEAM should not release the [aircraft] ... . Furthermore it was pointed out that if TEAM were to release the aircraft TEAM itself might be in serious breach of the UN Resolutions (as implemented by Council regulation (EEC) No. 990/93) ... and the matter was under investigation. At the same time directions were given to Air Traffic Control, whose clearance is necessary for departure of aircraft, not to clear this aircraft for take-off"

24. By letters dated 29 May 1993 to the applicant, TEAM noted that the opinion of the Sanctions Committee was awaited and that TEAM had been advised by the authorities that release of the aircraft before receipt of that opinion would be a violation of the UN sanctions regime.

D. Prior to judicial review proceedings

25. By memorandum dated 29 May 1993 the Turkish Embassy in Dublin requested, given its State's commitment to the sanctions regime, the release of the detained aircraft to Turkey.

26. By letter dated 2 June 1993 the Irish Permanent Mission informed the Sanctions Committee that the maintenance work had, in fact, already been carried out, that the Government regretted their failure to abide by the procedure they had initiated and that the matter had been taken up with TEAM. The aircraft was being detained pending the Committee's decision.

27. On 3 June 1993 the Irish Government learned of the response of the Sanctions Committee to the Turkish Government and that the Chairman of the Committee had indicated that the Committee would likely favour impounding. The Committee would not meet until 8 June 1993.

28. On 4 June 1993 the European Communities (Prohibition of Trade with the Federal Republic of Yugoslavia (Serbia and Montenegro) Regulations 1993 (S.I. 144 of 1993) was adopted. By letter dated 8 June 1993 the Minister for Transport (Energy and Communications) informed Dublin airport managers that he had authorised the impounding, until further notice, of the aircraft pursuant to that statutory instrument.

29. Shortly thereafter the applicant's second aircraft was grounded in Istanbul although the parties disagreed as to precisely why.

30. The letter of 14 June 1993 of the Sanctions Committee informed the Irish Permanent mission of its findings at its meeting of 8 June 1993:

> "... the provision of any services to an aircraft owned by an undertaking in the [FRY], except those specifically authorised in advance by the Committee ..., would not be in conformity with the requirements of the relevant Security Council resolutions. The members of the Committee also recalled the provisions of paragraph 24 of [UNSC Resolution 820 (1993)] regarding such aircraft, under which the aircraft in question should have already been impounded by the Irish authorities. The Committee, therefore, would be extremely grateful for being apprised of any action on behalf of Your Excellency's Government to that effect."

By letter dated 18 June 1993 the Irish Permanent Mission informed the Sanctions Committee that the aircraft had been detained on 28 May 1993 and formally impounded on 8 June 1993.

31. In its letter of 16 June 1993 to the Department of Transport, the applicant challenged the impoundment arguing that the purpose of EC Regulation 990/93 was not to deal with bare legal ownership but rather with operational control. On 24 June 1993 the Department responded:

> "The Minister is advised that the intention and effect of the UN Resolution as implemented through [EC Regulation 990/93] is to impose sanctions by impounding the types of commercial asset mentioned in Article 8, including aircraft, in any case where a person or undertaking in or operating from the [FRY] has any ownership interest of the kind mentioned. As this view of the scope and effect of the original Resolution has been confirmed by the [Sanctions Committee], the Minister does not feel entitled to apply [EC Regulation 990/93] in a manner which would depart from that approach. ... the aircraft must remain impounded. ... the Minister appreciates the difficulty that [the applicant] finds itself in and would be anxious to find any solution that was available to him under [EC Regulation 990/93] which would permit the release of the aircraft."

32. By letter dated 5 July 1993 the Turkish Embassy in Dublin repeated its request for the release of the aircraft stating that the Turkish Government would ensure impoundment in accordance with sanctions. The Irish Government indicated to the Sanctions Committee, by letter of 6 July 1993, that they would be favourably disposed to grant that request. On 4 August

1993 the Sanctions Committee ruled that the aircraft had to remain in Ireland, since the relevant resolutions required the Irish State to withhold all services from the aircraft including services which would enable it to fly.

E. The first judicial review proceedings: the High Court

33. In November 1993 the applicant applied for leave to seek judicial review of the Minister's decision to impound the aircraft. Amended grounds were later lodged taking issue with TEAM's role in the impoundment. On 15 April 1994 the High Court struck out TEAM as a respondent in the proceedings, the applicant's dispute with TEAM being a private law matter.

34. On 15 June 1994 the applicant's managing director explained in evidence that rental payments due to JAT had been set off against the deposits initially paid to JAT and that future rental payments were to be paid into a blocked bank account supervised by the Turkish Central Bank.

35. On 21 June 1994 Mr Justice Murphy delivered the judgment of the High Court. The issue before him could**,** he believed**,** be simply described: was the Minister for Transport bound by Article 8 of EC Regulation 990/93 to impound the applicant's aircraft**?** He considered the Department of Transport's letter of 24 June 1993 to the applicant to be the most helpful explanation of the Minister's reasoning. He found that:

> "... it is common case that the transaction between JAT and [the applicant] was entirely *bona fide*. There is no question of JAT having any interest direct or indirect in [the applicant] or in the management, supervision or direction of the business of that company. ...
>
> It is, however, common case that [UNSC Resolutions] do not form part of Irish domestic law and, accordingly, would not of themselves justify the Minister in impounding the aircraft. The real significance of the [UNSC Resolutions], in so far as they relate to the present proceedings, is that [UNSC Resolution 820 (1993)] ... provided the genesis for Article 8 of [EC Regulation 990/93]. ..."

36. In interpreting EC Regulation 990/93, Mr Justice Murphy had regard to its purpose. He found the aircraft not to be one to which Article 8 applied as it was not an aircraft in which a majority or controlling interest was held by a person or undertaking in or operating from the former FRY and that the decision of the Minister to impound was therefore *ultra vires*. However, the aircraft was, at that stage, the subject of an injunction obtained (in March 1994) by a creditor of JAT (SNECMA) restraining it from leaving the country. That injunction was later discharged on 11 April 1995.

F. The second judicial review proceedings: the High Court

37. Having corresponded with the applicant indicating that the Minister for Transport was investigating a further impoundment based on Article 1.1(e) of EC Regulation 990/90, the applicant was informed by letter of 5 August 1994 from the Department of Transport as follows:

> "The Minister has now considered the continuing position of the aircraft in the light of the recent ruling of the High Court and the provisions of the Council Regulations referred to.
>
> Arising out of the Minister's consideration, I am now directed to inform you that the Minister has ... directed that the aircraft ... be detained pursuant to Article 9 of [EC Regulation 990/93] as an aircraft which is suspected of having violated the provisions of that Regulation and particularly Article 1.1(e) and [EC Regulation] 1432/92. The aircraft will remain detained pending completion of the Minister's investigation of the suspected violation as required under Article 9 and Article 10 of [EC] Regulation 990/93."

Although not noted in that letter, the Minister's concern related to the applicant's setting off of JAT's financial obligations (certain insurance, maintenance and other liabilities) under the lease against the rental monies already paid by it into the blocked bank account.

38. On 23 September 1994 UNSC Resolution 943 (1994) was adopted. It temporarily suspended the sanctions as peace negotiations had begun but it did not apply to aircraft already impounded. It was implemented by EC Regulation 2472/94 on 10 October 1994.

39. In March 1995 the applicant was given leave to apply for judicial review of the Minister's decision to re-impound the aircraft. By judgment of 22 January 1996 the High Court quashed the Minister's decision to re-detain the aircraft. It noted that almost all of the monies which had been paid into the blocked account by the applicant had by then been used up (with the consent of the holding bank in Turkey) in order to discharge JAT's liabilities under the lease. The crucial question before the High Court was the Minister's delay in invoking Article 9 of EC Regulation 990/93 given that the applicant was an "innocent" party suffering heavy daily losses. The High Court found that the Minister had failed in his duty to investigate and decide such matters within a reasonable period of time, to conduct the investigations in accordance with fair procedures and to have proper regard to the rights of the applicant.

40. On 7 February 1996 the Irish Government appealed to the Supreme Court and applied for a stay on the High Court's order. On 9 February 1996 the Supreme Court refused the Minister's stay application. The overriding consideration in deciding to grant the stay or not was to find a balance which did not deny justice to either party. Noting the significant delay of the Minister in invoking Article 1.1(e) and the potentially minor damage to the

State (monies owed for the maintenance and parking in Dublin airport) contrasted with the applicant's calamitous losses, the justice of the case was overwhelmingly in the latter's favour.

41. The aircraft was therefore free to leave. By letters dated 12 and 14 March 1996 the applicant, JAT and TEAM were informed that the Minister considered that he no longer had any legal responsibility for the aircraft.

G. The first judicial review proceedings: the European Court of Justice ("ECJ")

42. On 8 August 1994 the Minister for Transport lodged an appeal in the Supreme Court against the High Court judgment of 21 June 1994. He took issue with the High Court's interpretation of EC Regulation 990/93 and requested a preliminary reference to the ECJ (Article 177, now Article 234, of the Treaty Establishing the European Community - "EC Treaty").

43. By order dated 12 February 1995 the Supreme Court referred the following question to the ECJ and adjourned the proceedings before it:

> "Is Article 8 of [EC Regulation 990/93] to be construed as applying to an aircraft which is owned by an undertaking the majority or controlling interest in which is held by [the FRY] where such aircraft has been leased by the owner for a term of four years from the 22 April 1992 to an undertaking the majority or controlling interest in which is not held by a person or undertaking in or operating from the said [FRY]?"

44. The parties made submissions to the ECJ. The applicant noted that it was ironic that, following UNSC Resolution 943/1994, JAT aircraft could fly whereas its aircraft remained grounded.

45. On 30 April 1996 Advocate General Jacobs ("the AG") delivered his opinion. Given the majority interest of JAT in the aircraft, Article 8 of EC Regulation 990/93 applied to it. The AG disagreed with the Irish High Court, considering that neither the aims nor the text of the relevant UNSC Resolutions regime provided any reason to depart from what he considered to be the clear wording of Article 8 of EC Regulation 990/93.

46. As to the question of the respect shown in that Regulation for fundamental rights and proportionality, the AG pointed out that:

> "It is well established that respect for fundamental rights forms part of the general principles of Community law, and that in ensuring respect for such rights, the [ECJ] takes account of the constitutional traditions of the Member States and of international agreements, notably [the Convention], which has a special significance in that respect.
>
> Article F(2) of the Treaty on European Union ... gives Treaty expression to the [ECJ's] case-law. ... In relation to the EC Treaty, it confirms and consolidates the [ECJ's] case-law underlining the paramount importance of respect for fundamental rights.

> Respect for fundamental rights is thus a condition of the lawfulness of Community acts – in this case, the Regulation. Fundamental rights must also, of course, be respected by Member States when they implement Community measures. All Member States are in any event parties to the [Convention], even though it does not have the status of domestic law in all of them. Although the Community itself is not a party to the Convention, and cannot become a party without amendment both of the Convention and of the Treaty, and although the Convention may not be formally binding upon the Community, nevertheless for practical purposes the Convention can be regarded as part of Community law and can be invoked as such both in the [ECJ] and in national courts where Community law is in issue. That is so particularly where, as in this case, it is the implementation of Community law by Member States which is in issue. Community law cannot release Member States from their obligations under the Convention."

47. The AG noted that the applicant had invoked the right to peaceful enjoyment of property protected by the Convention and the right to pursue a commercial activity recognised as a fundamental right by the ECJ. Having considered *Sporrong and Lönnroth v. Sweden* (judgment of 23 September 1982, Series A no. 52), he defined the essential question as being whether the interference with the applicant's possession of the aircraft was a proportionate measure in the light of the aims of general interest which EC Regulation 990/93 sought to achieve. He had regard to the application of this test in *AGOSI v. the United Kingdom* (judgment of 24 October 1986, Series A no. 108) and in *Air Canada v. the United Kingdom* (judgment of 5 May 1995, Series A no. 316-A) and to a "similar approach" adopted by the ECJ in cases concerning the right to property or to pursue a commercial interest (including *Hauer v. Land Rheinland-Pfalz* Case 44/79 [1979] ECR 3727, §§ 17-30).

48. While there had been a severe interference with the applicant's interest in the lease, it was difficult to identify a stronger type of public interest than that of stopping a devastating civil war. While some property loss was inevitable for any sanctions required to be effective, if it had been demonstrated that the interference in question was wholly unreasonable in light of the aims sought to be achieved, then the ECJ would intervene. However, he felt that neither the initial decision to impound nor the continued retention of the aircraft could be regarded as unreasonable.

49. Whether or not the financial impact of the sanctions were as outlined by the applicant, a general measure of the kind in question could not be set aside simply because of the financial consequences which the measure might have in a particular case. Given the strength of the public interest involved, the proportionality principle would not be infringed by any such losses.

50. The AG concluded that the contested decision did not:

> "... strike an unfair balance between the demands of the general interest and the requirements of the protection of the individual's fundamental rights. That conclusion seems consistent with the case-law of [this Court] in general. Nor has [the applicant]

suggested that there is any case-law under [the Convention] supporting its own conclusion.

The position seems to be no different if one refers to the fundamental rights as they result from "the constitutional traditions common to the Member States" referred to in the case-law of [the ECJ] and in Article F(2) of the Treaty on European Union. In the [above-cited *Hauer* case, the ECJ] pointed out ... , referring specifically to the German Grundgesetz, the Irish constitution and the Italian constitution, that the constitutional rules and practices of the Member States permit the legislature to control the use of private property in accordance with the general interest. Again it has not been suggested that there is any case-law supporting the view that the contested decision infringed fundamental rights. The decision of the Irish High Court was based, as we have seen, on different grounds."

51. By letter of 19 July 1996 TEAM informed JAT that the aircraft was free to leave provided that debts owed to TEAM were discharged.

52. On 30 July 1996 the ECJ ruled that EC Regulation 990/93 applied to the type of aircraft referred to in the Supreme Court's question to it. The ECJ noted that the domestic proceedings showed that the aircraft lease had been entered into "in complete good faith" and was not intended to circumvent the sanctions against the FRY.

53. It did not accept the applicant's first argument that the EC Regulation 990/93 did not apply because of the control on a daily basis of the aircraft by a non-FRY innocent party. Having considered the wording of EC Regulation 990/93, its context and aims (including the text and aims of the UNSC Resolutions it implemented), it found nothing to support the distinction made by the applicant. Indeed the use of day-to-day operation and control as opposed to ownership as a criterion for applying the regulation would jeopardise the effectiveness of the sanctions.

54. The applicant's second argument was that the application of EC Regulation 990/93 would infringe its right to peaceful enjoyment of his possessions and its freedom to pursue a commercial activity because it would destroy and obliterate the business of a wholly innocent party when the FRY owners had already been punished by blocked bank accounts. The ECJ did not find this persuasive:

"It is settled case-law that the fundamental rights invoked by [the applicant] are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community [see the above-cited *Hauer* case, Case 5/88 *Wachauf v Bundesamt fuer Ernaehrung und Forstwirtschaft* [1989] ECR 2609 and the above-cited *Germany v Council* case.)

Any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions.

Moreover, the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators.

> The provisions of [EC Regulation 990/93] contribute in particular to the implementation at Community level of the sanctions against the [FRY] adopted, and later strengthened, by several resolutions of the [UN] Security Council. ...
>
> It is in the light of those circumstances that the aim pursued by the sanctions assumes a special importance, which is, in particular, in terms of [EC Regulation 990/93] and more especially the eighth recital in the preamble thereto, to dissuade the [FRY] from "further violating the integrity and security of the Republic of Bosnia-Herzegovina and to induce the Bosnian Serb party to co-operate in the restoration of peace in this Republic".
>
> As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the [FRY], cannot be regarded as inappropriate or disproportionate.
>
> Article 8 of [EC Regulation 990/93] applies to an aircraft which is owned by an undertaking based in or operating from the [FRY], even though the owner has leased it for four years to another undertaking, neither based in nor operating from [the FRY] and in which no person or undertaking based in or operating from [the FRY] has a majority or controlling interest."

55. The answer to the Supreme Court's question was therefore:

> "Article 8 of [EC Regulation 990/93] concerning trade between the European Economic Community and the [FRY] applies to an aircraft which is owned by an undertaking based in or operating from the [FRY], even though the owner has leased it for four years to another undertaking, neither based in nor operating from the [FRY] and in which no person or undertaking based in or operating from the [FRY] has a majority or controlling interest"

56. On 6 August 1996 the Minister re-instated the impounding of the aircraft under Article 8 of EC Regulation 990/93.

H. The first and second judicial review proceedings: judgments of the Supreme Court

57. By notice of motion dated 29 October 1996 the applicant applied to the Supreme Court for, *inter alia*, an order determining the action "in the light of the decision of the [ECJ]" and for an order providing for the costs of the Supreme Court and ECJ proceedings. The grounding affidavit of the applicant of the same date recalled the applicant's *bona fides*, the benefit of having had the ECJ examine the Regulation for the first time, that ultimate responsibility for its predicament lay with the FRY authorities and that the operations of its company had been destroyed by the impoundment. It referred to EC Regulation 2815/95, noting that it did not allow aircraft already impounded to fly whereas those not previously impounded could do so. Since its aircraft was the only one impounded under that sanctions

regime, no other lessee could have initiated the action it had in order to clarify the meaning of the relevant Regulation.

58. On 29 November 1996 the Supreme Court delivered its judgment allowing the appeal of the Minister for Transport from the order of the High Court of 21 June 1994. It noted that the sole issue in the case was whether the Minister had been bound by Article 8 of EC Regulation 990/93 to impound the aircraft. Having noted the response of the ECJ, the Supreme Court simply stated that it was bound by that decision and the Minister's appeal was allowed.

59. In May 1998 the Supreme Court allowed the appeal from the order of the High Court of 22 January 1996. Given the intervening rulings of the ECJ and of the Supreme Court (of July and November 1996, respectively), the appeal was moot since, as and from the date of the initial order of impoundment, the aircraft had been lawfully detained under Article 8 of EC Regulation 990/93. There was no order as to costs.

I. The return to JAT of the aircraft

60. The applicant's leases on both aircraft had expired by May 1996 (paragraph 12 above). Further to the judgment of the Supreme Court of November 1996 (paragraph 58 above) and given the relaxation of the sanctions regime (67-71 below), JAT and the Minister for Transport reached an agreement in July 1997 concerning the latter's costs. JAT deposited IR£389,609.95 to an escrow account in the joint names of the Chief State Solicitor and its solicitors to cover all parking, maintenance, insurance and legal costs of the Minister for Transport associated with the impoundment. On 30 July 1997 the aircraft was returned to JAT.

II. THE SANCTIONS REGIME: THE RELEVANT PROVISIONS

A. Setting up the sanctions regime

61. In September 1991 the United Nations ("UN") Security Council adopted a Resolution (UNSC Resolution 713 (1991)) under Chapter VII of its Charter by which it expressed concern about the conflict in the former Yugoslavia and implemented a weapons and military embargo. UNSC Resolution 724 (1991), adopted in December 1991, established a Sanctions Committee to administer the relevant UNSC Resolutions.

62. UNSC Resolution 757 (1992) adopted on 30 May 1992 provided, in so far as relevant, as follows:

> "5. Decides that all States shall not make available to the authorities in the [FRY] or to any commercial, industrial or public utility undertaking in the [FRY], any funds, or any other financial or economic resources and shall prevent their nationals and any

person within their territories from removing from their territories or otherwise making available to those authorities or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within the [FRY], except payments exclusively for strictly medical or humanitarian purposes and foodstuffs; ...

7. Decides that all States shall:

(a) Deny any permission to any aircraft to take off from, land in or over-fly their territory if it is destined to land in or has taken off from the territory of the [FRY], unless the particular flight has been approved, for humanitarian or other purposes consistent with the relevant resolutions of the Council, by the [Sanctions Committee];

(b) Prohibit, by their nationals or from their territory, the provision of engineering or maintenance servicing of aircraft registered in the [FRY] or operated by or on behalf of entities in the [FRY] or components for such aircraft, the certification of airworthiness for such aircraft, and the payment of new claims against existing insurance contracts and the provision of new direct insurance for such aircraft; ...

9. Decides that all States, and the authorities in the [FRY], shall take the necessary measures to ensure that no claim shall lie at the instance of the authorities in the [FRY], or of any person or body in [FRY], or of any person claiming through or for the benefit of any such person or body, in connection with any contract or other transaction where its performance was affected by reason of the measures imposed by this resolution and related resolutions;"

It was implemented by the European Community ("EC") by Council Regulation of June 1992 (EC Regulation 1432/92) which was, in turn implemented in Ireland by Statutory Instrument ("SI"): the European Communities (Prohibition of Trade with the Republics of Serbia and Montenegro) Regulations 1992 (SI No. 157 of 1992) made it an offence under Irish law from 25 June 1992 to act in breach of that EC Regulation.

63. UNSC Resolution 787 (1992), adopted in November 1992, further tightened the economic sanctions against the FRY. This Resolution was implemented by EC Regulation 3534/92 adopted in December 1992.

64**.** UNSC Resolution 820 (1993), adopted on 17 April 1993, provided, *inter alia*, as follows:

"24. Decides that all States shall impound all vessels, freight vehicles, rolling stock and aircraft in their territories in which a majority or controlling interest is held by a person or undertaking in or operating from the [FRY] and that these vessels, freight vehicles, rolling stock or aircraft may be forfeited to the seizing State upon a determination that they have been in violation of resolutions ... 713 (1991), 757 (1992), 787 (1992) or the present resolution;"

65. This resolution was implemented by EC Regulation 990/93 which entered into force on 28 April 1993 once published in the Official Journal (O.J.L. 102/14 (1993) of that date (as specified in Article 13 of the Regulation) pursuant to Article 191(2) (now Article 254(2)) of the Treaty Establishing the European Community ("EC Treaty").

Article 1.1(e) and Articles 8-10 of that Regulation provided as follows:

"1. As and from 26 April 1993, the following shall be prohibited: ...

(e) the provision of non-financial services to any person or body for purposes of any business carried out in the Republics of Serbia and Montenegro.

...

8. All vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the [FRY] shall be impounded by the competent authorities of the Member States.

Expenses of impounding vessels, freight vehicles, rolling stock and aircraft may be charged to their owners.

9. All vessels, freight vehicles, rolling stock, aircraft and cargoes suspected of having violated, or being in violation of [EC Regulation 1432/92] or this Regulation shall be detained by the competent authorities of the Member States pending investigations.

10. Each Member State shall determine the sanctions to be imposed where the provisions of this [Regulation] are infringed.

Where it has been ascertained that vessels, freight vehicles, rolling stock, aircraft and cargoes have violated this Regulation, they may be forfeited to the Member State whose competent authorities have impounded or detained them."

66. On 4 June 1993 the Irish Minister for Tourism and Trade adopted the European Communities (Prohibition of Trade with the Federal Republic of Yugoslavia (Serbia and Montenegro)) Regulations 1993 (SI 144 of 1993). It provided, in so far as relevant, as follows:

"3. A person shall not contravene a provision of [EC Regulation 990/93].

4. A person who, on or after the 4th day of June, 1993, contravenes Regulation 3 of these Regulations shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 12 months or to both.

5. The Minister for Transport, Energy and Communications shall be the competent authority for the purpose of Articles 8 and 9 of the [EC Regulation 990/93] except in so far as the said Article 8 relates to vessels and the said Article 9 relates to cargoes.

6. (1) The powers conferred on the Minister for Transport, Energy and Communications by Articles 8 and 9 of the [EC Regulation 990/93] as the competent authority for the purposes of those Articles may be exercised by—

(a) members of the Garda Síochána,

(b) officers of customs and excise,

(c) Airport Police, Fire Services Officers of Aer Rianta, ... ,

(d) Officers of the Minister for Transport ... duly authorised in writing by the Minister for Transport, Energy and Communications in that behalf.

...

(3) A person shall not obstruct or interfere with a person specified in subparagraph (a), (b) or (c) of paragraph (1) of this Regulation, or a person authorised as aforesaid, in the exercise by him of any power aforesaid.

(4) A person who, on or after the 4th day of June, 1993, contravenes subparagraph (3) of this Regulation shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £500 or to imprisonment for a term not exceeding 3 months or to both.

7. Where an offence under Regulation 4 or 6 of these Regulations is committed by a body corporate and is proved to have been so committed with the consent, connivance or approval of or to have been attributable to any neglect on the part of any person, being a director, manager, secretary or other officer of the body corporate or a person who was purporting to act in any such capacity, that person as well as the body corporate, shall be guilty of an offence and shall be liable to be proceeded against and punished as if he were guilty of the first-mentioned offence."

B. Lifting the sanctions regime

67. UNSC Resolution 943 (1994) was adopted on 23 September 1994 and, in so far as relevant, read as follows:

"(i) the restrictions imposed by paragraph 7 of [UNSC Resolution 757 (1992)], paragraph 24 of [UNSC Resolution 820 (1993)] with regard to aircraft which are not impounded at the date of adoption of this resolution, ... shall be suspended for an initial period of 100 days from the day following the receipt ... of a report from the Secretary-General."

This resolution was implemented by EC Regulation 2472/94 of 10 October 1994, Article 5 of which suspended the operation of Article 8 of EC Regulation 990/93 "with regard to aircraft ... which had not been impounded at 23 September 1994".

68. The suspension of UNSC Resolution 820 (1993) was extended further by periods of 100 days on numerous occasions in 1995, and these resolutions were each implemented by EC Regulations.

69. UNSC Resolution 820 (1993) was suspended indefinitely in 1995 by UNSC Resolution 1022 (1995). It was implemented by EC Regulation 2815/95 of 4 December 1995 which provided, *inter alia*, as follows:

"1. [EC Regulation 990/93] is hereby suspended with regard to the [FRY].

2. As long as [EC Regulation 990/93] remains suspended, all assets previously impounded pursuant to that Regulation may be released by Member States in accordance with the law, provided that any such assets that are subject to any claims, liens, judgments, or encumbrances, or which are the assets of any person, partnership,

> corporation or other entity found or deemed to be insolvent under the law or the accounting principles prevailing in the relevant Member State, shall remain impounded until released in accordance with the applicable law."

70. UNSC Resolution 820 (1993) was definitively suspended and that suspension implemented by EC Regulation 462/96 from 27 February 1996. That regulation provides, in so far as relevant, as follows:

> "As long as [*inter alia*, EC Regulation 990/93] remain suspended, all funds and assets previously frozen or impounded pursuant to those Regulations may be released by Member States in accordance with law, provided that any such funds or assets that are subject to any claims, liens, judgments or encumbrances, ... shall remain frozen or impounded until released in accordance with the applicable law."

71. On 9 December 1996 EC Regulation 2382/96 repealed, *inter alia*, EC Regulation 990/93. On 2 March 2000 the European Communities (Revocation of Trade Sanctions concerning the Federal Republic of Yugoslavia (Serbia and Montenegro) and Certain Areas of the Republics of Croatia and Bosnia –Herzegovina) Regulations 2000 (S.I. No. 60 of 2000) repealed S.I. 144 of 1993.

III. RELEVANT EC LAW AND PRACTICE

72. This judgment concerns the provisions of European Community law ("EC law" or "Community law") of the "first pillar" of the European Union.

A. Fundamental rights: case-law of the ECJ[1]

73. While the founding treaty of the EC did not contain express provisions for the protection of human rights, the ECJ held as early as 1969 that fundamental rights were enshrined in the general principles of Community law protected by the ECJ[2]. By the early 1970s the ECJ had confirmed that, in protecting such rights, it was inspired by the constitutional traditions of the Member States[3] and by the guidelines supplied by international human rights treaties on which the Member States had collaborated or to which they were signatories[4]. The Convention's provisions were first explicitly referred to in 1975[5] and by 1979 its special significance amongst international treaties on the protection of human rights

[1] Reference to the ECJ includes, as appropriate, the Court of First Instance
[2] *Stauder v. City of Ulm*, Case 29/69 [1969] ECR 419
[3] *Internationale Handelsgesellschaft*, Case 11/70 [1970] ECR 1125
[4] *Nold v. Commission*, Case 4/73 [1974] 291
[5] *Rutili v.Minister of the Interior*, Case 36/75 [1975] ECR 1219 and see paragraph 10 of Opinion No. 256/2003 of the European Commission for Democracy through law (Venice Commission) *on "The Implications of a legally-binding EU Charter of Fundamental Rights on Human Rights Protection in Europe*"

had been recognised by the ECJ[6]. Thereafter the ECJ began to refer extensively to Convention provisions (sometimes where the EC legislation under its consideration had referred to the Convention)[7] and latterly to this Court's jurisprudence[8], the more recent ECJ judgments not prefacing such Convention references with an explanation of their relevance for EC law.

74. In a judgment of 1991, the ECJ was able to describe the role of the Convention in EC law in the following terms[9]:

> "41. ... as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are

[6] *Hauer v. Land Rheinland-Pfalz*, Case 44/79 [1979] ECR 3727

[7] For example, *Hauer v. Land Rheinland-Pfalz*, cited above, at § 17 (Article 1 of Protocol No. 1); *Regina v. Kent Kirk*, Case 63/83 [1984] ECR 2689, § 22 (Article 7); *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84 [1986] ECR 1651, § 18 (Articles 6 and 13); *Hoechst AG v. Commission*, Joined Cases 46/87 and 227/88 [1989] ECR 2859, § 18 (Article 8); *Commission v. Germany*, Case 249/86 [1989] ECR 1263 § 10 (Article 8); *ERT v. DEP*, Case C-260/89 [1991] ECR I-2925, § 45 (Article 10); *Bosman and Others*, Case C-415/93 [1995] ECR I-4921, § 79 (Article 11). *Philip Morris International, Inc and Others .v Commission*, Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 [2003] ECR II-1, § 121 (Articles 6 and 13); and *Bodil Lindqvist*, judgment of 6 November 2003, Case C-101/01 [2003], not yet published, § 90 (Article 10)

[8] For example, *Criminal proceedings against X*, Joined Cases C-74/95 and C-129/95 [1996] ECR I-6609, § 25 (concerning Article 7); *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, Case C-368/95 [1997] ECR I-3689, §§ 25-26 (concerning Article 10); *Lisa Jacqueline Grant v. South-West Trains Ltd*, Case C-249/96 [1998] ECR I-621, §§ 33-34 (concerning Articles 8, 12 and 14); *Baustahlgewebe GmbH v. Commission*, Case C-185/95 [1998] ECR I-8417, §§ 20 and 29 (concerning Article 6); *Dieter Krombach v. André Bamberski*, Case C-7/98 [2000] ECR I-1935 §§ 39-40 (concerning Article 6); *Mannesmannröhren-Werke AG v. Commission*, Case T-112/98 [2001] ECR II-729, §§ 59 and 77 (concerning Article 6); *Connolly v. Commission*, Case C-274/99 [2001] ECR I-1611, § 39 (concerning Article 10); *Mary Carpenter v. Secretary of State for the Home Department*, Case C-60/00 [2002] ECR I-6279, §§ 41-42 (Article 8); *Joachim Steffensen*, Case C-276/01 [2003] ECR I-3735, §§ 72 and 75-77 (Article 6); *Rechnungshof et al.*, Joined Cases C-465/00, C-138/01 and 139/01 [2003] ECR I-4989, §§ 73-77 and 83 (concerning Article 8); *Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd v. Commission*, Case T-224/00 [2003] ECR II-2597, §§ 39, 85 and 91 (concerning Article 7); *Secretary of State for the Home Department v. Hacene Akrich*, Case C-109/01 [2003] ECR I-9607, §§ 58-60 (concerning Article 8); *K.B. v. National Health Service Pensions Agency and Secretary of State for Health*, judgment of 7 January 2004, Case-117/01 [2004] not yet published, §§ 33-35 (concerning Article 12); *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, judgment of 25 March 2004, C-71/02 [2004] not yet published, §§ 50-51 (concerning Article 10); *Georgios Orfanopoulos and Others v. Land Baden-Württemberg*, judgment of 29 April 2004, Joined Cases C-482/01 and C-493/01 [2004] not yet published, §§ 98-99, (concerning Article 8); and *JFE Engineering Corp., Nippon Steel Corp., JFE Steel Corp. and Sumitomo Metal Industries Ltd v. Commission*, judgment of 8 July 2004, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 [2004], not yet published, § 178 (concerning Article 6)

[9] *ERT v. DEP*, cited above

signatories ... The [Convention] has special significance in that respect ... It follows that ...the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed.

42. As the Court has held ... it has no power to examine the compatibility with the [Convention] of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the [Convention]."

75. This statement has been often repeated by the ECJ notably in the Opinion of the Court on Accession by the Community to the Convention[10], in which case the ECJ notably opined that respect for human rights was "a condition of the lawfulness of Community acts".

76. In the *Kondova* case[11] relied upon by the applicant, the ECJ ruled on the refusal by the United Kingdom of an establishment request of a Bulgarian national on the basis of a provision in an association agreement between the EC and Bulgaria:

"Moreover, such measures [of the British Immigration authorities] must be adopted without prejudice to the obligation to respect that national's fundamental rights, such as the right to respect for his family life and the right to respect for his property, which follow, for the Member State concerned, from the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 or from other international instruments to which that State may have acceded."

B. Relevant treaty provisions[12]

1. Concerning fundamental rights

77. The above noted case-law developments were reflected in certain treaty amendments. In the preamble to the Single European Act 1986, the Contracting Parties expressed their determination:

"to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms ..."

78. Article 6 (formerly Article F) of the Treaty on European Union of 1992 ("the TEU") reads as follows:

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[10] *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*. Opinion 2/94 [1996] ECR I-1759

[11] *The Queen v. the Secretary of State for the Home Department, ex parte Eleanora Ivanova Kondova*, C-235/99 [2001], ECR I-6427

[12] The former numbering of Articles of the EC Treaty is used (followed, as appropriate, by the present numbering) given the period covered by the facts of the case

"1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States;

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

3. The Union shall respect the national identities of its Member States.

4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies."

79. The Treaty of Amsterdam 1997 required the ECJ, in so far as it had jurisdiction, to apply human rights standards to acts of Community institutions and gave the European Union the power to act against a Member State that had seriously and persistently violated the principles of the Article 6(1) of the TEU cited directly above.

80. The Charter of Fundamental Rights in the European Union, proclaimed in Nice on 7 December 2000 (not fully binding**),** states in its preamble that it:

"reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights."

Article 52(3) of the Charter provides:

"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

81. The Treaty establishing a Constitution for Europe, signed on 29 October 2004 **(**not in force**),** provides in its Article I-9 entitled "Fundamental Rights":

"1. The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the

constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

The above-described Charter of Fundamental Rights has been incorporated as Part II of this constitutional treaty.

2. Other relevant provisions of the EC Treaty

82. Article 5 (now Article 10) provides:

"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

83. Article 189 (now Article 249), in so far as relevant, reads as follows:

"A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. ..."

The description of a Regulation as being "binding in its entirety" and "directly applicable" in all Member States means that it takes effect[13] in the internal legal orders of Member States without the need for domestic implementation.

84. Article 234 (now Article 307) reads as follows:

"The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States."

[13] Regulations enter into effect on the date specified therein or, where there is no such date specified, 20 days after publication in the Official Journal (Article 191(2), now 254(2))

C. The EC control mechanisms

85. As regards the control exercised by the ECJ and national courts the ECJ has stated as follows:

> "39. Individuals are ... entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ... .
>
> 40. By Article 173 and Article 184 (now Article 241 EC), on the one hand, and by Article 177, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts ... . Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid ..., to make a reference to the Court of Justice for a preliminary ruling on validity.
>
> 41. Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.
>
> 42. In that context, in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act."[14]

1. Direct Actions before the ECJ

(a) Actions against Community Institutions

86. Article 173 (now Article 230) provides Member States, the European Parliament, the Council and the Commission with a right to apply to the ECJ for judicial review of an EC instrument ("the annulment action"). Applications by the Court of Auditors and the European Central Bank are more restricted and, while even more restricted, an individual (a natural or legal person) can also challenge "a decision addressed to that person or ... a decision which, although in the form of a regulation or a decision addressed

[14] *Unión de Pequeños Agricultores v Council of the European Union*, C-50/00 ECR [2002] I-6677

to another person, is of direct and individual concern to the former" (Article 173(4), now Article 230(4)).

87. According to Article 175 (now Article 232) Member States and the Community institutions can also call, *inter alia*, the Council, the Commission and the European Parliament to account before the ECJ for a failure to perform their Treaty obligations. Article 184 (now Article 241) allows a plea of illegality of a Regulation (adopted jointly by the Parliament and the Council, by the Council, by the Commission or by the European Central Bank) to be made during proceedings already pending before the ECJ on the basis of another Article: a successful challenge will result in the ECJ declaring its inapplicability *inter partes* but not the annulment of the relevant provision.

88. Having legal personality of its own, the EC can be sued for damages in tort, described as its non-contractual liability. Its institutions will be considered liable for wrongful (illegal or invalid) acts or omissions by the institution (*fautes de service*) or its servants (*fautes personelles*) which have caused damage to the claimant (Articles 178 and 215, now Articles 235 and 288). Unlike actions under Articles 173, 175 and 184 (now Articles 230, 232 and 241), and subject to the various inherent limitations imposed by the elements of the action to be established, there are no personal or *locus standi* limitations on the right to bring such an action. It can therefore provide an independent cause of action[15] before the ECJ to review the legality of an act or failure to act to those (including individuals) not having *locus standi* under Articles 173 or 175 but who have suffered damage.

(b) Actions against Member States

89. Under Article 169 (now Article 226) and Article 170 (now Article 227) both the Commission (in fulfilment of its role as "guardian of the Treaties") and a Member State are accorded, notably, the right to take proceedings against a Member State considered to have failed to fulfil its Treaty obligations. If the ECJ finds that a Member State has so failed, the State shall be required to take the necessary measures to comply with the judgment of the ECJ (Article 171, now Article 228). The Commission can also take proceedings against a Member State in other specific areas of Community regulation (such as State Aids - Article 93, now Article 88).

(c) Actions against individuals

90. There is no provision in the EC Treaty for a direct action before the ECJ against individuals. Individuals may be fined under certain provisions of EC law which fine may, in turn, be challenged before the ECJ.

[15] *Aktien-Zuckerfabrik Schöppenstedt v Council*, Case 5/71 [1971] ECR 975

2. Indirect Actions before the national courts

91. Where individuals seek to assert their Community rights before national courts or tribunals, they may do so in the context of any proceedings of national law, public or private, in which EC rights are relevant, in pursuit of any remedy, final or interim, under national law.

(a) Direct Effects

92. The "direct effect" of a provision of Community law means that it confers upon individuals rights and obligations upon which they can rely before the national courts. A provision with direct effect must not only be applied by the domestic courts but it will take precedence over conflicting domestic law pursuant to the principle of supremacy of EC law[16]. The conditions for acquiring direct effect are that the provision:

> "contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of the States which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition make it ideally adapted to produce direct effects in the legal relationship between States and their subjects."[17]

93. Certain EC Treaty provisions are considered to have direct effect, whether they impose a negative or positive obligation and certain have been found to have, as well as "vertical" effect (between the State and the individual), a horizontal effect (between individuals). Given the text of Article 189 (now Article 249), the provisions of Regulations are normally considered to have direct effect, both vertically and horizontally. Directives and Decisions can, in certain circumstances, have vertical direct effect though Recommendations and Opinions, having no binding force, cannot generally be invoked by individuals before national courts.

(b) The principles of indirect effect and State Liability

94. The rights an individual may claim under Community law are no longer confined to those under directly effective Community provisions: they now include rights based on the principles of indirect effect and State liability developed by the ECJ. According to the principle of "indirect effect" ("*interprétation conforme*") a Member State's obligations under Article 5 (now Article 10) require its authorities (including the judiciary) to

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[16] *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, Case no. 11/70 [1970] ER 1125

[17] laid down in the case of *Van Gend en Loos v Nederlandse Administratie des Belastingen*, Case 26/62 [1963] ECR 1

interpret as far as possible national legislation in the light of the wording and purpose of a relevant Directive[18].

95. The principle of State liability was first developed in the case of *Francovich v. Italy*[19]. The ECJ found that, where a State had failed to implement a Directive (whether or not directly effective), it would be obliged to compensate individuals for resulting damage if three conditions were met: the directive conferred a right on individuals; the content of the right was clear from the provisions of the directive itself; and there was a causal link between the State's failure to fulfil its obligation and the damage suffered by the person affected. In 1997 the ECJ[20] extended the notion of State liability to all domestic acts and omissions (legislative, executive and judicial) in breach of Community law provided the conditions for liability were fulfilled.

(c) Preliminary reference procedure

96. In order to assist national courts in correctly implementing EC law and maintaining its uniform application[21], Article 177 (now Article 234) provides national courts with the opportunity to consult the ECJ. In particular, Article 177 reads as follows:

> "The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of this Treaty;
>
> (b) the validity and interpretation of acts of the institutions of the Community ...;
>
> ...
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

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[18] *Von Colson and Kamann v Land Nordrhein-Westfalen*, Case 14/83 [1984] ECR 1891 and *Marleasing SA La Comercial Internacional de Alementación SA*, Case C-106/89 [1990] ECR I-4135

[19] *Francovich and Others v. Italy*, Cases C-6 & 9/90 [1991] ECR I-5357

[20] *Brasserie du Pêcheur and R v Secretary of State for Transport ex parte Factortame Ltd*, Case C-46&48/93 [1996] ECR I-1029. See also *Köbler v. Austria*, Case C-224/01 [2003] ECR I-10239

[21] *Commission v. Portugal*, Case C-55/02, judgment 18 November 2002, not yet published, § 45

97. The Court described the nature of this preliminary reference procedure as follows[22]:

> "30. ... the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such Community law as is necessary for them to give judgment in cases upon which they are called to adjudicate ... .
>
> 31. In the context of that cooperation, it is for the national court seized of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling ... ."

98. Article 177 distinguishes between domestic courts which have a discretion to refer and those courts of last instance for which referral is mandatory. However, according to the *CILFIT*[23] judgment, both categories of court must first determine whether an ECJ ruling on the EC law matter is "necessary to enable it to give judgment", even if the literal meaning of Article 177 would suggest otherwise:

> "it follows from the relationship between Article 177(2) and (3) that the courts ... referred to in Article 177(3) have the same discretion as any other national court ... to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment."

The ECJ in *CILFIT* indicated that a court of final instance would not be obliged to make a reference to the ECJ if: the question of EC law was not relevant (namely, if the answer to the question of EC law, regardless of what it may be, could in no way affect the outcome of the case); the provision had already been interpreted by the ECJ, even though the questions at issue were not strictly identical; and the correct application of EC law was so obvious, as to leave no scope for reasonable doubt, not only to the national court but also to the courts of the other Member States and to the ECJ. This matter was to be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gave rise and the risk of divergences in judicial decisions within the Community.

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[22] *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria*, C-112/00 [2003] ECR I-05659

[23] *CILFIT Srl v Ministro della Sanitá*, Case 283/81 [1982] ECR 3415

99. Once the reference is made, the ECJ will rule on the question put to it and that ruling is binding on the national court. The ECJ has no power to decide the issue before the national court and cannot therefore apply the provision of EC law to the facts of the particular case in question[24]. The domestic court will decide on the appropriate remedy.

IV. OTHER RELEVANT LEGAL PROVISIONS

A. The Vienna Convention on the Law of Treaties 1969 ("the Vienna Convention 1969")

100. Article 31(1) is entitled "General rule of interpretation" and provides that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Article 31(3) further provides that, as well as the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation together with any relevant rules of international law applicable in the relations between the parties shall be taken into account.

B. The Irish Constitution

101. Article 29 of the Irish Constitution, in so far as relevant, reads as follows:

> "1. Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality. ...
>
> 3. Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.
>
> 4 (10) ... No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State."

[24] *Jacob Adlerblum v Caisse nationale d'assurance vieillesse des travailleurs salariés*, Case 93-75 [1975] ECR 02147

THE LAW

I. THE PRELIMINARY OBJECTIONS

102. The Government maintained that the applicant failed to exhaust domestic remedies because it had not taken an action for damages (in contract or tort) against TEAM or initiated a constitutional action against Ireland. In any event, the application should have been introduced within six months of the ECJ ruling (since the Supreme Court had no choice but to implement that ruling) and was an abuse of the right of petition (given that the applicant was not an "innocent" party, attempting as it did to mislead the domestic courts and this Court in a number of material respects). The European Commission added that the Supreme Court did not refer a question concerning EC Regulation 2472/94 to the ECJ because the applicant had not invoked the Regulation in the domestic action. Other than referring to the Chamber's admissibility decision, the applicant did not comment.

The Chamber considered, for reasons outlined in its decision, that it would have been unreasonable to require the applicant to have taken proceedings in tort, contract or under the Constitution instead of, or during, its action in judicial review. It had not, moreover, been demonstrated that such proceedings offered any real prospects of success thereafter. The final decision, for the purposes of Article 35 § 1 and the six-month time-limit, was that of the Supreme Court of November 1996 which applied the ECJ's ruling. Finally, the Chamber found that the parties' submissions about the applicant's *bona fides* made under Article 35 § 3 and under Article 1 of Protocol No. 1 were the same and, further, that that *bona fides* issue was so closely bound up with the merits of the complaint under the latter Article that it was appropriate to join it to the merits of the application.

103. The Grand Chamber is not precluded from deciding admissibility questions at the merits stage: the Court can dismiss applications it considers inadmissible "at any stage of the proceedings", so that even at the merits stage (and subject to Rule 55 of the Rules of Court) it may reconsider an admissibility decision where it concludes that the application should have been declared inadmissible for one of the reasons listed in Article 35 of the Convention (*Pisano v. Italy* [GC] (striking out), no. 36732/97, § 34, 24 October 2002 and *Odièvre v. France* [GC], no. 42326/98, §§ 21-23, ECHR 2003 III).

104. However, the Grand Chamber observes that the present admissibility objections are precisely the same as those made to, and

dismissed by, the Chamber in its admissibility decision, and it sees no reason to depart from the Chamber's conclusions in those respects. In particular, the Government made no new legal submissions to the Grand Chamber as regards their exhaustion and timeliness objections. While they made additional factual submissions as regards the applicant's *bona fides* upon which its abuse of process claim is based, this does not affect in any respect the Chamber's view that the *bona fides* issue would fall to be examined, if at all, as part of the merits of the complaint under Article 1 of Protocol No. 1.

105. Without prejudice to the question of whether it is open to a third party admitted to a case following its admissibility to make a preliminary objection, the Grand Chamber does not consider that the above-noted comment of the European Commission warrants a conclusion that the applicant failed to exhaust domestic remedies. EC Regulation 2472/94 expressly excluded from its provisions aircraft already impounded under EC Regulation 990/93 and the applicant had already challenged, in the very domestic proceedings to which the European Commission referred, the lawfulness of the original impoundment under EC Regulation 990/93.

106. The Court therefore dismisses all preliminary objections before it.

II. SUBMISSIONS CONCERNING ARTICLE 1 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

107. The applicant maintained that the manner in which Ireland implemented the sanctions regime to impound its aircraft was a reviewable exercise of discretion within the meaning of Article 1 of the Convention and a violation of Article 1 of Protocol No. 1. The Government disagreed as did the third parties with the exception (in part) of the *Institut de Formation en Droits de l'Homme du Barreau de Paris*. The Court considers it clearer to describe the submissions made to it in the order set out below.

A. The Government

1. Article 1 of the Convention

108. The Convention must be interpreted in such a manner as to allow State parties to comply with international obligations so as not to thwart the current trend towards extending and strengthening international co-operation (*Waite and Kennedy v. Germany* [GC], no. 26083/94, § 72, ECHR 1999-I and *Beer and Regan v. Germany* [GC], no. 28934/95, § 62, 18 February 1999). It is not therefore contrary to the Convention to join international organisations and undertake other obligations once such organisations offer human rights' protection equivalent to the Convention.

This principle was first outlined in the "*M. & Co.*" case (see *M. & Co v. Germany*, no. 13258/87, Commission decision of 9 February 1990, Decisions and Reports (DR) 64, p. 138) and was then endorsed in the case of *Heinz v. the Contracting Parties also parties to the European Patent Convention* (no. 21090/92, Commission decision of 10 January 1994, DR 76-A, p. 125).

109. The critical point of distinction for the Government was whether the impugned State act amounted to an obligation or the exercise of a discretion. If, on the one hand, the State had been obliged as a result of its membership of an international organisation to act in a particular manner, the only matter requiring assessment was the equivalence of the human rights protection in the relevant organisation (the "*M. and Co.* doctrine" described above). If, on the other, the State could as a matter of law exercise independent discretion, this Court was competent. Contrary to the applicant's submission, the cases of *Matthews (Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999-I), *Cantoni* (*Cantoni v. France*, judgment of 15 November 1996, *Reports* 1996-V) and *Hornsby* (*Hornsby v. Greece*, judgment of 19 March 1997, *Reports* 1997-II) had no application to the present case, concerned as they were with discretionary decisions available to, and taken by, States.

110. Moreover, the Government considered that Ireland acted out of obligation and that the EC and the UN provided such equivalent protection.

As to the international obligations on the Irish State, the Government argued that it had complied with mandatory obligations derived from UNSC Resolution 820 (1993) and EC Regulation No. 990/93. As a matter of EC law, a regulation left no room for the independent exercise of discretion by the State. The direct effectiveness of EC Regulation 990/93 meant that SI 144 of 1993 had no bearing on the State's legal obligation to impound. The ECJ later conclusively confirmed the applicability of Article 8 of EC Regulation 990/93 and, thereby, the lawful basis for the impoundment. Even if the jurisdiction of the ECJ in a reference case could be considered limited, the ECJ authoritatively resolved the present domestic action.

Thereafter for the State to look behind the ECJ ruling, even with a view to its Convention compliance, would be contrary to its obligation of "loyal co-operation" (Article 5, now Article 10, of the EC Treaty – paragraph 82 above) and would undermine the special judicial co-operation between the national court and the ECJ envisaged by Article 177 (now Article 234) of the EC Treaty (paragraphs 96-99 above). As to the applicant's suggestion that the Supreme Court should have awarded compensation while applying the ECJ ruling, the Government considered that it was implicit in the opinion of the Advocate General ("AG"), in the ruling of the ECJ and in the second sentence of Article 8 of EC Regulation 990/93 that EC Regulation 990/93 did not envisage the payment of compensation. If the scheme envisaged was one of detention without compensation, it would be contrary

to the principle of uniform application and supremacy of Community law for Member States to, nevertheless, consider making an award.

Finally, they found unconvincing the applicant's suggestion that the Supreme Court exercised discretion in not taking account of the intervening relaxation of the sanctions regime. If the initial impoundment was lawful (under Article 8 of the EC Regulation 990/93 as confirmed by the ECJ), by definition, the partial relaxation of the sanctions regime in October 1994 did not apply to the applicant's aircraft as it had been already lawfully impounded. The terms of EC Regulation 2472/94 were as mandatory and clear as those of EC Regulation 990/93. It was, indeed, for this reason that a second reference to the ECJ raising EC Regulation 2472/94 would have been possible but pointless.

111. As to the equivalence of the EC human rights protection, the Government pointed to, *inter alia*, Article 6 of the Treaty on European Union, the judicial remedies offered by the ECJ and the national courts, the reliance on Convention provisions and jurisprudence by the ECJ and the declarations of certain Community institutions. Moreover, the present applicant had the opportunity, unlike in the *Matthews* case, to fully ventilate its claim that its fundamental rights had been breached and the decision of the ECJ was based on a consideration of its property rights. As to the UN, Articles 1(3) and 55 of the UN Charter were recalled together with the Universal Declaration of Human Rights of 1948 and the International Covenants on Civil and Political Rights and on Economic and Social and Cultural Rights of 1966.

2. Article 1 of Protocol No. 1 to the Convention

112. The Government's primary argument was that Ireland's compliance with its international obligations constituted sufficient justification, of itself, for any interference with the applicant's property rights.

113. Alternatively, the impounding of the aircraft amounted to a lawful and proportionate control of use of the applicant's possessions in the public interest (*AGOSI v. the United Kingdom* judgment of 24 October 1986, Series A no. 108, § 51 and *Air Canada v. the United Kingdom* judgment of 5 May 1995, Series A no. 316-A, § 34). The margin of appreciation was broad given the strength of the two public interest objectives pursued: the principles of public international law, including *pacta sunt servanda*, pursuant to which the State discharged clear mandatory international obligations following the decisions of the relevant UN and EC bodies (the Sanctions Committee and the ECJ) and participating in an international effort to end a conflict.

114. The Government relied on their submissions in the context of Article 1 in order to argue that Article 1 of Protocol No. 1 did not require compensation or account to have been taken of the relaxation of the sanctions regime in October 1994. They also made detailed submissions

challenging the applicant's *bona fides*, although they maintained that the applicant's innocence would not have rendered the impoundment inconsistent with Article 1 of Protocol No. 1. Finally, they responded to the applicant's detailed allegations concerning the position of TEAM and, in particular, explained that proceedings had not been issued against TEAM because that would have amounted to applying retrospectively the criminal liability for which SI 144 of 1993 had provided.

B. The applicant

1. Article 1 of the Convention

115. The applicant considered that the terms of EC Regulation 990/93 and the preliminary reference process admitted of State discretion for which Ireland was responsible under the Convention.

It agreed that if the substance of its grievance had resulted solely from Ireland's international obligations, this Court would have had no competence. In *M. & Co.* (and other cases relied upon by the Government) the complaint had been directed against acts of international organisations over the elaboration of which the Member State had no influence and in the execution of which the State had no discretion. Since the applicant was not challenging the provisions of EC Regulation 990/93 or the sanctions regime *per se*, the "equivalent protection" principle of the *M. & Co.* case was not relevant. On the contrary, the Irish State had been intimately involved in the adoption and application of EC Regulation 990/93 and had, at all material times, a real and reviewable discretion as to the means by which the result required by the EC Regulation could be achieved.

116. In particular, the applicant considered that the State had impounded the aircraft as a preventative step without a clear UN or EC obligation to do so. It was not obliged to appeal from the High Court judgment of June 1994. The Supreme Court was not required to refer a question to the ECJ (Case 283/81 *CILFIT v. Minister for Health* [1982] ECR 3415 and this Court's decision in *Moosbrugger v. Austria* (dec.), no. 44861/98, 25 January 2000). Thereafter, in referring the question it did to the ECJ and since the ECJ could only respond under Article 177 (now Article 234) to the interpretative (or validity) question raised, the Supreme Court had effectively chosen to exclude certain matters from the examination of the ECJ. Moreover, given the terms of Article 234 (now Article 307)**,** the Supreme Court should have implemented the ECJ ruling in a Convention compatible manner whereas it had simply "rubber-stamped" that ruling: it should have considered, and made a further reference to the ECJ if necessary, certain additional matters prior to implementing the ruling of the ECJ. The matters thereby not considered by the Supreme Court and not put before the ECJ concerned, *inter alia*, whether impoundment expenses should be charged, whether

compensation should be paid and the effect of the EC Regulation 2472/94 and the relaxation of the sanctions regime (paragraphs 67-71 above). The applicant noted that certain relevant matters were raised in an affidavit filed on its behalf in the Supreme Court following the ECJ ruling (paragraph 58 above) but that the Supreme Court ignored those points.

117. The applicant considered its position consistent with the Convention jurisprudence. More generally, while the Convention did not exclude the transfer of competences to international organisations, the State had to continue to secure Convention rights (see *T.I. v. the United Kingdom* (dec.), no. 43844/98, ECHR 2000-III and the above-cited *M. & Co.*). The Convention organs had on numerous occasions examined the compatibility with the Convention of the discretion exercised by a State in applying EC law (see, *inter alia, Van de Hurk v. the Netherlands*, judgment of 19 April 1994, Series A no. 288; *Procola v. Luxembourg*, judgment of 28 September 1995, Series A no. 326; the above-cited *Cantoni v. France* and *Hornsby v. Greece* judgments; *Pafitis and Others v. Greece*, judgment of 26 February 1998, Reports 1998-I; *Matthews v. the United Kingdom*, [GC] no. 24833/94, ECHR 1999; *S.A. Dangeville v. France*, no. 36677/97, judgment of 16 April 2002; and *Société Colas Est and Others v. France*, no. 37971/97, ECHR 2002-III). The case-law of the ECJ itself supported the applicant's position (Case C-235/99 *R v. Secretary of State for the Home Department, ex parte Kondova* ([2001] ECR I-6427, § 90), the latter case being the first case in which, according to the applicant, the ECJ recognised that it could not claim to be the final arbiter of questions of human rights as Member States remained answerable to this Court. The applicant also relied on the *Pellegrini v. Italy* judgment (no. 30882/96, ECHR-2001 VIII) where the Court found a violation of Article 6 because the Italian courts did not satisfy themselves as to the fairness of proceedings before the Ecclesiastical Courts of the Rome Vicariate before enforcing a decision of those tribunals.

If the Court was to follow the Government's reliance on the above-cited decision of *M. & Co.* and judgments of *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany*, then any Member State of the EC could, according to the applicant, escape its Convention responsibility once its courts referred a question and implemented an ECJ ruling. The percentage of domestic law sourced in the EC is significant and growing and the matters now covered by EC law are increasingly broad and sensitive: to accept that any State act implementing an EC obligation does not fall within the State's Convention responsibility would create an unacceptable lacuna of human rights protection in Europe.

118. In any event, the applicant argued that the EC did not offer “equivalent protection”. The limited role of the ECJ under Article 177 (now Article 234) was outlined above: there was no inherent jurisdiction in the ECJ to consider whether matters such as the absence of compensation and discriminatory treatment of the applicant amounted to a breach of its

property rights. Proceedings against a Member State for action or inaction allegedly in violation of Community law could only be initiated before the ECJ by the European Commission or another Member State and otherwise the individual had to take proceedings in the national courts. A party to such domestic proceedings had no right to an Article 177 (now Article 234) reference, that being a matter for the domestic court. As indicated in the above-cited *Kondova* case, if an EC provision was considered to infringe the Convention, the national courts and this Court, rather than the ECJ, would be the final arbiters.

119. For these reasons, the applicant maintained that the above-described exercise of discretion by the Irish authorities as regards the impoundment of its aircraft should be reviewed for its Convention compatibility by this Court.

2. Article 1 of Protocol No. 1

120. The applicant maintained that the interference with its possessions (the impoundment) amounted to a deprivation which could not be described as "temporary" given its impact. It was also unlawful since the Government had not produced any documentary evidence of the legal basis for the same and since the implementing SI No. 144 of 1993, indicating the authority competent to impound, was not adopted until after the impoundment.

121. Moreover, such an interference was unjustified because it was not in accordance with the "general principles of international law" within the meaning of Article 1 of Protocol No. 1 and because it left an innocent party to bear an individual and excessive burden as the Government had failed to strike a fair balance between the general interest (the international community's interest in putting an end to a war and the associated significant human rights violations and breaches of humanitarian law) and the individual damage (the significant economic loss of an innocent party).

In particular, the applicant considered that certain factors distinguished its case from *AGOSI* and *Air Canada*. It also considered unjustifiable the situation which pertained after the adoption of EC Regulation 2472/94 (its aircraft remained impounded while those of JAT circulated). Compensation was an important element in the overall justification for the applicant and its absence in a *de facto* deprivation situation generally amounted to a disproportionate interference especially since the aim of the sanctions regime could have been achieved while paying it compensation. Finally, the applicant made a number of allegations about the State's relationship with TEAM and argued, notably, that the Government's failure to prosecute TEAM (when, *inter alia*, the Sanctions Committee had recognised that TEAM had broken the sanctions regime) highlighted the unjustifiable nature of the applicant's position, a foreign company innocent of any wrongdoing. In this latter respect, the applicant reaffirmed its *bona fides*, responded in

detail to the Government's allegations of bad faith and pointed out that all courts before which the case was examined confirmed its innocence.

C. The Third Party submissions

1. The European Commission

(a) Article 1 of the Convention

122. The European Commission considered that the application concerned in substance a State's responsibility for Community acts: while a State retained some Convention responsibility after it had ceded powers to an international organisation, that responsibility was fulfilled once there was proper provision in that organisation's structure for effective protection of fundamental rights at a level at least "equivalent" to that of the Convention. The European Commission therefore supported the approach adopted in the *M. & Co.* case (cited above) and urged the Court to adopt this solution pending EC accession to the Convention. Thereafter, any Convention responsibility, over and above the need to establish equivalent protection, would only arise when the State exercised a discretion accorded to it by the international organisations.

123. The European Commission considered this approach to be consistent with the recent case-law of this Court. The reference in the above-cited *Matthews* judgment to a State's Convention responsibility continuing after a transfer of competence to the EC and to the Convention responsibility of the UK was consistent with the *M. & Co.* approach given the differing impugned measures at issue in both cases. The above-cited judgments of *Waite and Kennedy* and *Beer and Regan* fully confirmed the European Commission's position. The *Cantoni* case was clearly distinguishable as this Court had reviewed the discretion exercised by the French authorities to create criminal sanctions in implementing an EC Directive.

124. The reason for initially adopting this "equivalent protection" approach (facilitating State co-operation through international organisations) was equally, if not more, pertinent today. It was an approach which was especially important for the EC given its distinctive features of supra-nationality and the nature of EC law: to require a State to review for Convention compliance an act of the EC before implementing it (with the unilateral action and non-observance of EC law that would potentially entail) would pose an incalculable threat to the very foundations of the EC, a result not envisaged by the drafters of the Convention, supportive as they were of European co-operation and integration. Moreover, subjecting individual EC acts to Convention scrutiny would amount to making the EC

a respondent in Convention proceedings without any of the procedural rights and safeguards of a Contracting State to the Convention. In short, the *M. & Co.* approach allowed the Convention to be applied in a manner which took account of the needs and realities of international relations and the unique features of the EC system.

125. In the opinion of the European Commission, the respondent State had no discretion under EC law. When a case involved an Article 177 (now Article 234) reference, this Court should distinguish between the respective roles of the national courts and the ECJ, so that if the impugned act was a direct result of the ECJ's ruling this Court should refrain from scrutinising it.

In the European Commission's view, Ireland was obliged (especially given the view of the Sanctions Committee) by its duty of loyal co-operation (Article 5, now Article 10, of the EC Treaty) to appeal the judgment of Mr Justice Murphy of the High Court to the Supreme Court in order to ensure effective implementation of EC Regulation 990/93; the Supreme Court, as the last instance court, was obliged under Article 177 (now Article 234) of the EC Treaty to make a reference to the ECJ since there was no doubt that the Government's appeal before it raised a serious and central question of interpretation of Community law; the Supreme Court asked the ECJ whether Article 8 of EC Regulation 990/93 applied to an aircraft such as that leased by the applicant and the ECJ ruled that it did having reviewed the fundamental rights aspects of the case so that, although the ECJ could not examine the particular facts of cases, the present impoundment was conclusively assessed and decided by the ECJ. The ruling of the ECJ was binding on the Supreme Court.

In such circumstances, the Supreme Court had no discretion to exercise and, consequently, its implementation of the ECJ ruling was not susceptible to this Court's review.

126. Moreover, the European Commission considered that “equivalent protection” was to be found in EC laws and structures. It outlined the developing recognition of the Convention provisions as a significant source of general principles of EC law which law governed the activities of the Community institutions and States and was implemented by the EC's judicial machinery, and it noted the relevant Treaty amendments reinforcing these case-law developments.

127. Finally, the European Commission considered that the above-cited *Kondova* ruling clearly supported its position that discretionary acts of the State remained fully subject to the Convention. The applicant's reliance on Article 234 (now Article 307) of the EC Treaty was also erroneous and the conclusions drawn therefrom inappropriate: in expressing the international law principles such as *pacta sunt servanda*, Article 234 (now Article 307) simply confirmed the starting point of the relevant Convention analysis namely, that a State cannot avoid its Convention responsibilities by ceding power to an international organisation.

(b) Article 1 of Protocol No. 1

128. The European Commission considered it undisputable that EC Regulation 990/93 constituted the legal basis for the impoundment. It rejected the applicant's suggestion that the impoundment was unlawful pending national secondary legislation and agreed with the Government that the implementing statutory instrument contained administrative competence and procedural provisions which had no bearing on the directly applicable nature of EC Regulation 990/93. For the reasons set out in the AG's opinion and the ECJ's ruling, the European Commission argued that the impoundment until October 1994 was proportionate and it did not find persuasive the applicant's argument that it was unjustified thereafter.

2. The Italian Government

129. As regards Article 1 of the Convention, the Italian Government considered that the case amounted to a challenge to the provisions of the relevant UNSC Resolution and EC Regulation and was, as such, incompatible. The Irish State was obliged to implement these instruments, it was obliged to address the relevant organs (the Sanctions Committee and the ECJ) and to comply with the rulings obtained: this warranted a conclusion of incompatibility *ratione personae*. As to the original handing over of sovereign power to the UN and EC, this Government also relied on the case of *M. & Co.* arguing that both the UN and the EC provided "equivalent protection": this warranted a conclusion of incompatibility *ratione materiae* or *personae*. Finally, any imposition of an obligation on a State to review its UN and EC obligations for Convention compatibility would undermine the legal systems of international organisations and, consequently, the international response to serious international crises.

130. On the merits of Article 1 of Protocol No. 1, they underlined the importance of the public interest objective pursued by the impoundment.

3. The Government of the United Kingdom

131. They considered that, since the complaint was against the EC, it was incompatible with the Convention provisions. To make one Member State responsible for Community acts would, not only be contrary to Convention jurisprudence, but would also subvert fundamental principles of international law (including the separate legal personality of international organisations) and be inconsistent with the obligations of Member States of the EC. The UK relied upon the above-cited case of *M. & Co.*, noting that human rights safeguards within the Community legal order had been further strengthened since the *M. & Co*. decision was adopted.

132. On the merits of the complaint under Article 1 of Protocol No. 1, this Government underlined the importance of the public interest at stake,

considered that the margin of appreciation was therefore wide, and argued that, even if the applicant was an innocent party, this would not render the interference with its property rights disproportionate (see the above-cite *AGOSI* and *Air Canada* judgments).

4. Institut de Formation en Droits de l'Homme du Barreau de Paris (the *Institut*)

133. The *Institut* considered the case compatible with the provisions of the Convention. However, it was equally of the view that this would not prevent Member States from complying with their Community obligations or mean that the Court would have jurisdiction to examine EC provisions against the Convention. The application was compatible *ratione personae*, since the object of the case was not to challenge UN or the EC provisions but rather Ireland's implementation of them. It was compatible *ratione materiae* because Article 1 did not exclude a particular type of measure or any part of a Member State's jurisdiction from scrutiny. The *Institut* pointed, by way of illustration, to the matters assessed by the Court in a number of cases including those of *Cantoni, Matthews* and *Waite and Kennedy* (cited above). Since neither the UN nor the EC provided equivalent human rights protection (especially when seen from the point of view of individual access to that protection and the limitations of the preliminary reference procedure), the complaint had to be found compatible.

134. As to the merits of the complaint under Article 1 of Protocol No. 1, the *Institut* considered the initial deprivation of the aircraft to be entirely justified but left open the justifiability of the continued retention of the aircraft after October 1994.

III. THE COURT'S ASSESSMENT

A. Article 1 of the Convention

135. The parties and third parties made substantial submissions under Article 1 of the Convention about the Irish State's Convention responsibility for the impoundment given its EC obligations. This Article provides that:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

136. The text of Article 1 requires Member States to answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their "jurisdiction" (*Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-....). The notion of "jurisdiction" reflects the term's meaning in public international law (*Gentilhomme, Schaff-Benhadji and Zerouki v. France*,

judgment of 14 May 2002, § 20; *Banković and Others v. Belgium* and 16 other Contracting States (dec.), no. 52207/99, §§ 59-61, ECHR 2001-XII; and *Assanidze v. Georgia*, ECHR 2004 -..., § 137), so that a State's jurisdictional competence is considered primarily territorial (*Banković*, cited above, § 59), a jurisdiction presumed to be exercised throughout the State's territory (*Ilaşcu and Others*, cited above, § 312).

137. In the present case it is not disputed that the act about which the applicant complained, the detention of the aircraft leased by it for a period of time, was implemented by the authorities of the respondent State on its territory following a decision to impound of the Irish Minister for Transport. In such circumstances the applicant company, as the addressee of the impugned act, fell within the "jurisdiction" of the Irish State, with the consequence that its complaint about that act is compatible *ratione loci*, *personae* and *materiae* with the provisions of the Convention.

138. The Court is further of the view that the submissions referred to at paragraph 135 above concerning the scope of the responsibility of the respondent State go to the merits of the complaint under Article 1 of Protocol No. 1 and are therefore examined below.

B. Article 1 of Protocol no. 1 to the Convention

139. This Article reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

140. It was not disputed that there was an "interference" (the detention of the aircraft) with the applicant's "possessions" (the benefit of its lease of the aircraft) and the Court does not see any reason to conclude otherwise (see, for example, *Stretch v. the United Kingdom*, no. 44277/98, §§ 32-35, 24 June 2003).

1. The rule applicable

141. The parties did not, however, agree on whether that interference amounted to a deprivation of property (first paragraph of Article 1 of Protocol No. 1) or a control of use (its second paragraph). It is recalled that, in guaranteeing the right of property, this Article comprises "three distinct rules": the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of

property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (the *AGOSI* case, at § 48).

142. The Court considers that the sanctions regime amounted to a control of the use of property considered to benefit the former FRY and that the impugned detention of the aircraft was a measure to enforce that regime. While the applicant lost the benefit of approximately three years of a four-year lease, that loss formed a constituent element of the above-described control on the use of property. It is therefore the second paragraph of Article 1 which is applicable in the present case (the *AGOSI* case, at §§ 50-51 and *Gasus Dosier-und Fördertechnik GmbH v. the Netherlands*, judgment of 23 February 1995, Series A no. 306-B, § 59), the "general principles of international law" within the particular meaning of the first paragraph of Article 1 of Protocol No. 1 (and relied on by the applicant) not therefore requiring separate examination (*Gasus Dosier-und Fördertechnik GmbH*, §§ 66-74).

2. The legal basis for the impugned interference

143. The parties strongly disagreed as to whether the impoundment was at all times based on legal obligations on the Irish State flowing from Article 8 of EC Regulation 990/93.

For the purposes of its examination of this question, the Court recalls that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law even when that law refers to international law or agreements. Equally, the Community judicial organs are better placed to interpret and apply EC law. In each instance, the Court's role is confined to ascertaining whether the effects of such adjudication are compatible with the Convention (see, *mutatis mutandis*, *Waite and Kennedy*, cited above, § 54, and *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97, 44801/98, § 49, ECHR 2001-II).

144. While the applicant alluded briefly to the Irish State's role in the EC Council (at paragraph 115 above), the Court notes that the applicant's essential standpoint was that it was not challenging the provisions of the Regulation itself but rather their implementation.

145. Once adopted, EC Regulation 990/93 was "generally applicable" and "binding in its entirety" (pursuant to Article 189, now Article 249, of the EC Treaty), so that it applied to all Member States none of whom could lawfully depart from any of its provisions. In addition, its "direct

applicability" was not, and in the Court's view could not be, disputed. The Regulation became part of domestic law with effect from 28 April 1993 when it was published in the Official Journal, prior to the date of the impoundment and without the need for implementing legislation (see, in general, paragraphs 65 and 83 above).

The later adoption of S.I. 144 of 1993 did not, as suggested by the applicant, have any bearing on the lawfulness of the impoundment: it simply regulated certain administrative matters (the identity of the competent authority and the sanction to be imposed for a breach of the Regulation) as foreseen by Articles 9 and 10 of the EC Regulation. While the applicant queried which body was competent for the purposes of the Regulation (paragraph 120 above), the Court considers it entirely foreseeable that a Minister for Transport would implement the impoundment powers contained in Article 8 of EC Regulation 990/93.

It is true that the "genesis" of EC Regulation 990/93 was a UNSC Resolution adopted under Chapter VII of the UN Charter (a point developed in some detail by the Government and certain third parties). While the Resolution was pertinent to the interpretation of the Regulation (see the opinion of the AG and the ruling of the ECJ, paragraphs 45-50 and 52-55 above), the Resolution did not form part of Irish domestic law (Mr Justice Murphy, at paragraph 35 above) and could not therefore have constituted a legal basis for the impoundment by the Minister for Transport of the aircraft.

Accordingly, the Irish authorities rightly considered themselves obliged to impound any departing aircraft to which they considered Article 8 of EC Regulation 990/93 applied. Their decision that it did so apply was later confirmed, *inter alia*, by the ECJ (paragraphs 54-55 above).

146. Thereafter, the Court finds persuasive the European Commission's submission that the State's duty of loyal co-operation (Article 5, now Article 10, of the EC Treaty) required it to appeal the High Court judgment of June 1994 to the Supreme Court in order to clarify the interpretation of EC Regulation 990/93. This was the first time that Regulation had been applied and the High Court's interpretation differed from that of the Sanctions Committee, a body appointed by the UN to interpret the UNSC Resolution implemented by the EC Regulation.

147. The Court would also agree with the Government and the European Commission that the Supreme Court had no real discretion to exercise, either before or after its preliminary reference to the ECJ, for the reasons set out below.

In the first place, there being no domestic judicial remedy against its decisions, the Supreme Court had to make the preliminary reference it did having regard to the terms of Article 177 (now Article 234) of the EC Treaty and the judgment of the ECJ in the *CILFIT* case (see paragraph 98 above): the answer to the interpretative question put to the ECJ was not

clear (the conclusions of the Sanctions Committee and the Minister for Transport conflicted with those of the High Court); the question was of central importance to the case (see the High Court's description of the essential question in the case and its consequential judgment from which the Minister appealed to the Supreme Court, paragraphs 35-36 above); and there was no previous ruling by the ECJ on the point. This finding is not affected by the observation in the Court's decision in *Moosbrugger v. Austria* decision (cited and relied upon by the applicant above) that an individual does not *per se* have a right to a referral.

Secondly, the ECJ ruling was binding on the Supreme Court (paragraph 99 above).

Thirdly, the ruling of the ECJ effectively determined the domestic proceedings in the present case. Given the Supreme Court's question and the answer of the ECJ, the only conclusion open to the former was that EC Regulation 990/93 applied to the applicant's aircraft. It is moreover erroneous to suggest, as the applicant did, that the Supreme Court could have made certain orders additional to the ECJ ruling (including a second "clarifying" reference to the ECJ) as regards impoundment expenses, compensation and the intervening relaxation of the sanctions regime. The applicant's motion and affidavit of October 1996 filed with the Supreme Court did not develop these matters in any detail or request that Court to make such supplemental orders. In any event, the applicant was not required to discharge the impoundment expenses.

That EC Regulation 990/93 did not admit of an award of compensation was implicit in the findings of the AG and the ECJ (each considered the application of the Regulation to be justified despite the hardship that that implied) and in the expenses provisions of the second sentence of Article 8 of the Regulation. Consequently, the notions of uniform application and supremacy of EC law (paragraphs 92 and 96 above) prevented the Supreme Court from making such an award. As noted at paragraph 105 above, EC Regulation 2472/94 relaxing the EC sanctions regime from October 1994 expressly excluded from its ambit aircraft already lawfully impounded and neither the ECJ nor the Supreme Court referred to this point in their respective ruling (of July 1996) and judgment (of November 1996).

148. For these reasons, the Court finds that the impugned interference was not the result of an exercise of discretion by the Irish authorities, either under EC or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from EC law and, in particular, Article 8 of EC Regulation 990/93.

3. Whether the impoundment was justified

(a) The general approach to be adopted

149. Since the second paragraph is to be construed in the light of the general principle enunciated in the opening sentence of Article 1, there must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised: the Court must determine whether a fair balance has been struck between the demands of the general interest in this respect and the interest of the individual company concerned. In so determining, the State enjoys a wide margin of appreciation with regard to the means chosen to be employed and to the question of whether the consequences are justified in the general interest for the purpose of achieving the objective pursued (the *AGOSI* case, § 52).

150. The Court considers it evident from its finding at paragraphs 145-148 immediately above, that the general interest pursued by the impugned action was compliance with legal obligations flowing from the Irish State's membership of the EC.

It is, moreover, a legitimate interest of considerable weight. The Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between the Contracting Parties (Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969 and *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI), which principles include that of *pacta sunt servanda*. The Court has also long recognised the growing importance of international co-operation and of the consequent need to secure the proper functioning of international organisations **(**the above-cited cases of *Waite and Kennedy*, at §§ 63 and 72 and *Al-Adsani*, § 54. See also Article 234 (now Article 307) of the EC Treaty). Such considerations are critical for a supranational organisation such as the EC[25]. This Court has accordingly accepted that compliance with EC law by a Contracting Party constitutes a legitimate general interest objective within the meaning of Article 1 of Protocol No. 1 (*mutatis mutandis, S.A. Dangeville v. France*, cited above, at §§ 47 and 55).

151. The question is therefore whether, and if so to what extent, that important general interest of compliance with EC obligations can justify the impugned interference by the State with the applicant's property rights.

152. The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue co-operation in certain fields of activity (the *M. & Co.* decision, at p. 144 and *Matthews* at § 32, both cited above). Moreover, even as the holder of such transferred sovereign

[25] *Costa v. Ente Nazionale per l'Energia Electtrica* (ENEL), Case 6/64, [1964] ECR 585

power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party (see *CFDT v. European Communities*, no. 8030/77, Commission decision of 10 July 1978, DR 13, p. 231; *Dufay v. European Communities*, no. 13539/88, Commission decision of 19 January 1989; the above-cited *M. & Co.* case, at p. 144 and the above-cited *Matthews* judgment, at § 32).

153. On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention (*United Communist Party of Turkey and Others v. Turkey* judgment of 30 January 1998, Reports, 1998-I, § 29).

154. In reconciling both these positions and thereby establishing the extent to which State action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards (*M. & Co*. at p. 145 and *Waite and Kennedy*, at § 67). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (*mutatis mutandis*, the above-cited *Matthews v. the United Kingdom* judgment, at §§ 29 and 32-34, and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 47, ECHR 2001-VIII).

155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see the above-cited *M. & Co.* decision, at p. 145, an approach with which the parties and the European Commission agreed). By "equivalent" the Court means "comparable": any requirement that the organisation's protection be "identical" could run counter to the interest of international co-operation pursued (paragraph 150 above). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection.

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

However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights (*Loizidou v. Turkey (preliminary objections)*, judgment of 23 March 1995, Series A no. 310, § 75).

157. It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations. The numerous Convention cases cited by the applicant at paragraph 117 above confirm this. Each case (in particular, the *Cantoni* judgment, at § 26) concerned a review by this Court of the exercise of State discretion for which EC law provided. The *Pellegrini* case is distinguishable: the State responsibility issue raised by the enforcement of a judgment not of a Contracting Party to the Convention (the above-cited *Drozd and Janousek* case, § 110) is not comparable to compliance with a legal obligation emanating from an international organisation to which Contracting Parties have transferred part of their sovereignty. The *Matthews* case can also be distinguished: the acts for which the United Kingdom was found responsible were "international instruments which were freely entered into" by it (§ 33 of that judgment). The *Kondova* judgment (paragraph 76 above), also relied on by the applicant, is consistent with a State's Convention responsibility for acts not required by international legal obligations.

158. Since the impugned act constituted solely compliance by Ireland with its legal obligations flowing from membership of the EC (paragraph 148 above), the Court will now examine whether a presumption arises that Ireland complied with its Convention requirements in fulfilling such obligations and whether any such presumption has been rebutted in the circumstances of the present case.

(b) Was there a presumption of Convention compliance at the relevant time?

159. The Court has described (at paragraphs 73-81 above) the fundamental rights guarantees of the EC which govern Member States, Community institutions together with natural and legal persons ("individuals").

While the constituent EC treaty did not initially contain express provisions for the protection of fundamental rights, the ECJ subsequently recognised that such rights were enshrined in the general principles of Community law protected by it and that the Convention had a "special

significance" as a source of such rights. Respect for fundamental rights has become "a condition of the legality of Community acts" (paragraphs 73-75 above, together with the opinion of the AG in the present case at paragraphs 45-50 above) and in carrying out this assessment the ECJ refers extensively to Convention provisions and to this Court's jurisprudence. At the relevant time, these jurisprudential developments had been reflected in certain treaty amendments (notably those aspects of the Single European Act 1986 and of the TEU referred to at paragraphs 77-78 above).

This evolution has continued thereafter. The Treaty of Amsterdam 1997 is referred to at paragraph 79 above. Although not fully binding, the provisions of the Charter of Fundamental Rights of the European Union were substantially inspired by those of the Convention and the Charter recognises the Convention as establishing the minimum human rights standards. Article I-9 of the later Treaty establishing a Constitution for Europe (not in force) provides for the Charter to become primary law of the European Union and for the Union to accede to the Convention (see paragraphs 80-81 above).

160. However, the effectiveness of such substantive guarantees of fundamental rights depends on the mechanisms of control in place to ensure observance of such rights.

161. The Court has referred (at paragraphs 86-90 above) to the jurisdiction of the ECJ in, *inter alia*, annulment actions (Article 173, now Article 230), in actions against Community institutions for failure to perform Treaty obligations (Article 175, now Article 232), to hear related pleas of illegality under Article 184 (now Article 241) and in cases against Member States for failure to fulfil Treaty obligations (Articles 169, 170 and 171, now Articles 226, 227 and 228).

162. It is true that access of individuals to the ECJ under these provisions is limited: they have no *locus standi* under Articles 169 and 170; their right to initiate actions under Articles 173 and 175 is restricted as is, consequently, their right under Article 184; and they have no right to take an action against another individual.

163. It nevertheless remains the case that actions initiated before the ECJ by the Community institutions or a Member State constitute important control of compliance with Community norms to the indirect benefit of individuals. Individuals can also bring an action for damages before the ECJ in respect of the non-contractual liability of the institutions (paragraph 88 above).

164. Moreover, it is essentially through the national courts that the Community system provides a remedy to individuals against a Member State or another individual for a breach of EC law (see paragraphs 85 and 91 above). Certain EC Treaty provisions envisaged a complementary role for the national courts in the Community control mechanisms from the outset, notably Article 189 (the notion of direct applicability, now Article 249) and

Article 177 (the preliminary reference procedure, now Article 234). It was the development by the ECJ of important notions such as the supremacy of EC law, direct effect, indirect effect and State liability (paragraphs 92-95 above) which greatly enlarged the role of the domestic courts in the enforcement of Community law and its fundamental rights' guarantees.

The ECJ maintains its control on the application by national courts of EC law, including its fundamental rights guarantees, through the procedure for which Article 177 of the EC Treaty provides in the manner described at paragraphs 96-99 above. While the ECJ's role is limited to responding to the interpretative or validity question referred by the domestic court, the response will often be determinative of the domestic proceedings (as, indeed, it was in the present case - see paragraph 147 above) and detailed guidelines on the timing and content of a preliminary reference have been laid down by the EC treaty provision and developed by the ECJ in its case-law. The parties to the domestic proceedings have the right to put their case to the ECJ during the Article 177 process. It is further recalled that national courts operate in legal systems into which the Convention has been incorporated, albeit to differing degrees.

165. In such circumstances, the Court finds that the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, “equivalent” (within the meaning of paragraph 155 above) to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the EC (see paragraph 156).

(c) Has that presumption been rebutted in the present case?

166. The Court has had regard to the nature of the interference, to the general interest pursued by the impoundment and by the sanctions regime and to the ruling of the ECJ (in the light of the opinion of the AG), a ruling with which the Supreme Court was obliged to and did comply. It considers it clear that there was no dysfunction of the mechanisms of control of the observance of Convention rights.

In the Court's view, therefore, it cannot be said that the protection of the applicant's Convention rights was manifestly deficient with the consequence that the relevant presumption of Convention compliance by the respondent State has not been rebutted.

4. Conclusion under Article 1 of Protocol No. 1

167. It follows that the impoundment of the aircraft did not give rise to a violation of Article 1 of Protocol No. 1 to the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the preliminary objections; and

2. *Holds* that there has been no violation of Article 1 of Protocol No. 1 to the Convention;

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 30 June 2005.

Christos ROZAKIS
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) the joint concurring opinion of Mr Rozakis, Mrs Tulkens, Mr Traja, Mrs Botoucharova, Mr Zagrebelsky et Mr Garlicki;

(b) the concurring opinion of Mr Ress.

C.L.R.
P.J.M.

JOINT CONCURRING OPINION OF JUDGES ROZAKIS, TULKENS, TRAJA, BOTOUCHAROVA, ZAGREBELSKY AND GARLICKI

(Translation)

While we are in agreement with the operative provisions of the judgment, namely that there has been no violation of Article 1 of Protocol No. 1 in the instant case, we do not agree with all the steps in the reasoning followed by the majority, nor all aspects of its analysis. Accordingly, we wish to clarify certain points which we consider important.

1. In examining Article 1 of the Convention, the judgment rightly points out, on the basis of the Court's case-law, that it follows from the wording of that provision that the States Parties must answer for any infringement of the rights and freedoms protected by the Convention committed against persons placed under their "jurisdiction" (see paragraph 136). It concludes that the applicant company's complaint is compatible not only *ratione loci* (which was not contested) and *ratione personae* (which was not in issue) but also *ratione materiae* with the provisions of the Convention (see paragraph 137). Thus, the Court clearly acknowledges its jurisdiction to review the compatibility with the Convention of a domestic measure adopted on the basis of a European Community Regulation and, in so doing, departs from the decision given in *M. & Co. v. the Federal Republic of Germany* by the European Commission of Human Rights on 9 February 1990 (no. 13258/87, *Decisions and Reports* 64, p. 138).

It has now been accepted and confirmed that the principle that Article 1 of the Convention "makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member States' 'jurisdiction' from scrutiny under the Convention" (*United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, § 29) also applies to European Community law. It follows that the member States are responsible, under Article 1 of the Convention, for all acts and omissions of their organs, whether these arise from domestic law or from the need to fulfil international legal obligations.

2. In examining the alleged violation of Article 1 of Protocol No. 1 to the Convention, and having determined the applicable rule and the legal basis for the impugned interference, the Court's task was to examine whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be reached and, consequently, to determine if a fair balance had been struck between the demands of the

general interest and the interest of the applicant company. By its nature, such a review of proportionality can only be carried out *in concreto*.

In the instant case, the judgment adopts a general approach based on the concept of presumption: "If such [comparable] equivalent protection [of fundamental rights] is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient" (see paragraph 156).

3. Even supposing that such "equivalent protection" exists – a finding which, moreover, as the judgment correctly observes, could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection (see paragraph 155) –, we are not entirely convinced by the approach that was adopted in order to establish that such protection existed in the instant case.

The majority engages in a general abstract review of the Community system (see paragraphs 159-164) – a review to which all the Contracting Parties to the European Convention on Human Rights could in a way lay claim – and concludes that the protection of fundamental rights by EC law can be considered to be "equivalent" to that of the Convention system, thereby enabling the concept of presumption to be brought into play (see paragraph 165).

Needless to say, we do not wish to question that finding. We are fully convinced of the growing role of fundamental rights and their far-reaching integration into the Community system, and of the major changes in the case-law taking place in this field. However, it remains the case that the Union has not yet acceded to the European Convention on Human Rights and that full protection does not yet exist at European level.

Moreover, as the judgment rightly emphasises, "the effectiveness of such substantive guarantees of fundamental rights depends on the mechanisms of control in place to ensure observance of such rights" (see paragraph 160). From this procedural perspective, the judgment minimises or ignores certain factors which establish a genuine difference and make it unreasonable to conclude that "equivalent protection" exists in every case.

On the one hand, we have a reference for a preliminary ruling to the Court of Justice of the European Communities, made not by the applicant company but by the Supreme Court of Ireland. Such a reference does not constitute an appeal but a request for interpretation (Article 234 of the Treaty of Rome). Although the interpretation of Community law given by the Court of Justice of the European Communities is binding on the court which made the referral, the latter retains full discretion in deciding how to

apply that ruling *in concreto* when resolving the dispute before it. Equally, in its general review of "equivalent protection", the judgment should probably have explored further those situations which, admittedly, do not concern the instant case but in which the Court of Justice of the European Communities allows national courts a certain discretion in implementing its judgment and which could become the subject matter of an application to the European Court of Human Rights. However, it is clear from paragraph 157 of the judgment and the reference to *Cantoni v. France* (judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V) that the use of discretion in implementing a preliminary ruling by the Court of Justice of the European Communities is not covered by the presumption of "equivalent protection".

On the other hand, as the judgment itself acknowledges, individuals' access to the Community court is "limited" (see paragraph 162). Yet, as the Court reiterated in the *Mamatkulov and Askarov v. Turkey* judgment ([GC], nos. 46827/99 and 46951/99, 4 February 2005), the right of individual application "is one of the keystones in the machinery for the enforcement of the rights and freedoms set forth in the Convention" (see § 122 of that judgment). Admittedly, judicial protection under Community law is based on a plurality of appeals, among which the reference to the Court of Justice for a preliminary ruling has an important role. However, it remains that case that, despite its value, a reference for a preliminary ruling entails an internal, *a priori* review. It is not of the same nature and does not replace the external, *a posteriori* supervision of the European Court of Human Rights, carried out following an individual application.

The right of individual application is one of the basic obligations assumed by the States on ratifying the Convention. It is therefore difficult to accept that they should have been able to reduce the effectiveness of this right for persons within their jurisdiction on the ground that they have transferred certain powers to the European Communities. For the Court to leave to the EU's judicial system the task of ensuring "equivalent protection", without retaining a means of verifying on a case-by-case basis that that protection is indeed "equivalent", would be tantamount to consenting tacitly to substitution, in the field of Community law, of Convention standards by a Community standard which might be inspired by Convention standards but whose equivalence with the latter would no longer be subject to authorised scrutiny.

4. Admittedly, the judgment states that such *in concreto* review would remain possible, since the presumption could be rebutted if, in the circumstances of a particular case, the Court considered that "the protection of Convention rights was manifestly deficient" (see paragraph 156).

In spite of its relatively undefined nature, the criterion "manifestly deficient" appears to establish a relatively low threshold, which is in marked contrast to the supervision generally carried out under the European Convention on Human Rights. Since the Convention establishes a minimum level of protection (Article 53), any equivalence between it and the Community's protection can only ever be in terms of the means, not of the result. Moreover, it seems all the more difficult to accept that Community law could be authorised, in the name of "equivalent protection", to apply standards that are less stringent than those of the European Convention on Human Rights when we consider that the latter were formally drawn on in the Charter of Fundamental Rights of the European Union, itself an integral part of the Union's Treaty establishing a Constitution for Europe. Although these texts have not (yet) entered into force, Article II-112(3) of the Treaty contains a rule whose moral weight would already appear to be binding on any future legislative or judicial developments in European Union law: "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention."

Thus, in order to avoid any danger of double standards, it is necessary to remain vigilant. If it were to materialise, such a danger would in turn create different obligations for the Contracting Parties to the European Convention on Human Rights, divided into those which had acceded to international conventions and those which had not. In another context, that of reservations, the Court has raised the possibility of inequality between Contracting States and reiterated that this would "run counter to the aim, as expressed in the Preamble to the Convention, to achieve greater unity in the maintenance and further realisation of human rights" (*Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, § 77).

CONCURRING OPINION OF JUDGE RESS

1. This judgment demonstrates how important it will be for the European Union to accede to the European Convention of Human Rights in order to make the control mechanism of the Convention complete, even if this judgment has left the so-called *M. & Co*. approach far behind (application no. 13258/87, Commission decision of 9 February 1990, DR 64). It has accepted the Court's jurisdiction *ratione loci*, *personae* and *materiae* under Article 1 of the Convention, clearly departing from an approach which would declare the European Communities (EC) immune, even indirectly, from any supervision by this Court. On the examination of the merits of the complaint, the question is whether there exists a reasonable relation of proportionality between the interference with the applicant's property, on the one hand, and the general interest, on the other. On the basis of its case-law the Court developed, in particular in *Waite and Kennedy v. Germany* ([GC], no. 26083/94, ECHR 1999-I), a special *ratio decidendi* regarding the extent of its scrutiny in cases concerning international and supranational organisations. I can agree with the result in this case that there was no violation of Article 1 of Protocol No. 1 and that the infringement of the use of the applicant's property – in the general interest of safeguarding the sanctions regime of the UN and the EC – did not go beyond the limits which any trading company must be prepared to accept in the light of that general interest. One could argue that to come to this conclusion the whole concept of presumed Convention compliance by international organisations, and in particular by the EC, was unnecessary and even dangerous for the future protection of human rights in the Contracting States when they transfer parts of their sovereign power to an international organisation.

2. The judgment should not be seen as a step towards the creation of a double standard. The concept of a presumption of Convention compliance should not be interpreted as excluding a case by case review by this Court of whether there was really a breach of the Convention. I subscribe to the finding of the Court that there exists within the EC an effective protection of fundamental rights and freedoms including those guaranteed by the Convention even if the access of individuals to the ECJ is rather limited, as the Court has recognised, if not criticised, in paragraph 162. The Court has not addressed the question of whether this limited access is really in accordance with Article 6 § 1 of the Convention and whether the provisions, in particular, of former Article 173 should not be interpreted more extensively in the light of Article 6 § 1, a point that was in issue before both the Court of First Instance and the ECJ in the case of *Jégo-Quéré & Cie SA v Commission of the European Communities* (Case T-177/01, [2002] ECR II-02365 (Court of First Instance) and Case C-263/02 P, [2004] ECR I-3425, the ECJ. See also the judgment of the ECJ in *Unión de Pequeños*

Agricultores v Council of the European Union, Case C-50/00 P, [2002] ECR 2002 I-06677). One should not infer from paragraph 162 of the judgment in the present case that the Court accepts that Article 6 § 1 does not call for a more extensive interpretation. Since the guarantees of the Convention only establish obligations "of result", without specifying the means to be used, it seems possible to conclude that the protection of fundamental rights, including those of the Convention, by EC law can be considered to have been "equivalent" (paragraph 165), even if the protection of the Convention by the ECJ is not a direct one but rather an indirect one through different sources of law, namely the general principles of Community law. The criticism has sometimes been made that these general principles of Community law do not, as interpreted by the case-law of the ECJ, fulfil the required standard of protection, as they are limited by considerations of the general public interest of the EC. This reasoning makes it rather difficult for the ECJ to find violations of these general principles of community law. The Court's analysis of the "equivalence" of the protection is a rather formal one, and relates only to the procedures of protection and not to the jurisprudence of the ECJ in relation to the various substantive Convention guarantees: a major part of the jurisprudence of the ECJ on the level and intensity of the protection of property rights and the application of Article 1 of Protocol No. 1 is missing. But it is to be expected in future cases that the presumption of Convention compliance should and will be enriched by considerations about the level and intensity of protection of a specific fundamental right guaranteed by the Convention. In my view, one can not say for once and for all that, in relation to all Convention rights, there is already such a presumption of Convention compliance because of the mere formal system of protection by the ECJ. It may be expected that the provisions of the Charter of Fundamental Rights of the European Union, if it comes into force, may enhance and clarify this level of control for the future.

3. The Court decided that the presumption can only be rebutted if, in the circumstances of a particular case, it is considered that the protection of the Convention rights was *manifestly deficient*. The protection was manifestly deficient when there has, in procedural terms, been no adequate review in the particular case such as: when the ECJ lacks competence (as in the case of *Segi and Gestoras Pro-Amnistía and Others v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom* ((dec.), nos. 6422/02 and 9916/02, ECHR 2002-V); when the ECJ has been too restrictive in its interpretation of individual access to it; or indeed where there has been an obvious misinterpretation or misapplication by the ECJ of the guarantees of the Convention right. Even if the level of protection must only be "comparable" and not "identical", the *result* of the protection of the

Convention rights should be the same. It is undisputed that the level of control extends to both procedural and substantive violations of the Convention guarantees. Article 35 § 3 of the Convention refers to applications which are manifestly ill-founded and the new Article 28 § 1(b) as inserted by Protocol No. 14 gives the Committee the power to declare applications which are manifestly well-founded admissible and render at the same time a judgment on the merits: that is, in the wording of that new Article, if the underlying question in the case concerns an interpretation or application of the Convention (or its Protocols) which is already the subject of well-established case-law of the Court. One would conclude that the protection of the Convention right would be manifestly deficient if, in deciding the key question in a case, the ECJ were to depart from the interpretation or the application of the Convention or the Protocols that had already been the subject of well-established ECHR case-law. In all such cases, the protection would have to be considered to be manifestly deficient. In other cases concerning new questions of interpretation or application of a Convention right, it may be that the ECJ would decide in a way which the ECHR would not be prepared to follow in future cases, but in such cases it would be difficult to say that the deficiency was already manifest. But even that result should not be excluded *ab initio*. Accordingly, and relying on the wording of the Convention and its Protocols, I do not see the "manifestly deficient" level to be a major step in the establishment of a double standard. Since the ECJ would, in a future case, be under an obligation to consider whether there was already an interpretation or an application of the Convention which was already the subject of ECHR case-law, I am convinced that it is only in exceptional cases that the protection will be found to have been manifestly deficient. In the light of this interpretation of the judgment which confirms the ECJ's obligation to follow the "well-established case-law of the ECHR" I have agreed to the maxim in paragraph 156.

4. It would probably have been possible to elaborate in more detail on the various points made in paragraph 166 of the judgment. The very brief reference to the nature of the interference, to the general interest pursued by the impoundment and by the sanctions regime, and to the ECJ's ruling (in the light of the opinion of the AG) should not be seen as an open door through which any future cases where State authorities apply Community law can pass without any further scrutiny. The Court has referred to the fact that there was no dysfunction of the mechanism of control and of the observance of Convention rights. A dysfunction of the observance of Convention rights would arise precisely in those cases where the protection was manifestly deficient in the sense I have tried to explain. It would probably have been useful to explain this in more detail to avoid the impression that Member States of the European Communities live under a

different and more lenient system as regards the protection of human rights and fundamental freedoms of the Convention. In fact, the intensity of control and supervision by the ECHR will not be too different between these States and others (such as Russia or Ukraine) which are not EC Member States.

5. A general remark is necessary on paragraph 150 as regards the interpretation of the Convention "in the light of any relevant rules and principles of international law", which principles include that of *pacta sunt servanda*. This cannot be interpreted to give treaties concluded between the Contracting Parties precedence over the Convention. On the contrary, as the Court recognised in the case of *Matthews v. the United Kingdom* ([GC], no. 24833/94, ECHR 1999-I), international treaties between the Contracting Parties have to be consistent with the provisions of the Convention. The same is true of treaties establishing international organisations. The importance of international cooperation and the need to secure the proper functioning of international organisations cannot justify Contracting Parties creating and entering into international organisations which are not in conformity with the Convention. Furthermore, international treaties like the Convention may depart from rules and principles of international law normally applicable to relations between the Contracting Parties. Therefore, in the case of *Al-Adsani v. the United Kingdom* ([GC], no. 35763/97, ECHR 2001-XI, which the Court cited in this connection in its judgment in the present case), the Court's approach to the relationship between different sources of public international law was not the right one. The correct question should have been whether, and to what extent, the Convention guarantees individual access to tribunals in the sense of Article 6 § 1 and whether the parties could and should have been seen as nevertheless reserving the rule on state immunity. Since the Contracting Parties could have waived their right to invoke State immunity by agreeing to Article 6 § 1 of the Convention, the starting point should have been the interpretation of Article 6 § 1 alone. Unfortunately this question was never asked. In the present case, the correct approach should have been to examine whether, and to what extent, the Contracting Parties could and should be presumed to have reserved a special position in relation to the Convention for international treaties establishing an international organisation. The Court seems to proceed on the assumption that the Contracting States agreed *inherently* that the value of international cooperation through international organisations is such that it may prevail to a certain extent over the Convention. I could agree to this conclusion, in principle, if all Contracting Parties to the Convention were also parties to the international organisation in question. However, as Switzerland and Norway show, even from the very beginning of European integration, this has never been the case.

In the case of Buckley v. the United Kingdom (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Bernhardt, President,
Mr Thór Vilhjálmsson,
Mr L.-E. Pettiti,
Mr A.N. Loizou,
Mr J.M. Morenilla,
Sir John Freeland,
Mr B. Repik,
Mr K. Jungwiert,
Mr U. Lohmus,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 23 February and 26 August 1996,

Delivers the following judgment, which was adopted on the last-mentioned date:

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Notes by the Registrar

1. The case is numbered 23/1995/529/615. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") on 1 and 7 March 1995 respectively, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 20348/92) against the United Kingdom lodged with the Commission under Article 25 (art. 25) on 7 February 1992 by a British national, Mrs June Buckley.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). The object of the request and of the application was to

obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 of the Convention (art. 8).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 5 May 1995, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr L.-E. Pettiti, Mr A.N. Loizou, Mr J.M. Morenilla, Mr B. Repik, Mr K. Jungwiert and Mr U. Lohmus (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the British Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's and the applicant's memorials on 2 November 1995. Supplementary memorials were received from the Government and the applicant on 21 December 1995 and 5 February 1996 respectively.

5. On 25 January 1996 the President of the Chamber decided to admit to the case file certain documents received at the registry on 8 January from Mr A.J. Buck, Neighbourhood Watch Co-ordinator, of Willingham, Cambridgeshire (Rule 37 para. 2).

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 19 February 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr I. Christie, Assistant Legal Adviser,
Foreign and Commonwealth Office, Agent,
Mr D. Pannick QC,
Mr M. Shaw, Counsel,
Mr D. Russell, Department of the Environment,
Ms P. Prosser, Department of the Environment,
Mr R. Horsman, Department of the Environment,
Mrs K. Crandall, South Cambridgeshire District
Council, Advisers;

(b) for the Commission

Mr N. Bratza, Delegate;

(c) for the applicant

Mr P. Duffy, Barrister-at-Law,
Mr T. Jones, Barrister-at-Law, Counsel,
Mr L. Clements, Solicitor.

The Court heard addresses by Mr Bratza, Mr Duffy and Mr Pannick.

AS TO THE FACTS

I. Particular circumstances of the case

A. The background

7. The applicant is a British citizen and a Gypsy. She lives with her three children in caravans parked on land owned by her off Meadow Drove, Willingham, South Cambridgeshire, England. She is married but separated from her husband in 1991.

8. As far back as can be traced, the applicant's family have been Gypsies based in South Cambridgeshire. She has lived in caravans all her life and as a child travelled with her parents in this area. She continued this itinerant life until shortly before the birth of her third child in 1988.

9. In 1988 the applicant's sister and brother-in-law acquired a one-acre (approximately 4000 square metres) site off Meadow Drove, Willingham, and were granted personal, temporary planning permission for one living unit, comprising two caravans.

10. At her sister's invitation she moved on to this site in November 1988 when she was expecting her third child, because she had found it hard being constantly on the move with young children. During this period of settled living the two eldest children were able to attend a local school, where they integrated well.

11. On an unspecified date in 1988, the applicant acquired part of her sister's land (0.16 hectare) to the rear of the site, furthest away from Meadow Drove. She moved her three caravans on to this plot.

12. Her land is now part of a group of six adjacent sites which are occupied by Gypsies. One plot has received permanent planning permission for the residential use of three caravans. The site occupied by the applicant's sister enjoyed temporary permission until 4 August 1995. The remaining three sites have been occupied without planning permission and the occupants have been subject to enforcement proceedings (see paragraph 32 below). The occupants of two of those sites have also introduced applications before the European Commission of Human Rights.

13. The applicant has stated that she intends to resume her travelling life sometime in the future, and to pass on this tradition to her children.

In 1993 she travelled with her sister to Saint Neots in Cambridgeshire because her father-in-law was dying. She was able to park on waste ground for two weeks, but had to move on shortly after the funeral.

B. The application for planning permission

14. On 4 December 1989 the applicant applied retrospectively to South Cambridgeshire District Council for planning permission for the three caravans on her site.

She was refused on 8 March 1990 on the grounds that (1) adequate provision had been made for Gypsy caravans elsewhere in the South Cambridgeshire area, which had in the Council's opinion reached "saturation point" for Gypsy accommodation; (2) the planned use of the land would detract from the rural and open quality of the landscape, contrary to the aim of the local development plan which was to protect the countryside from all but essential development (see paragraph 30 below); and (3) Meadow Drove was an agricultural drove road which was too narrow to allow two vehicles to pass in safety.

15. On 9 April 1990 the Council issued an enforcement notice requiring the caravans to be removed within a month.

The applicant appealed against the enforcement notice to the Secretary of State for the Environment (see paragraph 33 below).

16. An inspector was appointed by the Secretary of State to report on the appeal (see paragraph 33 below). The inspector visited the site and considered written representations submitted by the applicant and the District Council.

In her report issued on 14 February 1991 the inspector observed that the local authority had granted planning permission to two caravan sites between the applicant's site and Meadow Drove (the applicant's sister's site and another), and to an agricultural workshop on land to the east of the site (which was occupied at the time of the inspection by an unauthorised road haulage business). The applicant's caravans were screened from the road because of these authorised and unauthorised developments. However, the inspector wrote that:

> "... whether seen or not, the development subject of these notices [i.e. the applicant's caravan site] extends development further from the road than that permitted. It thus intrudes into the open countryside, contrary to the aim of the Structure Plan [see paragraph 30 below] to protect the countryside from all but essential development."

The inspector also found that the access road to the site was too narrow for two vehicles to pass, and thus that the use of the site for caravans would not be in the interests of road safety.

She considered the applicant's special status as a Gypsy and observed that in January 1990 there were over sixty Gypsy families on unauthorised sites in the district of South Cambridgeshire. She continued:

> "It is therefore clear in my mind that a need exists for more authorised spaces. ... Nevertheless, I consider it important to keep concentrations of sites for gypsies small, because in this way they are more readily accepted by the local community. ... [T]he concentration of gypsy sites in Willingham has reached the desirable maximum and I do not consider that the overall need for sites should, in this case, outweigh the planning objections."

She concluded by recommending that the appeal be dismissed.

17. The Secretary of State dismissed the appeal on 16 April 1991.

The reasons given included the following:

> "The decisive issue in regard to the planning merits of your appeals is considered to be whether the undisputed need for additional gypsies' caravan site provision, in the administrative areas of the District Council, and of the County Council, is so pressing that it should be permitted to override the objections on planning policy and highway safety grounds to the retention of the use of the appeal site as a residential caravan site for gypsies. On this approach, the view is taken that the objections to the continued use of the appeal site as a residential gypsy caravan site are so strong, on planning policy and highway safety grounds, that a grant of planning permission could not be justified, either on a temporary or personal basis. In reaching this conclusion, full consideration has been given to policy advice in the Department's Circular 28/77, giving guidance to Councils on the need to provide adequate accommodation in the form of caravan sites, for gypsies residing in or resorting to their area. However, on the available evidence, the view is taken, in agreement with the officer's appraisal, that the concentration of gypsy caravan sites around the Willingham area has reached the desirable maximum, and the overall need for additional sites should not outweigh the planning and highway objections arising from the continued use of this particular site."

The applicant did not appeal to the High Court because she was advised by counsel that no grounds arose in her case (see paragraph 34 below).

C. Criminal proceedings against the applicant

18. The applicant has been prosecuted for failure to comply with the enforcement notice of May 1990. On 7 January 1992 she was fined £50 and required to pay £10 costs.

She has again been prosecuted on two occasions after the introduction of her application to the Commission on 7 February 1992.

On 12 January 1994 the magistrates granted her an absolute discharge but ordered her to pay the prosecution costs.

Finally, on 16 November 1994 she was fined £75 and ordered to pay £75 costs.

D. Designation

19. By a letter dated 20 May 1993, the Department of the Environment informed the District Council that the Secretary of State had decided to designate the area of South Cambridgeshire under section 12 of the Caravan Sites Act 1968 (see paragraph 37 below). It was noted that a small number of Gypsies still remained on unauthorised sites but that, in light of the provision made for sites which was greater than in any other district, it was considered "not expedient for adequate accommodation to be provided for Gypsies residing in or resorting to South Cambridgeshire district".

The order designating the district of South Cambridgeshire came into force on 13 August 1993, but no longer applies because of the

provisions of the Criminal Justice and Public Order Act 1994 (see paragraph 41 below).

E. Subsequent developments

20. On 19 September 1994 the applicant again applied for permission to station her caravans on her site, in the light of a change in the law (see paragraphs 40-42 below).

21. She was refused on 14 November 1994 on the grounds that (1) local planning policy dictated that development in open countryside should be restricted and no evidence to justify a departure from this policy had been advanced, and (2) adequate provision for Gypsies had been made along Meadow Drove (see paragraph 24 below).

22. The applicant (together with others occupying the neighbouring sites) appealed against this decision to the Secretary of State. A report was prepared by an inspector in May 1995.

The inspector considered, first, whether the continued use of the land as a Gypsy caravan site would detract from the rural nature of the area, and, secondly, if so, whether there were any special circumstances sufficient to outweigh this objection. She found that the road safety objection, which had been one of the grounds of refusal in April 1991 (see paragraph 16 above), no longer applied.

With regard to the first question, the inspector found that the applicant had a mobile home, three touring caravans and three sheds on her site. These were hidden from the road by the caravans on the sites in front and by an agricultural engineering business, the same depth as the applicant's site to the east. They were visible from other vantage points but could be adequately screened by planting hedges. However, she concluded that:

> "... the continued use of the rear plots considerably extends the depth of development south of the road. This intensification of use in itself inevitably detracts from the rural appearance and generally open character of the area, contrary to the objectives of national and local countryside policy. I must therefore conclude that the continued occupation of the land as gypsy caravan sites is harmful to the character and appearance of the countryside."

With regard to the special circumstances of the case, in particular the applicant's Gypsy status, the inspector made the following observations. She described the applicant's site as "clean, spacious and well-ordered". By contrast, the council-run site on Meadow Drove (see paragraphs 24-26 below) was "isolated, exposed and somewhat uncared for". Nevertheless, it was

> "a relevant consideration that there is available alternative accommodation close by, which would enable the appellants to stay in the Willingham area and their children to continue at the local schools".
>
> On the other hand,
>
> "little weight [could] be given to the private sites at Cottenham. No substantive evidence was given by either the Council or the appellants as to whether plots were actually

available there or their price".

The inspector considered the impact of Circular 1/94 (see paragraph 43 below) on the applicant's case, but concluded that, although it placed greater emphasis on the provision of sites by Gypsies themselves, it was government policy that proposals for Gypsy sites should continue to be determined solely in relation to land-use factors.

She concluded that there had been no material changes since the last appeal was heard and the present appeal should therefore be dismissed.

23. Accepting the inspector's conclusions and recommendations, the Secretary of State dismissed the appeal on 12 December 1995.

The applicant has filed an appeal to the High Court, which is now pending.

F. Authorised Gypsy sites in the district of South Cambridgeshire

24. In November 1992 the County Council opened an official Gypsy caravan site in Meadow Drove, about 700 metres away from the applicant's land. The site consists of fifteen pitches, each comprising a fenced, partially grassed area with hard standing for caravans and its own brick building containing a kitchen, shower and toilet. Each pitch is designed to accommodate one permanent caravan, one touring caravan, one lorry and one car. They are joined by a central road and the site stands in open countryside.

25. Between November 1992 (when the site opened) and August 1995, twenty-eight vacancies have arisen there. The District Council contacted the applicant by letters dated 17 February 1992 and 20 January 1994, informing her of the possible availability of pitches on this site and advising her to apply for one to the County Council. The applicant has never taken any action in this regard.

26. Since the site opened, the following incidents have reportedly taken place there: (1) an unsubstantiated allegation in May 1993 that one of the residents was in possession of a firearm; (2) a fight in December 1993 during which a resident on the site was punched in the eye by another; (3) in 1994 a car was brought on to the site and set alight; (4) in the same year there was an incident of domestic violence; (5) also in 1994, the warden's office on the site was burgled and damaged when temporarily vacant; (6) in 1995 a site resident was convicted of conduct likely to cause a breach of the peace after exchanging words and threatening gestures with a District Council refuse collector on the site; (7) in March 1995 four pitches were damaged by vandalism and/or fire.

27. There are authorised privately run sites at Smithy Fen, Cottenham, about 7 kilometres from Willingham. In May 1995 the cost of purchasing a pitch on one of them reportedly varied between £7,000 and £40,000.

II. Relevant domestic law and practice

A. General planning law

28. The Town and Country Planning Act 1990 (as amended by the

Planning and Compensation Act 1991) ("the 1990 Act") consolidated pre-existing planning law.

29. It provides that planning permission is required for the carrying out of any development of land (section 57 of the 1990 Act). A change in the use of land for the stationing of caravans can constitute a development (Restormel Borough Council v. Secretary of State for the Environment and Rabey [1982] Journal of Planning Law 785; John Davies v. Secretary of State for the Environment and South Hertfordshire District Council [1989] Journal of Planning Law 601).

30. An application for planning permission must be made to the local planning authority, which has to determine the application in accordance with the local development plan, unless material considerations indicate otherwise (section 54A of the 1990 Act). The local development plan in South Cambridgeshire restricts development in the countryside to that essential to the efficient operation of particular rural uses, such as horticulture, agriculture and forestry.

31. The 1990 Act provides for an appeal to the Secretary of State in the event of a refusal of permission (section 78). With immaterial exceptions, the Secretary of State must, if either the appellant or the authority so desire, give each of them the opportunity of making representations to an inspector appointed by the Secretary of State. It is established practice that each inspector must exercise independent judgment and must not be subject to any improper influence (see the Bryan v. the United Kingdom judgment of 22 November 1995, Series A no. 335-A, p. 11, para. 21). There is a further appeal to the High Court on the ground that the Secretary of State's decision was not within the powers conferred by the 1990 Act, or that the relevant requirements of the 1990 Act were not complied with (section 288).

32. If a development is carried out without the grant of the required planning permission, the local authority may issue an "enforcement notice", if it considers it expedient to do so having regard to the provisions of the development plan and to any other material considerations (section 172 (1) of the 1990 Act).

33. There is a right of appeal against an enforcement notice to the Secretary of State on the grounds, inter alia, that planning permission ought to be granted for the development in question (section 174). As with the appeal against refusal of permission, the Secretary of State must give each of the parties the opportunity of making representations to an inspector.

34. Again there is a further right of appeal "on a point of law" to the High Court against a decision of the Secretary of State under section 174 (section 289). Such an appeal may be brought on grounds identical to an application for judicial review. It therefore includes a review as to whether a decision or inference based on a finding of fact is perverse or irrational (R. v. Secretary of State for the Home Department, ex parte Brind [1991] Appeal Cases 696, 764 H-765 D). The High Court will also grant a remedy if the inspector's decision was such that there was no evidence to support a particular finding of fact; or the decision was made by reference to irrelevant factors or without regard to relevant factors; or made for an improper purpose, in a procedurally unfair manner or in a manner which breached any governing legislation or statutory instrument. However, the court of review cannot substitute its own decision on the merits of the case for

that of the decision-making authority.

B. Gypsy caravan sites provision

1. The Caravan Sites Act 1968

35. Part II of the Caravan Sites Act 1968 ("the 1968 Act") was intended to combat the problems caused by the reduction in the number of lawful stopping places available to Gypsies as a result of planning and other legislation and social changes in the post-war years. Section 16 defined "gipsies" as:

> "persons of nomadic habit of life, whatever their race or origin, but does not include members of an organised group of travelling showmen, or of persons engaged in travelling circuses, travelling together as such".

36. Section 6 of the 1968 Act provided that it should be the duty of local authorities:

> "to exercise their powers ... so far as may be necessary to provide adequate accommodation for gipsies residing in or resorting to their area".

The Secretary of State could direct local authorities to provide caravan sites where it appeared to him to be necessary (section 9).

37. Where the Secretary of State was satisfied either that a local authority had made adequate provision for the accommodation of Gypsies, or that it was not necessary or expedient to make such provision, he could "designate" that district or county (section 12 of the 1968 Act).

The effect of designation was to make it an offence for any Gypsy to station a caravan within the designated area with the intention of living in it for any period of time on the highway, on any other unoccupied land or on any occupied land without the consent of the occupier (section 10).

In addition, section 11 of the 1968 Act gave to local authorities within designated areas power to apply to a magistrates' court for an order authorising them to remove caravans parked in contravention of section 10.

2. The Cripps Report

38. By the mid-1970s it had become apparent that the rate of site provision under section 6 of the 1968 Act was inadequate, and that unauthorised encampments were leading to a number of social problems. In February 1976, therefore, the Government asked Sir John Cripps to carry out a study into the operation of the 1968 Act. He reported in July 1976 (Accommodation for Gypsies: A report on the working of the Caravan Sites Act 1968, "the Cripps Report").

Sir John estimated that there were approximately 40,000 Gypsies living in England and Wales. He found that:

> "Six-and-a-half years after the coming into operation of Part II of the 1968 Act, provision exists for only one-quarter of the estimated total number of gypsy families with no sites

> of their own. Three-quarters of them are still without the possibility of finding a legal abode ... Only when they are travelling on the road can they remain within the law: when they stop for the night they have no alternative but to break the law."

The report made numerous recommendations for improving this situation.

3. Circular 28/77

39. Circular 28/77 was issued by the Department of the Environment on 25 March 1977. Its stated purpose was to provide local authorities with guidance on "statutory procedures, alternative forms of gypsy accommodation and practical points about site provision and management". It was intended to apply until such time as more final action could be taken on the recommendations of the Cripps Report.

Among other advice, it encouraged local authorities to enable self-help by Gypsies through the adoption of a "sympathetic and flexible approach to [Gypsies'] applications for planning permission and site licences". Making express reference to cases where Gypsies had bought a plot of land and stationed caravans on it only to find that planning permission was not forthcoming, it recommended that in such cases enforcement action not be taken until alternative sites were available in the area.

4. Circular 57/78

40. Circular 57/78, which was issued on 15 August 1978, stated, inter alia, that "it would be to everyone's advantage if as many gypsies as possible were enabled to find their own accommodation", and thus advised local authorities that "the special need to accommodate gypsies ... should be taken into account as a material consideration in reaching planning decisions".

In addition, approximately £100 million was spent under a scheme by which one hundred per cent grants were made available to local authorities to cover the costs of creating Gypsy sites.

5. The Criminal Justice and Public Order Act 1994

41. Section 80 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act"), which came into force on 3 November 1994, repealed sections 6-12 of the 1968 Act (see paragraphs 35-37 above) and the grant scheme referred to in paragraph 40 above.

42. Section 77 of the 1994 Act gives to a local authority power to direct an unauthorised camper to move. An unauthorised camper is defined as

> "a person for the time being residing in a vehicle on any land forming part of the highway, any other unoccupied land or any occupied land without the owner's consent".

Failure to comply with such a direction as soon as practicable, or re-entry upon the land within three months, is a criminal offence. Local authorities are able to apply to a magistrates' court for an order authorising them to remove caravans parked in contravention of such a direction (section 78 of the 1994 Act).

6. Circular 1/94

43. New guidance on Gypsy sites and planning, in the light of the 1994 Act, was issued to local authorities by the Government in Circular 1/94 (5 January 1994), which cancelled Circular 57/78 (see paragraph 40 above).

Councils were told that:

"In order to encourage private site provision, local planning authorities should offer advice and practical help with planning procedures to gypsies who wish to acquire their own land for development. ... The aim should be as far as possible to help gypsies to help themselves, to allow them to secure the kind of sites they require and thus help avoid breaches of planning control."

However:

"As with other planning applications, proposals for gypsy sites should continue to be determined solely in relation to land-use factors. Whilst gypsy sites might be acceptable in some rural locations, the granting of permission must be consistent with agricultural, archaeological, countryside, environmental, and Green Belt policies ..."

PROCEEDINGS BEFORE THE COMMISSION

44. In her application (no. 20348/92) of 7 February 1992 to the Commission, Mrs Buckley alleged that she was prevented from living with her family in caravans on her own land and from following the traditional lifestyle of a Gypsy, contrary to Article 8 of the Convention (art. 8).

45. On 3 March 1994 the Commission declared the application admissible. In its report of 11 January 1995 (Article 31) (art. 31) the Commission expressed the opinion that there had been a violation of Article 8 (art. 8) (seven votes to five). The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment (1).

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Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-IV), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS TO THE COURT

46. In their memorial the Government requested the Court "to decide and declare that the facts [disclosed] no breach of the applicant's rights under Article 8 of the Convention (art. 8)".

The applicant requested the Court "to decide and declare that the facts [disclosed] a breach of [her] rights under Article 8 (art. 8) and/or Article 8 in conjunction with Article 14 (art. 14+8)" and to award her just satisfaction.

AS TO THE LAW

I. SCOPE OF THE CASE BEFORE THE COURT

A. Applicant's complaint under Article 14 of the Convention taken together with Article 8 (art. 14+8)

47. In her application to the Commission, the applicant claimed that the designation system under the Caravan Sites Act 1968 (see paragraph 37 above) and the criminalisation of "unauthorised camping" under the Criminal Justice and Public Order Act 1994 (see paragraph 42 above) discriminated against Gypsies by preventing them from pursuing their traditional lifestyle. In its report the Commission did not express an opinion on this point. The Commission's Delegate, speaking at the Court's hearing, stated that the Commission had come to the conclusion that it could not examine the complaint as such because the applicant could not show that she had been directly and immediately affected by either of the Acts in question.

48. Although the Commission considered the case only under Article 8 of the Convention (art. 8), this additional complaint is encompassed in the Commission's decision declaring the application admissible. The Court accordingly has jurisdiction to examine it (see the Philis v. Greece judgment of 27 August 1991, Series A no. 209, p. 19, para. 56).

B. Applicant's "formal objections"

49. At the Court's hearing on 19 February 1996, the Government mentioned, in support of their contention that the applicant had had available to her sufficient procedural safeguards, that the applicant did not appeal to the High Court against the Secretary of State's decision of 16 April 1991 (see paragraph 17 above).

In a letter received at the registry on 21 February 1996, the applicant's solicitor sought to place on record "formal objections" against the Government's reliance on that fact. The Government had based no preliminary objection on it at any time prior to the Court's hearing. Accordingly, any such objection should be dismissed as out of time (Rule 48 para. 1 of Rules of Court A) and barred by estoppel.

50. The Court observes that the applicant decided not to bring an appeal before the competent court after being advised by counsel that such an appeal was bound to fail (see paragraph 17 above).

However, as indicated above, the Government have not framed their comment as a preliminary objection. It is an argument going to the merits, to be considered by the Court at the appropriate juncture (see paragraph 79 below).

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION (art. 8)

51. The applicant submitted that since she was prevented from living in caravans on her own land with her family and from following a travelling life there had been, and continued to be, a violation of her right to respect for her private and family life and her home. She relied on Article 8 of the Convention (art. 8), which provides as follows:

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

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

The Government contested this argument but the Commission accepted it.

A. Whether a right protected by Article 8 (art. 8) is in issue

52. The Government disputed that any of the applicant's rights under Article 8 (art. 8) was in issue. In its contention, only a "home" legally established could attract the protection of that provision (art. 8).

53. In the submission of the applicant and the Commission there was nothing in the wording of Article 8 (art. 8) or in the case-law of the Court or Commission to suggest that the concept of "home" was limited to residences which had been lawfully established. They considered, in addition, that since the traditional Gypsy lifestyle involved living in caravans and travelling, the applicant's "private life" and "family life" were also concerned.

54. The Court, in its Gillow v. the United Kingdom judgment of 24 November 1986 (Series A no. 109), noted that the applicants had established the property in question as their home, had retained ownership of it intending to return there, had lived in it with a view to taking up permanent residence, had relinquished their other home and had not established any other in the United Kingdom. That property was therefore to be considered their "home" for the purposes of Article 8 (art. 8) (loc. cit., p. 19, para. 46).

Although in the Gillow case the applicant's home had initially been established legally, similar considerations apply in the present case. The Court is satisfied that the applicant bought the land to establish her residence there. She has lived there almost continuously since 1988 - save for an absence of two weeks, for family reasons, in 1993 (see paragraphs 11 and 13 above) - and it has not been suggested that she has established, or intends to establish, another residence elsewhere. The case therefore concerns the applicant's right to respect for her "home".

55. In view of the above conclusion it is unnecessary for the Court to decide whether the case also concerns the applicant's right to respect for her "private life" and "family life".

B. Whether there was an "interference by a public authority"

56. The applicant asked the Court to review the designation regime under the Caravan Sites Act 1968 (see paragraphs 35-37 above), which in her contention made it extremely difficult for Gypsies to follow their traditional lifestyle, and the criminalisation of "unauthorised campers" by the Criminal Justice and Public Order Act 1994

(see paragraphs 41-42 above), which, she submitted, was even more restrictive.

57. The Commission considered that it was empowered only to examine the applicant's complaints in so far as she had been directly affected by the measures in question. Neither the Caravan Sites Act 1968 nor the Criminal Justice and Public Order Act 1994 had ever been applied to the detriment of the applicant.

58. The Government submitted that "to the extent that there [had] been any interference with the applicant's rights under Article 8 para. 1 (art. 8-1)", such interference consisted of the enforcement against her of planning controls.

59. It not being the Court's task to review legislation in the abstract, the Court will confine itself as far as possible to examining the specific issues raised by the case before it (see, as a recent authority, the Bellet v. France judgment of 4 December 1995, Series A no. 333-B, p. 42, para. 34).

It does not appear that any measures based on either the Caravan Sites Act 1968 or the Criminal Justice and Public Order Act 1994 have ever been taken against the applicant. What is more, the order designating South Cambridgeshire entered into force only on 13 August 1993 (see paragraph 19 above), well after the enforcement notice (9 April 1990 - see paragraph 15 above) and the decision of the Secretary of State (16 April 1991 - see paragraph 17 above). It is not therefore within the competence of the Court to entertain those of the applicant's claims which are based on these Acts.

60. On the other hand, the applicant was refused the planning permission which would have allowed her to live in the caravans on her land, was required to remove the caravans and prosecuted for failing to do so (see paragraphs 14-18 above), all pursuant to the relevant sections of the Town and Country Planning Act 1990. This undoubtedly constitutes "interference by a public authority" with the applicant's exercise of her right to respect for her home (see, mutatis mutandis, the above-mentioned Gillow judgment, p. 19, para. 47).

C. Whether the interference was "in accordance with the law"

61. It was not contested that the measures to which the applicant was subjected were "in accordance with the law".

The Court finds no cause to arrive at a different conclusion.

D. Whether the interference pursued a "legitimate aim"

62. According to the Government, the measures in question were taken in the enforcement of planning controls aimed at furthering highway safety, the preservation of the environment and public health. The legitimate aims pursued were therefore public safety, the economic well-being of the country, the protection of health and the protection of the rights of others.

The Commission accepted this in substance but noted that the aspect of highway safety, which figured prominently in the Council's decisions of 8 March 1990, the inspector's report of 14 February 1991 and, by implication, the Secretary of State's decision of 16 April 1991

(see paragraphs 14-17 above), was no longer relied on in later decisions.

The applicant did not dispute that the authorities had acted in the furtherance of a legitimate aim.

63. On the facts of the case the Court sees no reason to doubt that the measures in question pursued the legitimate aims stated by the Government.

E. Whether the interference was "necessary in a democratic society"

1. Arguments before the Court

(a) The applicant

64. The applicant accepted that Gypsies should not be immune from planning controls but argued that the burden placed on her was disproportionate. She stated that, seeking to act within the law, she had purchased the site to provide a safe and stable environment for her children and to be near the school they were attending.

65. She drew attention to the fact that at the time of the events complained of, the official site further down Meadow Drove had not yet opened. In any event, the official site had since proved unsuitable for a single woman with children. There had been reports of crime and violence there and the inspector's report of May 1995 had noted that the site was bleak and exposed (see paragraph 22 above). In the circumstances, therefore, the official site could not be considered an acceptable alternative for the applicant's own site.

On the other hand, the same report had noted that the applicant's site was well maintained. It could also be adequately screened by vegetation, which would lessen its visual impact on the countryside.

66. Finally, the applicant considered that there was no further alternative open to her as the cost of stationing her caravans on a private site in the vicinity was prohibitive.

(b) The Government

67. The Government noted that planning laws were necessary in a modern society for the preservation of urban and rural landscape. This reflected the needs of the entire population. In assessing the need for particular measures, the domestic authorities required a wide margin of appreciation.

In the present context, it was necessary to construe Article 8 of the Convention (art. 8) consistently with Article 1 of Protocol No. 1 (P1-1), which allowed the State, amongst other things, to enforce such laws as it deemed necessary to control the use of property in accordance with the general interest.

68. National law was designed to achieve a fair balance between the interests of individuals and those of the community as a whole. In particular, it provided for a quasi-judicial procedure allowing individuals to challenge planning decisions (see paragraph 31 above); this procedure, moreover, had been found by the Court in its

Bryan judgment cited above to meet the requirements of Article 6 of the Convention (art. 6).

69. In so far as it was necessary to afford Gypsies special protection, this need had been taken into account. The Government had provided legislation and guidelines requiring authorities involved in the planning process to have particular regard to the specific constraints imposed by Gypsy life (see paragraphs 35-37 and 39 above). Moreover, Gypsies' accommodation needs were met by local authorities through the provision of authorised caravan sites and by advising Gypsies on the prospects of planning permission for private sites.

In the applicant's case, the reports of the inspectors showed that her Gypsy status had been weighed in her favour, as indeed was required by the pertinent guidelines (see paragraph 16 above).

In any event, it was unacceptable to exempt any section of the community from planning controls, or to allow any group the benefit of more lenient standards than those to which the general population was subject.

70. The applicant had had sufficient alternative options open to her. She had been invited to apply for a pitch on the official site further down Meadow Drove, both before and after it opened (see paragraph 25 above). She had failed to do so on each occasion. The Government denied that crime and violence were rife there; in any event, in so far as the applicant's failure was based on such allegations, it was clear that they could not have been material considerations before the site had even opened. Moreover, in the Government's contention, sufficient private sites were available in the area (see paragraph 27 above), most of them owned by Gypsies. The true position was that the applicant had consistently refused to countenance living anywhere else than on her own land.

Finally, the sanctions which had been applied to the applicant had been limited to small fines (see paragraph 18 above).

(c) The Commission

71. The Commission submitted that Gypsies following a traditional lifestyle required special consideration in planning matters and considered that this had been recognised by the Government. In the specific circumstances of the applicant's case, however, a proper balance had not been achieved.

72. The area in question had not been singled out for special protection, whether as a national park, as an area of outstanding natural beauty or as a green belt. The stationing of caravans on the frontage of the site had been authorised, as had the erection of buildings belonging to an agricultural engineering business on neighbouring land (see paragraph 16 above). An official Gypsy caravan site had been opened further down Meadow Drove (see paragraph 24 above). Moreover, the inspector, in her report of May 1995, had found that the applicant's site could be adequately screened from view by planting hedges (see paragraph 22 above).

73. For the same reasons as given by the applicant, the Commission accepted that the applicant could not be required to move to the official site further down Meadow Drove. It further accepted that the space available on other official caravan sites in the

South Cambridgeshire area was insufficient (see paragraph 16 above). Nor could the applicant be required to move to a private authorised site, the inspector herself having expressed doubts as to the availability of plots on such sites and their price (see paragraph 22 above).

2. The Court's assessment

(a) General principles

74. As is well established in the Court's case-law, it is for the national authorities to make the initial assessment of the "necessity" for an interference, as regards both the legislative framework and the particular measure of implementation (see, inter alia and mutatis mutandis, the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, p. 25, para. 59, and the Miailhe v. France (no. 1) judgment of 25 February 1993, Series A no. 256-C, p. 89, para. 36). Although a margin of appreciation is thereby left to the national authorities, their decision remains subject to review by the Court for conformity with the requirements of the Convention.

The scope of this margin of appreciation is not identical in each case but will vary according to the context (see, inter alia and mutatis mutandis, the above-mentioned Leander judgment, ibid.). Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned.

75. The Court has already had occasion to note that town and country planning schemes involve the exercise of discretionary judgment in the implementation of policies adopted in the interest of the community (in the context of Article 6 para. 1 (art. 6-1), see the Bryan judgment cited above, p. 18, para. 47; in the context of Article 1 of Protocol No. 1 (P1-1), see the Sporrong and Lönnroth v. Sweden judgment of 23 September 1982, Series A no. 52, p. 26, para. 69; the Erkner and Hofauer v. Austria judgment of 23 April 1987, Series A no. 117, pp. 65-66, paras. 74-75 and 78; the Poiss v. Austria judgment of 23 April 1987, Series A no. 117, p. 108, paras. 64-65, and p. 109, para. 68; the Allan Jacobsson v. Sweden judgment of 25 October 1989, Series A no. 163, p. 17, para. 57, and p. 19, para. 63). It is not for the Court to substitute its own view of what would be the best policy in the planning sphere or the most appropriate individual measure in planning cases (see, mutatis mutandis, the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 23, para. 49). By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. In so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation.

76. The Court cannot ignore, however, that in the instant case the interests of the community are to be balanced against the applicant's right to respect for her "home", a right which is pertinent to her and her children's personal security and well-being (see the above-mentioned Gillow judgment, p. 22, para. 55). The importance of that right for the applicant and her family must also be taken into account in determining the scope of the margin of appreciation allowed

to the respondent State.

Whenever discretion capable of interfering with the enjoyment of a Convention right such as the one in issue in the present case is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. Indeed it is settled case-law that, whilst Article 8 (art. 8) contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (art. 8) (see the McMichael v. the United Kingdom judgment of 24 February 1995, Series A no. 307-B, p. 55, para. 87).

77. The Court's task is to determine, on the basis of the above principles, whether the reasons relied on to justify the interference in question are relevant and sufficient under Article 8 para. 2 (art. 8-2).

(b) Application of the above principles

78. The applicant complained about the rejection of her appeal against the enforcement notice.

79. The law governing the decision-making process leading to the contested decision entitled the applicant to appeal to the Secretary of State on the ground, inter alia, that planning permission ought to be granted. Moreover, the appeal procedure comprised an assessment by a qualified independent expert, the inspector, to whom the applicant was entitled to make representations (see paragraphs 16 and 33 above). The Court is satisfied that the procedural safeguards provided for in the regulatory framework were therefore such as to afford due respect to the applicant's interests under Article 8 (art. 8).

Subsequent judicial review by the High Court was also available, notably in so far as the applicant felt that the inspector (or the Secretary of State) had not taken into account relevant considerations or had based the contested decision on irrelevant considerations (see paragraph 34 above). In the event, the applicant declined to appeal to the High Court on the advice of counsel that such an appeal was bound to fail (see paragraph 17 above).

80. In the instant case, an investigation was carried out by the inspector, who actually saw the land for herself and considered written representations submitted by the applicant and the District Council (see paragraph 16 above). In conformity with government policy, as set out in Circulars 28/77 and 57/78 (see paragraphs 39 and 40 above), the special needs of the applicant as a Gypsy following a traditional lifestyle were taken into account. The inspector and later the Secretary of State had regard to the shortage of Gypsy caravan sites in the area and weighed the applicant's interest in being allowed to continue living on her land in caravans against the general interest of conforming to planning policy (see paragraphs 16 and 17 above). They found the latter interest to have greater weight given the particular circumstances pertaining to the area in question.

Thus, in her report the inspector stated:

"... [the applicant's caravan site] extends development further

> from the road than that permitted. It thus intrudes into the open countryside, contrary to the aim of the Structure Plan to protect the countryside from all but essential development."

and:

> "It is ... clear in my mind that a need exists for more authorised spaces. ... Nevertheless, I consider it important to keep concentrations of sites for gypsies small, because in this way they are more readily accepted by the local community. ... [T]he concentration of gypsy sites in Willingham has reached the desirable maximum and I do not consider that the overall need for sites should, in this case, outweigh the planning objections."

The Secretary of State's reasoning in his decision included the following:

> "The decisive issue in regard to the planning merits of your appeals is considered to be whether the undisputed need for additional gypsies' caravan site provision, in the administrative areas of the District Council, and of the County Council, is so pressing that it should be permitted to override the objections on planning policy and highway safety grounds to the retention of the use of the appeal site as a residential caravan site for gypsies. On this approach, the view is taken that the objections to the continued use of the appeal site as a residential gypsy caravan site are so strong, on planning policy and highway safety grounds, that a grant of planning permission could not be justified, either on a temporary or personal basis. In reaching this conclusion, full consideration has been given to policy advice in the Department's Circular 28/77, giving guidance to Councils on the need to provide adequate accommodation in the form of caravan sites, for gypsies residing in or resorting to their area."

81. The applicant was offered the opportunity, first in February 1992 and again in January 1994, to apply for a pitch on the official caravan site situated about 700 metres from the land which she currently occupies (see paragraphs 24 and 25 above). Evidence has been adduced which tends to show that the alternative accommodation available at this location was not as satisfactory as the dwelling which she had established in contravention of the legal requirements (see paragraph 26 above). However, Article 8 (art. 8) does not necessarily go so far as to allow individuals' preferences as to their place of residence to override the general interest.

82. It is also true that subsequently, in her report of July 1995, the second inspector found that the applicant's caravans could have been adequately screened from view by planting hedges; this would have hidden them from view but, so the inspector concluded, would not have reduced their intrusion into open countryside in a way which national and local planning policy sought to prevent (see paragraph 22 above).

83. After the refusal of planning permission the applicant was fined relatively small sums for failing to remove her caravans (see paragraph 18 above). To date she has not been forcibly evicted from her land but has continued to reside there (see paragraph 7 above).

84. In the light of the foregoing, the Court considers that proper regard was had to the applicant's predicament both under the terms of the regulatory framework, which contained adequate procedural safeguards protecting her interest under Article 8 (art. 8), and by the responsible planning authorities when exercising their discretion in relation to the particular circumstances of her case. The latter authorities arrived at the contested decision after weighing in the balance the various competing interests in issue. As pointed out above (at paragraph 75), it is not the Court's task to sit in appeal on the merits of that decision. Although facts were adduced arguing in favour of another outcome at national level, the Court is satisfied that the reasons relied on by the responsible planning authorities were relevant and sufficient, for the purposes of Article 8 (art. 8), to justify the resultant interference with the exercise by the applicant of her right to respect for her home. In particular, the means employed to achieve the legitimate aims pursued cannot be regarded as disproportionate. In sum, the Court does not find that in the present case the national authorities exceeded their margin of appreciation.

(c) Conclusion

85. In conclusion, there has been no violation of Article 8 (art. 8).

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 8 (art. 14+8)

86. The applicant claimed to be the victim of discrimination on the ground of her Gypsy status, contrary to Article 14 of the Convention taken together with Article 8 (art. 14+8). Article 14 of the Convention (art. 14) provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

In her contention, both the 1968 Act and the Criminal Justice and Public Order Act 1994 prevented Gypsies from pursuing their traditional lifestyle by making it illegal for them to locate their caravans on unoccupied land.

87. The Government denied that the applicant had been the victim of any difference of treatment.

The Commission confined itself to noting that she had never been directly and immediately affected by either of the Acts in question.

88. The Court has already found (at paragraph 59 above) that it cannot consider any of the applicant's claims based on the Caravan Sites Act 1968 or the Criminal Justice and Public Order Act 1994.

More generally, it does not appear that the applicant was at any time penalised or subjected to any detrimental treatment for attempting to follow a traditional Gypsy lifestyle. In fact, it appears that the relevant national policy was aimed at enabling Gypsies to cater for their own needs (see paragraphs 39 and 40 above).

89. That being so, the applicant cannot claim to have been the victim of discrimination contrary to Article 14 taken together with Article 8 (art. 14+8). Accordingly, there has been no violation under this head (art. 14+8).

FOR THESE REASONS, THE COURT

1. Holds, unanimously, that Article 8 of the Convention (art. 8) is applicable in the present case;

2. Holds, by six votes to three, that there has been no violation of Article 8 of the Convention (art. 8);

3. Holds, by eight votes to one, that there has been no violation of Article 14 of the Convention taken together with Article 8 (art. 14+8).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 September 1996.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the following dissenting opinions are annexed to this judgment:

(a) partly dissenting opinion of Mr Repik;
(b) partly dissenting opinion of Mr Lohmus;
(c) dissenting opinion of Mr Pettiti.

Initialled: R. B.

Initialled: H. P.

PARTLY DISSENTING OPINION OF JUDGE REPIK

(Translation)

I voted with the majority in favour of finding that Article 8 (art. 8) was applicable in this case and that there had been no violation of Article 14 (art. 14). However, I regret that I am unable to agree with the majority finding that there has been no violation of Article 8 (art. 8). It is with the majority's finding that the interference in issue was necessary in a democratic society (paragraphs 78 to 84 of the judgment) that I disagree.

The observations which I make in this partly dissenting opinion are strictly limited to the instant case. I have no intention of questioning the United Kingdom's policy towards the Gypsy minority or that minority's position, which seems to be incomparably more favourable than that in many other States, in particular in certain new member States of the Council of Europe. However, it must be borne in mind that this is the first case before the Court concerning the right of a member of the Gypsy minority; I am concerned about how the Court's first judgment on this subject will be interpreted and how it will be

received by the Gypsy minority.

The concept of necessity implies a pressing social need; in particular, the measure taken must be proportionate to the legitimate aim pursued. It has to be determined whether a fair balance has been struck between the aim pursued and the right concerned, regard being had to the latter's importance and to the seriousness of the infringement. All that is well known and has been reiterated by the Court on a number of occasions in its case-law (see, in particular, the following judgments: Gillow v. the United Kingdom, 24 November 1986, Series A no. 109, p. 22, para. 55; Olsson v. Sweden (no. 1), 24 March 1988, Series A no. 130, p. 32, para. 67; Berrehab v. the Netherlands, 21 June 1988, Series A no. 138, p. 16, para. 29).

In the present case the national authorities did not properly assess whether the aim pursued was proportionate to the applicant's right to respect for her home and to the seriousness of the infringement of that right. At no stage during the domestic proceedings was the problem before the authorities considered in terms of a right of the applicant protected by the Convention, for the Government denied throughout that a right to respect for the home was in issue and therefore that there had been any interference with that right. The applicant's interests, confronted with the requirements of the protection of the countryside, were only taken into account in abstract, general terms, such as "the undisputed need for additional gypsies' caravan site provision" (paragraph 17 of the judgment) or "the applicant's Gypsy status" (paragraph 22 of the judgment). There was never any mention of the applicant's right to respect for her home or of the importance of that right to her given her financial and family situation. Nor was any account taken of the possible consequences for the applicant and her children were she to be evicted from her land.

In these circumstances the Court, in order to fulfil its supervisory role, ought itself to have considered whether the interference was proportionate to the right in issue and to its importance to the applicant, all the more so as where a fundamental right of a member of a minority is concerned, especially a minority as vulnerable as the Gypsies, the Court has an obligation to subject any such interference to particularly close scrutiny. In my opinion, the Court has not fully performed its duty as it has not taken into account all the relevant matters adduced by the Commission and was too hasty in invoking the margin of appreciation left to the State.

Respect for planning policy, in particular protection of the countryside, has been placed on one side of the scales. The Court has not taken into account that the weight of that interest is considerably reduced by the fact, reported by the Commission, that the applicant did not park her caravans either on land under special protection or in unspoilt open countryside. There are in fact already a number of buildings on neighbouring land (see paragraph 72 of the judgment) and the applicant's caravans could have been adequately screened from view by planting hedges (see paragraph 82 of the judgment). In any event, the fact that the applicant's caravans were parked there did not impair the rural, open character of the countryside any more than it had been impaired previously.

Much importance was attached to the fact that the applicant could have moved to a different site. The Commission considered that it was not reasonably open to the applicant to move to a private site

and that the official Meadow Drove site was not suitable for her (see paragraphs 79 and 82 of the Commission's opinion). As regards the possibility of moving to Meadow Drove, the Court found that from the applicant's point of view the question was merely one of individual preference as to her place of residence and that such preferences are not protected by Article 8 (art. 8) (see paragraph 81 of the judgment). The Court underestimates the cogency of the arguments advanced by the Commission, which reported in detail on the condition of the Meadow Drove site and the numerous incidents which have occurred there. The safety of the applicant's family is not guaranteed there and it is an unsuitable place for bringing up her children. The applicant did not, therefore, refuse to move there out of sheer capriciousness.

Moreover, that argument cannot apply to the measures taken before 1992, which were the matters primarily complained of in the application lodged with the Commission on 7 February 1992, as the Meadow Drove site was only opened in November 1992.

Whilst the applicant wishes to find a safe and stable place to set up home, she also wishes to retain the possibility of travelling during school holidays - a legitimate objective given the traditional way of life and culture of the Gypsy minority (1). However, she would not be sure of finding a vacant pitch on the official site on returning from her travels.

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1. Travelling is a need that is deeply rooted in Gypsy psychology. "The traveller who loses the possibility, and the hope, of travelling on, loses with it his very reason for living." Extract from Roma, Gypsies and Travellers by Jean-Pierre Liégeois, Council of Europe Press, Strasbourg, 1994, p. 79.

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If the applicant were obliged to leave her land, she would be exposed to the constant worry of having to find a place where she could lawfully stay, her children's education would be jeopardised and so on (see the precarious situation of travelling Gypsies described in the Cripps Report, cited in paragraph 38 of the judgment).

Lastly, as regards the extent of the interference, the Court only takes into account the relatively small amount of the fines imposed on the applicant for failing to remove her caravans (see paragraph 83 of the judgment) not her overall position; she still faces prosecution, further fines and eviction from her land, with all that entails in the way of insecurity and disruption of her family life.

To my mind, the fair balance between the applicant's rights and the interests of society has not been struck and the interference has therefore not been justified under Article 8 para. 2 (art. 8-2). That does not mean to say that Gypsies, as a group, are exempt from lawful constraints under town and country planning law. The question whether a fair balance has been struck between the relevant opposing interests depends on the particular facts of each case.

In sum, there has been a violation of Article 8 of the Convention (art. 8).

PARTLY DISSENTING OPINION OF JUDGE LOHMUS

Unlike the majority of the Court I am of the opinion that in

the present case Article 8 of the Convention (art. 8) has been violated.

The majority of the Court did not find that the national authorities exceeded their margin of appreciation in the present case (see paragraph 84 of the judgment).

My opinion coincides with the conclusions of the Commission.

Living in a caravan and travelling are vital parts of Gypsies' cultural heritage and traditional lifestyle. This fact is important to my mind in deciding whether the correct balance has been struck between the rights of a Gypsy family and the general interest of the community. The Council of Europe Committee of Ministers Resolution (75) 13 noted the need to safeguard the cultural heritage and identity of nomads. It has been stated before the Court that the applicant as a Gypsy has the same rights and duties as all the other members of the community. I think that this is an oversimplification of the question of minority rights. It may not be enough to prevent discrimination so that members of minority groups receive equal treatment under the law. In order to establish equality in fact, different treatment may be necessary to preserve their special cultural heritage.

Even allowing the existence of genuine and substantial planning objections to the continuing occupation of the land, the factors weighing in favour of the public interest in planning controls are of a slight and general nature.

Mrs Buckley lives with her three children in caravans parked on land owned by her since 1988. In 1994 the inspector described the applicant's site as "clean, spacious and well-ordered". By contrast, the council-run site on Meadow Drove was "isolated, exposed and somewhat uncared for". Although alternative accommodation is available on the official site, it appears doubtful whether it is suitable for Mrs Buckley's needs.

DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I have not voted with the majority of the Court as I consider that there has been a violation of Article 8 and of Article 14 (art. 8, art. 14) in this case.

Before analysing the reasons that have led me to this opinion, I have a general observation to make. This is the first time that a problem concerning Gypsy communities and "travellers" has been referred to the European Court. Europe has a special responsibility towards Gypsies. During the Second World War States concealed the genocide suffered by Gypsies. After the Second World War, this direct or indirect concealment continued (even with regard to compensation). Throughout Europe, and in member States of the Council of Europe, the Gypsy minority have been subject to discrimination, and rejection and exclusion measures have been taken against them. There has been a refusal to recognise Gypsy culture and the Gypsy way of life. In eastern Europe the return to the democracy has not helped them. Can the European Convention provide a remedy for this situation? The answer must be yes, since the purpose of the Convention is to impose a positive obligation on the States to ensure that fundamental rights

are guaranteed without discrimination. Did the present case afford the opportunity for a positive application of the Convention in this sphere?

That is the question which the Court had to answer in the Buckley case.

In order to conclude that there has been no violation of Article 8 (art. 8), the Court partly adopts an initial analysis of the facts similar to the Commission's, that is to say the findings of fact set out in particular in paragraphs 76 to 78 of its report, although the Court makes a number of changes to the wording. However, the Court rejects the reasoning in paragraphs 79 to 84 of the report, which led the Commission to express the opinion that there had been a violation. In order to do that, the Court attaches greater weight to the report cited in paragraph 16 of the judgment than to the one cited in paragraph 22, which is equally substantiated.

The Strasbourg institutions' difficulty in identifying this type of problem is that the deliberate superimposition and accumulation of administrative rules (each of which would be acceptable taken singly) result, firstly, in its being totally impossible for a Gypsy family to make suitable arrangements for its accommodation, social life and the integration of its children at school and, secondly, in different government departments combining measures relating to town planning, nature conservation, the viability of access roads, planning permission requirements, road safety and public health that, in the instant case, mean the Buckley family are caught in a "vicious circle".

In attempting to comply with the disproportionate requirements of an authority or a rule, a family runs the risk of contravening other rules. Such unreasonable combinations of measures are in fact only employed against Gypsy families to prevent them living in certain areas.

The British Government denied that their policy was discriminatory. Yet a number of legal provisions expressly refer to Gypsies in order to restrict their rights by means of administrative rules. However, the only acceptable discrimination under Article 14 (art. 14) is positive discrimination, which implies that in order to achieve equality of rights through equality of opportunity it is necessary in certain cases to grant additional rights to the deprived members of the population such as the underclasses of developed countries, and the Gypsy and Jenische (1) communities.

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1. A nomadic community in Alsace.

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The discrimination results equally from the fact that if in similar circumstances a British citizen who was not a Gypsy wished to live on his land in a caravan, the authorities would not raise any difficulties, even if they considered his conduct to be unorthodox.

If the Buckley case were transposed to a family of ecologists or adherents of a religion instead of Gypsies, the harassment to which Mrs Buckley was subjected would not have occurred; even supposing that it had, domestic remedies or an application under the European Convention on Human Rights would have allowed such an interference with family life to be brought to an end, which was not

so under the domestic law in the case of Gypsy families.

If the facts of the case are analysed, not by combining the different areas of law and legal provisions concerned, but taking them individually under the Convention, the Commission's report (paragraphs 21 to 38) and the factors relating to Article 8 (art. 8) and Protocol No. 1 (P1) lead to the following conclusions:

(a) with regard to the free movement of persons and the individual's freedom of establishment with his family, the obstacles placed in the way of Gypsies go beyond the general law. Forcing them to live in a designated area is equivalent to placing them or assigning them to a territory, all the more so where the area proves to be unhealthy or not adapted to the children's schooling needs;

(b) with regard to the right to family property, there is a breach of the right to family life - in respect of which reference could have been made to the use of property within the meaning of Protocol No. 1 (P1) - on account of the systematic refusal to convert retrospective planning permission into permanent permission to park the caravans. The fact that there had been an exchange of occupation of the land by the families (two sisters) could not justify such a refusal;

(c) with regard to the minimum right to accommodation, one of the constituents of Article 8 (art. 8), where the accommodation is a substantial and essential part of family life, the authority's requirement that an owner move because of the concentration of Gypsy sites in the area amounts to an unacceptable or disproportionate interference, since the owner is not liable for the acts or omissions of others (Commission's report, paragraph 27);

(d) with regard to the impairment of the "rural and open quality of the landscape" and environment protection (Commission's report, paragraph 24) which, in the Government's submission, would justify an interference even under Article 8 (art. 8), the fact that the authorities rely on this argument only against Gypsy families also amounts to a disproportionate interference for, in the hierarchy of the State's positive obligations, the survival of families must come before bucolic or aesthetic concerns.

The Court was asked to consider this case under Articles 8 and 14 of the Convention (art. 8, art. 14) only, but in this sphere and in situations similar to the Buckley family's, the aspects of discrimination and breach of the right to accommodation and a home, inasmuch as they necessarily have an impact on the right to respect for family life, are indissociable from such respect.

In my view, therefore, the Court is wrong in paragraphs 54 and 55 to restrict the scope of its review and analysis.

The Government's reliance on the lawful aim pursued was not justified, because the grounds of public safety, economic well-being of the country and protection of health and of the rights of others were not established and should not therefore have been accepted in paragraph 63.

The question of the sites was an important consideration. The Government had, moreover, recognised that Gypsies following a traditional way of life required special consideration (paragraph 71).

However, as the Commission noted, a proper balance had not been achieved although the Buckley family had been living on the site without incident since 1988. The official Meadow Drove site was quite unsuitable. The capacity of other official sites was insufficient (applicant's memorial, paragraphs 66 to 69) and no other privately owned site offering acceptable conditions was available (Commission's report, paragraphs 78 and 79). Other private sites were likewise unavailable.

On the other hand, Mrs Buckley's site was properly maintained (applicant's memorial, paragraph 65). In her report of July 1995 the second inspector found that the objection relating to protection of the site could have been overcome by planting hedges, but the Government concluded that that "would not have reduced [the] intrusion into [the] countryside" (paragraph 82 of the judgment).

The Court, which rightly recalls that it cannot act as an appeal court, nonetheless states its conviction that the authority's grounds were relevant, a statement that may appear self-contradictory. But the grounds could not be relevant under the Convention as the Government's approach is to give priority to protection of the landscape over respect for family life. The ranking of fundamental rights under Article 8 and Protocol No. 1 (art. 8, P1) is thereby reversed and, moreover, the traditional aptitude for travel is impeded. In addition, in the present case, there was no effective procedural safeguard to enable a remedy for the administrative harassment to be provided under Article 8 (art. 8) (see the McMichael v. the United Kingdom judgment of 24 February 1995, Series A no. 307-B, p. 57, paras. 91 and 92).

With regard to the reasons for the interference, the Court relies on the inspector's report from which it quotes (in paragraph 80 of the judgment) extracts that are favourable to the Government's case; but there are other passages in the report that support the applicant's case. It suffices to refer to the passages from the reports quoted in the applicant's memorial to see that the passages relied on were not necessarily the most relevant ones (applicant's memorial, paragraphs 65, 66, 69 and 71; verbatim record of hearing pp. 11, 20 and 23).

Reasons are given in paragraph 75 of the judgment which would have been justified under Protocol No. 1 (P1), but which in my opinion are not valid because what is at stake is family life, not planning considerations.

The demands of family life have consequently not been taken into consideration (paragraph 80). The following passage quoted from the inspector's report (paragraph 80 of the judgment) is revealing: "...in this way they are more readily accepted by the local community" (sic)!!

It is not in keeping with the spirit of Article 8 (art. 8) to subordinate respect for the applicant's right to family life, as the Government maintain, to the greater convenience of the local community and its greater willingness to accept others (paragraph 80), or to give the applicant's special needs lower priority than the objectives of government policy (paragraph 80). The Bryan and Sporrong and Lönnroth judgments were concerned with different situations in international law, in particular Protocol No. 1 (P1) (paragraph 75). The Court afforded greater protection of the home and

accommodation in the Niemietz and Gillow judgments, situations in which there was in fact less risk to family life. Essentially, the Convention ought, in the case of Gypsy families, to inspire the greatest possible respect for family life, transcending planning considerations.

With regard to Article 14 taken together with Article 8 (art. 14+8), the Court holds that there has been no violation (see paragraphs 59 and 88 of the judgment) because it considers that the 1968 and 1994 Acts had not been applied to the applicant's detriment. However, in the general context of Article 14 and Article 8 (art. 14, art. 8) all of the applicant's complaints relate to the effect of the de jure and de facto measures, which, in being discriminatory prevented respect for family life.

With regard to Article 14 of the Convention (art. 14), relied on here but also included in the assessment of the case under Article 8 (art. 8), section 16 of the Caravan Sites Act 1968 expressly refers to Gypsies, thereby discriminating in its treatment of them compared with other nationals.

The apparent aim of the British legislation is to promote acceptance of Gypsies in towns and villages (section 6 of the 1968 Act) but the use made of this section has achieved the opposite result. The same occurs in other Council of Europe States where the family life of Gypsy groups is frustrated by various administrative constraints - for instance, allowing them to set up camp but denying them access to water or schools. Providing caravan sites for travellers does not meet the real needs. It is this which has given rise to the numerous proposals made by the international movement ATD Fourth World in Europe, a non-governmental organisation consulted by States.

Mrs Buckley's position is comparable to that of this category of deprived groups (travellers, Gypsies and Jenische).

The paragraphs from the inspectors' reports on which the Government relied are contradicted by other paragraphs from the reports cited by the Commission and the applicant. To my mind, it is therefore not possible to conclude that the interference was justified.

The Commission rightly found that it was impossible to live on a private site (other than the one originally purchased by Mrs Buckley or her sister). It was similarly impossible to live on waste ground. The Commission recognised that the proposal that they live on the neighbouring official site came up against the problems of the various incidents that had occurred there, which would give rise to a situation incompatible with family life within the meaning of Article 8 (art. 8) and lead to discriminatory treatment affecting only travellers.

Thus, either there are too many administrative obstacles or else the alternative proposals are inadequate, and this considerably destabilises the family and makes the children's future unsettled. The pretexts of planning controls and road safety appear to be unfounded or derisory in comparison with the major problem of preserving family life.

Admittedly, only Articles 8 and 14 (art. 8, art. 14) are in issue, but the failure to comply with those provisions (art. 8, art. 14) in this case could, in similar cases, be considered also under Article 1 of Protocol No. 1 (P1-1). When Article 8 (art. 8) is being

interpreted, the discriminatory aspects serve indirectly to show that the claimed justification for the interference is unfounded.

In any event, the findings taken as a whole should not, in my view, allow the harassment and alleged safety measures directed at the Buckley family to be considered proportionate to the aim pursued, and necessary in a democratic society such as the Council of Europe has the role of consolidating through the guarantees provided by Articles 8 and 14 taken individually or together (art. 8, art. 14, art. 14+8).

The Court uses the notion of margin of appreciation in formulations (see paragraph 84 of the judgment) which appear to me to extend that concept too far when compared with the Court's previous case-law and without laying down any precise criteria. The practice established under the Court's case-law has been to restrict the States' margin of appreciation by making it subject to review by the Court by reference to the criteria which the Court has laid down by virtue of its autonomous power to interpret the Convention. The comprehensive wording adopted also seems to me to be different from that used in the Court's judgments concerning the application of Protocol No. 1 (P1).

In the present case, moreover, there was no necessity for the measures in a democratic State (on the contrary) and the interference was, at the very least, disproportionate.

International organisations have been very attentive to the situation of the Gypsies (see Second Report United Nations ECOSOC E/CN4/Sub2/1995/15).

The European Union and the Council of Europe have examined the problem on a number of occasions, whilst noting the indifference of both west and east European States. Many studies have been carried out which come to the same conclusion (see Droit du quart monde, Revue Editions Centre ATD nos. 1 to 9).

In my view, the European Court had, in the Buckley case, an opportunity to produce, in the spirit of the European Convention, a critique of national law and practice with regard to Gypsies and travellers in the United Kingdom that would have been transposable to the rest of Europe, and thereby partly compensate for the injustices they suffer.

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

COURT (PLENARY)

CASE OF COSSEY v. THE UNITED KINGDOM

(Application no. 10843/84)

JUDGMENT

STRASBOURG

27 September 1990

In the Cossey case[*],

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 51 of the Rules of Court[**] and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr J.M. MORENILLA RODRIGUEZ,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 27 April and 29 August 1990,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court on 4 July 1989 by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") and on 13 July 1989 by the European Commission of Human Rights ("the Commission"), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for

[*] The case is numbered 16/1989/176/232. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] The amended Rules of Court which entered into force on 1 April 1989 are applicable to the present case.

the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 10843/84) against the United Kingdom lodged with the Commission under Article 25 (art. 25) by Miss Caroline Cossey, a British citizen, on 24 February 1984.

The Government's application referred to Article 48 (art. 48) and the Commission's request to Articles 44 and 48 (art. 44, art. 48) and the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the application and of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 12 (art. 12) and also, in the case of the request, Article 8 (art. 8) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant - who will be referred to in this judgment in the feminine - stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30).

3. The Chamber to be constituted included ex officio Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 23 August 1989 the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr F. Matscher, Mr B. Walsh, Mr J. De Meyer, Mrs E. Palm and Mr I. Foighel (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr N. Valticos, substitute judge, replaced Mr De Meyer, who had withdrawn (Rules 22 para. 1 and 24 para. 2).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the representative of the applicant on the need for a written procedure (Rule 37 para. 1). In accordance with the order made in consequence, the registry received, on 19 October 1989, the applicant's memorial and, on 20 October 1989, the Government's.

By letter of 16 January 1990, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 9 January 1990 that the oral proceedings should open on 24 April 1990 (Rule 38).

6. On 21 February 1990 the Chamber decided, pursuant to Rule 51, to relinquish jurisdiction forthwith in favour of the plenary Court.

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr N. PARKER, Assistant Legal Adviser,

Foreign and Commonwealth, *Agent*,
Mr N. BRATZA, *Counsel*,
Mr A. INGLESE, Home Office,
Mr W. JENKINS, General Register, *Advisers*;
- for the Commission
Mr E., *Delegate*;
- for the applicant
Mr D. PANNICK, *Counsel*,
Mr H. BRANDMAN, Sollicitor.

The Court heard addresses by Mr Bratza for the Government, by Mr Busuttil for the Commission and by Mr Pannick for the applicant, as well as replies to questions put by the Court and by two of its members individually.

8. Various documents were filed by the applicant on 27 and 30 April and 22 May and by the Government on 5 June, including further particulars of the former's claim under Article 50 (art. 50) and the latter's comments thereon.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

9. The applicant, who is a British citizen, was born in 1954 and registered in the birth register as a male, under the male Christian names of Barry Kenneth.

10. At the age of 13 the applicant realised that she was unlike other boys and, by the age of 15 or 16, she understood that, although she had male external genitalia, she was psychologically of the female sex.

In July 1972 she abandoned her male Christian names and assumed the female Christian name of Caroline, a change which she confirmed by deed poll (see paragraph 16 below) in March 1973. Since July 1972 she has been known under that name for all purposes, has dressed as a woman and has adopted a female role.

11. In December 1974 the applicant, who had previously taken female hormones and had had an operation for breast augmentation involving implants, underwent gender reassignment surgery in a London hospital, to render the external anatomy nearer that of the female gender.

A medical report dated 8 February 1984 describes Miss Cossey as a pleasant young woman, states that she has lived a full life as a female, both psychologically and physically, since the surgery and records that a genital examination showed her to have the external genitalia and vagina of a

female. As a post-operative female transsexual, she is able to have sexual intercourse with a man.

12. In 1976 the applicant was issued with a United Kingdom passport as a female (see paragraphs 16-17 below). From about 1979 to 1986 she was a successful fashion model, featuring regularly in newspapers, magazines and advertisements.

13. In 1983 Miss Cossey and Mr L., an Italian national whom she had known for some fourteen months, wished to marry each other.

By letter of 22 August 1983, the Registrar General informed the applicant that such a marriage would be void as a matter of English law, because it would classify her as male notwithstanding her anatomical and psychological status. Her Member of Parliament advised her in a letter of 30 August 1983 that a change in the law would be required to enable her to marry. A reply on behalf of the Registrar General, dated 18 January 1984, to a further enquiry by the applicant stated that she could not be granted a birth certificate showing her sex as female, since such a certificate records details as at the date of birth (see paragraphs 18-20 below).

In 1985 - after the date of her application to the Commission - Miss Cossey and Mr L. ceased to be engaged to be married, though they remained good friends.

14. On 21 May 1989 the applicant purported to marry a Mr X, at a ceremony conducted at a London synagogue. However, their relationship terminated on 11 June of the same year.

Following a petition filed by Miss Cossey, who had been advised that this was her only means of obtaining financial relief, the marriage was, by decree nisi made by the High Court on 17 January 1990, pronounced to have been by law void by reason of the parties not being respectively male and female (see paragraphs 23-24 below). That decree was made final on 13 March 1990.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Medical treatment

15. In the United Kingdom gender reassignment operations are permitted without legal formalities. The operations and treatment may be carried out under the National Health Service.

B. Change of name

16. Under English law a person is entitled to adopt such first names or surname as he or she wishes and to use these new names without any restrictions or formalities, except in connection with the practice of some

professions where the use of the new names may be subject to certain formalities (see, inter alia, Halsbury's Laws of England, 4th ed., vol. 35, paras. 1173-1176). For the purposes of record and to obviate the doubt and confusion which a change of name is likely to involve, the person concerned very frequently makes a declaration in the form of a "deed poll" which may be enrolled with the Central Office of the Supreme Court.

The new names are valid for purposes of legal identification and may be used in documents such as passports, driving licences, car registration books, national insurance cards, medical cards, tax codings and social security papers. The new names are also entered on the electoral roll.

C. Identity documents

17. Civil status certificates or equivalent current identity documents are not in use or required in the United Kingdom. Where some form of identification is needed, this is normally met by the production of a driving licence or a passport. These and other identity documents may, according to the prevailing practice, be issued in the adopted names of the person in question with a minimum of formality. In the case of transsexuals, the documents are also issued so as to be in all respects consistent with the new identity. Thus, the practice is to allow the transsexual to have a current photograph in his or her passport and the prefix "Mr", "Mrs", "Ms" or "Miss", as appropriate, before his or her adopted names.

D. The register of births

18. The system of civil registration of births, deaths and marriages was established by statute in England and Wales in 1837. Registration of births is at present governed by the Births and Deaths Registration Act 1953 ("the 1953 Act"), which requires that the birth of every child be registered by the Registrar of Births and Deaths for the area in which the child is born. The particulars to be entered are prescribed in regulations made under the 1953 Act.

A birth certificate takes the form either of an authenticated copy of the entry in the register of births or of an extract from the register. A certificate of the latter kind, known as a "short certificate of birth", is in a form prescribed and contains such particulars as are prescribed by regulations made under the 1953 Act, that is the name and surname, sex, date of birth and place of birth of the individual. It omits, notably, any particulars relating to parentage or adoption contained in the register.

An entry in a birth register and the certificate derived therefrom are records of facts at the time of birth. Thus, in England and Wales the birth certificate constitutes a document revealing not current identity, but historical facts. The system is intended to provide accurate and

authenticated evidence of the events themselves and also to enable the establishment of the connections of families for purposes related to succession, legitimate descent and distribution of property. The registration records also form the basis for a comprehensive range of vital statistics and constitute an integral and essential part of the statistical study of population and its growth, medical and fertility research and the like.

19. The 1953 Act provides for the correction, by the registrar or superintendent registrar, of clerical errors, such as the incorrect statement or omission of the year of the birth, and for the correction of factual errors; however, in the latter case, an amendment can be made only if the error occurred when the birth was registered. The birth register may also, within twelve months from the date of registration, be altered to give or change the name of a child.

Statutory provision is made for the re-registration of the birth of a child who has been legitimated by the subsequent marriage of his parents. Thereafter birth certificates supplied concerning him take the form of a certified copy of the entry of re-registration; no copy of the previous entry may be given except under the direction of the Registrar General.

Under the Adoption Act 1976, where a child is adopted, an entry (not including the names of the natural parents) will be made in a separate register known as the Adopted Children Register. In addition, the original entry in the register of births will be marked with the word "Adopted". The Registrar General keeps books to make traceable the connection between the entries in the two registers but these books are not accessible to the public, save on application by the adopted person himself or by order of a court. It is open to anyone to obtain a certified copy of the entry in the Adopted Children Register or a short certificate which contains no particulars relating to parentage.

20. The criteria for determining the sex of the person to be registered are not laid down in the 1953 Act nor in any of the regulations made under it. However, the practice of the Registrar General is to use exclusively the biological criteria: chromosomal, gonadal and genital sex. The fact that it becomes evident later in life that the person’s "psychological sex" is at variance with these biological criteria is not considered to imply that the initial entry was a factual error and, accordingly, any request to have the initial entry changed on this ground will be refused. Only in cases of a clerical error, or where the apparent and genital sex of the child was wrongly identified or in case of biological intersex, i.e. cases in which the biological criteria are not congruent, will a change of the initial entry be contemplated and it is necessary to adduce medical evidence that the initial entry was incorrect. However, no error is accepted to exist in the birth entry of a person who undergoes medical and surgical treatment to enable that person to assume the role of the opposite sex.

21. Indexes are maintained of all entries in birth registers. It is open to any member of the public to search the indexes (but not the registers themselves) and obtain a certified copy of any such entry. However, identification of the index reference requires prior knowledge not only of the name under which the person concerned was registered, but also of the approximate date and place of birth and the registration district.

22. The law does not require that the birth certificate be produced for any particular purpose, although a certificate may in practice be requested by certain institutions and employers.

A birth certificate has in general to accompany a first application for a passport, but is not needed for its renewal or replacement or for an application for a driving licence. A birth certificate is also usually (though not invariably) required by insurance companies when issuing pension or annuity policies, but not for the issue of motor or household policies nor, as a rule, for the issue of a life insurance policy. It may also be required when enrolling at a university and when applying for employment, inter alia, with the Government. In the case of a religious marriage ceremony, the celebrant is not obliged nor is there any statutory power under English law to ask the parties to produce copies of their birth certificates (see also paragraph 25 below).

E. Marriage

23. In English law, marriage is defined as a voluntary union for life of one man and one woman to the exclusion of all others (per Lord Penzance in Hyde v. Hyde (1868) Law Reports 1 Probate and Divorce 130, 133). Section 11 of the Matrimonial Causes Act 1973 gives statutory effect to the common-law provision that a marriage is void ab initio if the parties are not respectively male and female.

Under section 12 of the same Act, a marriage which is not consummated owing to the incapacity or wilful refusal of one of the parties to consummate it, is voidable.

24. According to the decision of the High Court in Corbett v. Corbett [1971] Probate Reports 83, sex, for the purpose of contracting a valid marriage, is to be determined by the chromosomal, gonadal and genital tests where these are congruent, and without regard to any operative intervention. The relevance of a birth certificate to the question whether a marriage is void only arises as a matter of evidence which goes to the proof of the identity and sex of the person whose birth it certifies. The entry in the birth register is prima facie evidence of the person's sex. It may, however, be rebutted if evidence of sufficient weight to the contrary is adduced.

25. If, for the purpose of procuring a marriage or a certificate or licence for marriage, any person knowingly and wilfully makes a false oath or makes or signs a false declaration, notice or certificate required under any

Act relating to marriage, he or she is guilty of an offence under section 3(1) of the Perjury Act 1911. However, a person contracting a marriage abroad is not liable to prosecution under this Act.

F. The legal definition of sex for other purposes

26. The biological definition of sex laid down in Corbett v. Corbett has been followed by English courts and tribunals on a number of occasions and for purposes other than marriage.

In one case concerning prostitution, a male-to-female transsexual, who had undergone both hormone and surgical treatment, was nevertheless treated as a male by the Court of Appeal for the purposes of section 30 of the Sexual Offences Act 1956 and section 5 of the Sexual Offences Act 1967 (Regina v. Tan and Others [1983] 2 All England Law Reports 12). In two cases concerning social security legislation, male-to-female transsexuals were considered by the National Insurance Commissioner as males for the purposes of retirement age; in the first case the person in question had only received hormone therapy, in the second she had involuntarily begun to develop female secondary characteristics at the age of 46, which developments were followed by surgery and adoption of a female social role some 13 years later (cases R (P) 1 and R (P) 2 in the 1980 Volume of National Insurance Commissioner Decisions). Lastly, in a case before an Industrial Tribunal a female-to-male transsexual, who had not undergone any sex-change treatment, was treated as a female by the Tribunal for the purposes of the Sex Discrimination Act 1975; the person in question had sought and received employment in a position reserved for men under the Factories Act, but was dismissed after discovery of her biological sex (White v. British Sugar Corporation Ltd [1977] Industrial Relations Law Reports 121).

PROCEEDINGS BEFORE THE COMMISSION

27. In her application (no. 10843/84) lodged with the Commission on 24 February 1984, Miss Cossey complained of the fact that under English law she cannot claim full recognition of her changed status and, in particular, is unable to enter into a valid marriage with a man. She alleged violations of Articles 8 and 12 (art. 8, art. 12) of the Convention.

28. The Commission declared the application admissible on 5 July 1985. In its report of 9 May 1989 (drawn up in accordance with Article 31) (art. 31), the Commission expressed the opinion, by ten votes to six, that there had been a violation of Article 12 (art. 12), but not of Article 8 (art. 8).

The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

29. At the hearing on 24 April 1990 the Government requested the Court to "decide and declare that there has been no breach of the applicant's right to respect for private life under Article 8 para. 1 (art. 8-1) ... or of the applicant's right to marry and to found a family under Article 12 (art. 12) ...".

AS TO THE LAW

30. Miss Cossey claimed that the refusal to issue her with a birth certificate showing her sex as female and her inability, under English law, to contract a valid marriage with a man gave rise to violations of Article 8 and Article 12 (art. 8, art. 12), respectively, of the Convention. These provisions read as follows:

Article 8 (art. 8)

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

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

Article 12 (art. 12)

"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

The applicant's allegations were contested by the Government. A majority of the Commission expressed the opinion that there had been a violation of Article 12 (art. 12) but not of Article 8 (art. 8).

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[*] Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 184 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

31. The Court was confronted in the Rees case with issues akin to those arising in the present case. It therefore has to determine whether the two cases are distinguishable on their facts or whether it should depart from the judgment which it gave in the former case on 17 October 1986 (Series A no. 106; "the Rees judgment").

I. IS THE PRESENT CASE DISTINGUISHABLE ON ITS FACTS FROM THE REES CASE?

32. In the view of the applicant and certain members of the Commission, the present case was distinguishable on its facts from the Rees case, in that, at the time of their respective applications to the Commission, Miss Cossey had a male partner wishing to marry her (see paragraph 13 above) whereas Mr Rees did not have a female partner wishing to marry him. Reference was also made to the ceremony of marriage between the applicant and Mr X (see paragraph 14 above) which, although the marriage was declared void, was said to underline her wish to marry.

The Court is not persuaded that this difference is material. In the first place, the fact that Mr Rees had no such partner played no part in the Court's decisions, which were based on a general consideration of the principles involved (see the Rees judgment, pp. 14-18 and 19, paras. 35-46 and 48-51). In any event, as regards Article 8 (art. 8), the existence or otherwise of a willing marriage partner has no relevance in relation to the contents of birth certificates, copies of which may be sought or required for purposes wholly unconnected with marriage. Again, as regards Article 12 (art. 12), whether a person has the right to marry depends not on the existence in the individual case of such a partner or a wish to marry, but on whether or not he or she meets the general criteria laid down by law.

33. Reliance was also placed by the applicant on the fact that she is socially accepted as a woman (see paragraphs 10-12 above), but this provides no relevant distinction because the same was true, mutatis mutandis, of Mr Rees (see the Rees judgment, p. 9, para. 17). Neither is it material that Miss Cossey is a male-to-female transsexual whereas Mr Rees is a female-to-male transsexual: this - the only other factual difference between the two cases - is again a matter that had no bearing on the reasoning in the Rees judgment.

34. The Court thus concludes that the present case is not materially distinguishable on its facts from the Rees case.

II. SHOULD THE COURT DEPART FROM ITS REES JUDGMENT?

35. The applicant argued that, in any event, the issues arising under Articles 8 and 12 (art. 8, art. 12) deserved reconsideration.

It is true that, as she submitted, the Court is not bound by its previous judgments; indeed, this is borne out by Rule 51 para. 1 of the Rules of Court. However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions (see, amongst several authorities, the Inze judgment of 28 October 1987, Series A no. 126, p. 18, para. 41).

A. Alleged violation of Article 8 (art. 8)

36. The applicant asserted that the refusal to issue her with a birth certificate showing her sex as female constituted an "interference" with her right to respect for her private life, in that she was required to reveal intimate personal details whenever she had to produce a birth certificate. In her view, the Government had not established that this interference was justified under paragraph 2 of Article 8 (art. 8-2).

On this point, the Court remains of the opinion which it expressed in the Rees judgment (p. 14, para. 35): refusal to alter the register of births or to issue birth certificates whose contents and nature differ from those of the original entries cannot be considered as an interference. What the applicant is arguing is not that the State should abstain from acting but rather that it should take steps to modify its existing system. The question is, therefore, whether an effective respect for Miss Cossey’s private life imposes a positive obligation on the United Kingdom in this regard.

37. As the Court has pointed out on several occasions, notably in the Rees judgment itself (p. 15, para. 37), the notion of "respect" is not clear-cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion’s requirements will vary considerably from case to case. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention.

38. In reaching its conclusion in the Rees judgment that no positive obligation of the kind now in issue was incumbent on the United Kingdom, the Court noted, inter alia, the following points (pp. 17-18, paras. 42-44).

(a) The requirement of striking a fair balance could not give rise to any direct obligation on the respondent State to alter the very basis of its system for the registration of births, which was designed as a record of historical

facts, by substituting therefor a system of documentation, such as that used in some other Contracting States, for recording current civil status.

(b) An annotation to the birth register, recording Mr Rees' change of sexual identity, would establish only that he belonged thenceforth - and not from the time of his birth - to the other sex. Furthermore, the change so recorded could not mean the acquisition of all the biological characteristics of the other sex. In any event, such an annotation could not, without more, constitute an effective safeguard for ensuring the integrity of his private life, as it would reveal the change in question.

(c) That change, and the corresponding annotation, could not be kept secret from third parties without a fundamental modification of the existing system for maintaining the register of births, which was accessible to the public. Secrecy could have considerable unintended results and could prejudice the purpose and function of the register by, for instance, complicating factual issues arising in the fields of family and succession law. It would also take no account of the position of third parties, in that they would be deprived of information which they had a legitimate interest to receive.

39. In the Court's view, these points are equally cogent in the present case, especially as regards Miss Cossey's submission that arrangements could be made to provide her either with a copy birth certificate stating her present sex, the official register continuing to record the sex at birth, or, alternatively, a short-form certificate, excluding any reference either to sex at all or to sex at the date of birth.

Her suggestions in this respect were not precisely formulated, but it appears to the Court that none of them would overcome the basic difficulties. Unless the public character of the register of births were altered, the very details which the applicant does not wish to have disclosed would still be revealed by the original entry therein or, if that entry were annotated, would merely be highlighted. Moreover, the register could not be corrected to record a complete change of sex since that is not medically possible.

40. In the Rees judgment, the Court, having noted that the United Kingdom had endeavoured to meet Mr Rees' demands to the fullest extent that its system allowed - and this applies also in the case of Miss Cossey -, pointed out that the need for appropriate legal measures concerning transsexuals should be kept under review having regard particularly to scientific and societal developments (pp. 17 and 19, paras. 42 and 47).

The Court has been informed of no significant scientific developments that have occurred in the meantime; in particular, it remains the case - as was not contested by the applicant - that gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex.

There have been certain developments since 1986 in the law of some of the member States of the Council of Europe. However, the reports

accompanying the resolution adopted by the European Parliament on 12 September 1989 (OJ No C 256, 9.10.1989, p. 33) and Recommendation 1117 (1989) adopted by the Parliamentary Assembly of the Council of Europe on 29 September 1989 - both of which seek to encourage the harmonisation of laws and practices in this field - reveal, as the Government pointed out, the same diversity of practice as obtained at the time of the Rees judgment. Accordingly this is still, having regard to the existence of little common ground between the Contracting States, an area in which they enjoy a wide margin of appreciation (see the Rees judgment, p. 15, para. 37). In particular, it cannot at present be said that a departure from the Court's earlier decision is warranted in order to ensure that the interpretation of Article 8 (art. 8) on the point at issue remains in line with present-day conditions (see paragraph 35 above).

41. The applicant also prayed in aid Article 14 (art. 14) of the Convention, which prohibits discrimination in the enjoyment of the rights and freedoms guaranteed. However, the Court does not consider that this provision assists her. She appears to have relied on it not so much in order to challenge a difference of treatment between persons placed in analogous situations (see, amongst various authorities, the Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 26, para. 60) but rather as a means of introducing into her submissions the notion of proportionality between a measure or a restriction and the aim which it seeks to achieve. Yet that notion is already encompassed within that of the fair balance that has to be struck between the general interest of the community and the interests of the individual (see paragraph 37 above and the Lithgow and Others judgment of 8 July 1986, Series A no. 102, p. 50, para. 120).

42. The Court accordingly concludes that there is no violation of Article 8 (art. 8).

The Court would, however, reiterate the observations it made in the Rees judgment (p. 19, para. 47). It is conscious of the seriousness of the problems facing transsexuals and the distress they suffer. Since the Convention always has to be interpreted and applied in the light of current circumstances, it is important that the need for appropriate legal measures in this area should be kept under review.

B. Alleged violation of Article 12 (art. 12)

43. In reaching its conclusion in the Rees judgment that there had been no violation of Article 12 (art. 12), the Court noted the following points (p. 19, paras. 49-50).

(a) The right to marry guaranteed by Article 12 (art. 12) referred to the traditional marriage between persons of opposite biological sex. This appeared also from the wording of the Article (art. 12) which made it clear that its main concern was to protect marriage as the basis of the family.

(b) Article 12 (art. 12) laid down that the exercise of the right to marry shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right was impaired. However, the legal impediment in the United Kingdom on the marriage of persons who were not of the opposite biological sex could not be said to have an effect of this kind.

44. Miss Cossey placed considerable reliance, as did the Delegate of the Commission, on the fact that she could not marry at all: as a woman, she could not realistically marry another woman and English law prevented her from marrying a man.

In the latter connection, Miss Cossey accepted that Article 12 (art. 12) referred to marriage between a man and a woman and she did not dispute that she had not acquired all the biological characteristics of a woman. She challenged, however, the adoption in English law of exclusively biological criteria for determining a person's sex for the purposes of marriage (see paragraph 24 above) and the Court's endorsement of that situation in the Rees judgment, despite the absence from Article 12 (art. 12) of any indication of the criteria to be applied for this purpose. In her submission, there was no good reason for not allowing her to marry a man.

45. As to the applicant's inability to marry a woman, this does not stem from any legal impediment and in this respect it cannot be said that the right to marry has been impaired as a consequence of the provisions of domestic law.

As to her inability to marry a man, the criteria adopted by English law are in this respect in conformity with the concept of marriage to which the right guaranteed by Article 12 (art. 12) refers (see paragraph 43 (a) above).

46. Although some Contracting States would now regard as valid a marriage between a person in Miss Cossey's situation and a man, the developments which have occurred to date (see paragraph 40 above) cannot be said to evidence any general abandonment of the traditional concept of marriage. In these circumstances, the Court does not consider that it is open to it to take a new approach to the interpretation of Article 12 (art. 12) on the point at issue. It finds, furthermore, that attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry.

47. In the context of Article 12 (art. 12) the applicant again prayed in aid Article 14 (art. 14) of the Convention. On this point it suffices to refer to the observations in paragraph 41 above.

48. The Court thus concludes that there is no violation of Article 12 (art. 12).

FOR THESE REASONS, THE COURT

1. Holds by ten votes to eight that there is no violation of Article 8 (art. 8);

2. Holds by fourteen votes to four that there is no violation of Article 12 (art. 12).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 September 1990.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint partly dissenting opinion of Mrs Bindschedler-Robert and Mr Russo;

(b) joint partly dissenting opinion of Mr Macdonald and Mr Spielmann;

(c) dissenting opinion of Mr Martens;

(d) joint dissenting opinion of Mrs Palm, Mr Foighel and Mr Pekkanen.

R. R.
M.-A. E.

PARTLY DISSENTING JOINT OPINION OF JUDGES BINDSCHEDLER-ROBERT AND RUSSO

(Translation)

In the instant case the Court has confirmed the opinion it expressed in its judgment in the Rees case, in which it said that the United Kindgom could not be required to adapt its system of recording civil status in such a way that a transsexual's change of sexual identity appeared in his birth certificate. However, we are no more persuaded now than we were then that the arguments advanced in support of this view are valid. It remains our view that as regards the way in which it draws up the civil-status documents in question - that is to say the birth register and birth certificate - the United Kingdom has not taken all the appropriate steps to ensure, as far as possible, that allowance is made for changes in certain persons' sexual identity; and we consider that although, as we are glad to acknowledge, it has endeavoured to meet transsexuals' demands in several other respects, it has therefore to this extent failed to respect the applicant's private life. In our opinion, a just balance could have been struck between the public interest and the interests of the individual without upsetting the present system of recording civil status; the fact that such a balance would not necessarily meet all the applicant's demands should not prevent the Court from giving it due weight in assessing whether Article 8 (art. 8) has been complied with.

As to the rest, and in order to avoid repeating ourselves, we would refer to the dissenting opinion that we expressed jointly with our late lamented colleague Mr Gersing in the Rees case.

JOINT PARTLY DISSENTING OPINION OF JUDGES MACDONALD AND SPIELMANN

(Translation)

1. Like the majority, we consider that there is no violation of Article 12 (art. 12) of the Convention.

2. On the other hand, we are of the opinion that there is a violation of Article 8 (art. 8).

Whilst we can agree with sub-paragraphs 1 and 2 of paragraph 40 of the judgment, the same does not apply to sub-paragraph 3 of that paragraph, which reads:

> "There have been certain developments since 1986 in the law of some of the member States of the Council of Europe. However, the reports accompanying the resolution adopted by the European Parliament on 12 September 1989 (OJ No C 256, 9.10.1989, p. 33) and Recommendation 1117 (1989) adopted by the Parliamentary Assembly of the Council of Europe on 29 September 1989 - both of which seek to encourage the harmonisation of laws and practices in this field - reveal, as the Government pointed out, the same diversity of practice as obtained at the time of the Rees judgment. Accordingly this is still, having regard to the existence of little common ground between the Contracting States, an area in which they enjoy a wide margin of appreciation (see the Rees judgment, p. 15, para. 37). In particular, it cannot at present be said that a departure from the Court's earlier decision is warranted in order to ensure that the interpretation of Article 8 (art. 8) on the point at issue remains in line with present-day conditions (see paragraph 35 above)."

We consider that since 1986 there have been, in the law of many of the member States of the Council of Europe, not "certain developments" but clear developments.

We are therefore of the opinion that, although the principle of the States' "wide margin of appreciation" was at a pinch acceptable in the Rees case, this is no longer true today.

Paragraph 42 of the judgment contains the following passage:

> "The Court would, however, reiterate the observations it made in the Rees judgment (p. 19, para. 47). It is conscious of the seriousness of the problems facing transsexuals and the distress they suffer. Since the Convention always has to be interpreted and applied in the light of current circumstances, it is important that the need for appropriate legal measures in this area should be kept under review."

This is meagre consolation for the individuals concerned. In our view, concrete measures are necessary now.

DISSENTING OPINION OF JUDGE MARTENS

1. INTRODUCTION

1.1 Like the majority I think that neither the relevant facts nor the issues for decision in the case of Miss Cossey differ from those in the case of Mr Rees in a way which would justify distinguishing the former from the latter.

Unlike the majority, however, I am of the opinion that the Court had indeed "cogent reasons" [1] for departing from its Rees judgment. A true reconsideration of the issues arising under Articles 8 and 12 (art. 8, art. 12) should have led it to conclude that the Rees judgment was wrong - or at least that present-day conditions warranted a different decision in the Cossey case. I am convinced therefore that the Court should have responded to the pressing invitation by the Commission's Delegate to overrule its decision in the Rees case.

1.2 To explain my opinion I propose first to make some general remarks which will outline my position on the human-rights aspects of the problem of transsexualism (section 2). I will then set out why I think that the Court should have decided the Rees case differently (sections 3 and 4). Lastly I will give further arguments for overruling that decision (section 5).

2. GENERAL REMARKS ON TRANSSEXUALISM AS A PROBLEM OF HUMAN RIGHTS

2.1 Like Mr Rees, the applicant is a transsexual, that is she belongs to that small and tragic group of fellow-men who are smitten by the conviction of belonging to the other sex, this conviction being both incurable and irresistible.

2.2 If a transsexual is to achieve any degree of well-being, two conditions must be fulfilled:

1. by means of hormone treatment and gender reassignment surgery his (outward) physical sex must be brought into harmony with his psychological sex;

2. the new sexual identity which he has thus acquired must be recognised not only socially but also legally.

2.3 Like the Rees case, the present case concerns only the second of these conditions. Consequently, there is no need to go into the medical procedures to be followed in order to ensure that treatment - especially the surgery, which is irreversible - is applied only after very careful diagnosis. This is all the less necessary as the applicant has undergone all the requisite medical treatment which, as in the Rees case, was paid for by the National Health Service; it may therefore be assumed that all medical and medical-ethical requirements for that treatment were met, viz. that after exhaustive

investigations the doctors were satisfied that their patient was a bona fide transsexual and that his well-being would be promoted by the surgery.

2.4 As to the second of the above conditions, it should be stressed that (medical) experts in this field have time and again stated that for a transsexual the "rebirth" he seeks to achieve with the assistance of medical science is only successfully completed when his newly acquired sexual identity is fully and in all respects recognised by law.

This urge for full legal recognition is part of the transsexual's plight. That explains why so many transsexuals, after having suffered the medical ordeals they have to endure, still muster the courage to start and keep up the often long and humiliating fight for a new legal identity [2].

That explains also why neither Mr Rees nor Miss Cossey nor the various other transsexuals who had raised complaints against the United Kingdom were willing to be content with the comparatively advantageous situation which obtains in the United Kingdom as to the possibilities of changing one's first name and the relevant prefixes on such official documents as passports and driving licences. Both Mr Rees and Miss Cossey made it abundantly clear that what they were seeking was full legal recognition of their newly acquired sexual identity.

2.5 The endeavours of transsexuals to obtain legal recognition of what they feel as their attaining the sex to which they have always belonged have, however, often met with a marked aversion on the part of the authorities. It seems that the transsexual's attempts to "change sex" infringe a deeply rooted taboo. At any rate, the first reactions of authorities as well as of courts have been almost instinctively hostile and negative.

The United Kingdom decision in a case of transsexualism, the judgment of the High Court in the case of Corbett v. Corbett [3] - to which judgment I will have to refer again -, well illustrates this tendency: using terms which scarcely veil his distaste [4] and basing himself on a reasoning which has been severely criticised by various legal writers [5], the learned Judge simply refused to attach any legal relevance to reassignment surgery. The reactions of the highest courts in other countries have not been more helpful [6]. And the European Court of Human Rights has until now inscribed itself into that trend: Van Oosterwijck, Rees, Cossey, a saddening series [7].

2.6.1 Yet some legislatures and some courts have taken another course. They have realised that post-operative transsexuals are tragic human beings who have already suffered so much that their request for full legal recognition of their new sexual identity should be granted, as far as is reasonably possible.

2.6.2 In paragraph 44 of its report of 12 December 1984 in the Rees case the Commission noted that at that time the legislatures of several member States had introduced the possibility of a change of legal sex for transsexuals and had, subject to certain conditions, acknowledged their right

to marry a person of their former sex. The report mentioned the Swedish Act of 1972, the German Act of 1980 and the Italian Act of 1982.

When the Rees case was pleaded before the Court [8] there was some dispute between the parties as to the situation in other member States [9]. In this context both parties referred to "recent" legislation in the Netherlands [10]. It was probably due to this dispute that the Court itself spoke vaguely of "several States" having, through legislation (or otherwise [11]), given transsexuals the option of changing their personal status to fit their newly gained identity (paragraph 37).

I will refer to this subject again in section 5 below. In the present context it suffices to note that, generally speaking, European legislatures began to take up the case of transsexuals only at the end of the seventies and at the beginning of the eighties (the Swedish legislature having set the example in 1972).

2.6.3 So much for the legislatures. As to the decisions of courts, I would only mention the 1976 judgment of the Appellate Division of the Superior Court of New Jersey [12] and the 1978 judgment of the West German Bundesverfassungsgericht [13]. Both judgments - and their similarity is the more striking because they come from different legal traditions - make the same essential points.

Both judgments may be summarised as taking the view that the change of sexual identity which results from successful reassignment surgery should be deemed a change of sex for legal purposes.

The Bundesverfassungsgericht said:

> "Human dignity and everyone's fundamental right to develop his personality freely make it imperative to assign a man's personal status to the sex to which he belongs according to his psychological and physical constitution."

It remarked in conclusion that in its opinion the refusal to change the sex of post-operative transsexuals in the register of births was not based on any public interest which could justify the interference with their fundamental rights.

The New Jersey court said:

> "In so ruling we do no more than give legal effect to a fait accompli based upon medical judgment and action which are irreversible. Such recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality."

2.7 I think that these indeed are the essential points. The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality. A transsexual does use those very fundamental rights. He is prepared to shape himself and his fate. In doing so he goes through long,

dangerous and painful medical treatment to have his sexual organs, as far as is humanly feasible, adapted to the sex he is convinced he belongs to. After these ordeals, as a post-operative transsexual, he turns to the law and asks it to recognise the fait accompli he has created. He demands to be recognised and to be treated by the law as a member of the sex he has won; he demands to be treated without discrimination, on the same footing as all other females or, as the case may be, males. This is a request which the law should refuse to grant only if it truly has compelling reasons, for in the light of what has been said in paragraphs 2.2 and 2.4 above such a refusal can only be qualified as cruel. But there are no such reasons.

My position may be summarised by a quotation which I borrow from a critic of the Corbett doctrine [14]:

> "Refusal to reclassify the sex of a post-operative transsexual seems inconsistent with the principles of a society which expresses concern for the privacy and dignity of its citizens."

3. WHY THE REES CASE SHOULD HAVE BEEN DECIDED DIFFERENTLY AS REGARDS ARTICLE 8 (art. 8)

3.1 Having made my position clear, I now turn to the Court's reasoning in its Rees judgment.

The first feature which strikes the reader of that judgment is its predominantly technical nature. First there is a technical discussion on the distinction between negative and positive obligations flowing from Article 8 (art. 8) of the Convention. There follows an analysis in some depth of the difficulties the United Kingdom legislature would encounter were the United Kingdom to be obliged to comply with Mr Rees' wishes as regards altering its birth-registration system.

In my opinion the Court, in allowing itself to be enticed into this course, sadly undervalued some of the essential issues in that case.

3.2 Time and again it had been stressed on behalf of Mr Rees that, although the United Kingdom's refusal to permit alteration or adjustment of the register of births was an important issue, the very essence of his complaints was that he had to live under a legal system which, for all questions where sex was legally relevant, held that only biological sex was decisive, and which - as biological sex was determined once and for all at birth - refused to recognise for legal purposes the new sexual identity which he, as a post-operative transsexual, had acquired [15].

This approach is reflected in paragraph 34 of the Court's judgment. However, it is significant that, when embarking upon its exposition on positive and negative obligations under Article 8 (art. 8), the Court already does not mention this central issue any more but turns directly to the more

technical issue of the "mere" (!) refusal to alter the register of births (paragraph 35).

3.3 Mr Rees' description of the position of transsexuals under United Kingdom law is undoubtedly correct. It is true that Mr Justice Ormrod had expressly limited his decision to the determination of a person's sex for the purposes of marriage. However, since the Court of Appeal subsequently held that "both common sense and the desirability of certainty and consistency" demanded that his decision should apply for the purpose of certain provisions of criminal law [16], it is generally assumed that his test would apply whenever it is legally relevant whether one is a male or a female - for instance, in questions of inheritance, title, social insurance, pension benefits, labour relations and equal pay, tax treatment, immigration, etc. [17]. The European Court recognised this, albeit somewhat cautiously, by saying that "at the present stage of the development of United Kingdom law" [18] Mr Rees "would be regarded as a woman, inter alia, as far as marriage, pension rights and certain employments are concerned" (paragraph 40) [19].

3.4 In my opinion it follows from what has been said in paragraphs 3.2 and 3.3 above that it is at least questionable whether the Court rightly held (paragraph 35) that in the Rees case only the existence and the scope of the positive obligations flowing from Article 8 (art. 8) were at stake: the very essence of Mr Rees' complaints was not the "refusal to alter the register of births or to issue birth certificates whose contents and nature differ from those of the birth register"; the very essence of his complaints was that the legal system in force in the United Kingdom (the BSD-system) was inconsistent with his rights under Article 8 (art. 8) of the Convention [20].

In my view judgments such as those in the Marckx case, the Dudgeon case, the Malone case and the Norris case [21] may be cited as a persuasive argument for the proposition that the maintenance in force of the BSD-system continuously and directly affected Mr Rees' private life and therefore should have been deemed to constitute a continuing interference [22].

The BSD-system keeps treating post-operative transsexuals for legal purposes as members of the sex which they have disowned psychically and physically as well as socially. The very existence of such a legal system must continuously, directly and distressingly affect their private life [23].

Sexual identity is not only a fundamental aspect of everyone's personality but, through the ubiquity of the sexual dichotomy, also an important societal fact. For post-operative transsexuals sexual identity has, understandably, a very special and sensitive importance because they acquired theirs deliberately, at a high cost in mental and bodily suffering. To be condemned to live, as far as that identity is concerned, in opposition to and thus "outlawed" by their country's legal system must therefore cause permanent and acute personal distress to post-operative transsexuals in the

United Kingdom. That is to say nothing of the lifelong dread to which the BSD-system condemns them, by obliging them, every time that their sex is legally relevant, to make the painful choice between either hiding what legally is "the truth" - with all the legal consequences of such untruthfulness, such as making themselves liable to a criminal charge, dismissal or a demand for nullification of the legal act in question - or revealing that legal "truth" and facing at least the possibility of very humiliating or even hostile reactions.

3.5 If the Court - as in my opinion it should have done - had accepted that the BSD-system constitutes a continuous interference with the right of post-operative transsexuals to respect for their private life, it would have become decisive whether the United Kingdom had convincingly established that its maintenance in force of that system met the requirements of paragraph 2 of Article 8 (art. 8-2). The mere fact that several States had by then already - as the Court put it (paragraph 37) - "given transsexuals the option of changing their personal status to fit their newly-gained identity" is a strong indication that, had the Court followed this line of reasoning, it would have held that it could not be said that the United Kingdom's refusal to modify the system was "necessary in a democratic society" [24].

3.6.1 But let us, for the sake of argument, accept that the decisive question was whether the United Kingdom's failure to change the BSD-system violated a positive obligation flowing from Article 8 (art. 8). I then question whether the Court, having found

> "that there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage",

was right to conclude therefrom that

> "this is an area in which the Contracting Parties enjoy a wide margin of appreciation." (paragraph 37)

3.6.2 I accept, of course, that the notion of "respect" is not clear-cut and that the notion's requirements will therefore vary considerably from case to case. I also accept that this means that special situations obtaining in the State concerned may have to be taken into account when assessing whether or not the failure of that State to take a specific measure may be accepted as still being compatible with due respect for the private life of an individual. Finally I accept that this means that under some circumstances a certain margin of appreciation should be left to the State concerned.

3.6.3 I would point out, however, that in my opinion States do not enjoy a margin of appreciation as a matter of right, but as a matter of judicial self-restraint [25]. Saying that the Court will leave a certain margin of appreciation to the States is another way of saying that the Court - conscious that its position as an international tribunal having to develop the law in a sensitive area calls for caution - will not fully exercise its power to verify whether States have observed their engagements under the Convention, but

will find a violation only if it cannot reasonably be doubted that the acts or omissions of the State in question are incompatible with those engagements.

It is, therefore, up to the Court to decide, in every case or in every group of cases, whether a "margin of appreciation" should be left to the State and, if so, how much. For this decision various factors may be relevant and will, at the end of the day, have to be balanced.

On the one hand, the preamble to the Convention, which recalls the aim of achieving greater unity between member States and stresses that Fundamental Freedoms are "best maintained" by "a common understanding and observance of ... Human Rights", seems to invite the Court to develop common standards. To the extent that the number of member States increases, this side of the Court's mandate gains in weight, for in such a larger, diversified community the development of common standards may well prove the best, if not the only way of achieving the Court's professed aim of ensuring that the Convention remains a living instrument to be interpreted so as to reflect societal changes and to remain in line with present-day conditions [26].

Judicial self-restraint may, on the other hand, be called for by the specific features of the case or the fact that it cannot be decided without taking into consideration special situations obtaining in the defendant State. If, after careful consideration, the Court is convinced that the latter is really the case, then it may be that the State should be left a certain margin of appreciation; if not, that will be a strong indication that there is no need - and consequently no room - for judicial self-restraint.

3.6.4 In this context I recall what I have said in paragraph 3.2 above: it is true that the United Kingdom's refusal to permit an alteration or adjustment of the register of births was an important issue, but the essence of the complaints of Mr Rees was that the United Kingdom maintained - or did not change - the BSD-system.

It is true that, as the European Parliament put it in its resolution of 12 September 1989 [27], "transsexuality is ... also a problem of a society which is incapable of coming to terms with a change in the roles of the sexes laid down in its culture", but there is nothing in the file that suggests that, as to the role of the sexes, the culture of the United Kingdom differs essentially from that of other member States. There is therefore no need to take into account specific features of British society or other special conditions obtaining in the United Kingdom in order to decide whether the United Kingdom's maintaining the BSD-system is compatible with its engagements under the Convention. In this context I think that it may suffice to refer to what has been said in paragraphs 2.7 and 3.4 above.

As to the specific features of the case, I note that, while the United Kingdom courts take the view that "common sense and the desirability of certainty and consistency" demand that the Corbett doctrine - which dates from 1970 - be extended to all questions where sex is legally relevant, and

while the United Kingdom Government have defended the legal system thus created, neither the criticism of the Corbett doctrine nor the initiatives of other legislatures have given the United Kingdom legislature reason to change the BSD-system.

Thus the United Kingdom transsexuals had no resource other than the European Court of Human Rights. That Court's help was, moreover, needed in an area as fundamental as respect for human dignity and private life. Other member States had already shown that, however diverse their solutions were in detail, a common standard could well be found as to the principle of full legal recognition of the new sexual identity gained by post-operative transsexuals.

It is my firm belief that the Court, by nevertheless exercising judicial self-restraint, sadly failed its vocation of being the last-resort protector of oppressed individuals.

3.6.5 For these reasons I think that the Court should not have built its reasoning on the assumption that "this is an area in which the Contracting Parties enjoy a wide margin of appreciation". I agree with what was pleaded on behalf of Mr Rees [28]: the essential question was whether maintaining or not changing the BSD-system was compatible with the United Kingdom's obligations under Article 8 (art. 8). That question can only be answered in the negative (see paragraphs 2.7 and 3.4 above). In this context there simply is no room for a margin of appreciation. That margin comes into play only when a State resolves to recognise the new sexual identity of post-operative transsexuals: then there should be room for a certain discretion as to the requirements for and the form of such recognition.

3.7 The last point brings us back to paragraphs 3.1 and 3.2 above.

It follows from what I have said there that in my opinion the Court should not have dealt with all the technical difficulties which counsel for the United Kingdom had ably expounded in order to explain why the United Kingdom could not be expected to change its birth-registration system [29]. In my view the Court should have confined itself to the essential question and should have held that the United Kingdom's maintenance in force (or not changing) of the BSD-system violates Article 8 (art. 8). If, after that, the Court had still wanted to address the United Kingdom's technical arguments, it could have added that:

(a) other legislatures had shown that in a democratic society this problem can be regulated;

(b) presumably it must be possible to do that under United Kingdom law as well and to do it in such a way that the regulation fits in with the British legal system;

(c) it is, however, not for the Court to go into technical questions as to how that should be achieved and exactly which provisions should be enacted, because the Court has only to see to it that the individual is

protected against the maintenance in force of a system which is incompatible with the rights and freedoms secured by the Convention [30].

4. WHY THE REES CASE SHOULD HAVE BEEN DECIDED DIFFERENTLY AS REGARDS ARTICLE 12 (art. 12)

4.1 I now come to a question which was less emphasised in the case of Mr Rees than in that of Miss Cossey: the question whether the BSD-system violates the right to marry as laid down in Article 12 (art. 12) of the Convention.

4.2 It follows from what I have argued in section 3 that I too [31] am of the opinion that the question whether the United Kingdom is also in violation of Article 12 (art. 12) is only of academic interest: this is because the maintenance in force of the BSD-system already constitutes a violation of Article 8 (art. 8), which requires that the new sexual identity acquired by post-operative transsexuals should be fully and in all respects recognised by the law. However, in view of the importance attached to this issue in the case of Miss Cossey, I will explain why I think that on this issue also the Court should have decided the Rees case differently.

4.3.1 In the Rees judgment the question whether the BSD-system violates Article 12 (art. 12) was answered in the negative. The Court's arguments for doing so are conspicuously succinct: they only consist of two short paragraphs, of which the first (paragraph 49) is already decisive. There the Court interprets the words "men and women" in Article 12 (art. 12) as denoting: "persons of opposite biological sex" (italics added).

4.3.2 The Court does not elucidate the term "biological sex", but the meaning of that term can be deduced from the judgment.

The arguments on which the Court's interpretation is based seem to echo those used by Mr Justice Ormrod in Corbett v. Corbett as the basis for his opinion that "sex is clearly an essential determinant of the relationship called marriage". Whilst the Court speaks of "traditional marriage", the learned Judge said that marriage "always has been recognised as the union of man and woman" and "is the institution on which the family is built". Both this conspicuous similarity of arguments and paragraph 50 of the Rees judgment - where the Court, referring to United Kingdom law, notes that under that law persons who are not of the "opposite biological sex" cannot marry - warrant the conclusion that the Court used the term "biological sex" in the very same sense as did Mr Justice Ormrod, namely as "the biological sexual constitution of an individual" which is "fixed at birth".

4.3.3 If understood this way, paragraph 49 is indeed decisive because, given that it is common ground that gender reassignment surgery does not change biological sex, a post-operative transsexual still belongs to the sex he was born into and therefore cannot derive from Article 12 (art. 12) the right to marry a person belonging to that same sex.

4.3.4 Paragraph 50 clearly illustrates that this was indeed the Court's perception of the matter. In this paragraph the Court establishes that "it cannot be said" (emphasis added) that the BSD-system impairs the very essence of the right to marry.

Prima facie this rather strongly worded assertion comes as a surprise, because it was argued on behalf of Mr Rees that the effect of the BSD-system is to deprive a post-operative transsexual of any possibility of contracting a valid marriage [32]: after his operation not only psychological [33] but also physical factors prevent his marrying a person of the opposite biological sex, whilst his marrying a person whom he physically and psychologically is able to marry is precluded by the BSD-system.

A rather persuasive argument, it would seem, but not one which caused the Court to substantiate its assertion under discussion. Indeed, this was not necessary with the restrictive interpretation of Article 12 (art. 12) which the Court had adopted: if Article 12 (art. 12) really confines the right to marry to persons who are of the opposite biological sex, it of course follows without further substantiation that the BSD-system does not impair the right guaranteed by Article 12 (art. 12).

4.4.1 Having ascertained how paragraph 49 should be understood, let us now consider the arguments on which the Court based its restrictive interpretation.

4.4.2 It may perhaps be inferred from the wording of the first sentence of paragraph 49 ("the traditional marriage") that the Court meant to invoke the intention of the draftsmen. If so, this argument is far from convincing. When the Convention was drafted transsexualism was, at most, a medical and ethical problem, but certainly not a legal issue (see also paragraph 38 of the Rees judgment). It cannot therefore be assumed that the draftsmen, having considered the issue, decided to deny post-operative transsexuals the right to marry.

However, even if it could be so assumed, the Court - which rightly professes that the Convention is a living instrument - should, in order to make its argument conclusive, have added that (and explained why), under current European conceptions of marriage too, there is no reason for going back on that denial. But such additional argument is conspicuously lacking. Or should one deduce from the fact that the reference in paragraph 47 to future developments is found at the end of the section devoted to the alleged violation of Article 8 (art. 8) and not at the end of the judgment that in the Court's view its restrictive interpretation of Article 12 (art. 12) is of perennial value [34]?

4.4.3 The Court's second argument is that it appears from the wording of the Article (art. 12) that it "is mainly concerned to protect marriage as the basis of the family".

This argument may, perhaps, account for the draftsmen's having regarded marriage as the traditional union between a man and a woman. For

several reasons it cannot, however, serve as an argument for the Court's decision in 1986 that in this context "a man" and "a woman" can be understood only as a man and a woman in the biological sense.

The first reason is that it cannot be assumed that the stated purpose of the right to marry (to protect marriage as the basis of the family) can serve as a basis for its delimitation: under Article 12 (art. 12) it would certainly not be permissible for a member State to provide that only those who can prove their ability to procreate are allowed to marry [35].

The second reason is that it is hardly compatible with the modern, open and pragmatic construction of the concept of "family life" which has evolved in the Court's case-law since its Marckx judgment [36] to base the interpretation of Article 12 (art. 12) merely on the traditional view according to which marriage was the pivot of a closed system of family law. On the contrary, that evolution calls for a more functional approach to Article 12 (art. 12) as well [37], an approach which takes into consideration the factual conditions of modern life.

4.5.1 So much for the arguments on which the Court based its restrictive interpretation of Article 12 (art. 12). Even if those arguments may be open to criticism, it remains, of course, possible that the Court's interpretation nevertheless has to be accepted.

It is true that Article 12 (art. 12), by speaking of "men and women", clearly indicates that marriage is the union of two persons of opposite sex. That does not necessarily mean, however, that "sex" in this context must be interpreted as "biological sex". Nor can it be maintained that "tradition" implies that "sex" in this context can only mean "the biological sexual constitution of an individual which is fixed at birth". That interpretation has, therefore, to be supported by further arguments, the more so as it is far from self-evident that, when seeking a definition of what is meant by "sex" in this context, one should choose one which depends on the situation obtaining when the would-be spouses were born, rather than when they want to marry, especially as the sexual condition of an individual is determined by several factors (viz. chromosomal factors; gonadal factors; genital factors; psychological factors) nearly all of which are (more or less) capable of changing [38].

Only the chromosomal factor is not. But why should this particular factor be decisive? Why should an individual who - although having since birth the chromosomes of a male [39] - at the moment he wants to marry no longer has testes or a penis but, on the contrary, shows all the (outward) genital and psychological factors of a female (and who is socially accepted as such), nevertheless, for the purpose of determining whether that individual should be allowed to marry a man, be deemed to be still a man himself? To attach so much weight to the chromosomal factor requires further explanation. That explanation, moreover, should be based on at least one relevant characteristic of marriage, for only then could it serve as a legal

justification for the differentiation between the individual just described and an individual who is similar in all respects, save for having since birth the chromosomes of a female. The Court's judgment does not offer such an explanation. Neither does the judgment in Corbett v. Corbett, which the Court seems to have espoused.

Even if, for the sake of argument, one were to adopt Mr Justice Ormrod's view that "sex is clearly an essential determinant of the relationship called marriage", as well as his opinion that this is so because "the capacity for natural heterosexual intercourse" is essential for marriage, one cannot but treat both individuals referred to on the same footing as regards their fitness to marry a man: both are, as far as heterosexual intercourse is concerned, capable of performing the essential role of a woman [40]; for that role chromosomes are completely irrelevant [41].

In other words, it is arbitrary and unreasonable in this context to ignore successful gender reassignment surgery and to retain the criterion of biological sex.

4.5.2 This is all the more so because Mr Justice Ormrod's arguments are clearly unacceptable. Marriage is far more than a sexual union, and the capacity for sexual intercourse is therefore not "essential" for marriage. Persons who are not or are no longer capable of procreating or having sexual intercourse may also want to and do marry. That is because marriage is far more than a union which legitimates sexual intercourse and aims at procreating: it is a legal institution which creates a fixed legal relationship between both the partners and third parties (including the authorities [42]); it is a societal bond, in that married people (as one learned writer put it) "represent to the world that theirs is a relationship based on strong human emotions, exclusive commitment to each other and permanence"; it is, moreover, a species of togetherness in which intellectual, spiritual and emotional bonds are at least as essential as the physical one.

Article 12 (art. 12) of the Convention protects the right of all men and women (of marriageable age) to enter into that union and therefore the definition of what is meant by "men and women" in this context should take into account all these features of marriage.

4.6 The above considerations serve to demonstrate why I am convinced that in its Rees judgment the Court erred in holding that the right to marry guaranteed by Article 12 (art. 12) (only) refers to the traditional marriage between persons of opposite biological sex.

They also show why I think that for the purposes of Article 12 (art. 12) a transsexual, after successful gender reassignment surgery, should be deemed to belong to the sex he has chosen and therefore should have the right to marry a person of the sex opposite to his chosen one.

Finally they explain why I think that, as far as transsexuals who have undergone successful gender reassignment surgery are concerned, the effect of the legal impediment in the United Kingdom to the marriage of persons

who are not of the opposite biological sex is to reduce the right to marry - which is guaranteed to these persons also - to such an extent that the very essence of that right is impaired.

5. WHY THE COURT IN THE COSSEY CASE SHOULD HAVE OVERRULED ITS DECISION IN THE REES CASE

5.1 In paragraph 2 of my separate opinion in the Brozicek case [43] I indicated what seem to me the most important aspects to take into account when a court - like the European Court of Human Rights in the present case - is considering overruling a previous decision.

5.2 A court should, I said, overrule only if it is convinced "that the new doctrine is clearly the better law". This condition is, of course, based on the idea that in principle legal certainty and consistency require that a court follows its own established case-law: it should therefore overrule only when the new doctrine is clearly better than the old one. Thus far I am in agreement with the majority (see paragraph 35 of the judgment).

It follows from the foregoing paragraphs that, in my opinion, this first condition was certainly met in the present case: I hope to have made it clear why I do not hesitate to say that the Rees judgment was wrong.

I may add that the judgment has in fact been criticised by a number of learned writers [44]. The Commission too was not convinced and its Delegate said at the hearing that it had referred the Cossey case to the Court in the hope of inducing it to overrule its Rees judgment.

5.3 There were, moreover, two further aspects which, in my opinion, militated strongly in favour of overruling on this occasion.

The first is that in the present case the Court was not invited to depart from a body of established case-law, but to overrule one single judgment, albeit one which was rather recent and nearly unanimous. This made overruling easier. The case for doing so was, furthermore, considerably strengthened by the fact that only a single judgment was concerned because confirming that judgment would bar overruling for a long time to come.

The second argument which pleaded for overruling was that in this particular case it could not be said that overruling would be unjust by creating a disparity between the party who lost the first case and the one who would win the second: the fact that in both cases the United Kingdom is the defendant ensures that overruling would benefit not only Miss Cossey but Mr Rees as well. This is quite apart from the question whether, when fundamental rights of an individual are at stake, the Court of Human Rights is ever entitled to go against its convictions on the mere ground of following a precedent: where violation of a human right is at stake, should not legal certainty always give way?

5.4 The latter question can be left unanswered in this case, but it brings me to a possible argument against overruling the Rees judgment, namely

that such a course would have come as a disagreeable surprise to those Governments which, like that of the United Kingdom, have felt absolved by that judgment from changing their legal system as regards transsexuals. I do not think, however, that this confidence deserved protection, if only because the Court, in paragraph 47 of its Rees judgment, had clearly indicated both that it had not yet spoken its last word on the matter and that scientific or societal developments might call for a different assessment.

5.5 This raises, of course, the question whether overruling was also justified by such developments.

It is common ground that there are no scientific developments which could warrant a different judgment in the Cossey case. But I think that one cannot say the same of societal developments.

There is an ever-growing awareness of the essential importance of everyone's identity and of recognising the manifold differences between individuals that flow therefrom. With that goes a growing tolerance for, and even comprehension of, modes of human existence which differ from what is considered "normal". With that also goes a markedly increased recognition of the importance of privacy, in the sense of being left alone and having the possibility of living one's own life as one chooses. These tendencies are certainly not new, but I have a feeling that they have come more into the open especially in recent years.

This kind of feeling is, of course, hardly capable of proof. Nevertheless, there are some facts which may at least convincingly illustrate what I mean.

I recall that the Court presumably based its Rees judgment on the assumption that only five member States had already, in one way or another, made it possible for post-operative transsexuals to have their new sexual identity fully recognised by the law (see paragraph 2.6.2 above). It is immaterial whether that assumption was then correct, for what matters is that at present it clearly is no longer so.

In addition to the Netherlands, whose legislation, apparently, was not taken into account in the Rees judgment, one may today identify as States which make provision for the full legal recognition of the new sexual identity of post-operative transsexuals [45]: Denmark, Finland, Luxemburg, Spain and Turkey; moreover the case-law in some other States (Belgium, France [46] and Portugal) has nearly achieved the same result. Today therefore legal recognition of gender reassignment is somehow made possible in fourteen member States [47].

This shows, I think, an important "societal development", viz. a marked increase in public acceptance of transsexualism and a clearly wider sharing of the convictions set forth in section 2 of this opinion. This conclusion is strongly reinforced by the fact that both the Parliamentary Assembly of the Council of Europe and the European Parliament have recently adopted resolutions recommending that reclassification of the sex of a post-operative transsexual be made legally possible [48].

5.6.1 The Court does not deny these societal developments. But it denies that they warrant the conclusion that present-day conditions demand that, as the report of the European Parliament had put it:

> "[O]nce the sex change process has been completed, it must be legally recognised."

It remains to be seen on what arguments the Court based this refusal.

5.6.2 The reason for the Court's refusal to accept the societal developments as material is given in paragraph 40 of the judgment: in the Court's opinion there is still "little common ground" between the member States, because of the "diversity of practice" revealed by the reports accompanying the above-mentioned resolutions. The Court adds that these resolutions "seek to encourage the harmonisation of laws and practices in this field".

It is true, of course, that the manner in which the various member States where a post-operative transsexual's new sexual identity is today legally recognised have regulated that recognition differs considerably from State to State. As I said before (see paragraph 3.6.5 above), there is room here for a margin of appreciation and for differences of detail. But that does not warrant the conclusion that there is still "little common ground" between these States. What is essential is that today legal recognition is somehow made possible in a considerable number of member States.

Both the Parliamentary Assembly of the Council of Europe and the European Parliament were well aware that legal recognition is one of the central issues raised by transsexualism. In their resolutions they did not ask for harmonisation of laws but for the enactment of laws which make such legal recognition possible. They did so because they both considered that, as the Parliamentary Assembly put it,

> "the legislation of many member states is seriously deficient in this area and does not permit transsexuals, particularly those who have undergone an operation, to have civil status amendments made ...".

Both recommended that those deficiencies be remedied by the enactment of provisions on a procedure for transsexuals to change sex, which inter alia should offer - as a minimum, the European Parliament added - legal recognition.

5.6.3 One cannot but conclude that the reasons given for the Court's refusal to accept the societal developments as material are based on a distortion of the real state of affairs and are therefore far from convincing.

The explanation may be that behind these explicit arguments lie hidden policy arguments. From judgments such as those in the Marckx case, the Dudgeon case, the Rees case, the case of F.v. Switzerland and the Cossey case [49] one gets the impression that the Court, at least as far as family law and sexuality are concerned, moves extremely cautiously when confronted with an evolution which has reached completion in some member States, is still in progress in others but has seemingly left yet others untouched. In

such cases the Court's policy seems to be to adapt its interpretation to the relevant societal change only if almost all member States have adopted the new ideas.

In my opinion this caution is in principle not consistent with the Court's mission to protect the individual against the collectivity and to do so by elaborating common standards (see paragraph 3.6.3 above). Caution is indeed called for, but in another direction: if a collectivity oppresses an individual because it does not want to recognise societal changes, the Court should take great care not to yield too readily to arguments based on a country's cultural and historical particularities.

5.7 For all these reasons I feel convinced that the Court should have overruled its Rees judgment and should have held that the United Kingdom had violated both Article 8 and Article 12 (art. 8, art. 12) of the Convention.

NOTES

1. See paragraph 35 of its judgment in the Cossey case (hereinafter: "the judgment").

2. A fight which not infrequently is carried even as far as the Convention institutions!

Apart from its decisions in the Van Oosterwijck, the Rees and the Cossey cases, the Commission has declared admissible applications nos. 6699/74 [X v. Federal Republic of Germany, decision of 15.12.1977, Decisions and Reports no. 11, p. 16; report of 11.10.1979, Decisions and Reports no. 17, p. 21]; 9420/81 [38 Transsexuals v. Italy, decision of 5.10.1982, unpublished]; 10622/83 [J. v. the United Kingdom, decision of 5.7.1985]; 11095/84 [W. v. the United Kingdom, decision of 10.10.1985] and 13343/87 [decision of 13.2.1990]. See also the Commission's report in the Rees case, paragraph 41.

On the Commission's case-law, see, amongst others: M.R. Will, in Gedächtnisschrift für L.-J. Constantinesco, pp. 939 et seq. (Carl Heymanns Verlag (Köln), 1983); S. Breitenmoser, Der Schutz der Privatsphäre gemäss Art. 8 EMRK (1986), pp. 137 et seq. (Helbing Lichtenhahn (Basel), 1986).

3. [1970] 2 W.L.R. 1306, 1324; [1970] 2 All.E.R. 33, 48 (P.D.A.).

4. See, for example, the rather unfeeling description of the respondent: "the pastiche of feminity was convincing"; or the harsh comment on "sexual intercourse, using the completely artificial cavity constructed by Dr ..." as being "the reverse of ordinary and in no sense natural". See also: J. Taitz, Anglo-American Law Review, Vol. 15 (1986), pp. 144 et seq.

5. See, amongst others: D.A.R. Green, New Law Journal 1970, p. 210; B.v.D. van Niekerk, South African Law Journal, Vol. 87 (1970), p. 239; D.K. Smith, Cornell Law Review, Vol. 56 (1970/1971), pp. 1005 et seq.; I. McColl Kennedy, Anglo-American Law Review, Vol. 2 (1973), pp. 114 et seq.; M.L. Lupton, South African Law Journal, Vol. 93 (1976), p. 385 (with reference to a South African decision following Corbett); R.J. Bailey,

Australian Law Journal, Vol. 53 (1979), pp. 659 et seq. (with reference to an Australian decision following Corbett).

6. See, amongst others, the following decisions: Cour de Cassation: 16 December 1975, D. 1976, 397; 30 November 1983, D. 1984, 165; 3 March 1987 and 31 March 1987, D. 1987, 445 (France); HR 13 December 1973, NJ 1975, 130 and HR 3 January 1975, NJ 1975, 187 (Netherlands); BGH 21 September 1971, BGHZ 57, 63 (West Germany).

7. Van Oosterwijck judgment of 6 November 1980, Series A no. 40; Rees judgment of 17 October 1986, Series A no. 106; and Cossey judgment of 27 September 1990, Series A no. 184.

8. On 18 March 1986.

9. The United Kingdom Government accepted that 5 member States had introduced legislative or administrative measures to give recognition to a "change of sex"; counsel for Mr Rees mentioned 7 member States having done so.

10. In fact the Act was dated 24 April 1985. It is not clear why the Commission did not mention this Act in its report.

11. The Commission had mentioned that in Switzerland the courts recognise a change of sex and allow a corresponding entry in the birth register with effect ex nunc, and that in Norway change of sex is acknowledged by ministerial measures.

12. M.T. v. J.T. (1976) 2 F.L.R. 2247.

13. BVerfGE 49, 286.

14. Medical Law Review, Vol. 31 (1971), p. 235.

15. For example, when counsel said at the hearing:

> "The applicant has already submitted that the disclosure of his birth certificate and his sexual identity before surgery, and the embarrassment that such disclosure causes, is only part of his complaint under Article 8 (art. 8). At the heart of the complaint is the very issue of the non-recognition of the identity itself."

It is important to stress that the same point was made on behalf of Mr Van Oosterwijck and of Miss Cossey: not only because this confirms what has been said in paragraphs 2.4 and 2.7 above, but also because this shows that my criticism of the Rees judgment, as far as it is based on this point, also holds good for the Cossey judgment.

16. In R.v.Tan and Others [1983] 1 Q.B. 1053; [1983] 2 All ER 12. See, for a critical appraisal of this decision, P.J. Pace, Criminal Law Review 1983, pp. 317 et seq.

17. See, for example, Steve Cohen and Others, The Law and Sexuality (1978), pp. 72 et seq.; Terrence Walton, NLY (1984) 34, no. 6159, pp. 937 et seq.; Alec Samuels, Med. Sci. Law (1984) 24, no. 3, pp. 163 et seq.

18. In the judgment the Court mostly speaks of "English law" instead of "United Kingdom law". I prefer, however, to follow the terminology it used in its Rees judgment, because what is at stake in these cases is the United Kingdom’s responsibility with regard to the relevant part of its law, and in

this respect it is immaterial whether English law is concerned or one of the other bodies of law in force within the United Kingdom.

19. For the sake of brevity, the system which, for all questions where sex is legally relevant, holds that only Biological Sex is Decisive, and which, consequently, refuses to recognise for legal purposes the new sexual identity which a post-operative transsexual has acquired will hereinafter be referred to as the BSD-system.

20. The same holds good for Miss Cossey: it is simply not correct to say, as the Court does in paragraph 36 of its judgment, that what she was arguing was "not that the State should abstain from acting but rather that it should take steps to modify its existing system". What she was arguing was essentially that she had to live under a system which was inconsistent with her rights under the Convention and it would seem obvious that an applicant who alleges that a law or a legal system is inconsistent with the Convention can only be understood as arguing primarily that the State should have abstained from enacting that law and at any rate should not have maintained it. This underlines, moreover, that it is at least unfortunate to use the way in which the applicant has formulated his grievances as an argument when explaining why a positive rather than a negative obligation of the State is at stake!

21. Judgment of 13 June 1979, Series A no. 31, p. 13, para. 27; judgment of 22 October 1981, Series A no. 45, p. 18, para. 41; judgment of 2 August 1984, Series A no. 82, p. 31, para. 64; judgment of 26 October 1988, Series A no. 142, p. 18, para. 38.

22. What these judgments have in common is that they demonstrate that the mere existence of a certain legal system may in itself amount to an interference, apart from any measures actually taken.

23. See also the analysis of the Commission in its report in the Van Oosterwijck case, paragraphs 50-52 (Series B no. 36, pp. 25-26), to which analysis reference was made in its report in the Rees case, paragraph 41.

24. See, mutatis mutandis, the Autronic AG judgment of 22 May 1990, Series A no. 178, pp. 26-28, paras. 60-63.

25. See also in this sense: M-A. Eissen in his contribution to: Conseil constitutionnel et Cour européenne des Droits de l'Homme, p. 141 (Editions STH (Paris), 1990).

26. See paragraph 35 of the judgment.

27. See paragraph 40 of the judgment.

28. See the Rees judgment, pp. 14-15, para. 36.

29. See, mutatis mutandis, the Olsson judgment of 24 March 1988, Series A no. 130, p. 37, para. 82.

30. What has been said in paragraph 3.7 relieves me from going into paragraphs 42-46 of the Rees judgment. But I cannot help noting my disagreement with the last sentence of paragraph 43 where the Court accepts one of the United Kingdom's arguments for not changing its birth-

registration system: a change as demanded by Mr Rees - who had asked that annotations in the register recognising a new sexual identity should be kept secret - would, the Government argued, not take into account the position of third parties (e.g. life insurance companies) "in that they would be deprived of information which they had a legitimate interest to receive".

Of course insurers may have a legitimate interest to know that a proposer has had gender reassignment surgery, but so they have when he has undergone other kinds of drastic medical operations. Insurance law has its own ways and means of protecting that interest, mostly by obliging the proposer to inform the insurer of material facts and by empowering the insurer to nullify the contract if it appears that the insured has withheld such vital information. Nobody would imagine protecting insurers by insisting that everyone enters all medical treatment in a public register. Such third-party interests cannot justify not protecting the privacy of post-operative transsexuals.

31. See the opinion of Mr Frowein and others in paragraph 54 of the Commission's report in the Rees case.

32. See already the Commission's admissibility decision, Decisions and Reports no. 36, p. 87.

33. As a rule transsexuals are heterosexual; thus a female-to-male transsexual is attracted by heterosexual females. See W. Eicher, Transsexualismus (1984), p. 167 (Gustav Fischer (Stuttgart & New York), 1984).

34. From paragraphs 35 and 46 of the judgment it appears that this question should be answered in the negative. Paragraph 35 makes no exception as regards the Court's interpretation of Article 12 (art. 12) and paragraph 46 makes it clear that the Court would eventually be prepared to assume that a more liberal interpretation is "in line with present-day conditions", albeit only when there is evidence that "the traditional concept of marriage" has been generally abandoned.

35. See the Commission's report in the Van Oosterwijck case, paragraph 59 (Series B no. 36, p. 28).

36. Judgment of 13 June 1979, Series A no. 31.

37. But for paragraph 46 of its present judgment (see note 34), a first indication of such an approach in the Court's case-law might, perhaps, have been discerned in its F. v. Switzerland judgment of 18 December 1987 (Series A no. 128): anyhow, there the Court was prepared to verify whether national law is compatible with Article 12 (art. 12) to an extent that seems considerably greater than in the Rees case.

38. It is true that the gonadal factor cannot (yet) be changed completely, viz. in the sense of a biological man being made capable of bearing, or a biological woman of begetting a child, but it can be changed at least in the sense that it may be eliminated.

39. I take the example of a post-operative male-to-female transsexual because that is the case of the present applicant. I am, however, not quite sure that the argument also holds good for a post-operative female-to-male transsexual, such as Mr Rees, because it is not quite certain that such a post-operative transsexual is, as far as heterosexual intercourse is concerned, capable of performing the essential role of a man. See, on the one hand, W. Eicher, Transsexualismus (1984), p. 168, who seems to imply that he is not, and, on the other hand, J. Taitz, Anglo-American Law Review, Vol. 15 (1986), p. 144, who very firmly declares that he is well capable of having sexual intercourse as a man.

40. Mr Justice Ormrod apparently thought otherwise (see note 4 above), but wrongly so: see, amongst others: D.K. Smith, Cornell Law Review, Vol. 56 (1970/1971), p. 970; W. Eicher, Transsexualismus (1984), p. 167.

41. See the following quotation from a letter from H. Benjamin (author of: Clinical Aspects of Transsexualism in the male and the female (1963)), given by Smith (see note 40), p. 966:

> "The ‘chromosomal sex’ is merely of abstract, scientific and theoretical interest in the case of transsexuals. Nobody can see an XX or XY constellation. To insist that a person must live and be legally classified in accordance with his or her chromosomal sex violates common sense as well as humanity. It reduces science to a mere technicality and an absurd one at that."

42. In the Rees case counsel for the applicant said at the Court’s hearing:

"Marriage is a fundamental institution of society and a wide variety of laws of social regulation turn upon it. The right to sponsor a spouse to come into the country, the right to succeed to a tenancy in either private or public ownership, the right to different tax allowances, differing rights on succession of property are but some of the examples of how the law treats a relationship between a man and a woman who are married wholly differently from if they were not married."

43. Judgment of 19 December 1989, Series A no. 167.

44. See, amongst others, Note P.R. Journal du Droit International 1987, p. 799; A. Drzemczewski and C. Warbrick, Yearbook of European Law, Vol. 6 (1986), pp. 429 et seq.; Zwaak, NJCM-Bulletin, Vol. 12 (1987), pp. 552 et seq.; Jacot-Guillarmod, Méthodes d’interprétation comparées, p. 123 (Editions Universitaires (Fribourg, Suisse), 1989); E.A. Alkema, note NJ 1990, 322; P.J. van Dijk, NJB 1990, p. 813.

45. Full recognition includes, of course, recognition for the purposes of marriage, so that these States permit post-operative transsexuals to marry a member of their biological sex.

46. During the Court’s first deliberations I included France in this list, basing myself on reports of the European Parliament referred to in paragraph 40 of the judgment and on the excellent article of M. Gobert, Le transsexualisme, fin ou commencement, La Semaine Juridique 1988, pp. 3361 et seq. Since then the Cour de Cassation has handed down its decision

of 21 March 1990 (concerning the same person who was the interested party in its above-mentioned decision of 30 November 1983). As this decision seems to be confined to the rejection of the argument based on Article 8 (art. 8) of the Convention, I do not, for the moment, feel that it obliges me to strike France off the list.

47. The growing number of States which provide for legal recognition of gender reassignment, and the ever-increasing social mobility within the member States of the EEC make it all the more necessary for the United Kingdom to abandon its BSD-system: the maintenance of that system is, if possible, still more harsh with regard to foreign post-operative transsexuals living in the United Kingdom who are nationals from such States.

48. See paragraph 40 of the judgment.

49. See the Marckx judgment, p. 19, para. 41 ("the great majority of the member States of the Council of Europe"); the Dudgeon judgment, pp. 20-21, para. 49, and pp. 23-24, para. 60 ("the great majority of the member States"); the Rees judgment, p. 15, para. 37 ("little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage"); the F.v. Switzerland judgment, p. 16, para. 33; the Cossey judgment, para. 46.

JOINT DISSENTING OPINION OF JUDGES PALM, FOIGHEL AND PEKKANEN

1. We agree with the majority that the relevant facts and issues to be decided in the Cossey case are similar to those in the Rees case. We have, however, arrived at conclusions which differ from those of the majority. Our reasons are the following.

2. In paragraph 37 of its Rees judgment the European Court of Human Rights stated with regard to Article 8 (art. 8) that in this area "the law appears to be in a transitional stage". It continued, in paragraph 47, by saying that "(t)he need for appropriate legal measures should be kept under review having regard particularly to scientific and societal developments".

This is an unusual but important and relevant statement. It underlined the fact that the question of the status of transsexuals is one where legal solutions necessarily follow medical, social and moral developments in society. It also indicated to the Contracting States that the Rees judgment might not be the Court’s last word on the subject and that it might be overruled. The majority in the Rees case thus reserved its right to reconsider its opinion in the light of societal developments. These considerations should also, in our opinion, be applied in the interpretation of Article 12 (art. 12).

For these reasons it is not necessary, from the point of view of the general consistency and homogeneity of this Court’s practice, to examine the Cossey case solely by reference to the decision in the Rees case.

3. Miss Cossey, like Mr Rees, belongs to that small group of people who psychologically are firmly convinced that they belong to the sex opposite to their physical sex. Miss Cossey underwent gender reassignment surgery in 1974 and she has since lived a full life as a female both psychologically and physically. She seeks full legal recognition of her new, current sexual identity. Transsexuals have, however, not been very successful in their demands that their new status be accepted by the legislature and by the courts.

This negative attitude towards transsexuals is based on deeply rooted moral and ethical notions which, nevertheless, seem to be slowly changing in European societies. There is a growing awareness of the importance of each person’s own identity and of the need to tolerate and accept the differences between individual human beings. Furthermore, the right to privacy and the right to live, as far as possible, one’s own life undisturbed are increasingly accepted.

These new, more tolerant attitudes are also reflected in modern legislation as well as administrative and court practices. Several European States have accepted the possibility of recognising a change of sex on the part of transsexuals and have, subject to certain conditions, acknowledged their right to marry (Sweden 1972, Denmark 1973-75, Federal Republic of

Germany 1980, Italy 1982 and the Netherlands 1985). In some States the same result has been achieved through administrative or court practice (e.g. Finland and Norway). In addition, rectification of the birth certificate following a change of sex can be obtained in some European countries (e.g. Belgium, Luxemburg, Spain and Turkey). This comprises in some States also the right to marry.

In this context it is important to note that in 1989 a stand on the question of the rights of transsexuals was taken both by the Parliamentary Assembly of the Council of Europe (Recommendation 1117/1989) and by the European Parliament (Resolution of 12 September 1989, OJ no. C 256, 19.10.1989, p. 33). The European Parliament called on the Member States "to enact provisions on transsexuals' right to change sex by endocrinological, plastic surgery, and cosmetic treatment, on the procedure, and banning discrimination against them". The procedure should offer, inter alia, legal recognition, change of first name, and change of sex on birth certificates and identity documents. The Recommendation of the Parliamentary Assembly contains similar demands. The decisions of these representative organs clearly indicate that, according to prevailing public opinion, transsexuals should have the right to have their new sexual identity fully recognised by the law.

4. With regard to the alleged violation of Article 8 (art. 8) of the Convention, the central point is that the register of births records particulars, such as the sex of the child, as at the time of the birth and cannot under English law be changed to reflect the new sex of a post-operative transsexual. As a consequence of this, Miss Cossey is forced to reveal intimate personal details whenever a birth certificate is requested, for instance by certain institutions and employers. These situations are painful and distressing for her. She is obliged to choose between either hiding her new sexual identity, with all the possible consequences, or revealing her new sex and facing humiliating and even hostile reactions. In these and similar situations Miss Cossey's right to respect for her private life is, in our opinion, violated. What is more, the present English system relating to birth certificates constitutes a continuous and direct interference in the private life of Miss Cossey.

The retention of that system cannot, in our opinion, satisfy the requirements of Article 8 para. 2 (art. 8-2) of the Convention. It is merely a question of administrative procedure which, as the examples from other democratic societies clearly show, can be arranged in several different ways so as not to violate the rights of transsexuals.

5. When drafting Article 12 (art. 12) of the Convention the draftsmen probably had in mind the traditional marriage between persons of opposite biological sex as the Court stated in paragraph 49 of its Rees judgment. However, transsexualism was not at that time a legal problem, so that it cannot be assumed that the intention was to deny transsexuals the right to

marry. Moreover, as we have tried to show above, there have been significant changes in public opinion as regards the full legal recognition of transsexualism. In view of the dynamic interpretation of the Convention followed by the Court, these social and moral developments should also be taken into account in the interpretation of Article 12 (art. 12).

Gender reassignment surgery does not change a person's biological sex. It is impossible for Miss Cossey to bear a child. Yet, in all other respects, both psychological and physical, she is a woman and has lived as such for years.

The fact that a transsexual is unable to procreate cannot, however, be decisive. There are many men and women who cannot have children but, in spite of this, they unquestionably have the right to marry. Ability to procreate is not and cannot be a prerequisite for marriage.

The only argument left against allowing Miss Cossey to marry a man is the fact that biologically she is considered not to be a woman. But neither is she a man, after the medical treatment and surgery. She falls somewhere between the sexes. In this situation a choice must be made and the only humane solution is to respect the objective fact that, after the surgical and medical treatment which Miss Cossey has undergone and which was based on her firm conviction that she is a woman, Miss Cossey is psychologically and physically a member of the female sex and socially accepted as such.

It should also be borne in mind that Miss Cossey has no possibility of marrying unless she is allowed to marry a man as she wishes. It would be impossible, both psychologically and physically, for her to marry a woman. There would certainly also be doubts as to the legality of a marriage of this kind.

6. For these reasons we are of the opinion that in the present case there is a violation of Articles 8 and 12 (art. 8, art. 12) of the Convention.

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

THIRD SECTION

CASE OF DJAVIT AN v. TURKEY

(Application no. 20652/92)

JUDGMENT

STRASBOURG

20 February 2003

FINAL

09/07/2003

In the case of Djavit An v. Turkey,

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

Mr L. CAFLISCH, *President*,
Mr P. KŪRIS,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr K. TRAJA, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 30 January 2003,

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

PROCEDURE

1. The case originated in an application (no. 20652/92) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Cypriot national, Mr Ahmet Djavit An ("the applicant"), on 8 September 1992.

2. The applicant, who had been granted legal aid, was represented by Mr M. Shaw QC, practising in London. The Turkish Government ("the respondent Government") were represented by their Agent, Mr Z.M. Necatigil.

3. The applicant alleged a violation of Articles 10, 11 and 13 of the Convention, on account of the refusal by the Turkish and Turkish-Cypriot authorities to allow him to cross the "green line" into southern Cyprus in order to participate in bi-communal meetings.

4. The application was declared partly admissible by the Commission on 14 April 1998 and transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mr R. Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The respondent Government accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. The applicant and the respondent Government each filed observations on the merits (Rule 59 § 1). In addition, third-party comments were received from the Cypriot Government, which had exercised its right to intervene (Article 36 § 1 of the Convention and Rule 61 § 2). The parties replied to those comments (Rule 61 § 5).

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section.

THE FACTS

8. The applicant is a Cypriot national of Turkish origin who was born in 1950 and is a paediatrician residing in Nicosia, north of the "green line".

9. In addition to being a critic of the Turkish-Cypriot authorities and of the Turkish military presence in the northern part of Cyprus, which he defines as "occupation", the applicant is the "Turkish-Cypriot coordinator" of the Movement for an Independent and Federal Cyprus, an unregistered association of Turkish and Greek Cypriots founded in 1989 in Nicosia. The movement has a Turkish-Cypriot coordinating committee in the northern part of the island and a Greek-Cypriot coordinating committee in the southern part. The purpose of the Movement is to develop close relations between the two communities. To that end, it organises bi-communal meetings of a political, cultural, medical or social character.

10. The applicant is normally unable to obtain a permit from the Turkish and Turkish-Cypriot authorities to visit the "buffer-zone" or the southern part of the island in order to participate in various bi-communal meetings. Thus, between 8 March 1992 and 14 April 1998, the date of the Commission's admissibility decision, only 6 out of 46 requests for such permits were granted. Further, between 18 April 1998 and 16 October 1999 two more permits were refused, one of which, however, was granted later on. The requests that were turned down concerned, *inter alia*, a UNFICYP (United Nations Peacekeeping Force in Cyprus) Spring Fair at Nicosia International Airport in May 1992, a bi-communal medical seminar organised by the UNHCR (United Nations High Commissioner for Refugees) in June 1992, a meeting of the coordinating committee for the "Movement for an Independent and Federal Cyprus" at the Ledra Palace in October 1992 as well as two meetings for the reorganisation of this committee in April and July 1994, a seminar on cardiology organised by the UNHCR in June 1994, a general meeting of the New Cyprus Association in December 1997 and a number of receptions organised by the German embassy in Nicosia. Moreover, in May 1992 the above-mentioned

authorities refused to allow Greek Cypriots to attend a meeting organised by the applicant in the northern part of the island.

11. The applicant claimed that the Council of Ministers of the "Turkish Republic of Northern Cyprus" (the "TRNC") had adopted a decision prohibiting him from contacting Greek Cypriots. Reference to this decision was allegedly made in a letter dated 3 February 1992 by the Health Minister of the "TRNC" to the applicant, which reads as follows:

> "According to the information our Ministry has received, you were informed by the Ministry of Foreign Affairs and Defence orally and this has been a decision of the government and we have nothing to add in our capacity as the Ministry."

12. On 7 May 1992 the applicant wrote to the Prime Minister of the "TRNC" requesting to be informed of the content of the Council of Ministers' decision referred to in the above-mentioned letter, but received no reply.

13. On 29 May 1992 he sent a letter of protest to the Foreign Minister of Turkey, which has also remained unanswered.

14. On 18 May 1994 the Directorate of Consular and Minority Affairs of the Ministry of Foreign Affairs and Defence of the "TRNC" informed the applicant that "the permission requested by [his] letter of 19 April 1994 was refused for security reasons, in the public interest and because [he had] made propaganda against the State".

15. On 24 May 1994 the applicant wrote to the Deputy Prime Minister of the "TRNC", asking whether the previous decision of the Council of Ministers was still in force since he was not allowed to visit the buffer-zone or cross over into Nicosia. He received no answer and on 19 July 1994 he sent a reminder, which also remained unanswered. However, the applicant claimed that, in an article published in a newspaper on 18 March 1996, the former Deputy Prime Minister (to whom he had sent the above-mentioned letters) had stated that when he had held this position he had requested an explanation by the Prime Minister as well as the President of the "TRNC" in relation to the refusal of permits, but had not received an answer.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

16. The Court observes that, in the proceedings before the Commission, the respondent Government raised several objections to the admissibility of the application. The Commission considered these objections under the following heads: (1) alleged lack of jurisdiction and responsibility of the respondent State in respect of the acts complained of; (2) alleged failure by

the applicant to comply with the six-month rule; and (3) alleged failure by the applicant to exhaust domestic remedies.

17. The Court further observes that the Commission, in its admissibility decision of 14 April 1998, rejected the respondent Government's challenges under the first head and partly under the second head. As regards the latter, the Commission decided to declare inadmissible the part of the application which related to the period before 8 March 1992. Moreover, the Commission decided to reserve to the merits stage the issues raised under the third head. The Court therefore considers it appropriate to examine the respondent Government's argument on this point as well as the issue of jurisdiction that the respondent Government raised again in their submissions on the merits of this application, in the form of preliminary objections.

A. As to the respondent State's responsibility under the Convention in respect of the alleged violations

18. As in the proceedings before the Commission, the respondent Government disputed Turkey's liability under the Convention for the violations alleged in the application. In their submissions to the Court, the respondent Government claimed that the acts complained of were imputable exclusively to the "TRNC", an independent and sovereign State established by the Turkish-Cypriot community in the exercise of its right to self-determination. In particular, the respondent Government submitted that the control and day-to-day administration of the designated crossing-points, such as that of the Ledra Palace, and the issuance of permits were within the exclusive jurisdiction and/or responsibility of the authorities of the "TRNC" and not of Turkey.

19. In relation to this the respondent Government disagreed with the findings of the Court in *Loizidou v. Turkey* ((preliminary objections), judgment of 23 March 1995, Series A no. 310, and (merits), judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI), and in its judgment of 10 May 2001 in the inter-State case of *Cyprus v. Turkey* ([GC], no. 25781/94, ECHR 2001-IV). They also contended that the Commission, in its decision as to the admissibility of the present application, had not interpreted the decision in *Chrysostomos and Papachrysostomou v. Turkey* correctly (nos. 15299/89 and 15300/89, Commission's report of 8 June 1993, Decisions and Reports (DR) 86-A, p. 4).

20. The applicant and the Cypriot Government disputed these submissions, relying essentially on the reasons given by the Court for rejecting similar objections raised by Turkey in *Loizidou* (preliminary objections and merits) and in *Cyprus v. Turkey*, all cited above. They asserted that Turkey was responsible under the Convention for all acts and

omissions of the “TRNC” as well as its control over “the border area” and crossings.

21. The Court refers to its dismissal of the respondent Government's preliminary objections in *Loizidou* (*merits*), cited above, as to Turkey's alleged lack of jurisdiction and responsibility for the acts complained of (pp. 2232-36, §§ 49-57). More precisely, the Court considered in that judgment and in connection with that particular applicant's plight:

> “52. As regards the question of imputability, the Court recalls in the first place that in its above-mentioned Loizidou judgment (*preliminary objections*) (pp. 23-24, § 62) it stressed that under its established case-law the concept of 'jurisdiction' under Article 1 of the Convention is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Of particular significance to the present case the Court held, in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration. ...
>
> 56. ...
>
> It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in northern Cyprus ... that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC' ... Those affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention. Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.”

22. Many of the considerations in the above-mentioned case were confirmed by the Court in its judgment in *Cyprus v. Turkey*. The Court observes that in its latter judgment it rejected the Government's arguments that it had been mistaken in its approach to the issues raised by *Loizidou*, especially on the matter of Turkey's liability for alleged violations of Convention rights (see *Cyprus v. Turkey*, §§ 69-81) and it considered that Turkey's responsibility was not limited to property issues such as those considered in *Loizidou*. In particular, the Court stated the following:

> “77. It is of course true that in *Loizidou* the Court was addressing an individual's complaint concerning the continuing refusal of the authorities to allow her access to her property. However, it is to be observed that the Court's reasoning is framed in terms of a broad statement of principle as regards Turkey's general responsibility under the Convention for the policies and actions of the 'TRNC' authorities. Having effective overall control over northern Cyprus, its responsibility cannot be confined to

the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's 'jurisdiction' must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey."

23. Accordingly, the Court dismisses the respondent Government's aforementioned objections and concludes that the matters complained of in the instant application fall within the "jurisdiction" of Turkey within the meaning of Article 1 of the Convention and therefore entail the respondent State's responsibility under the Convention.

B. Exhaustion of domestic remedies

1. Arguments before the Court

(a) The respondent Government

24. The respondent Government maintained that the applicant had not attempted to exhaust the remedies available to him within the judicial and administrative system of the "TRNC", as required by Article 35 of the Convention. In this connection they submitted that there were effective and adequate remedies within the judicial system of the "TRNC", which were easily accessible to the applicant, offered him reasonable prospects of success and were capable of providing him with redress. Affirming the impartiality and independence of the judicial system in the "TRNC", the respondent Government submitted the following points.

(i) The Constitution of the "TRNC" incorporated provisions for human rights drawn from the 1960 Cypriot Constitution, and also the European Convention on Human Rights, which formed part of the laws of the "TRNC". Under the Constitution fundamental rights and liberties could only be restricted by law and only for the purposes that were provided for in law. Articles 136 to 155 of the Constitution provided for access to independent courts and for judicial review of administrative action on the grounds of illegality or error of law and excess and/or abuse of power (Article 152) as well as judicial review of legislation by way of reference to the Supreme Constitutional Court (Article 148) and institution of proceedings for annulment of legislation and subsidiary legislation (Article 147). In particular, Article 152 of the Constitution provided that the High Administrative Court had exclusive jurisdiction to adjudicate finally on a complaint that a decision, act or omission of any body, authority or person exercising any executive or administrative authority was contrary to any of the provisions of the Constitution, or of any law or subsidiary legislation thereunder, or exceeded or abused the powers vested in such

body or authority or person. The applicant could have brought administrative proceedings in the High Administrative Court for annulment of the relevant decision or decisions of the Council of Ministers and/or responsible ministry and/or any authority that had allegedly prevented him from crossing over to southern Cyprus.

(ii) The courts had also adopted certain principles which included, *inter alia*, the rules of natural justice or procedural fairness and the principles of reasonableness, proportionality and reasoning of administrative acts. In order to take effect in relation to the person concerned, the administrative decision had to have been properly taken and served on the person concerned. Unless this had been done the purported act would have been incomplete and would not have come into operation *vis-à-vis* the person concerned.

(iii) It would have been very unlikely for any administrative act or decision to be characterised as an "act of State" and to be excluded from judicial review. Judicial review of an administrative act relating to matters of high policy would have been treated just like any other administrative act, subject to principles of administrative law relating to the exercise of discretionary powers granted under legal and constitutional provisions. The alleged refusals by the authorities to permit the applicant to visit southern Cyprus would not have been regarded by the courts in the "TRNC" as a political act outside their competence. Although the authorities might have been held to have had a certain amount of discretion regarding the merits of the issue involved, the court would not have declined jurisdiction if there had been a procedural defect relating, for instance, to the elaboration and service of the relevant administrative act or decision, or the lack of legal provisions allowing the authorities to take the relevant decision, particularly if such a decision were to restrict or limit the exercise of a right or liberty enshrined in the Constitution.

(iv) Under Article 76 of the "TRNC" Constitution there was a right of individual petition to the authorities of the State. Failure by the appropriate authority to reply to a petition made under the above-mentioned provision within a period of thirty days constituted an "omission" of the authorities under Article 152 of the Constitution giving the complainant the right to apply to the High Administrative Court.

(v) It was also possible to submit petitions to the Petitions Committee of the Legislative Assembly of the "TRNC" under the Petitions Law (no. 30/1976);

(vi) In addition, the applicant could have submitted a complaint to the Attorney-General of the "TRNC" about the matter. Under the Constitution the Attorney-General was an independent officer of the State, and if the applicant had complained to him, he could have taken up the matter with the competent bodies of the State.

(vii) In view of the fact that the applicant had been given permission on many occasions to visit southern Cyprus, his argument that he was not required to exhaust domestic remedies due to the existence of an "administrative practice" to refuse applications to visit southern Cyprus was unfounded. Each application was considered by the Ministry of Foreign Affairs and Defence on its own merits and, in case of refusal, it was open to the applicant to challenge such refusal on its merits and/or on procedural grounds.

(viii) In the light of the Court's judgment in *Cyprus v. Turkey*, the applicant's argument that "TRNC" remedies were inherently illegal as they emanated from an illegal situation was unfounded on both legal and factual grounds.

25. Finally, the respondent Government maintained that the applicant had by-passed the judicial bodies of the "TRNC" not because of the lack of effective judicial remedies but because he was not willing to avail himself of the available remedies. In this connection, they referred to the significance of the applicant's political motivation as well as the political aspect of the present application. They alleged that the applicant was a person of extreme and provocative views that many Turkish Cypriots might have thought transcended the boundaries of criticism. They stated that his style of writing was reminiscent of similar, if not identical, expressions on the same points that were often used in the four inter-State applications by Cyprus against Turkey. In this connection, they mentioned the reference by the applicant to the International Association for the Protection of Human Rights in Nicosia on his legal-aid form, hinting at Greek-Cypriot involvement, assistance or instigation, and found it surprising that he should denigrate to such an extent the State in which he lived and/or the authorities, including the judiciary, of that State.

(b) The applicant

26. The applicant countered the arguments of the respondent Government with submissions that included the following points.

(i) Although the Court, in its judgment in *Cyprus v. Turkey*, was not persuaded that the "TRNC" courts were inherently illegal under international law and thus in principle incapable of offering effective remedies, it was nevertheless true under Article 35 § 1 of the Convention that the definition and application of domestic remedies should be in accord with the rules and requirements of international law. These constituted the essential boundaries of the provision which could not be crossed.

(ii) The respondent Government had failed to discharge the burden of proof for Convention purposes (see *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV). In particular, they had not addressed the key questions of the effectiveness of any of the claimed remedies with regard to the applicant and in the light of the situation. Their

observations simply noted generally a range of provisions of the "TRNC" Constitution with no attempt to point to a remedy for the applicant.

(iii) The applicant had never been informed of, and had been entirely unable to discover, any proper legal basis for his treatment. Any effective remedy claimed by the respondent Government had to be seen in this light. The applicant had been prevented in an arbitrary and erratic fashion from carrying out his attempts to establish and further contacts with Greek Cypriots in southern Cyprus with a view to developing friendly relations. He had consistently sought to discover the reasons underlying the refusal to allow him to visit southern Cyprus. There did not appear to be any statutory basis in the law of northern Cyprus regulating contacts between north and south. Requests for permission to cross into the south were always treated arbitrarily, with no proper notice of refusal or no notice at all, and were often dealt with negatively, in that express permission to cross was not sent to the relevant crossing-point, or was refused orally, so that the decision was impossible to challenge in practice. The applicant believed that for political reasons he would not in any event have been treated fairly. He understood that oral decisions concerning him had been taken and he argued that he had not obtained anything in writing apart from veiled threats.

(iv) Article 12 of the "TRNC" Constitution expressly provided that no interpretation could be accepted which implied any right to engage in activities aimed at changing the "rights and status" of the "TRNC". In this connection, the applicant pointed to a letter from the Directorate of Consular and Minority Affairs of the Ministry of Foreign Affairs and Defence of the "TRNC" dated 18 May 1994 that justified the refusal of a permit requested by the applicant on the ground that he engaged in propaganda against the State as well as for reasons pertaining to security and the public interest.

(v) Entry regulations into the "TRNC" (and thus by necessary implication exit and re-entry) and the principles of implementation were based on decisions of the Council of Ministers of the "TRNC" which in the legal system of the "TRNC" were not subject to any judicial review (see *Cyprus v. Turkey*, cited above, Commission's report of 4 June 1999, § 109);

(vi) In view of the fact that the "TRNC" courts did not have jurisdiction over the Turkish forces manning the dividing line, no "TRNC" court decision supporting the applicant's claim would have or could have any binding effect upon the relevant Turkish forces, not least because both Turkey and the "TRNC" maintained that they were separate independent States.

(vii) In any event the arbitrary and erratic practices with regard to permission to cross over into southern Cyprus were such as to amount to an administrative practice. As affirmed and accepted by the Court in its judgment in *Cyprus v. Turkey*, the policy of impeding bi-communal contacts, at least from 1996, amounted to an administrative practice. Unlike the position in the inter-State case, however, the violation of the applicant's

Convention rights fell within the period covered by the Commission's admissibility decision of 14 April 1998, so that he was absolved from the obligation to exhaust domestic remedies. The argument was that the practice in question amounted to arbitrarily disrupting and impeding such contacts and not that every single contact was prevented. Such a practice had been maintained throughout the period relevant to his application.

(c) The Cypriot Government

27. The Cypriot Government made observations similar to those of the applicant, disputing the arguments of the respondent Government. In their submissions the Cypriot Government argued that remedies within the "TRNC" judicial system did not constitute effective domestic remedies requiring exhaustion for the purposes of Article 35 § 1 of the Convention. Alternatively, they submitted that the illegality of those remedies in international law amounted to a "special circumstance" absolving the applicant from the requirement of exhaustion. The Cypriot Government disagreed with the decision both of the Commission in its report of 4 June 1999 and of the majority of the Court in its judgment of 10 May 2001 in *Cyprus v. Turkey* that remedies available within the "TRNC" could be regarded as "domestic remedies". They also raised the following additional points.

(i) The respondent Government had failed to specify the exact remedies available to the applicant with the requisite degree of certainty within the "TRNC" legal system, being accessible and capable of affording effective redress with reasonable prospects of success. The observations of the respondent Government could only be taken to refer to the possibility of an application for "judicial review" based on the "constitutional" rights referred to; that had not been shown to be effective in practice, or to be sufficiently certain to meet the requirements of Article 35.

(ii) In order to have been effective, any remedy for the present violations would have had to be able to prevent or forestall the violation. No such means could ever have been available since the applicant had never been given formal notification of the decision in advance enabling him to challenge the refusal, but had been notified only at the time it was implemented – by means of a refusal of permission to cross the line. In practical terms, it would have been extremely difficult, if not impossible, for the applicant, or others in the same position, to initiate any process by which an effective remedy, capable of overturning the decision, could have been granted. A challenge mounted after the event would not have been an effective remedy or established a right of passage for the future since each application to cross the Turkish cease-fire lines was separate and resulted in a separate refusal (that was not, however, communicated in advance).

(iii) In view of Article 12 of the "TRNC" Constitution, any political activity, including bi-communal activity, which was aimed at promoting the

case for terminating Turkey's illegal occupation of northern Cyprus and for re-establishing the rule of law and thus bringing about “changes” to the perceived “status” of the “TRNC” as an independent State was denied “constitutional” protection, negating consequently the rights to freedom of assembly, association or expression. Thus, it could not be said that a constitutional challenge by the applicant would have enjoyed reasonable prospects of success.

(iv) The evidence established a practice of restricting freedom of movement and thereby suppressing freedom of expression and association and of preventing the involvement of Turkish Cypriots in bi-communal organisations and activities taking place in the south. Thus the situation differed from that before the Court in the inter-State case. In the present case there was evidence of the practice of imposing politically motivated restrictions on freedom of movement in order to prevent Turkish-Cypriot opponents of the regime from travelling to the south in order to exercise their rights to freedom of expression and association (see US State Department Country Reports on Human Rights, 1993, 1994 and 1996; *Cyprus v. Turkey*, Commission's report cited above). There was direct evidence of the application of this practice to the applicant and others. Despite the scale of this practice, the respondent Government were unable to point to any example of a case where a successful challenge had been brought on comparable facts. The position was essentially the same for other Turkish Cypriots wishing to cross from the north to the south.

(v) Alternatively, even if the Court were to conclude that there was insufficient evidence to establish the existence of an administrative practice, the pattern of repeated violations was still relevant. Where, as here, there was a pattern of politically motivated restrictions on freedom of expression and association, the absence of any clear remedy, or any previous instances of such a remedy being applied for or granted, was plainly relevant to the determination of whether the respondent Government had demonstrated that the suggested remedies were available in practice and had reasonable prospects of success (see *Akdivar and Others*, cited above).

(vi) The courts of the “TRNC” were neither independent nor impartial when called upon to determine political disputes or disputes involving supporters or opponents of the “TRNC”.

2. The Court's assessment

28. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies which are available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain both in theory and in practice, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be brought

subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used. However, there is no obligation to have recourse to remedies which are inadequate or ineffective (see *Akdivar and Others*, cited above, p. 1210, §§ 65-67).

29. It is incumbent on the respondent Government claiming non-exhaustion to indicate to the Court with sufficient clarity the remedies to which the applicant has not had recourse and to satisfy the Court that the remedies were effective and available in theory and in practice at the relevant time, that is to say that they were accessible, were capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Akdivar and Others*, cited above, p. 1211, § 68, and *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A no. 301-B, p. 77, § 35).

30. As regards the application of Article 35 § 1 to the facts of the present case, the Court firstly observes that in paragraph 102 of its judgment of 10 May 2001 in *Cyprus v. Turkey* it held that, for the purposes of former Article 26 (current Article 35 § 1), remedies available in the "TRNC" may be regarded as "domestic remedies" of the respondent State and that the question of their effectiveness is to be considered in the specific circumstances where it arises. In this connection Court considers, as it did in the above judgment, that the reliance by the applicant and the Cypriot Government on the illegality of the "TRNC" courts seems to contradict the assertion they make that Turkey is responsible for the violations alleged in northern Cyprus – an assertion which has been accepted by the Court (see paragraphs 21-23 above). In particular the Court stated the following in *Cyprus v. Turkey*:

> "101. ... It appears ... difficult to admit that a State is made responsible for the acts occurring in a territory unlawfully occupied and administered by it and to deny that State the opportunity to try to avoid such responsibility by correcting the wrongs imputable to it in its courts. To allow that opportunity to the respondent State in the framework of the present application in no way amounts to an indirect legitimisation of a regime which is unlawful under international law."

31. The Court also notes that the same contradiction arises between the alleged unlawfulness of the institutions set up by the "TRNC" and the argument of the applicant and the Cypriot Government, to be examined at a later stage (see paragraphs 70-74 below), that there has been a breach of Article 13 of the Convention: it cannot be asserted, on the one hand, that there has been a violation of that Article because a State has not provided a remedy while asserting on the other hand that any such remedy, if provided, would be null and void (see *Cyprus v. Turkey*, cited above, § 101).

32. As regards the possible remedies cited by the respondent Government, the Court considers that the latter's assertions cannot suffice to justify the objection they have raised at this stage of the proceedings. In their submissions to the Court the respondent Government referred to a number of constitutional provisions with emphasis, firstly, on the judicial review of administrative acts, decisions and omissions of any body, authority or person exercising administrative or executive power; secondly, on the possibility of recourse to the High Administrative Court in the event of failure by the authorities of the "TRNC" to reply to an individual petition within the time allowed; and, thirdly, on the submission of a complaint to the Attorney-General. The Court notes that the respondent Government's submissions regarding this point are very general. The respondent Government have not shown that any of the remedies cited would have afforded redress in any way whatsoever to the applicant. Moreover, the Court does not consider that a remedy before the administrative courts can be regarded as adequate and sufficient in respect of the applicant's complaints, since it is not satisfied that a determination can be made in the course of such proceedings concerning the refusal of the permits at the "green line". The same applies to the submission of complaints to the Attorney-General of the "TRNC".

33. Furthermore, the submission by the respondent Government of a list of various cases brought by Turkish Cypriots before the "TRNC" courts does not affect the Court's conclusions in the above paragraphs. The Court notes in this connection that there is no similarity between the present proceedings and those cases as none of them concerned allegations of refusal by the authorities of the "TRNC" to grant permits to Turkish Cypriots to cross the "green line" into southern Cyprus.

34. Finally, the Court also notes the decision of the Commission in *Cyprus v. Turkey* (Commission's report cited above, § 264) in which the Commission noted that entry regulations into the "TRNC" and the principles of implementation are based on decisions of the Council of Ministers of the "TRNC" and are not subject to any judicial review. The Commission was referring to the entry into or exit from the "TRNC" of Greek Cypriots and not to the exit from (and entry into) the "TRNC" of Turkish Cypriots, as in the instant case. The respondent Government stated that the body taking the decision as to whether a permit will be granted is the Ministry of Foreign Affairs and Defence of the "TRNC". In that respect, it seems that a distinction exists between the two situations. The respondent Government have not clarified this point in their submissions. However, the Court considers that it is not necessary to examine the point in the present case.

35. It reiterates that it is not for the Convention bodies to cure of their own motion any shortcomings or lack of precision in the respondent

Government's arguments (see *Stran Greek Refineries and Stratis Andreadis*, cited above).

36. Accordingly, the Court concludes that, in the absence of convincing explanations from the respondent Government and in the light of all the above, the application cannot be rejected for failure to exhaust domestic remedies. The Court thus dismisses the respondent Government's objection on that point. In view of this conclusion, the Court considers that it is not necessary to address the issue of administrative practice.

37. The Court would emphasise, in accordance with its judgment in *Cyprus v. Turkey*, that its ruling is confined to the particular circumstances of the present case. It is not to be interpreted as a general statement that remedies are ineffective in the "TRNC" or that applicants are absolved from the obligation under Article 35 § 1 to have normal recourse to the remedies that are available and functioning. It is only in circumstances such as those which have been shown to exist in the present case that it accepts that applicants may apply to the Court for a remedy in respect of their grievances without having made any attempt to seek redress before the local courts.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

38. The applicant complained that the refusals by the Turkish and Turkish-Cypriot authorities to allow him to cross the "green line" in order to participate in bi-communal meetings had prevented him from exercising his right to freedom of expression, including the freedom to hold opinions and ideas and to receive and impart information, as guaranteed by Article 10 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

39. The Court notes that the issue of freedom of expression cannot in the present case be separated from that of freedom of assembly. The protection of personal opinions, secured by Article 10 of the Convention, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 of the Convention (see *Ezelin v. France*, judgment of 26 April 1991, Series A

no. 202, p. 20, § 37). Thus, observing that the applicant's grievances relate mainly to alleged refusals of the "TRNC" authorities to grant him permits to cross over the "green line" and meet with Greek Cypriots, the Court considers that Article 11 of the Convention takes precedence as the *lex specialis* for assemblies, so that it is unnecessary to examine the issue under Article 10 separately. The Court will, however, have regard to Article 10 when examining and interpreting Article 11.

III. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

40. The applicant complained that the refusals by the Turkish and Turkish-Cypriot authorities to allow him to cross the "green line" in order to participate in bi-communal meetings had prevented him from exercising his right to freedom of assembly and association with Greek Cypriots in breach of Article 11 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

A. Submissions before the Court

1. The respondent Government

41. The respondent Government submitted that the complaints of the applicant related in essence to freedom of movement, guaranteed under Article 2 of Protocol No. 4 to the Convention, which Turkey had not ratified. Accordingly, the respondent Government maintained that the intention of the applicant was to circumvent this legal impediment by attempting to dress up the complaints in the form of a violation of Articles 10 and 11 of the Convention.

42. Furthermore, the respondent Government pointed out that *Loizidou* was distinguishable from the present case in that the applicant was in essence able to exercise his rights under the above-mentioned provisions. His alleged inability to visit southern Cyprus on the few occasions during the period in respect of which this application had been found admissible had not in any way affected his Convention rights. On the contrary, they

contended that during the period in question the applicant had been able to attend a number of gatherings in southern Cyprus.

43. The respondent Government claimed that, although the Commission had acknowledged that limitations on freedom of movement, whether arising from a person's deprivation of liberty or from the status of a particular area, might indirectly affect other matters, this did not mean that deprivation of liberty or restriction of access to a certain area interfered directly with any other right protected under the Convention (see *15 foreign students v. the United Kingdom*, nos. 7671/76 etc., Commission decision of 19 May 1977, DR 9, p. 185).

44. Moreover they maintained that it was not possible to characterise the gatherings mentioned by the applicant, such as exhibitions, festivals, concerts, fairs and receptions, as "assembly" under Article 11 of the Convention. This provision, the Government submitted, did not include gatherings for purposes of entertainment, or such occasions where people come together to share, or enjoy, the company of others. In this context, the Government pointed out that the applicant's arguments were based on a concept of "association" in the sense of the mere possibility for people to come together without necessarily doing so in an organised form, and did not relate to any specific interference with attempts by the applicant to form an association, in the sense of an organisational structure, with Greek Cypriots. They stated that the Movement for an Independent and Federal Cyprus, of which the applicant was the Turkish-Cypriot coordinator, had been formed without any interference by the Turkish-Cypriot authorities. Additionally, nearly all the instances mentioned by the applicant of his inability to visit southern Cyprus were not in any way connected with the activities of the above-mentioned association.

45. Finally, the respondent Government contended that, in any event, the exercise of the rights asserted by the applicant was subject to the restrictions permitted under Article 11 § 2 of the Convention.

2. The applicant

46. The applicant disputed the arguments of the respondent Government. He submitted that his complaints had not focused in practice or in theory upon freedom of movement as such. It was the inability to engage in peaceful discourse and intercourse, to pursue the basic democratic rights of receiving and imparting "information and ideas with those on the island of Cyprus who shared his aims of a peaceful and friendly resolution of the problems of that island without interference by public authority and regardless of frontiers" that lay at the heart of his application. In the circumstances of the current situation in Cyprus, he felt that it was only by meetings between Turkish and Greek Cypriots that ideas for a peaceful political settlement could be truly imparted, received and exchanged. However, he stated that such meetings could not be held in northern Cyprus

and meetings of equivalent range and quality could not be organised anywhere other than in southern Cyprus. Thus, the lack of a proper system to regulate crossing from north to south and the arbitrary and erratic way in which he alleged he had been prevented from attending various relevant meetings in the south had substantially and adversely affected his Convention rights to freedom of assembly and association as well as expression.

47. The applicant stated that in this context the element of "movement" was purely a by-product of the essential rights in question. He argued that his case was analogous in this respect to that in *Loizidou*, where the issue of freedom of movement was considered by the Court to be a peripheral aspect of the core complaint concerning the right to property. Furthermore, he noted that *15 foreign students* (cited above), referred to by the respondent Government in their submissions, was not relevant to the present application or appropriate since that case did not concern freedom of movement.

48. Moreover, it was submitted by the applicant that, although the case-law to date on the interpretation of the term "assembly" was not extensive and had focused on demonstrations, Article 11 of the Convention covered the right of persons to gather together in order to further their common interests in a peaceful manner, whether in public or private meetings (see *Rassemblement jurassien and Unité jurassienne v. Switzerland*, no. 8191/78, Commission decision of 10 October 1979, DR 17, p. 93). In this sense, the applicant stated, the actions in relation to him fell within the framework of Article 11 and constituted a violation of its provisions. The activities complained of had had the effect as well as the intention of severely disrupting the possibility afforded by peaceful assembly of furthering attempts at mutual reconciliation and peaceful settlement of a grievous situation in Cyprus. He maintained that the essence of the various meetings held had been to bring together Turkish and Greek Cypriots with the intention of working towards such goals. The actions complained of had resulted in great difficulty in ensuring Turkish-Cypriot participation in such endeavours. The applicant distinguished *Cyprus v. Turkey* from his own case since the conclusions of the Court in that case under Article 11 of the Convention with regard to Turkish Cypriots had referred to the position of Turkish Cypriots in general and not to the position of a specific person or persons.

49. In relation to freedom of association the applicant stated that the minimum organisation and stability tests required were fulfilled by the Movement for an Independent and Federal Cyprus.

50. The applicant contended that he was not aware of any relevant law regulating the matters of which he complained and that there was no legal protection against arbitrary interference by the public authorities with his rights. In this connection he argued that the respondent Government had made no effort at all to indicate the grounds on which such interference

might have been justified, nor had they shown it to be necessary in a democratic society.

51. Finally the applicant maintained that, in accordance with the principle of protection from arbitrariness in the exercise of authority, the respondent Government, once aware of complaints about the violations of Article 11 of the Convention, were obliged to conduct a prompt and effective investigation (see *Kurt v. Turkey*, judgment of 25 May 1998, *Reports* 1998-III, pp. 1184-85, §§ 122, 124, and pp. 1187-88, §§ 133-34, and *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3159 and 3163, §§ 115 and 123). According to the applicant, failure to do this exacerbated the violations and constituted a further distinct violation of Article 11.

3. The Cypriot Government

52. The Cypriot Government disputed the arguments of the respondent Government. They maintained that the non-ratification by the respondent Government of Protocol No. 4 to the Convention had no bearing on the applicant's complaint that the restrictions imposed on his freedom to travel to the south infringed his rights under Articles 10 and 11 of the Convention. In support of this argument, the Cypriot Government stated that the Court had held on a number of occasions that the fact that the subject matter of a particular complaint was addressed in an optional Protocol which the State concerned had not ratified did not prevent consideration of the complaint under a provision of the Convention itself (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 24 April 1985, Series A no. 94, and *Guzzardi v. Italy*, judgment of 2 October 1980, Series A no. 39). They also referred to the conclusions of the Court in *Loizidou* and the findings of both the Commission and the Court in relation to the position of the Karpas Greek Cypriots in *Cyprus v. Turkey*.

53. Finally, the Cypriot Government maintained that the respondent Government had not justified the interference with the applicant's rights and had thus failed to demonstrate that the measures taken in the present case met the test established in Article 11 § 2 of the Convention.

B. The Court's assessment

1. Preliminary remark

54. The Court first observes that the applicant's complaint under Article 11 of the Convention is not limited to the question of freedom of movement, that is, to physical access to the southern part of Cyprus. His complaint, as set out in his submissions, is that the authorities, by constantly refusing to grant him permits to cross the “green line”, have effectively

prevented him from meeting Greek Cypriots and from participating in bi-communal meetings, thus affecting his right to freedom of assembly and association, contrary to Article 11 of the Convention. It is this complaint, as formulated above, that was addressed by the applicant as well as the Turkish and the Cypriot Governments in their submissions to the Court. In this connection the Court also refers to its findings and reasoning in *Loizidou* (merits), rejecting similar arguments raised by the respondent Government regarding freedom of movement (judgment cited above, p. 2237, §§ 60-63).

55. Seen in the above light the Court cannot accept the characterisation of the applicant's complaint as being limited to the right to freedom of movement. Article 11 of the Convention is thus applicable.

2. General principles

56. The Court observes at the outset that the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Thus, it should not be interpreted restrictively (see *G. v. Germany*, no. 13079/87, Commission decision of 6 March 1989, DR 60, p. 256; *Rassemblement jurassien and Unité jurassienne*, cited above, p. 93; and *Rai and Others v. the United Kingdom*, no. 25522/94, Commission decision of 6 April 1995, DR 81-A, p. 146). As such this right covers both private meetings and meetings in public thoroughfares as well as static meetings and public processions; in addition, it can be exercised by individuals and those organising the assembly (*Rassemblement jurassien and Unité jurassienne*, cited above, p. 119, and *Christians against Racism and Fascism v. the United Kingdom*, no. 8440/78, Commission decision of 16 July 1980, DR 21, p. 138, at p. 148).

57. The Court notes in addition that States must not only safeguard the right to assemble peacefully but also refrain from applying unreasonable indirect restrictions upon that right (see *Ezelin*, cited above). Lastly, the Court considers that, although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights (see *Christians against Racism and Facism*, cited above, p. 148).

3. Application of the above principles to the instant case

58. In the present case, the Court points out that the Commission, in its admissibility decision of 14 April 1998, declared admissible only the part of the application which related to the period after 8 March 1992. The Court's jurisdiction *ratione temporis* only permits it to consider the period from the above date until 14 April 1998, the latter being the date of the admissibility decision, that is, a period of six years and one month. Thus, alleged

violations of Convention rights not occurring within this period are outside the scope of the present judgment.

59. The Court observes that during the above period the respondent Government refused to grant permits to the applicant on a substantial number of occasions. Although the applicant was allowed to cross over the "green line" and attend some meetings, these were very few in comparison with the number of times he was not permitted to cross over. In particular, during the period under consideration, only six out of forty-six requests were granted. The Court notes that in some of these instances permits were granted to other persons who had submitted requests, but not to the applicant. In this connection the Court also reiterates its findings in *Cyprus v. Turkey* in relation to the rigorous approach taken by the "TRNC" authorities to bi-communal contacts after the second half of 1996 by the imposition of restrictions and, indeed, prohibitions (§§ 368-69). In the instant case, between 2 February 1996 and 14 April 1998, the applicant was refused a permit every time he requested to cross over to southern Cyprus for the purpose of attending bi-communal meetings (ten in total).

60. The Court considers that, despite the varied nature of the meetings the applicant wished to attend, they all shared a core characteristic: they were bi-communal. Thus, irrespective of the form they took and by whom they were organised, their aim was the same, namely, to bring into contact Turkish Cypriots living in the north and Greek Cypriots living in the south with a view to engaging in dialogue and exchanging ideas and opinions with the hope of securing peace on the island. In the light of this objective, whether or not the applicant was to participate in these meetings as the Turkish-Cypriot coordinator of the Movement for an Independent and Federal Cyprus is irrelevant for determining the question of freedom of assembly, given the ambit of the right guaranteed by Article 11 of the Convention.

61. In view of the above, the Court considers that the refusals to grant permits to the applicant in order to cross into southern Cyprus in effect barred his participation in bi-communal meetings there, preventing him consequently from engaging in peaceful assembly with people from both communities. In this connection the Court observes that hindrance can amount to a violation of the Convention just like a legal impediment (see *Loizidou* (merits), cited above, p. 2237, § 63).

62. Accordingly, the Court concludes that there has been an interference with the applicant's right to the freedom of peaceful assembly guaranteed by Article 11 of the Convention.

63. Such an interference gives rise to a breach of this provision unless it can be shown that it was "prescribed by law", pursued one or more legitimate aims as defined in paragraph 2, and was "necessary in a democratic society".

64. It must first be examined whether the restriction complained of was "prescribed by law".

65. The Court reiterates that one of the requirements flowing from the expression "prescribed by law" is the foreseeability of the measure concerned. A rule cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, for example, *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III).

66. In the present case the respondent Government did not refer to any law or measures in the "TRNC" regulating the issuance of permits to Turkish Cypriots living in northern Cyprus to cross the "green line" into southern Cyprus for the purposes of attending bi-communal meetings. Furthermore, they did not provide any indication as to when refusal of such permits is allowed.

67. The task of the Court is only to assess the circumstances of the individual case before it. The Court concludes that there seems to be no law applicable in the present case regulating the issuance of permits to Turkish Cypriots living in northern Cyprus to cross the "green line" into southern Cyprus in order to engage in peaceful assembly with Greek Cypriots. Therefore, the manner in which restrictions were imposed on the applicant's exercise of his freedom of assembly was not "prescribed by law" within the meaning of Article 11 § 2 of the Convention.

68. In the light of the above the Court does not consider it necessary to examine whether the other requirements laid down by Article 11 § 2 of the Convention were satisfied. Further, in view of the above, the Court does not consider it necessary to address the issue of freedom of association.

69. Accordingly, the Court concludes that there has been a violation of Article 11 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

70. The applicant complained that no effective domestic remedy existed with regard to the violations of Articles 10 and 11 of the Convention, in breach of Article 13 thereof, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

71. The respondent Government stated that the allegations of the applicant under Article 13 were closely related to the issue of domestic remedies and thus their submissions in relation to the existence of effective and practical remedies within the "TRNC" available to the applicant were

also applicable with regard to this provision. In addition they submitted that, as decided by the Commission in *Chrysostomos and Papachrysostomou*, cited above, the applicant could not complain under Article 13 once he had chosen not to avail himself of existing available and effective remedies.

72. The applicant and the Cypriot Government reaffirmed their arguments in relation to the issue of domestic remedies and submitted that these were also applicable with regard to the question of effective remedies under Article 13 of the Convention.

73. The Court observes that, as regards the possible remedies cited by the respondent Government, they have not put forward any example showing their use in a case similar to the present one (see *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, judgment of 19 December 1994, Series A no. 302, p. 20, § 53). They have therefore failed to show that such remedies would have been effective.

74. It follows that there has been a violation of Article 13 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

76. The applicant submitted that he had suffered considerably as a direct result of his long-running attempt to enforce his freedoms of expression and assembly within the context of seeking peace in Cyprus by way of an agreement between the two communities.

A. Damage

1. Pecuniary damage

77. The applicant claimed damages in respect of pecuniary loss for which he gave no figure. He submitted that the delay in the consideration of his case had prevented him from obtaining a job in Nicosia, in the southern part of Cyprus, while the continuing lack of resolution of the issues in question had grievously affected his ability to secure a living in the north. He claimed that he had been prevented from attending further meetings and that his whole professional and financial situation had been seriously affected.

78. The respondent Government did not address the applicant's claim.

79. The Court considers that the applicant has not adduced any proof in support of the above claims. He has not shown that the delay in the consideration of his case has affected his ability to earn his living in northern Cyprus or that he has been prevented at any time from securing employment in southern Cyprus.

80. Therefore, the Court does not find any causal link between the matter found to constitute a violation of the Convention and the pecuniary damage allegedly sustained by the applicant. In accordance with the principles of its case-law, it rejects the entirety of the applicant's claim under this head (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 127, ECHR 1999-IV).

2. Non-pecuniary damage

81. The applicant claimed compensation for non-pecuniary damage in the sum of 50,000 pounds sterling (GBP) for prolonged anxiety, frustration and stress over an extended and continuing period. He contended that the above damage constituted a direct consequence of the actions and omissions for which the respondent State was responsible under the Convention.

82. The respondent Government did not address the applicant's claim.

83. The Court considers that the applicant must have suffered from a feeling of helplessness and frustration in the face of the continuous refusals by the authorities for over six years to grant him permits to cross over into southern Cyprus and participate in bi-communal meetings. The Court considers that this cannot be compensated solely by the findings of violations.

84. Accordingly, the Court, having regard to the nature of the case and deciding on an equitable basis, awards the applicant the sum of 15,000 euros (EUR), which it considers would represent fair compensation for the non-pecuniary damage sustained.

B. Costs and expenses

85. The applicant also claimed a total of GBP 6,175 for legal costs and expenses.

86. The Court is not satisfied that all the costs and expenses claimed under this head were necessarily incurred and are reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI). Further, the Court notes that the applicant was granted legal aid. Therefore, it considers it appropriate to award the applicant the sum of EUR 4,715.

C. Default interest

87. The Court considers that the default interest should be fixed at an annual rate equal to the marginal lending rate of the European Central Bank plus three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses* by six votes to one the Government's preliminary objections;

2. *Holds* unanimously that it is not necessary to examine separately the applicant's complaint under Article 10 of the Convention;

3. *Holds* by six votes to one that there has been a violation of Article 11 of the Convention;

4. *Holds* by six votes to one that there has been a violation of Article 13 of the Convention;

5. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 4,715 (four thousand seven hundred and fifteen euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 February 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER	Lucius CAFLISCH
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Gölcüklü is annexed to this judgment.

L.C.
V.B.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

To my great regret, I cannot agree with the majority's opinion and reasoning or with their conclusions in the present case, for the following reasons.

1. On the island of Cyprus two communities – the Turkish community and the Greek community – once lived and still live side by side, on an equal footing, but not always on very good terms, it must be admitted.

2. It will be remembered that the fateful day as far as the Cypriot "affair" or "crisis" is concerned was 15 July 1974. That was the date of the *coup d'état* organised by the Greek colonels with the intention of annexing the island to Greece (enosis). The head of State, Archbishop Makarios, fled the country and asked for assistance from the UN Security Council.

3. Following the *coup d'état*, whose declared aim was to put an end to the Cypriot State's existence, Turkey intervened alone (in view of the indifference of the other two guarantor States) to save the Republic; the intervention was based on the guarantee agreement between three States (the United Kingdom, Greece and Turkey), which gave them the right to intervene, separately or jointly, if the situation so required. It was therefore effected in implementation of a clause in an international instrument.

4. The above-mentioned events considerably altered the existing political situation and led to the separation of the two communities and division of the island (the southern part, Greek, and the northern part, Turkish). I must add that this separation had already been perceptible since 1963. With the situation deteriorating day by day, the buffer-zone had been set up and the UN forces interposed as far back as 1964.

Subsequently, the "green line" – or demarcation line – was drawn between the south and north of the island, under the protection and surveillance of the UN forces. The population exchange was agreed between the Turkish authorities and the Greek authorities.

5. First, a few particulars to clarify the status of the buffer-zone and the "green line". In his report of 7 December 1989 – Security Council document S/21010 – on the UN operation in Cyprus the Secretary-General of the United Nations made the following observations about a demonstration on the demarcation line on 19 July 1989:

> "In the evening of 19 July, some 1,000 Greek Cypriot demonstrators ... forced their way into the United Nations buffer-zone in the ... area of Nicosia. The demonstrators broke through a wire barrier maintained by UNFICYP and destroyed a UNFICYP observation post. They then broke through the line formed by UNFICYP soldiers and entered a former school complex where UNFICYP reinforcements regrouped to prevent them from proceeding further ..."

The Secretary-General continued:

> "The events described above created considerable tension in the island and intensive efforts were made, both at United Nations Headquarters and at Nicosia, to contain and resolve the situation. On 21 July, I expressed my concern at the events that had taken place and stressed that it was vital that all parties keep in mind the purpose of the United Nations buffer-zone as well as their responsibility to ensure that that area was not violated. The President of the Security Council ... also stressed the need strictly to respect the ... buffer-zone." (See *Chrysostomos and Papachrysostomou v. Turkey*, nos. 15299/89 and 15300/89, Commission's report of 8 July 1993, Decisions and Reports (DR) 86-A, pp. 12-14, § 42; see also *Loizidou v. Turkey* (preliminary objections), no. 15318/89, judgment of 23 March 1995, Series A no. 310, opinion of the Commission, pp. 50-54, §§ 76 et seq.)

6. That means that freedom of movement between northern and southern Cyprus ceased to be possible in July 1974 and that the impossibility is not imputable to Turkey alone or to the Turkish Republic of Northern Cyprus (the "TRNC"). In a way, it is the international community (the United Nations) which has taken on the responsibility of ensuring respect for the "green" demarcation line.

The division of Cyprus was not an arbitrary act due to Turkey's intervention but an act which was the result and consequence of an agreement between the two communities (Turkish and Greek) in Vienna on 31 July and 2 August 1975. That agreement is applied, as we have just seen, under UN supervision. Two subsequent agreements, in 1977 and 1979, advocated a bi-zonal solution and provided that each community would be responsible for the administration of its own territory. Questions of freedom of movement, place of residence, etc., were settled under the bi-zonal and bi-communal system.

My *first conclusion* is that although the "TRNC" is not recognised by the international community, the buffer-zone and the "green" demarcation line are, and they must be respected according to the needs and circumstances of the time. Another paragraph taken from *Loizidou* (opinion of the Commission cited above) eloquently makes that point:

> "82. The Commission finds that it is not in this connection required to examine the status of the 'Turkish Republic of Northern Cyprus'. It notes that the demonstration on 19 March 1989, in the course of which the applicant was arrested in northern Cyprus, constituted a violation of the arrangements concerning the respect of the buffer-zone in Cyprus... The provisions under which the applicant was arrested and detained ... served to protect this very area. This cannot be considered as arbitrary.
>
> 83. The Commission therefore finds that the applicant's arrest and detention were justified under Article 5 § 1 (f), as applied to the regime created in Cyprus by international agreements concerning the buffer-zone."

The terms "buffer-zone" and "green line" therefore do not mean "public green space" or "English garden"; they are not a "park" that one can walk through as one wishes to meet one's friends nor are they a "sports field".

7. We must bear in mind the very marked political colouring of the instant case. A court must, of course, concentrate on the legal aspect of the case before it; but it cannot always entirely avoid being caught up in political situations and taking them as the "facts of the case". International law tends to take into account historical and political situations as relevant and valid "facts", even if they are the outcome of illegal acts. Before 1989 the tendency in international law was not to go back further than one generation; at present the perspective has changed and the past is probed as far back as possible to reach the original illegality (as was the case with events in the Balkans).

8. The northern part of Cyprus is not a black hole. There is a socially and politically organised, democratic and independent community there, with its own legal system; the name and classification we give it are of no import. Can one deny the political existence of Taiwan?

In fact, in its report in *Chrysostomos and Papachrysostomou* and its opinion in *Loizidou* (both cited above), the European Commission of Human Rights examined the applicants' complaints (concerning the lawfulness of detention, peaceful enjoyment of possessions, etc.) from the standpoint of the law in force in northern Cyprus as such (see paragraphs 148-49 and 174, and paragraphs 76-79 respectively). Here is what the Commission said in its opinion in *Loizidou*:

> "76. The Commission has examined whether the applicant was deprived of her liberty 'in accordance with a procedure prescribed by law', as required by Article 5 § 1. It recalls that, on the question whether an arrest is 'lawful', including whether it complies with 'a procedure prescribed by law', the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. ...
>
> 77. As regards domestic law in [northern] Cyprus, the Commission notes that, under Chapter 155, section 14(1), sub-paragraphs (b) and (c) of the Criminal Procedure Law ..., any police officer may, without warrant, arrest any person who commits in his presence [an] offence...
>
> 78. The Commission further notes that the applicant, having crossed the buffer-zone, was arrested in northern Cyprus by Turkish Cypriot policemen ...
>
> 79. Having regard to the above elements, the Commission finds that the arrest and detention of the applicant in [northern] Cyprus, by police officers acting under Chapter 155, section 14, of the Criminal Procedure Law, took place 'in accordance with a procedure prescribed by law', as required by Article 5 § 1 of the Convention."

9. As Judge Baka said in his dissenting opinion in *Loizidou v. Turkey* (merits) (judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI):

> "... Article 159 of the 'TRNC' Constitution and certain other legal provisions cannot be completely set to one side as devoid of all effect merely on the basis of the international non-recognition of the entity in northern Cyprus."

Moreover, the Court itself, in paragraph 45 of *Loizidou* (merits), noted:

> "[I]nternational law recognises the legitimacy of certain legal arrangements and transactions in such a situation [international non-recognition of the 'TRNC', for instance as regards the registration of births, deaths and marriages, 'the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory' (see, in this context, Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] International Court of Justice Reports 16, p. 56, §. 125)."

Would it not be pertinent to enquire whether non-attribution of "legal validity for purposes of the Convention to such provisions as Article 159 of the fundamental law on which the Turkish Government rely" (see paragraph 44 of *Loizidou* (merits)) would not amount to ignoring the effects "only to the detriment of the inhabitants of the [t]erritory", to use the words quoted by the Court in paragraph 45 of the same judgment? Especially when it is remembered that tens of thousands of Turkish Cypriots were displaced from southern to northern Cyprus after the Vienna agreements.

10. That is why the Court was careful to emphasise, in connection with the exhaustion of remedies in the present case, that "its ruling is confined to the particular circumstances of the present case. It is not to be interpreted as a general statement that remedies are ineffective in the 'TRNC' or that applicants are absolved from the obligation under Article 35 § 1 to have normal recourse to the remedies that are available and functioning" (see paragraph 37 of the present judgment).

11. In the present case the majority dismissed the respondent Government's preliminary objection of inadmissibility for non-exhaustion of domestic remedies, in particular because they were unable to prove to the Court that there had been cases similar to this one. Are the respondent Government responsible for the fact that before the proceedings instituted by the applicant no action had been brought before the national authorities to secure recognition, through a decision, of a right allegedly held under the Convention?

12. I feel I must emphasise once more that northern Cyprus is not a vacuum. Notwithstanding its international situation, its provides for all the needs of its inhabitants. The judicial authorities, in particular, discharge their duties there as in any other State. They try the cases submitted to them, which may be brought before them both by nationals of the country and by aliens, notably by British companies.

13. My *second conclusion* is that this case should have been declared inadmissible for failure to exhaust domestic remedies, as the Convention requires. That being so, the complaint concerning Article 13 also falls.

14. Lastly, this case is not about either freedom of expression or freedom of association. Moreover, the applicant has expressed his opinion both in his writings and publications and through his application to the Commission.

He may, if he wishes, gain access to southern Cyprus otherwise than by crossing the "green line". He was prevented from crossing the "green line" and the buffer-zone not just by the authorities of the respondent Government but pursuant to international agreements enforced in the first place by the UN forces, and by the Turkish-Cypriot forces in the north and Greek-Cypriot forces in the south.

15. In truth, the present case is purely and simply about freedom of movement. But that freedom is not absolute. In public international law there is no general right to cross a State border or demarcation line to gain access to this or that property or to meet associates or friends in the name of freedom of association. I refer in that connection to what Judges Bernhardt and Lopes Rocha said in their dissenting opinion in *Loizidou* (merits), concerning access to immovable property: "The case of Mrs Loizidou is not the consequence of an individual act of Turkish troops directed against her property or her freedom of movement, but it is the consequence of the establishment of the borderline in 1974 and its closure up to the present day." Mr Djavit An's case was the result of the same closure of the same borderline.

16. I will close my remarks on the present judgment with a reference, *mutatis mutandis*, to the conclusions of the European Commission of Human Rights in *Loizidou* (opinion of the Commission, cited above):

> "97. The Commission considers that a distinction must be made between claims concerning the peaceful enjoyment of one's possessions and claims of freedom of movement. It notes that the applicant, who was arrested after having crossed the buffer-zone in Cyprus in the course of a demonstration, claims the right freely to move on the island of Cyprus, irrespective of the buffer-zone and its control, and bases this claim on the statement that she owns property in the north of Cyprus.
>
> 98. The Commission acknowledges that limitations of the freedom of movement – whether resulting from a person's deprivation of liberty or from the status of a particular area – may indirectly affect other matters, such as access to property. But this does not mean that a deprivation of liberty, or restriction of access to a certain area, interferes directly with the right protected by Article 1 of Protocol No. 1. In other words, the right to the peaceful enjoyment of one's possessions does not include, as a corollary, the right to freedom of movement (see, *mutatis mutandis*, applications nos. 7671/76 etc., 15 foreign students v. the United Kingdom, decision of 19 May 1977, DR 9, p. 185, at pp. 186 ff.).
>
> 99. The Commission therefore finds that the applicant's claim of free access to the north of Cyprus, which has been examined above (at paragraphs 81 ff.) under Article 5 of the Convention, cannot be based on her alleged ownership of property in the northern part of the island.
>
> 100. It follows that it discloses no issue under Article 1 of Protocol No. 1.
>
> ...

101. The Commission concludes ... that there has been no violation of Article 1 of Protocol No. 1 to the Convention."

17. My *third conclusion* is that just as a person in police custody or detention pending trial cannot claim to be the victim of an infringement of his right to respect for his family life (Article 8) or his freedom of association (Article 11) on account of the fact that it is impossible for him to participate in a meeting of the association to which he belongs, so in the present case it cannot be considered that there has been a violation of Article 11 of the Convention as regards the applicant.

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

COURT (PLENARY)

CASE OF DUDGEON v. THE UNITED KINGDOM

(Application no. 7525/76)

JUDGMENT

STRASBOURG

22 October 1981

In the Dudgeon case,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. M. ZEKIA,
Mr. J. CREMONA,
Mr. THÓR VILHJÁLMSSON,
Mr. W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. D. EVRIGENIS,
Mr. G. LAGERGREN,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. E. GARCIA DE ENTERRIA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. R. BERNHARDT,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 24 and 25 April and from 21 to 23 September 1981,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The Dudgeon case was referred to the Court by the European Commission of Human Rights ("the Commission"). The case originated in an application against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission on 22 May 1976 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom citizen, Mr. Jeffrey Dudgeon.

2. The Commission’s request was lodged with the registry of the Court on 18 July 1980, within the period of three months laid down by Articles 32

par. 1 and 47 (art. 32-1, art. 47). The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration made by the United Kingdom recognising the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the Commission's request is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Article 8 (art. 8) of the Convention, taken alone or in conjunction with Article 14 (art. 14+8).

3. The Chamber of seven judges to be constituted included, as ex officio members, Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr. G. Balladore Pallieri, the President of the Court (Rule 21 par. 3 (b) of the Rules of Court). On 30 September 1980, the President drew by lot, in the presence of the Registrar, the names of the five other members of the Chamber, namely Mr. G. Wiarda, Mr. D. Evrigenis, Mr. G. Lagergren, Mr. L. Liesch and Mr. J. Pinheiro Farinha (Article 43 in fine of the Convention and Rule 21 par. 4) (art. 43).

4. Mr. Balladore Pallieri assumed the office of President of the Chamber (Rule 21 par. 5). He ascertained, through the Registrar, the views of the Agent of the Government of the United Kingdom ("the Government") and the Delegates of the Commission as regards the procedure to be followed. On 24 October 1980, he directed that the Agent of the Government should have until 24 December to file a memorial and that the Delegates should be entitled to file a memorial in reply within two months from the date of the transmission to them by the Registrar of the Government's memorial. On 20 December, Mr. Wiarda, the Vice-President of the Court, who had replaced Mr. Balladore Pallieri as President of the Chamber following the latter's death (Rule 21 par. 5), agreed to extend the first of these time-limits until 6 February 1981.

5. On 30 January 1981, the Chamber decided under Rule 48 of the Rules of Court to relinquish jurisdiction forthwith in favour of the plenary Court.

6. The Government's memorial was received at the registry on 6 February and that of the Commission on 1 April; appended to the Commission's memorial were the applicant's observations on the Government's memorial.

7. After consulting through the Registrar, the Agent of the Government and the Delegates of the Commission, Mr. Wiarda, who had in the meantime been elected President of the Court, directed on 2 April 1981 that the oral proceedings should open on 23 April 1981.

8. On 3 April, the applicant invited the Court to hear expert evidence from Dr. Dannacker, Assistant Professor at the University of Frankfurt. In a letter received at the registry on 15 April, the Delegates of the Commission stated that they left it to the Court to decide whether such evidence was necessary.

9. A document was filed by the Government on 14 April 1981.

10. The oral hearings were held in public at the Human Rights Building, Strasbourg, on 23 April 1981. Immediately before their opening, the Court had held a preparatory meeting and decided not to hear expert evidence.

There appeared before the Court:

- for the Government:

Mrs. A. GLOVER, Legal Adviser,
Foreign and Commonwealth Office, *Agent*,
Mr. N. BRATZA, Barrister-at-law,
Mr. B. KERR, Barrister-at-law, *Counsel*,
Mr. R. TOMLINSON, Home Office,
Mr. D. CHESTERTON, Northern Ireland Office,
Mr. N. BRIDGES, Northern Ireland Office, *Advisers*;

- for the Commission:

Mr. J. FAWCETT,
Mr. G. TENEKIDES, *Delegates*,
Lord GIFFORD, Barrister-at-law,
Mr. T. MUNYARD, Barrister-at-law,
Mr. P. CRANE, Solicitor, assisting the Delegates under Rule 29 par. 1, second sentence, of the Rules of Court.

The Court heard addresses by the Delegates and Lord Gifford for the Commission, and by Mr. Kerr and Mr. Bratza for the Government. Lord Gifford submitted various documents through the Delegates of the Commission.

11. On 11 and 12 May, respectively, the Registrar received from the Agent of the Government and from the Commission's Delegates and those assisting them their written replies to certain questions put by the Court and/or their written observations on the documents filed before and during the hearings.

12. In September 1981, Mr. Wiarda was prevented from taking part in the consideration of the case; Mr. Ryssdal, as Vice-President of the Court, thereafter presided over the Court.

AS TO THE FACTS

13. Mr. Jeffrey Dudgeon, who is 35 years of age, is a shipping clerk resident in Belfast, Northern Ireland.

Mr. Dudgeon is a homosexual and his complaints are directed primarily against the existence in Northern Ireland of laws which have the effect of making certain homosexual acts between consenting adult males criminal offences.

A. The relevant law in Northern Ireland

14. The relevant provisions currently in force in Northern Ireland are contained in the Offences against the Person Act 1861 ("the 1861 Act"), the Criminal Law Amendment Act 1885 ("the 1855 Act") and the common law.

Under sections 61 and 62 of the 1861 Act, committing and attempting to commit buggery are made offences punishable with maximum sentences of life imprisonment and ten years' imprisonment, respectively. Buggery consists of sexual intercourse per anum by a man with a man or a woman, or per anum or per vaginam by a man or a woman with an animal.

By section 11 of the 1885 Act, it is an offence, punishable with a maximum of two years' imprisonment, for any male person, in public or in private, to commit an act of "gross indecency" with another male. "Gross indecency" is not statutorily defined but relates to any act involving sexual indecency between male persons; according to the evidence submitted to the Wolfenden Committee (see paragraph 17 below), it usually takes the form of mutual masturbation, inter-crural contact or oral-genital contact. At common law, an attempt to commit an offence is itself an offence and, accordingly, it is an offence to attempt to commit an act proscribed by section 11 of the 1885 Act. An attempt is in theory punishable in Northern Ireland by an unlimited sentence (but as to this, see paragraph 31 below).

Consent is no defence to any of these offences and no distinction regarding age is made in the text of the Acts.

An account of how the law is applied in practice is given below at paragraphs 29 to 31.

15. Acts of homosexuality between females are not, and have never been, criminal offences, although the offence of indecent assault may be committed by one woman on another under the age of 17.

As regards heterosexual relations, it is an offence, subject to certain exceptions, for a man to have sexual intercourse with a girl under the age of 17. Until 1950 the age of consent of a girl to sexual intercourse was 16 in both England and Wales and in Northern Ireland, but by legislation introduced in that year the age of consent was increased to 17 in Northern Ireland. While in relation to the corresponding offence in England and Wales it is a defence for a man under the age of 24 to show that he believed with reasonable cause the girl to be over 16 years of age, no such defence is available under Northern Ireland law.

B. The law and reform of the law in the rest of the United Kingdom

16. The 1861 and 1885 Acts were passed by the United Kingdom Parliament. When enacted, they applied to England and Wales, to all Ireland, then unpartitioned and an integral part of the United Kingdom, and also, in the case of the 1885 Act, to Scotland.

1. England and Wales

17. In England and Wales the current law on male homosexual acts is contained in the Sexual Offences Act 1956 ("the 1956 Act") as amended by the Sexual Offences Act 1967 ("the 1967 Act").

The 1956 Act, an Act consolidating the existing statute law, made it an offence for any person to commit buggery with another person or an animal (section 12) and an offence for a man to commit an act of "gross indecency" with another man (section 13).

The 1967 Act, which was introduced into Parliament as a Private Member's Bill, was passed to give effect to the recommendations concerning homosexuality made in 1957 in the report of the Departmental Committee on Homosexual Offences and Prostitution established under the chairmanship of Sir John Wolfenden (the "Wolfenden Committee" and "Wolfenden report"). The Wolfenden Committee regarded the function of the criminal law in this field as

> "to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official, or economic dependence",

but not

> "to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined".

The Wolfenden Committee concluded that homosexual behaviour between consenting adults in private was part of the "realm of private morality and immorality which is, in brief and crude terms, not the law's business" and should no longer be criminal.

The 1967 Act qualified sections 12 and 13 of the 1956 Act by providing that, subject to certain exceptions concerning mental patients, members of the armed forces and merchant seamen, buggery and acts of gross indecency in private between consenting males aged 21 years or over should not be criminal offences. It remains a crime to commit a homosexual act, of the kind referred to in these sections, with a person aged less than 21 in any circumstances.

The age of majority for certain purposes, including capacity to marry without parental consent and to enter into contractual relations, was reduced from 21 to 18 by the Family Law Reform Act 1969. The voting age and the minimum age for jury service were likewise reduced to 18 by the Representation of the People Act 1969 and the Criminal Justice Act 1972, respectively.

In 1977, the House of Lords rejected a Bill aimed at reducing the age of consent for private homosexual act to 18. Subsequently, in a report

published in April 1981, a committee established by the Home Office, namely the Policy Advisory Committee on Sexual Offences, recommended that the minimum age for homosexual relations between males should be reduced to 18. A minority of five members favoured a reduction to 16.

2. Scotland

18. When the applicant lodged his complaint in 1976, the relevant law applicable was substantially similar to that currently in force in Northern Ireland. Section 7 of the Sexual Offences (Scotland) Act 1976, a consolidating provision re-enacting section 11 of the 1885 Act, provided for the offence of gross indecency; the offence of sodomy existed at common law. However, successive Lord Advocates had stated in Parliament that their policy was not to prosecute in respect of acts which would not have been punishable if the 1967 Act had applied in Scotland. The Criminal Justice (Scotland) Act 1980 ("the 1980 Act") formally brought Scottish law into line with that of England and Wales. As in the case of the 1967 Act, the change in the law originated in amendments introduced in Parliament by a Private Member.

C. Constitutional position of Northern Ireland

19. Under an Act of the United Kingdom Parliament, the Government of Ireland Act 1920, a separate Parliament for Northern Ireland was established with power to legislate on all matters devolved by that Act, including criminal and social law. An executive known as the Government of Northern Ireland was also established with Ministers responsible for the different areas of the devolved powers. By convention, during the life of the Northern Ireland Parliament (1921-9172) the United Kingdom Parliament rarely, if ever, legislated for Northern Ireland in respect of the devolved matters - in particular social matters - falling within the former Parliament’s legislative competence.

20. In March 1972, the Northern Ireland Parliament was prorogued and Northern Ireland was made subject to "direct rule" from Westminster (see the judgment of 18 January 1978 in the case of Ireland v. the United Kingdom, Series A no. 25, pp. 10 and 20-21, par. 19 and 49). Since that date, except for a period of five months in 1974 when certain legislative and executive powers were devolved to a Northern Ireland Assembly and Executive, legislation for Northern Ireland in all fields has been the responsibility of the United Kingdom Parliament. There are 12 members of the United Kingdom House of Commons, out of a total of 635, who represent constituencies in Northern Ireland.

Under the provisions currently in force, power is conferred on Her Majesty to legislate for Northern Ireland by Order in Council. Save where there are reasons of urgency, no recommendation may be made to Her

Majesty to make an Order in Council under these provisions unless a draft of the Order has been approved by each House of Parliament. It is the responsibility of the Government to prepare a draft Order and to lay it before Parliament for approval. A draft can only be approved or rejected in toto by Parliament, but not amended. The function of the Queen in Council in making an Order once it has been approved by Parliament is purely formal. In practice, much legislation for Northern Ireland is effected in this form rather than by means of an Act of Parliament.

D. Proposals for reform in Northern Ireland

21. No measures comparable to the 1967 Act were ever introduced into the Northern Ireland Parliament either by the Government of Northern Ireland or by any Private Member.

22. In July 1976, following the failure of the Northern Ireland Constitutional Convention to work out a satisfactory form of devolved government for Northern Ireland, the then Secretary of State for Northern Ireland announced in Parliament that the United Kingdom Government would thenceforth by looking closely at the need for legislation in fields which it had previously been thought appropriate to leave to a future devolved government, in particular with a view to bringing Northern Ireland law more closely into harmony with laws in other parts of the country. He cited homosexuality and divorce as possible areas for action. However, recognising the difficulties about such subjects in Northern Ireland, he indicated that he would welcome the views of the local people, including those of the Standing Advisory Commission on Human Rights ("the Advisory Commission") and of Members of Parliament representing Northern Ireland constituencies.

23. The Advisory Commission, which is an independent statutory body, was accordingly invited to consider the matter. As regards homosexual offences, the Advisory Commission received evidence from a number of persons and organisations, religious and secular. No representations were made by the Roman Catholic Church in Northern Ireland or by any of the 12 Northern Ireland Members of the United Kingdom House of Commons.

The Advisory Commission published its report in April 1977. The Advisory Commission concluded that most people did not regard it as satisfactory to retain the existing differences in the law with regard to homosexuality and that few only would be strongly opposed to changes bringing Northern Ireland law into conformity with that in England and Wales. On the other hand, it did not consider that there would be support for legislation which went further, in particular by lowering the age of consent. Its recommendations were that the law of Northern Ireland should be brought into line with the 1967 Act, but that future amendments to the 1967 Act should not automatically apply to Northern Ireland.

24. On 27 July 1978, the Government published a proposal for a draft Homosexual Offences (Northern Ireland) Order 1978, the effect of which would have been to bring Northern Ireland law on the matter broadly into line with that of England and Wales. In particular, homosexual acts in private between two consenting male adults over the age of 21 would no longer have been punishable.

In a foreword to the proposal, the responsible Minister stated that "the Government had always recognised that homosexuality is an issue about which some people in Northern Ireland hold strong conscientious or religious opinions". He summarised the main arguments for and against reform as follows:

> "In brief, there are two differing viewpoints. One, based on an interpretation of religious principles, holds that homosexual acts under any circumstances are immoral and that the criminal law should be used, by treating them as crimes, to enforce moral behaviour. The other view distinguishes between, on the one hand that area of private morality within which a homosexual individual can (as a matter of civil liberty) exercise his private right of conscience and, on the other hand, the area of public concern where the State ought and must use the law for the protection of society and in particular for the protection of children, those who are mentally retarded and others who are incapable of valid personal consent.
>
> I have during my discussions with religious and other groups heard both these viewpoints expressed with sincerity and I understand the convictions that underlie both points of view. There are in addition other considerations which must be taken into account. For example it has been pointed out that the present law is difficult to enforce, that fear of exposure can make a homosexual particularly vulnerable to blackmail and that this fear of exposure can cause unhappiness not only for the homosexual himself but also for his family and friends.
>
> While recognising these differing viewpoints I believe we should not overlook the common ground. Most people will agree that the young must be given special protection; and most people will also agree that law should be capable of being enforced. Moreover those who are against reform have compassion and respect for individual rights just as much as those in favour of reform have concern for the welfare of society. For the individuals in society, as for Government, there is thus a difficult balance of judgment to be arrived at."

Public comment on the proposed amendment to the law was invited.

25. The numerous comments received by the Government in response to their invitation, during and after the formal period of consultation, revealed a substantial division of opinion. On a simple count of heads, there was a large majority of individuals and institutions against the proposal for a draft Order.

Those opposed to reform included a number of senior judges, District Councils, Orange Lodges and other organisations, generally of a religious character and in some cases engaged in youth activities. A petition to "Save Ulster from Sodomy" organised by the Democratic Unionist Party led by Mr. Ian Paisley, a Member of the United Kingdom House of Commons,

collected nearly 70.000 signatures. The strongest opposition came from certain religious groups. In particular, the Roman Catholic Bishops saw the proposal as an invitation to Northern Irish society to change radically its moral code in a manner liable to bring about more serious problems than anything attributable to the present law. The Roman Catholic Bishops argued that such a change in the law would lead to a further decline in moral standards and to a climate of moral laxity which would endanger and put undesirable pressures on those most vulnerable, namely the young. Similarly, the Presbyterian Church in Ireland, whilst understanding the arguments for the change, made the point that the removal from the purview of the criminal law of private homosexual acts between consenting adult males might be taken by the public as an implicit licence if not approval for such practices and as a change in public policy towards a further relaxation of moral standards.

The strongest support for change came from organisations representing homosexuals and social work agencies. They claimed that the existing law was unnecessary and that it created hardship and distress for a substantial minority of persons affected by it. It was urged that the sphere of morality should be kept distinct from that of the criminal law and that considerations of the personal freedom of the individual should in such matters be paramount. For its part, the Standing Committee of the General Synod of the Church of Ireland accepted that homosexual acts in private between consenting adults aged 21 and over should be removed from the realm of criminal offence, but in amplification commented that this did not mean that the Church considered homosexuality to be an acceptable norm.

Press reports indicated that most of the political formations had expressed favourable views. However, none of the 12 Northern Ireland Members of Parliament publicly supported the proposed reform and several of them openly opposed it. An opinion poll conducted in Northern Ireland in January 1978 indicated that the people interviewed were evenly divided on the global question of the desirability of reforming the law on divorce and homosexuality so as to bring it into line with that of England and Wales.

26. On 2 July 1979, the then Secretary of State for Northern Ireland, in announcing to Parliament that the Government did not intend to pursue the proposed reform, stated:

> "Consultation showed that strong views are held in Northern Ireland, both for and against in the existing law. Although it is not possible to say with certainty what is the feeling of the majority of people in the province, it is clear that is substantial body of opinion there (embracing a wide range of religious as well as political opinion) is opposed to the proposed change ... [T]he Government have [also] taken into account ... the fact that legislation on an issue such as the one dealt with in the draft order has traditionally been a matter for the initiative of a Private Member rather than for Government. At present, therefore, the Government propose to take no further action ..., but we would be prepared to reconsider the matter if there were any developments in the future which were relevant."

27. In its annual report for 1979-1980, the Advisory Commission reiterated its view that law should be reformed. It believed that there was a danger that the volume of opposition might be exaggerated.

28. Since the Northern Ireland Parliament was prorogued in 1972 (see paragraph 20 above), there has been no initiative of any kind for legislation to amend the 1861 and 1885 Acts from any of the mainstream political organisations or movements in Northern Ireland.

E. Enforcement of the law in Northern Ireland

29. In accordance with the general law, anyone, including a private person, may bring a prosecution for a homosexual offence, subject to the Director of Public Prosecutions' power to assume the conduct of the proceedings and, if he thinks fit, discontinue them. The evidence as to prosecutions for homosexual offences between 1972 and 1981 reveals that none has been brought by a private person during that time.

30. During the period from January 1972 to October 1980 there were 62 prosecutions for homosexual offences in Northern Ireland. The large majority of these cases involved minors that is persons under 18; a few involved persons aged 18 to 21 or mental patients or prisoners. So far as the Government are aware from investigation of the records, no one was prosecuted in Northern Ireland during the period in question for an act which would clearly not have been an offence if committed in England or Wales. There is, however, no stated policy not to prosecute in respect of such acts. As was explained to the Court by the Government, instructions operative within the office of the Director of Public Prosecutions reserve the decision on whether to prosecute in each individual case to the Director personally, in consultation with the Attorney General, the sole criterion being whether, on all the facts and circumstances of that case, a prosecution would be in the public interest.

31. According to the Government, the maximum sentences prescribed by the 1861 and 1885 Acts are appropriate only for the most grave instances of the relevant offence and in practice no court would ever contemplate imposing the maximum sentence for offences committed between consenting parties, whether in private or in public. Furthermore, although liable to an unlimited sentence, a man convicted of an attempt to commit gross indecency would in practice never receive a sentence greater than that appropriate if the offence had been completed; in general, the sentence would be significantly less. In all cases of homosexual offences the actual penalty imposed will depend on the particular circumstances.

F. The personal circumstances of the applicant

32. The applicant has, on his own evidence, been consciously homosexual from the age of 14. For some time he and others have been conducting a campaign aimed at bringing the law in Northern Ireland into line with that in force in England and Wales and, if possible, achieving a minimum age of consent lower than 21 years.

33. On 21 January 1976, the police went to Mr. Dudgeon's address to execute a warrant under the Misuse of Drugs Act 1971. During the search of the house a quantity of cannabis was found which subsequently led to another person being charged with drug offences. Personal papers, including correspondence and diaries, belonging to the applicant in which were described homosexual activities were also found and seized. As a result, he was asked to go to a police station where for about four and a half hours he was questioned, on the basis of these papers, about his sexual life. The police investigation file was sent to the Director of Prosecutions. It was considered with a view to instituting proceedings for the offence of gross indecency between males. The Director, in consultation with the Attorney General, decided that it would not be in the public interest for proceedings to be brought. Mr. Dudgeon was so informed in February 1977 and his papers, with annotations marked over them, were returned to him.

PROCEEDINGS BEFORE THE COMMISSION

34. In his application, lodged with the Commission on 22 May 1976, Mr. Dudgeon claimed that:

- the existence, in the criminal law in force in Northern Ireland, of various offences capable of relating to male homosexual conduct and the police investigation in January 1976 constituted an unjustified interference with his right to respect for his private life, in breach of Article 8 (art. 8) of the Convention;

- he had suffered discrimination, within the meaning of Article 14 (art. 14) of the Convention, on grounds of sex, sexuality and residence.

The applicant also claimed compensation.

35. By decision of 3 March 1978, the Commission declared admissible the applicant's complaints concerning the laws in force in Northern Ireland prohibiting homosexual acts between males (or attempts at such acts), but inadmissible as being manifestly ill-founded his complaints concerning the existence in Northern Ireland of certain common law offences.

In its report adopted on 13 March 1980 (Article 31 of the Convention) (art. 31), the Commission expressed the opinion that:

- the legal prohibition of private consensual homosexual acts involving male persons under 21 years of age was not in breach of the applicant's rights either under Article 8 (art. 8) (eight votes to two) or under Article 14

read in conjunction with Article 8 (art. 14+8) (eight votes to one, with one abstention);

- the legal prohibition of such acts between male persons over 21 years of age breached the applicant's right to respect for his private life under Article 8 (art. 8) (nine votes to one);

- it was not necessary to examine the question whether the last-mentioned prohibition also violated Article 14 read in conjunction with Article 8 (art. 14+8) (nine votes to one).

The report contains one separate opinion.

FINAL SUBMISSIONS MADE TO THE COURT

36. At the hearing on 23 April 1981, the Government maintained the submissions set out in their memorial, whereby they requested the Court:

"(1) With regard to Article 8 (art. 8)

To decide and declare that the present laws in Northern Ireland relating to homosexual acts do not give rise to a breach of Article 8 (art. 8) of the Convention, in that the laws are necessary in a democratic society for the protection of morals and for the protection of the rights of other for the purposes of paragraph 2 of Article 8 (art. 8-2).

(2) With regard to Article 14, in conjunction with Article 8 (art. 14+8)

(i) To decide and declare that the facts disclose no breach of Article 14, read in conjunction with Article 8 (art. 14+8) of the Convention;

alternatively, if and in so far as a breach of Article 8 (art. 8) of the Convention is found

(ii) To decide and declare that it is unnecessary to examine the question whether the laws in Northern Ireland relating to homosexual acts give rise to a separate breach of Article 14, read in conjunction with Article 8 (art. 14+8) of the Convention".

AS TO THE LAW

I. THE ALLEGED BREACH OF ARTICLE 8 (art. 8)

A. Introduction

37. The applicant complained that under the law in force in Northern Ireland he is liable to criminal prosecution on account of his homosexual conduct and that he has experienced fear, suffering and psychological distress directly caused by the very existence of the laws in question - including fear of harassment and blackmail. He further complained that, following the search of his house in January 1976, he was questioned by the police about certain homosexual activities and that personal papers belonging to him were seized during the search and not returned until more than a year later.

He alleged that, in breach of Article 8 (art. 8) of the Convention, he has thereby suffered, and continues to suffer, an unjustified interference with his right to respect for his private life.

38. Article 8 (art. 8) provides as follows:

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

39. Although it is not homosexuality itself which is prohibited but the particular acts of gross indecency between males and buggery (see paragraph 14 above), there can be no doubt but that male homosexual practices whose prohibition is the subject of the applicant's complaints come within the scope of the offences punishable under the impugned legislation; it is on that basis that the case has been argued by the Government, the applicant and the Commission. Furthermore, the offences are committed whether the act takes place in public or in private, whatever the age or relationship of the participants involved, and whether or not the participants are consenting. It is evident from Mr. Dudgeon's submissions, however, that his complaint was in essence directed against the fact that homosexual acts which he might commit in private with other males capable of valid consent are criminal offences under the law of Northern Ireland.

B. The existence of an interference with an Article 8 (art. 8) right

40. The Commission saw no reason to doubt the general truth of the applicant's allegations concerning the fear and distress that he has suffered in consequence of the existence of the laws in question. The Commission unanimously concluded that "the legislation complained of interferes with the applicant's right to respect for his private life guaranteed by Article 8 par. 1 (art. 8-1), in so far as it prohibits homosexual acts committed in

private between consenting males" (see paragraphs 94 and 97 of the Commission's report).

The Government, without conceding the point, did not dispute that Mr. Dudgeon is directly affected by the laws and entitled to claim to be a "victim" thereof under Article 25 (art. 25) of the Convention. Nor did the Government contest the Commission's above-quoted conclusion.

41. The Court sees no reason to differ from the views of the Commission: the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 par. 1 (art. 8-1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life (see, mutatis mutandis, the Marckx judgment of 13 June 1979, Series A no. 31, p. 13, par. 27): either he respects the law and refrains from engaging – even in private with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.

It cannot be said that the law in question is a dead letter in this sphere. It was, and still is, applied so as to prosecute persons with regard to private consensual homosexual acts involving males under 21 years of age (see paragraph 30 above). Although no proceedings seem to have been brought in recent years with regard to such acts involving only males over 21 years of age, apart from mental patients, there is no stated policy on the part of the authorities not to enforce the law in this respect (ibid). Furthermore, apart from prosecution by the Director of Public Prosecution, there always remains the possibility of a private prosecution (see paragraph 29 above).

Moreover, the police investigation in January 1976 was, in relation to the legislation in question, a specific measure of implementation - albeit short of actual prosecution - which directly affected the applicant in the enjoyment of his right to respect for his private life (see paragraph 33 above). As such, it showed that the threat hanging over him was real.

C. The existence of a justification for the interference found by the Court

42. In the Government's submission, the law in Northern Ireland relating to homosexual acts does not give rise to a breach of Article 8 (art. 8), in that it is justified by the terms of paragraph 2 of the Article (art. 8-2). This contention was disputed by both the applicant and the Commission.

43. An interference with the exercise of an Article 8 (art. 8) right will not be compatible with paragraph 2 (art. 8-2) unless it is "in accordance with the law", has an aim or aims that is or are legitimate under that paragraph and is "necessary in a democratic society" for the aforesaid aim or aims (see,

mutatis, mutandis, the Young, James and Webster judgment of 13 August 1981, Series A no. 44, p. 24, par. 59).

44. It has not been contested that the first of these three conditions was met. As the Commission pointed out in paragraph 99 of its report, the interference is plainly "in accordance with the law" since it results from the existence of certain provisions in the 1861 and 1885 Acts and the common law (see paragraph 14 above).

45. It next falls to be determined whether the interference is aimed at "the protection of morals" or "the protection of the rights and freedoms of others", the two purposes relied on by the Government.

46. The 1861 and 1885 Acts were passed in order to enforce the then prevailing conception of sexual morality. Originally they applied to England and Wales, to all Ireland, then unpartitioned, and also, in the case of the 1885 Act, to Scotland (see paragraph 16 above). In recent years the scope of the legislation has been restricted in England and Wales (with the 1967 Act) and subsequently in Scotland (with the 1980 Act): with certain exceptions it is no longer a criminal offence for two consenting males over 21 years of age to commit homosexual acts in private (see paragraphs 17 and 18 above). In Northern Ireland, in contrast, the law has remained unchanged. The decision announced in July 1979 to take no further action in relation to the proposal to amend the existing law was, the Court accepts, prompted by what the United Kingdom Government judged to be the strength of feeling in Northern Ireland against the proposed change, and in particular the strength of the view that it would be seriously damaging to the moral fabric of Northern Irish society (see paragraphs 25 and 26 above). This being so, the general aim pursued by the legislation remains the protection of morals in the sense of moral standards obtaining in Northern Ireland.

47. Both the Commission and the Government took the view that, in so far as the legislation seeks to safeguard young persons from undesirable and harmful pressures and attentions, it is also aimed at "the protection of the rights and freedoms of others". The Court recognises that one of the purposes of the legislation is to afford safeguards for vulnerable members of society, such as the young, against the consequences of homosexual practices. However, it is somewhat artificial in this context to draw a rigid distinction between "protection of the rights and freedoms of others" and "protection of morals". The latter may imply safeguarding the moral ethos or moral standards of a society as a whole (see paragraph 108 of the Commission’s report), but may also, as the Government pointed out, cover protection of the moral interests and welfare of a particular section of society, for example schoolchildren (see the Handyside judgment of 7 December 1976, Series A no. 24, p. 25, par. 52 in fine - in relation to Article 10 par. 2 (art. 10-2) of the Convention). Thus, "protection of the rights and freedoms of others", when meaning the safeguarding of the moral interests and welfare of certain individuals or classes of individuals who are in need

of special protection for reasons such as lack of maturity, mental disability or state of dependence, amounts to one aspect of "protection of morals" (see, mutatis mutandis, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 34, par. 56). The Court will therefore take account of the two aims on this basis.

48. As the Commission rightly observed in its report (at paragraph 101), the cardinal issue arising under Article 8 (art. 8) in this case is to what extent, if at all, the maintenance in force of the legislation is "necessary in a democratic society" for these aims.

49. There can be no denial that some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law can be justified as "necessary in a democratic society". The overall function served by the criminal law in this field is, in the words of the Wolfenden report (see paragraph 17 above), "to preserve public order and decency [and] to protect the citizen from what is offensive or injurious". Furthermore, this necessity for some degree of control may even extend to consensual acts committed in private, notably where there is call - to quote the Wolfenden report once more - "to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence". In practice there is legislation on the matter in all the member States of the Council of Europe, but what distinguishes the law in Northern Ireland from that existing in the great majority of the member States is that it prohibits generally gross indecency between males and buggery whatever the circumstances. It being accepted that some form of legislation is "necessary" to protect particular sections of society as well as the moral ethos of society as a whole, the question in the present case is whether the contested provisions of the law of Northern Ireland and their enforcement remain within the bounds of what, in a democratic society, may be regarded as necessary in order to accomplish those aims.

50. A number of principles relevant to the assessment of the "necessity", "in a democratic society", of a measure taken in furtherance of an aim that is legitimate under the Convention have been stated by the Court in previous judgments.

51. Firstly, "necessary" in this context does not have the flexibility of such expressions as "useful", "reasonable", or "desirable", but implies the existence of a "pressing social need" for the interference in question (see the above-mentioned Handyside judgment, p. 22, par. 48).

52. In the second place, it is for the national authorities to make the initial assessment of the pressing social need in each case; accordingly, a margin of appreciation is left to them (ibid). However, their decision remains subject to review by the Court (ibid., p. 23, par. 49).

As was illustrated by the Sunday Times judgment, the scope of the margin of appreciation is not identical in respect of each of the aims justifying restrictions on a right (p. 36, par. 59). The Government inferred from the Handyside judgment that the margin of appreciation will be more extensive where the protection of morals is in issue. It is an indisputable fact, as the Court stated in the Handyside judgment, that "the view taken ... of the requirements of morals varies from time to time and from place to place, especially in our era," and that "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements" (p. 22, par. 48).

However, not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8 (art. 8-2).

53. Finally, in Article 8 (art. 8) as in several other Articles of the Convention, the notion of "necessity" is linked to that of a "democratic society". According to the Court’s case-law, a restriction on a Convention right cannot be regarded as "necessary in a democratic society" - two hallmarks of which are tolerance and broadmindedness - unless, amongst other things, it is proportionate to the legitimate aim pursued (see the above-mentioned Handyside judgment, p. 23, par. 49, and the above-mentioned Young, James and Webster judgment, p. 25, par. 63).

54. The Court’s task is to determine on the basis of the aforesaid principles whether the reasons purporting to justify the "interference" in question are relevant and sufficient under Article 8 par. 2 (art. 8-2) (see the above-mentioned Handyside judgment, pp. 23-24, par. 50). The Court is not concerned with making any value-judgment as to the morality of homosexual relations between adult males.

55. It is convenient to begin by examining the reasons set out by the Government in their arguments contesting the Commission’s conclusion that the penal prohibition of private consensual homosexual acts involving male persons over 21 years of age is not justified under Article 8 par. 2 (art. 8-2) (see paragraph 35 above).

56. In the first place, the Government drew attention to what they described as profound differences of attitude and public opinion between Northern Ireland and Great Britain in relation to questions of morality. Northern Irish society was said to be more conservative and to place greater emphasis on religious factors, as was illustrated by more restrictive laws even in the field of heterosexual conduct (see paragraph 15 above).

Although the applicant qualified this account of the facts as grossly exaggerated, the Court acknowledges that such differences do exist to a

certain extent and are a relevant factor. As the Government and the Commission both emphasised, in assessing the requirements of the protection of morals in Northern Ireland, the contested measures must be seen in the context of Northern Irish society.

The fact that similar measures are not considered necessary in other parts of the United Kingdom or in other member States of the Council of Europe does not mean that they cannot be necessary in Northern Ireland (see, mutatis mutandis, the above-mentioned Sunday Times judgment, pp. 37-38, par. 61; cf. also the above-mentioned Handyside judgment, pp. 26-28, par. 54 and 57). Where there are disparate cultural communities residing within the same State, it may well be that different requirement, both moral and social, will face the governing authorities.

57. As the Government correctly submitted, it follows that the moral climate in Northern Ireland in sexual matters, in particular as evidenced by the opposition to the proposed legislative change, is one of the matters which the national authorities may legitimately take into account in exercising their discretion. There is, the Court accepts, a strong body of opposition stemming from a genuine and sincere conviction shared by a large number of responsible members of the Northern Irish community that a change in the law would be seriously damaging to the moral fabric of society (see paragraph 25 above). This opposition reflects - as do in another way the recommendations made in 1977 by the Advisory Commission (see paragraph 23 above - a view both of the requirements of morals in Northern Ireland and of the measures thought within the community to be necessary to preserve prevailing moral standards.

Whether this point of view be right or wrong, and although it may be out of line with current attitudes in other communities, its existence among an important sector of Northern Irish society is certainly relevant for the purposes of Article 8 par. 2 (art. 8-2).

58. The Government argued that this conclusion is further strengthened by the special constitutional circumstances of Northern Ireland (described above at paragraphs 19 and 20). In the period between 1921 (when the Northern Ireland Parliament first met) and 1972 (when it last sat), legislation in the social field was regarded as a devolved matter within the exclusive domain of that Parliament. As a result of the introduction of "direct rule" from Westminster, the United Kingdom Government, it was said, had a special responsibility to take full account of the wishes of the people of Northern Ireland before legislating on such matters.

In the present circumstances of direct rule, the need for caution and for sensitivity to public opinion in Northern Ireland is evident. However, the Court does not consider it conclusive in assessing the "necessity", for the purposes of the Convention, of maintaining the impugned legislation that the decision was taken, not by the former Northern Ireland Government and

Parliament, but by the United Kingdom authorities during what they hope to be an interim period of direct rule.

59. Without any doubt, faced with these various considerations, the United Kingdom Government acted carefully and in good faith; what is more, they made every effort to arrive at a balanced judgment between the differing viewpoints before reaching the conclusion that such a substantial body of opinion in Northern Ireland was opposed to a change in the law that no further action should be taken (see, for example, paragraphs 24 and 26 above). Nevertheless, this cannot of itself be decisive as to the necessity for the interference with the applicant's private life resulting from the measures being challenged (see the above-mentioned Sunday Times judgment, p. 36, par. 59). Notwithstanding the margin of appreciation left to the national authorities, it is for the Court to make the final evaluation as to whether the reasons it has found to be relevant were sufficient in the circumstances, in particular whether the interference complained of was proportionate to the social need claimed for it (see paragraph 53 above).

60. The Government right affected by the impugned legislation protects an essentially private manifestation of the human personality (see paragraph 52, third sub-paragraph, above).

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States (see, mutatis mutandis, the above-mentioned Marckx judgment, p. 19, par. 41, and the Tyrer judgment of 25 April 1978, Series A no. 26, pp. 15-16, par. 31). In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent (see paragraph 30 above). No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.

It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may

be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.

61. Accordingly, the reasons given by the Government, although relevant, are not sufficient to justify the maintenance in force of the impugned legislation in so far as it has the general effect of criminalising private homosexual relations between adult males capable of valid consent. In particular, the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent. "Decriminalisation" does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features.

To sum up, the restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved.

62. In the opinion of the Commission, the interference complained of by the applicant can, in so far as he is prevented from having sexual relations with young males under 21 years of age, be justified as necessary for the protection of the rights of others (see especially paragraphs 105 and 116 of the report). This conclusion was accepted and adopted by the Government, but disputed by the applicant who submitted that the age of consent for male homosexual relations should be the same as that for heterosexual and female homosexual relations that is, 17 years under current Northern Ireland law (see paragraph 15 above).

The Court has already acknowledged the legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth (see paragraph 49 above). However, it falls in the first instance to the national authorities to decide on the appropriate safeguards of this kind required for the defence of morals in their society and, in particular, to fix the age under which young people should have the protection of the criminal law (see paragraph 52 above).

D. Conclusion

63. Mr. Dudgeon has suffered and continues to suffer an unjustified interference with his right to respect for his private life. There is accordingly a breach of Article 8 (art. 8).

II. THE ALLEGED BREACH OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 8 (art. 14+8)

64. Article 14 (art. 14) reads as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association, with a national minority, property, birth or other status."

65. The applicant claimed to be a victim of discrimination in breach of Article 14 taken in conjunction with Article 8 (art. 14+8), in that he is subject under the criminal law complained of to greater interference with his private life than are male homosexuals in other parts of the United Kingdom and heterosexuals and female homosexuals in Northern Ireland itself. In particular, in his submission Article 14 (art. 14) requires that the age of consent should be the same for all forms of sexual relations.

66. When dealing with the issues under Article 14 (art. 14), the Commission and likewise the Government distinguished between male homosexual acts involving those under and those over 21 years of age.

The Court has already held in relation to Article 8 (art. 8) that it falls in the first instance to the national authorities to fix the age under which young people should have the protection of the criminal law (see paragraph 62 above). The current law in Northern Ireland is silent in this respect as regards the male homosexual acts which it prohibits. It is only once this age has been fixed that an issue under Article 14 (art. 14) might arise; it is not for the Court to pronounce upon an issue which does not arise at the present moment.

67. Where a substantive Article of the Convention has been invoked both on its own and together with Article 14 (art. 14) and a separate breach has been found of the substantive Article, it is not generally necessary for the Court also to examine the case under Article 14 (art. 14), though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case (see the Airey judgment of 9 October 1979, Series A no. 32 p. 16, par. 30).

68. This latter condition is not fulfilled as regards the alleged discrimination resulting from the existence of different laws concerning male homosexual acts in various parts of the United Kingdom (see paragraphs 14, 17 and 18 above). Moreover, Mr. Dudgeon himself conceded that, if the Court were to find a breach of Article 8 (art. 8), then this particular question would cease to have the same importance.

69. According to the applicant, the essential aspect of his complaint under Article 14 (art. 14) is that in Northern Ireland male homosexual acts, in contrast to heterosexual and female homosexual acts, are the object of criminal sanctions even when committed in private between consenting adults.

The central issue in the present case does indeed reside in the existence in Northern Ireland of legislation which makes certain homosexual acts punishable under the criminal law in all circumstances. Nevertheless, this aspect of the applicant's complaint under Article 14 (art. 14) amounts in effect to the same complaint, albeit seen from a different angle, that the Court has already considered in relation to Article 8 (art. 8); there is no call to rule on the merits of a particular issue which is part of and absorbed by a wider issue (see, mutatis mutandis, the Deweer judgment of 27 February 1980, Series A no. 35, pp. 30-31, par. 56 in fine). Once it has been held that the restriction on the applicant's right to respect for his private sexual life give rise to a breach of Article 8 (art. 8) by reason of its breadth and absolute character (see paragraph 61 in fine above), there is no useful legal purpose to be served in determining whether he has in addition suffered discrimination as compared with other persons who are subject to lesser limitations on the same right. This being so, it cannot be said that a clear inequality of treatment remains a fundamental aspect of the case.

70. The Court accordingly does not deem it necessary to examine the case under Article 14 (art. 14) as well.

III. THE APPLICATION OF ARTICLE 50 (art. 50)

71. Counsel for the applicant stated that, should the Court find the Convention to have been violated, his client would seek just satisfaction under Article 50 (art. 50) in respect of three matters: firstly, the distress, suffering and anxiety resulting from the police investigation in January 1976; secondly, the general fear and distress suffered by Mr. Dudgeon since he was 17 years of age; and finally, legal and other expenses. Counsel put forward figures of 5,000 pounds under the first head, 10,000 pounds under the second and 5,000 pounds under the third.

The Government, for their part, asked the Court to reserve the question.

72. Consequently, although it was raised under Rule 47 bis of the Rules of Court, this question is not ready for decision and must be reserved; in the circumstances of the case, the Court considers that the matter should be referred back to the Chamber in accordance with Rule 50 par. 4 of the Rules of Court.

FOR THE REASONS, THE COURT

1. Holds by fifteen votes to four that there is a breach of Article 8 (art. 8) of the Convention;

2. Holds by fourteen votes to five that it is not necessary also to examine the case under Article 14 taken in conjunction with Article 8 (art. 14+8);

3. Holds unanimously that the question of the application of Article 50 (art. 50) is not ready for decision;
(a) accordingly reserves the whole of the said question;
(b) refers the said question back to the Chamber under Rule 50 par. 4 of the Rules of Court.

Done in English and in French, the English text being authentic, at the Human Rights Building, Strasbourg, this twenty-second day of October, one thousand nine hundred and eighty-one.

For the President
John CREMONA
Judge

Marc-André EISSEN
Registrar

The following separate opinions are annexed to the present judgment in accordance with Article 51 par. 2 (art. 51-2) of the Convention and Rule 50 par. 2 of the Rules of Court:

- dissenting opinion of Mr. Zekia;

- dissenting opinion of Mr. Evrigenis and Mr. García de Enterría;

- dissenting opinion of Mr. Matscher;

- dissenting opinion of Mr. Pinheiro Farinha;

- partially dissenting opinion of Mr. Walsh.

J. C.
M.-A.E.

DISSENTING OPINION OF JUDGE ZEKIA

I am dealing only with the crucial point which led the Court to find a breach of Article 8 § 1 (art. 8-1) of the Convention by the respondent Government.

The Acts of 1861 and 1885 still in force in Northern Ireland prohibit gross indecency between males and buggery. These enactments in their unamended form are found to interfere with the right to respect for the private life of the applicant, admittedly a homosexual.

The decisive central issue in this case is therefore whether the provisions of the aforesaid laws criminalising homosexual relations were necessary in a democratic society for the protection of morals and for the protection of the rights and freedoms of others, such a necessity being a prerequisite for the validity of the enactment under Article 8 § 2 (art. 8-2) of the Convention.

After taking all relevant facts and submissions made in this case into consideration, I have arrived at a conclusion opposite to the one of the majority. I proceed to give my reasons as briefly as possible for finding no violation on the part of the respondent Government in this case.

1. Christian and Moslem religions are all united in the condemnation of homosexual relations and of sodomy. Moral conceptions to a great degree are rooted in religious beliefs.

2. All civilised countries until recent years penalised sodomy and buggery and akin unnatural practices.

In Cyprus criminal provisions similar to those embodied in the Acts of 1861 and 1885 in the North of Ireland are in force. Section 171 of the Cyprus Criminal Code, Cap. 154, which was enacted in 1929, reads:

> "Any person who (a) has carnal knowledge of any person against the order of nature, or (b) permits a male person to have carnal knowledge of him against the order of nature is guilty of a felony and is liable to imprisonment for five years."

Under section 173, anyone who attempts to commit such an offence is liable to 3 years' imprisonment.

While on the one hand I may be thought biased for being a Cypriot Judge, on the other hand I may be considered to be in a better position in forecasting the public outcry and the turmoil which would ensue if such laws are repealed or amended in favour of homosexuals either in Cyprus or in Northern Ireland. Both countries are religious-minded and adhere to moral standards which are centuries' old.

3. While considering the respect due to the private life of a homosexual under Article 8 § 1 (art. 8-1), we must not forget and must bear in mind that respect is also due to the people holding the opposite view, especially in a country populated by a great majority of such people who are completely against unnatural immoral practices. Surely the majority in a democratic society are also entitled under Articles 8, 9 and 10 (art. 8, art. 9, art. 10) of the Convention and Article 2 of Protocol No. 1 (P1-2) to respect for their

religious and moral beliefs and entitled to teach and bring up their children consistently with their own religious and philosophical convictions.

A democratic society is governed by the rule of the majority. It seems to me somewhat odd and perplexing, in considering the necessity of respect for one's private life, to underestimate the necessity of keeping a law in force for the protection of morals held in high esteem by the majority of people.

A change of the law so as to legalise homosexual activities in private by adults is very likely to cause many disturbances in the country in question. The respondent Government were justified in finding it necessary to keep the relevant Acts on the statute book for the protection of morals as well as for the preservation of public peace.

4. If a homosexual claims to be a sufferer because of physiological, psychological or other reasons and the law ignores such circumstances, his case might then be one of exculpation or mitigation if his tendencies are curable or incurable. Neither of these arguments has been put forward or contested. Had the applicant done so, then his domestic remedies ought to have been exhausted. In fact he has not been prosecuted for any offence.

From the proceedings in this case it is evident that what the applicant is claiming by virtue of Article 8 §§ 1 and 2 (art. 8-1, art. 8-2) of the European Convention is to be free to indulge privately into homosexual relations.

Much has been said about the scarcity of cases coming to court under the prohibitive provisions of the Acts we are discussing. It was contended that this fact indicates the indifference of the people in Northern Ireland to the non-prosecution of homosexual offences committed. The same fact, however, might indicate the rarity of homosexual offences having been perpetrated and also the unnecessariness and the inexpediency of changing the law.

5. In ascertaining the nature and scope of morals and the degree of the necessity commensurate to the protection of such morals in relation to a national law, adverted to in Articles 8, 9 and 10 (art. 8, art. 9, art. 10) of the European Convention on Human Rights, the jurisprudence of this Court has already provided us with guidelines:

> "A" The conception of morals changes from time to time and from place to place. There is no uniform European conception of morals. State authorities of each country are in a better position than an international judge to give an opinion as to the prevailing standards of morals in their country. (Handyside judgment of 7 December 1976, Series A no. 24, p. 22, § 48)

It cannot be disputed that the moral climate obtaining in Northern Ireland is against the alteration of the law under consideration, the effect of which alteration, if made, would be in some way or other to license immorality.

> "B" State authorities likewise are in a better position to assess the extent to which the national legislation should necessarily go in restricting, for the protection of morals and of the rights of others, rights secured under the relevant Articles of the Convention.

The legislative assembly competent to alter the laws under review refrained to do so, believing it to be necessary to maintain them for the protection of morals prevailing in the region and for keeping the peace. The Contracting States are entitled to a margin of appreciation, although undoubtedly not an unlimited one.

Taking account of all relevant facts and points of law and the underlying principles for an overall assessment of the situation under consideration, I fail to find that the keeping in force in Northern Ireland of Acts - which date from the last century - prohibiting gross indecency and buggery between male adults has become unnecessary for the protection of morals and of the rights of others in that country. I have come to the conclusion therefore that the respondent Government did not violate the Convention.

DISSENTING OPINION OF JUDGES EVRIGENIS AND GARCIA DE ENTERRIA

(Translation)

Being of the opinion that the case should also have been examined under Article 14 read in conjunction with Article 8 (art. 14+8), but without prejudging our position on the merits of the matter, we have felt compelled to vote against point no. 2 in the operative provisions of the judgment for the following reasons:

At least the difference of treatment in Northern Ireland between male homosexuals and female homosexuals and between male homosexuals and heterosexuals (see paragraphs 65 and 69 of the judgment) - a difference in treatment relied on in argument by the applicant - ought to have been examined under Article 14 read in conjunction with Article 8 (art. 14+8). Even accepting the restrictive formula enunciated by the Court in the Airey judgment and applied in the judgment in the present case (at paragraph 67: "a clear inequality of treatment" being "a fundamental aspect of the case"), it would be difficult to assert that these conditions were not plainly satisfied in the circumstances. In any event, to interpret Article 14 (art. 14) in the restrictive manner heralded in the Airey judgment deprives this fundamental provision in great part of its substance and function in the system of substantive rules established under the Convention.

DISSENTING OPINION OF JUDGE MATSCHER

(Translation)

I. As concerns the alleged interference with an article 8 (art. 8) right

Although I agree with the general tenor of the Court's reasoning, I take a somewhat different view of the facts of the case. As a result, I am unable to concur with the conclusions of the judgment on the issue of a violation of Article 8 (art. 8) of the Convention. I will therefore endeavour to set out my views below.

Article 8 (art. 8) does not at all require that the State should consider homosexuality - in whatever form it may be manifested - as an alternative that is equivalent to heterosexuality and that, in consequence, its laws should treat each of them on the same footing. Indeed, the judgment quite rightly adverts to this point on several occasions.

On the other hand, it does not follow from the above that the criminal prosecution of homosexual acts committed in private between consenting adults (leaving aside certain special situations as, for example, where there has been abuse of a state of dependence or where the acts occur in certain contexts of communal living such as a boarding school, barracks, etc.) is "necessary", within the meaning of Article 8 § 2 (art. 8-2), for the protection of those values which a given society legitimately (likewise for the purposes of the Convention) wishes to preserve. I therefore agree with the general tenor of the reasoning in the judgment as regards the interpretation to be given to Article 8 (art. 8), and in particular to paragraph 2 of that Article (art. 8-2), in the present case.

In this connection, however, there are two arguments to which I cannot subscribe.

At paragraph 51, it is said that the adjective "necessary" implies the existence of a "pressing social need" for the interference in question (reference to the Handyside judgment of 7 December 1976, Series A no. 24, § 48). To my mind, however, once it has been granted that an aim is legitimate for the purposes of Article 8 § 2 (art. 8-2), any measure directed towards the accomplishment of that aim is necessary if failure to take the measure would create a risk that that aim would not be achieved. It is only in this context that one can examine the necessity for a certain measure and, adding a further factor, the proportionality between the value attaching to the aim and the seriousness of the measure (see paragraphs 54 and 60 in fine). Since the adjective "necessary" thus refers solely to the measures (that is, the means), it does not permit an assessment whether the aim itself is legitimate, something that the judgment appears to do when it links "necessary" with "pressing social need".

Furthermore, according to paragraph 60, second sub-paragraph, no evidence has been adduced to show that the attitude of tolerance adopted in practice by the Northern Ireland authorities has been injurious to moral standards in the region. I cannot but regard this as a purely speculative argument, devoid of any foundation and which thus has no probative value whatsoever.

My disagreement relates in the first place to the evaluation made of the legal provisions and the measures of implementation of which the applicant complains to have been a victim in concreto and to be still a potential victim by reason of the existence of the impugned legislation.

(a) The Government asserted that for a long time (to be precise, between 1972 and 1980) there have been no criminal prosecutions in circumstances corresponding to those of the present case. No one contradicted this assertion which, moreover, would more than appear to be a correct statement of the reality. It is true that at common law a prosecution could also be brought by a private individual, subject to the Director of Public Prosecutions' power to discontinue the proceedings. However, here again there have been no examples of prosecutions of this kind during the period in question (paragraphs 29-30).

I conclude from this that in practice there are no prosecutions for homosexual acts committed in private between consenting adults. The absence of any form of persecution seems to be well established by the existence of a number of associations (the Commission lists at least five in paragraph 30 of its report) - the applicant being the Secretary of one of them - which pursue their activities hardly in secret but more or less without any constraint and are, amongst other things, engaged in conducting a campaign for the legalisation of homosexuality, and some of whose members, if not the majority, openly profess - it may be supposed - homosexual tendencies.

In these circumstances, the existence of "fear, suffering and psychological distress" experienced by the applicant as a direct result of the laws in force - something which the Commission and the Court saw no reason to doubt (paragraphs 40-41) – seems to me, on the contrary, to be extremely unlikely.

To sum up, I believe that it is not the letter of the law that has to be taken into account, but the actual situation obtaining in Northern Ireland, that is to say, the attitude in fact adopted for at least ten years by the competent authorities in respect of male homosexuality.

The situation is therefore fundamentally different from that in the Marckx case (paragraph 27 of the judgment of 13 June 1979, Series A no. 31) to which the present judgment refers (in paragraph 41): in the former case, the provisions of Belgian civil law complained of applied directly to the applicant who suffered their consequences in her family life; in the instant case, the legislation complained of is formally in force but as a matter of fact it is not applied as regards those of its aspects which are being

attacked. This being so, the applicant and those like him can organise their private life as they choose without any interference on the part of the authorities.

Of course, the applicant and the organisations behind him are seeking more: they are seeking the express and formal repeal of the laws in force, that is to say a "charter" declaring homosexuality to be an alternative equivalent to heterosexuality, with all the consequences that that would entail (for example, as regards sex education). However, this is in no way required by Article 8 (art. 8) of the Convention.

(b) The police action on 21 January 1976 (paragraphs 30-31) against the applicant can also be seen in a different light: in the particular circumstances, the police were executing a warrant under the Misuse of Drugs Act 1971. During the search, the police found papers providing evidence of his homosexual tendencies. The reason why the police pursued their enquiries was probably also to investigate whether the applicant did not have homosexual relations with minors as well. Indeed, it is well known that this is a widespread tendency in homosexual circles and the fact that the applicant himself was engaged in a campaign for the lowering of the legal age of consent points in the same direction; furthermore, the enquiries in question took place in the context of a more extensive operation on the part of the police, the purpose of which was to trace a minor who was missing from home and believed to be associating with homosexuals (see on this point the reply of the Government to question 8, document Court (81) 32). Furthermore, the file on the case was closed by the competent judicial authorities.

This overall evaluation of the facts leads me to the view that the applicant cannot claim to be the victim of an interference with his private life. For this reason I conclude that there has not been a violation of Article 8 (art. 8) of the Convention in the present case.

II. As concerns the alleged breach of article 14 read in conjunction with article 8 (art. 14+8)

The applicant alleged a breach of Article 14 read in conjunction with Article 8 (art. 14+8) on three (or even four) counts: (a) the existence of different laws in the different parts of the United Kingdom; (b) distinctions drawn in respect of the age of consent; (c) and (d) differences of treatment under the criminal law between male homosexuality and female homosexuality and between homosexuality and heterosexuality.

As far as the age of consent is concerned ((b)), the Court rightly notes (at paragraph 66, second sub-paragraph) that this is a matter to be fixed in the first instance by the national authorities. The reasoning of the majority of the Court runs as follows: male homosexuality is made punishable under the criminal law in Northern Ireland without any distinction as to the age of the

persons involved; consequently, it is only once this age has been fixed that an issue under Article 14 (art. 14) might arise. This reasoning is coherent and there is nothing to add.

To my mind, the competent authorities do in fact draw a distinction according to age and exhibit tolerance only in relation to homosexuality between consenting adults. I find that, for reasons whose obviousness renders any explanation superfluous, this differentiation is perfectly legitimate for the purposes of Article 14 (art. 14) and thus gives rise to no discrimination.

As regards the other complaints ((a), (c) and (d)), the majority of the Court state that when a separate breach of a substantive Article of the Convention has been found, there is generally no need for the Court also to examine the case under Article 14 (art. 14); the position is otherwise only if a clear inequality of treatment in the enjoyment of the right at issue is a fundamental aspect of the case (reference to the Airey judgment of 9 October 1979, Series A no. 32, paragraph 30). This latter condition is said not be fulfilled in the circumstances. Furthermore, the judgment continues, there is no call to rule on the merits of a particular issue which is part of and absorbed by a wider issue (reference to the Deweer judgment of 27 February 1980, Series A no. 35, paragraph 56 in fine), this being the position in the present case. In these conditions, there appeared to the majority to be no useful legal purpose to be served in determining whether the applicant has in addition suffered discrimination as compared with other persons subject to lesser limitations on the same right.

I regret that I do not feel able to agree with this line of reasoning. In my view, when the Court is called on to rule on a breach of the Convention which has been alleged by the applicant and contested by the respondent Government, it is the Court’s duty, provided that the application is admissible, to decide the point by giving an answer on the merits of the issue that has been raised. The Court cannot escape this responsibility by employing formulas that are liable to limit excessively the scope of Article 14 (art. 14) to the point of depriving it of all practical value.

Admittedly, there are extreme situations where an existing difference of treatment is so minimal that it entails no real prejudice, physical or moral, for the persons concerned. In that event, no discrimination within the meaning of Article 14 (art. 14) could be discerned, even if on occasions it might be difficult to produce an objective and rational explanation for the difference of treatment. It is only in such conditions that, in my opinion, the maxim "de minimis non curat praetor" would be admissible (see, mutatis mutandis, my separate opinion appended to the Marckx judgment, p. 58). I do not, however, find these conditions satisfied in the present case, with the result that a definite position must be taken regarding the alleged violation of Article 14 (art. 14) in relation to the complaints made by the applicant.

(a) The diversity of domestic laws, which is characteristic of a federal State, can in itself never constitute a discrimination, and there is no necessity to justify diversity of this kind. To claim the contrary would be to disregard totally the very essence of federalism.

(c) and (d) The difference of character between homosexual conduct and heterosexual conduct seems obvious, and the moral and social problems to which they give rise are not at all the same. Similarly, there exists a genuine difference, of character as well as of degree, between the moral and social problems raised by the two forms of homosexuality, male and female. The differing treatment given to them under the criminal law is thus founded, to my mind, on clearly objective justifications.

Accordingly, I come to the conclusion that there has been no breach of Article 14 read in conjunction with Article 8 (art. 14+8) in respect of any of the heads of complaint relied on by the applicant.

DISSENTING OPINION OF JUDGE PINHEIRO FARINHA

(Translation)

I am unable to agree with the views and conclusions expressed in the present case by my eminent colleagues as regards the breach by the United Kingdom of Article 8 (art. 8) of the Convention.

In my opinion, there was no victim and the Court does not have jurisdiction to take cognisance of a breach alleged by someone who is not a victim.

The action by the police was decided on (paragraph 33) in implementation of the Misuse of Drugs Act 1971 and not with a view to taking action under the criminal law against homosexuality.

The police investigation "took place in the context of a more extensive operation on the part of the police, the object of which was to trace a minor who was missing from home and believed to be associating with homosexuals" (dissenting opinion of Judge Matscher) and it did not lead to any criminal prosecution being brought (paragraph 41).

The file on the case was closed by the prosecuting authorities, despite the fact that the applicant was the secretary of an organisation campaigning for the legalisation of homosexuality and notwithstanding the proof of his homosexual tendencies.

I come to the conclusion that because the legislation was not enforced against him and is applicable not directly but only after a concrete decision by the authorities, the applicant was not a victim.

There being no victim, the conclusion must be that there was no breach of Article 8 (art. 8) or of Article 14 taken together with Article 8 (art. 14+8).

I would further emphasise that "there can be no denial that some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, can be justified as ‘necessary in a democratic society’", and that "this necessity for some degree of control may even extend to consensual acts committed in private" (paragraph 49).

PARTIALLY DISSENTING OPINION OF JUDGE WALSH

Is the applicant a "victim" within the meaning of Article 25 (art. 25)?

1. The law of Northern Ireland does not make homosexuality a crime nor does it make all homosexual activities criminal. The 1885 Act is the only one of the two legislative provisions attacked in these present proceedings that can be described as dealing solely with homosexual activities. The Act of 1885 makes criminal the commission of acts of gross indecency between male persons whether in private or in public. The provisions of the Act of 1861 which is also impugned by the applicant applies equally to heterosexual activities and homosexual activities. The applicant’s complaint is directed only towards the application of the provision of the 1861 Act to homosexual activities of the type mentioned in the section impugned. Of these, the Court is in reality concerned with but one, namely sodomy between male persons.

2. The Act of 1885 does not specifically designate any particular acts of gross indecency but simply prohibits "gross indecency". Acts of indecency between male persons are not per se criminal offences but only such of them as amount to "gross indecency". What particular acts in any given case may be held to amount to gross indecency is a matter for the court, which means in effect the jury, to decide on the particular facts of each case.

3. The applicant did not claim that he had at any time indulged in any of the activities prohibited either by the law of 1861 or by the law of 1885, nor has he stated that he desires to indulge in them or that he intends to do so. In effect his case is that if he should choose to engage in any of the prohibited activities the effect of the law, if enforced, would be to violate the protection of his private life which is guaranteed by Article 8 (art. 8) of the Convention. In fact no action has been taken against him by the authorities under either of the legislative provisions referred to.

4. It is true that the police displayed an interest in the question of whether or not he had indulged in homosexual activities. It is not known to the Court whether or not the activities in question constituted offences under either of the impugned legislative provisions. The documentary material which gave rise to this police interest came to light during the execution by the police of a search warrant issued pursuant to the laws which prohibit the misuse of drugs. The applicant was requested to accompany the police to the police station for the purpose, inter alia, of continuing inquiries into his suspected homosexual activities. The applicant voluntarily agreed to go to the police station. If he had been brought there against his will solely for the purpose of being interrogated about his alleged homosexual activities, he would have been the victim of false imprisonment and under the law of Northern Ireland he would have had an action for damages in the ordinary civil

courts. So far as is disclosed by the evidence in the application, no such action has ever been brought or contemplated and it has not been suggested that the applicant's visit to the police station was other than purely voluntary. It is common case that at the police station he was informed by the police that he was under no obligation to answer any questions or to make any statement. Notwithstanding this, the applicant voluntarily made a statement the contents of which have not been disclosed to the Court. The Court does not know whether the statement was incriminatory or exculpatory. No prosecution was ever instituted against the applicant either by the police or by the Director of Public Prosecutions in respect of any alleged illegal homosexual activities.

No question of the privacy of the applicant's home being invaded arises as the entry to his house was carried out under a valid search warrant dealing with the abuse of drugs and no complaint has been made about the warrant or the entry. Some personal papers, including correspondence and diaries belonging to the applicant in which were described homosexual activities, were taken away by the police. The Court has not been informed whether the papers were irrelevant to the suspected drug offences being investigated and in respect of which there has been no complaint.

5. It is clear that the applicant's case is more in the nature of a "class action". In so far as he is personally concerned, it scarcely amounts to a quia timet action. Having suffered no prosecution himself he is in effect asking the Court to strike down two legislative provisions of a member State. The Court has no jurisdiction of a declaratory character in this area unrelated to an injury actually suffered or alleged to have been suffered by the applicant. In my view, if the Court were to undertake any such competence in cases where the applicant has neither been a victim nor is imminently to be a victim, the consequences would be far-reaching in every member State.

6. In my opinion the applicant has not established that he is a victim within the meaning of Article 25 (art. 25) of the Convention and he is therefore not entitled to the ruling he seeks.

Alleged breach of Article 8 (art. 8)

7. If the applicant is to be regarded as being a victim within the meaning of Article 25 (art. 25), then the applicability of Article 8 (art. 8) to his case falls to be considered.

Paragraph 1 of Article 8 (art. 8-1) provides that "everyone has the right to respect for his private and family life, his home and his correspondence". There is no suggestion that any point relating to family life arises in this case. Therefore the complaint is in reality one to a claim of right to indulge in any homosexual activities in the course of his private life and, presumably, in private.

8. The first matter to consider is the meaning of paragraph 1 of Article 8 (art. 8-1). Perhaps the best and most succinct legal definition of privacy is that given by Warren and Brandeis – it is "the right to be let alone". The

question is whether under Article 8 § 1 (art. 8-1), the right to respect for one's private life is to be construed as being an absolute right irrespective of the nature of the activity which is carried on as part of the private life and no interference with this right under any circumstances is permitted save within the terms of paragraph 2 of Article 8 (art. 8-2). This appears to be the interpretation put upon it by the Court in its judgment.

It is not essentially different to describe the "private life" protected by Article 8 § 1 (art. 8-1) as being confined to the private manifestation of the human personality. In any given case the human personality in question may in private life manifest dangerous or evil tendencies calculated to produce ill-effects upon himself or upon others. The Court does not appear to consider as a material factor that the manifestation in question may involve more than one person or participation by more than one person provided the manifestation can be characterised as an act of private life. If for the purposes of this case this assumption is to be accepted, one proceeds to the question of whether or not the interference complained of can be justified under paragraph 2 (art. 8-2). This in turn begs the question that under Article 8 (art. 8) the inseparable social dimensions of private life or "private morality" are limited to the confines of paragraph 2 of Article 8 (art. 8-2). It is beyond question that the interference, if there was such, was in accordance with the law. The question posed by paragraph 2 (art. 8-2) is whether the interference permitted by the law is necessary in a democratic society in the interests of the protection of health or morals or the rights and freedoms of others.

9. This raises the age-old philosophical question of what is the purpose of law. Is there a realm of morality which is not the law's business or is the law properly concerned with moral principles? In the context of United Kingdom jurisprudence and the true philosophy of law this debate in modern times has been between Professor H. L. A. Hart and Lord Devlin. Generally speaking the former accepts the philosophy propounded in the last century by John Stuart Mill while the latter contends that morality is properly the concern of the law. Lord Devlin argues that as the law exists for the protection of society it must not only protect the individual from injury, corruption and exploitation but it

> "must protect also the institutions and the community of ideas, political and moral, without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies".

He claims that the criminal law of England not only "has from the very first concerned itself with moral principles but continues to concern itself with moral principles". Among the offences which he pointed to as having been brought within the criminal law on the basis of moral principle, notwithstanding that it could be argued that they do not endanger the public, were euthanasia, the killing of another at his own request, suicide pacts,

duelling, abortion, incest between brother and sister. These are acts which he viewed as ones which could be done in private and without offence to others and need not involve the corruption or exploitation of others. Yet, as he pointed out, no one has gone so far as to suggest that they should all be left outside the criminal law as matters of private morality.

10. It would appear that the United Kingdom does claim that in principle it can legislate against immorality. In modern United Kingdom legislation a number of penal statutes appear to be based upon moral principles and the function of these penal sanctions is to enforce moral principles. Cruelty to animals is illegal because of a moral condemnation of enjoyment derived from the infliction of pain upon sentient creatures. The laws restricting or preventing gambling are concerned with the ethical significance of gambling which is confined to the effect that it may have on the character of the gambler as a member of society. The legislation against racial discrimination has as its object the shaping of people's moral thinking by legal sanctions and the changing of human behaviour by having the authority to punish.

11. The opposite view, traceable in English jurisprudence to John Stuart Mill, is that the law should not intervene in matters of private moral conduct more than necessary to preserve public order and to protect citizens against what is injurious and offensive and that there is a sphere of moral conduct which is best left to individual conscience just as if it were equitable to liberty of thought or belief. The recommendations of the Wolfenden Committee relied partly upon this view to favour the non-intervention of the law in case of homosexual activities between consenting adult males. On this aspect of the matter the Wolfenden Committee stated:

> "There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice in action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality."

This aspect of the Wofenden Committee's report apparently commends itself to the Court (see paragraphs 60 and 61 of the judgment).

12. The Court also agrees with the conclusion in the Wolfenden Report to the effect that there is a necessity for some degree of control even in respect of consensual acts committed in private notably where there is a call "to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence" (paragraph 49 of the judgment). Furthermore, the Court accepts that some form of legislation is necessary to protect not only particular sections of society but also the moral ethos of

society as a whole (ibid.). However, experience has shown that exploitation and corruption of others is not confined to persons who are young, weak in body or mind or inexperienced or in a state of physical, moral or economic dependence.

13. The fact that a person consents to take part in the commission of homosexual acts is not proof that such person is sexually orientated by nature in that direction. A distinction must be drawn between homosexuals who are such because of some kind of innate instinct or pathological constitution judged to be incurable and those whose tendency comes from a lack of normal sexual development or from habit or from experience or from other similar causes but whose tendency is not incurable. So far as the incurable category is concerned, the activities must be regarded as abnormalities or even as handicaps and treated with the compassion and tolerance which is required to prevent those persons from being victimised in respect of tendencies over which they have no control and for which they are not personally responsible. However, other considerations are raised when these tendencies are translated into activities. The corruption for which the Court acknowledges need for control and the protection of the moral ethos of the community referred to by the Court may be closely associated with the translation of such tendencies into activities. Even assuming one of the two persons involved has the incurable tendency, the other may not. It is known that many male persons who are heterosexual or pansexual indulge in these activities not because of any incurable tendency but for sexual excitement. However, it is to be acknowledged that the case for the applicant was argued on the basis of the position of a male person who is by nature homosexually predisposed or orientated. The Court, in the absence of evidence to the contrary, has accepted this as the basis of the applicant's case and in its judgment rules only in respect of males who are so homosexually orientated (see, for example, paragraphs 32, 41 and 60 of the judgment).

14. If it is accepted that the State has a valid interest in the prevention of corruption and in the preservation of the moral ethos of its society, then the State has a right to enact such laws as it may reasonably think necessary to achieve these objects. The rule of law itself depends on a moral consensus in the community and in a democracy the law cannot afford to ignore the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt. Virtue cannot be legislated into existence but non-virtue can be if the legislation renders excessively difficult the struggle after virtue. Such a situation can have an eroding effect on the moral ethos of the community in question. The ultimate justification of law is that it serves moral ends. It is true that many forms of immorality which can have a corrupting effect are not the subject of prohibitory or penal legislation. However such omissions do not imply a denial of the possibility of corruption or of the erosion of the moral ethos of

the community but acknowledge the practical impossibility of legislating effectively for every area of immorality. Where such legislation is enacted it is a reflection of the concern of the "prudent legislator".

Moreover, it must not be overlooked that much of the basis of the Wolfenden Committee's recommendation that homosexual relations between adult males should be decriminalised was the belief that the law was difficult to enforce and that when enforced was likely to do more harm than good by encouraging other evils such as blackmail. This is obviously not necessarily of universal validity. The relevant conditions may vary from one community to another. Experience also shows that certain sexual activities which are not in themselves contraventions of the criminal law can also be fruitful subjects for blackmail when they offend the moral ethos of the community, e.g. adultery, female homosexuality and, even, where it is not illegal, male homosexuality.

15. Sexual morality is only one part of the total area of morality and a question which cannot be avoided is whether sexual morality is "only private morality" or whether it has an inseparable social dimension. Sexual behaviour is determined more by cultural influences than by instinctive needs. Cultural trends and expectations can create drives mistakenly thought to be intrinsic instinctual urges. The legal arrangement and prescriptions set up to regulate sexual behaviour are very important formative factors in the shaping of cultural and social institutions.

16. In my view, the Court's reference to the fact that in most countries in the Council of Europe homosexual acts in private between adults are no longer criminal (paragraph 60 of the judgment) does not really advance the argument. The twenty-one countries making up the Council of Europe extend geographically from Turkey to Iceland and from the Mediterranean to the Arctic Circle and encompass considerable diversities of culture and moral values. The Court states that it cannot overlook the marked changes which have occurred in the laws regarding homosexual behaviour throughout the member States (ibid.) It would be unfortunate if this should lead to the erroneous inference that a Euro-norm in the law concerning homosexual practices has been or can be evolved.

17. Religious beliefs in Northern Ireland are very firmly held and directly influence the views and outlook of the vast majority of persons in Northern Ireland on questions of sexual morality. In so far as male homosexuality is concerned, and in particular sodomy, this attitude to sexual morality may appear to set the people of Northern Ireland apart from many people in other communities in Europe, but whether that fact constitutes a failing is, to say the least, debatable. Such views on unnatural sexual practices do not differ materially from those which throughout history conditioned the moral ethos of the Jewish, Christian and Muslim cultures.

18. The criminal law at no time has been uniform throughout the several legal systems within the United Kingdom. The Court recognises that where

there are disparate cultural communities residing within the same State it may well be that different requirements, both moral and social, will face the governing authorities (paragraph 56 of the judgment). The Court also recognises that the contested measures must be seen in the context of Northern Ireland society (ibid.). The United Kingdom Government, having responsibility for statutory changes in any of the legal systems which operate within the United Kingdom, sounded out opinion in Northern Ireland on this question of changing the law in respect of homosexual offences. While it is possible that the United Kingdom Government may have been mistaken in its assessment of the effect the sought-after change in the law would have on the community in Northern Ireland, nevertheless it is in as good, if not a better, position than is the Court to assess that situation. Criminal sanctions may not be the most desirable way of dealing with the situation but again that has to be assessed in the light of the conditions actually prevailing in Northern Ireland. In all cultures matters of sexual morality are particularly sensitive ones and the effects of certain forms of sexual immorality are not as susceptible of the same precise objective assessment that is possible in matters such as torture or degrading and inhuman treatment. To that extent the Court’s reference in its judgment (paragraph 60) to Tyrer’s case is not really persuasive in the present case. It is respectfully suggested that the Marckx judgment is not really relevant in the present case as that concerned the position of an illegitimate child whose own actions were not in any way in question.

19. Even if it should be thought, and I do not so think, that the people of Northern Ireland are more "backward" than the other societies within the Council of Europe because of their attitude towards homosexual practices, that is very much a value judgment which depends totally upon the initial premise. It is difficult to gauge what would be the effect on society in Northern Ireland if the law were now to permit (even with safeguards for young people and people in need of protection) homosexual practices of the type at present forbidden by law. I venture the view that the Government concerned, having examined the position, is in a better position to evaluate that than this Court, particularly as the Court admits the competence of the State to legislate in this matter but queries the proportionality of the consequences of the legislation in force.

20. The law has a role in influencing moral attitudes and if the respondent Government is of the opinion that the change sought in the legislation would have a damaging effect on moral attitudes then in my view it is entitled to maintain the legislation it has. The judgment of the Court does not constitute a declaration to the effect that the particular homosexual practices which are subject to penalty by the legislation in question virtually amount to fundamental human rights. However, that will not prevent it being hailed as such by those who seek to blur the essential difference between homosexual and heterosexual activities.

21. Even the Wolfenden Report felt that one of the functions of the criminal law was to preserve public order and decency and to provide sufficient safeguards against the exploitation and corruption of others and therefore recommended that it should continue to be an offence "for a third party to procure or attempt to procure an act of gross indecency between male persons whether or not the act to be procured constitutes a criminal offence". Adults, even consenting adults, can be corrupted and may be exploited by reason of their own weaknesses. In my view this is an area in which the legislature has a wide discretion or margin of appreciation which should not be encroached upon save where it is clear beyond doubt that the legislation is such that no reasonable community could enact. In my view no such proof has been established in this case.

22. In the United States of America there has been considerable litigation concerning the question of privacy and the guarantees as to privacy enshrined in the Constitution of the United States. The United States Supreme Court and other United States courts have upheld the right of privacy of married couples against legislation which sought to control sexual activities within marriage, including sodomy. However, these courts have refused to extend the constitutional guarantee of privacy which is available to married couples to homosexual activities or to heterosexual sodomy outside marriage. The effect of this is that the public policy upholds as virtually absolute privacy within marriage and privacy of sexual activity within the marriage.

It is a valid approach to hold that, as the family is the fundamental unit group of society, the interests of marital privacy would normally be superior to the State’s interest in the pursuit of certain sexual activities which would in themselves be regarded as immoral and calculated to corrupt. Outside marriage there is no such compelling interest of privacy which by its nature ought to prevail in respect of such activities.

23. It is to be noted that Article 8 § 1 (art. 8-1) of the Convention speaks of "private and family life". If the ejusdem generis rule is to be applied, then the provision should be interpreted as relating to private life in that context as, for example, the right to raise one’s children according to one’s own philosophical and religious tenets and generally to pursue without interference the activities which are akin to those pursued in the privacy of family life and as such are in the course of ordinary human and fundamental rights. No such claim can be made for homosexual practices.

24. In my opinion there has been no breach of Article 8 (art. 8) of the Convention.

Article 14 (art. 14)

25. I agree with the judgment of the Court in respect of Article 14 (art. 14).

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

COURT (CHAMBER)

CASE OF DUDGEON v. THE UNITED KINGDOM (ARTICLE 50)

(Application no. 7525/76)

JUDGMENT

STRASBOURG

24 February 1983

In the Dudgeon case,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court*, as a Chamber composed of the following judges:

Mr. R. RYSSDAL, President,
Mr. J. CREMONA,
Mr. D. EVRIGENIS,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. B. WALSH,
Sir Vincent EVANS, *Judges*,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 1 October, 23 and 24 November 1982, and on 29 January 1983,

Delivers the following judgment, which was adopted on the last mentioned date, on the application in the present case of Article 50 (art. 50) of the Convention:

PROCEDURE AND FACTS

1. The Dudgeon case was referred to the Court by the European Commission of Human Rights ("the Commission") in July 1980. The case originated in an application against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission on 22 May 1976 by a United Kingdom citizen, Mr. Jeffrey Dudgeon.

2. On 30 January 1981, the Chamber constituted to hear the case relinquished jurisdiction in favour of the plenary Court (Rule 48 of the Rules of Court). By judgment of 22 October 1981, the plenary Court held, inter alia, that the applicant had been the victim of a breach of Article 8 (art. 8) of the Convention by reason of the existence in Northern Ireland of laws which had the effect of making certain homosexual acts committed in private between consenting adult males criminal offences (Series A no. 45, point 1 of the operative provisions and paragraphs 37-63 of the reasons, pp. 27 and 17-25).

The only outstanding matter to be settled in the present case is the question of the application of Article 50 (art. 50). Accordingly, as regards

* Note by the Registrar: That is, the version of the Rules applicable when proceedings were instituted. A revised version of the Rules of Court entered into force on 1 January 1983, but only in respect of cases referred to the Court after that date.

the facts the Court will confine itself here to giving the pertinent details; for further particulars, reference should be made to paragraphs 13 to 33 of the above-mentioned judgment (ibid., pp. 7-16).

3. At the hearing held on 23 April 1981, counsel for the applicant had stated that, should the Court find a violation of the Convention, his client would be seeking just satisfaction under Article 50 (art. 50) to obtain financial compensation for damage suffered and for legal and other expenses incurred. The Government of the United Kingdom ("the Government"), for their part, had taken no stand on the matter.

In its judgment of 22 October 1981, the Court reserved the whole of the question of the application of Article 50 (art. 50) and referred it back to the Chamber under Rule 50 § 4 of the Rules of Court. On the same day, the Chamber invited the Commission to submit, within the coming two months, written observations thereon, including notification of any friendly settlement at which the Government and the applicant might have arrived (ibid., p. 48).

4. Following two extensions by the President of the Chamber of the above-mentioned time-limit and in accordance with his orders and directions, the following documents were filed at the registry:

- on 17 May 1982, the observations of the Delegates of the Commission, appended to which were, inter alia, details of the applicant’s claim;
- on 6 August 1982, a memorial from the Government;
- on 15 September 1982, the reply of the Delegates to a question raised therein by the Government;
- on 15 October 1982, through the Secretary to the Commission, the observations of the applicant on the above-mentioned memorial of the Government;
- on 15 November 1982, the comments of the Government on the latter observations.

On 8 November 1982 and 11 January 1983, the Secretariat of the Commission transmitted to the Registrar further observations by Mr. Dudgeon, which the latter had sent to the Commission on his own initiative.

These various documents revealed that it had not been possible to arrive at a friendly settlement. The Delegates did not comment on the merits of the applicant’s claim, which may be summarised as follows:

- for damage suffered as a result of the police investigation carried out in 1976, financial compensation of £5,000;
- for damage suffered by reason of the very existence of the legislation successfully complained of, financial compensation of £10,000 and a declaration by the Government that if Mr. Dudgeon were to apply for civil service employment he would not be discriminated against either on grounds of homosexuality or for having lodged his petition with the Commission;
- reimbursement of costs itemised at £4,655.

Further particulars of the claim are set out below in the section "As to the law".

5. Following the Court's judgment of 22 October 1981 and on the initiative of the Government, an Order in Council, entitled the Homosexual Offences (Northern Ireland) Order 1982, was made. Subject to certain exceptions concerning mental patients, members of the armed forces and merchant seamen, the effect of this Order, which came into force on 9 December 1982, is to "decriminalise" in Northern Ireland homosexual acts committed in private between two consenting males aged 21 years and over. The Order brings the relevant law in Northern Ireland into line with that applying in the remainder of the United Kingdom (see the above-mentioned judgment of 22 October 1981, pp. 9-10, §§ 16-18).

6. Having consulted, through the Registrar, the Agent of the Government and the Delegates of the Commission, the Chamber decided on 1 October 1982 that there was no call to hold hearings.

7. Mr. J. Cremona, Mr. F. Matscher and Mr. B. Walsh, substitute judges, took the place of Mr. Thór Vilhjálmsson, Mr. G. Lagergren and Mr. L. Liesch, who were prevented from taking part in the further consideration of the case (Rules 22 § 1 and 24 § 1 of the Rules of Court).

AS TO THE LAW

8. Article 50 (art. 50) of the Convention provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

9. The applicant claimed just satisfaction for damage allegedly caused to him by the very existence of the impugned legislation and also by the police investigation carried out in his respect in 1976, and for legal and other expenses incurred. The various items will be examined separately.

I. DAMAGE ALLEGEDLY CAUSED BY THE VERY EXISTENCE OF THE IMPUGNED LEGISLATION

10. The applicant alleged that as a consequence of the laws found by the Court to be in breach of Article 8 (art. 8) of the Convention, he had suffered "considerable damage over many years" in the form of

- psychological damage,
- prejudice to his relationships with his family and society,

- non-fulfilment of personal potential,
- injury to reputation, and
- loss of earning capacity.

The applicant put forward £10,000 as a suitable figure for compensation.

The Government questioned the extent to which the prejudice alleged could be said to derive from the existence of the impugned legislation; they suggested that many of the difficulties elaborated in the applicant's submissions derive from society's disapproval of homosexuality rather than from the existence of the laws in question. As their main submission, they invited the Court to find that its judgment of 22 October 1981 itself afforded sufficient just satisfaction for the applicant, without the need for monetary compensation. In the alternative, they contended that the figure of £10,000 was excessive in the circumstances.

11. The existence of the laws in question undoubtedly caused the applicant at least some degree of fear and psychological distress; this is clear from the grounds on which the Court found a breach of Article 8 (art. 8) (see pp. 17, 18 and 24, §§ 37, 40, 41 and 60 of the above-mentioned judgment of 22 October 1981, Series A no. 45).

However, just satisfaction is to be afforded only "if necessary", and the matter falls to be determined by the Court at its discretion, having regard to what is equitable (see the Sunday Times judgment of 6 November 1980, Series A no. 38, p. 9, § 15 in fine).

12. The unjustified interference with Mr. Dudgeon's right to respect for his private life resided in "the maintenance in force of the impugned legislation in so far as it ha[d] the general effect of criminalising private homosexual relations between adult males capable of valid consent" (Series A no. 45, p. 24, § 61). The Government inferred from the judgment of 22 October 1981 that the laws in question cannot be said always to have been in breach of the Convention, but rather became out of step with changing standards of respect for private life under Article 8 (art. 8). Paragraph 60, on which the Government relied, does indeed support their contention (ibid., pp. 23-24).

Following the Court's earlier judgment, an Order in Council has been made bringing the law of Northern Ireland into line with that of the remainder of the United Kingdom (see paragraph 5 above).

13. The applicant did not accept that the designated age of 21 years in the new legislation fully satisfied his claim under Article 8 (art. 8). However, within the framework of the procedure concerning the application of Article 50 (art. 50), the task of the Court is limited to giving a ruling on the just satisfaction, if any, to be afforded on the basis of its decision on the substantive issues of the case.

14. Subject to the question of the age of consent, Mr. Dudgeon should be regarded as having achieved his objective of securing a change in the law of Northern Ireland. This being so and having regard to the nature of the

breach found, the Court considers that in relation to this head of claim the judgment of 22 October 1981 constitutes in itself adequate just satisfaction for the purposes of Article 50 (art. 50), without it being "necessary" to afford financial compensation (see, for example, mutatis mutandis, the Le Compte, Van Leuven and De Meyere judgment of 18 October 1982, Series A no. 54, p. 8, § 16).

15. In addition to financial compensation, the applicant initially sought a formal declaration from the Government that if he were to apply for civil service employment in Northern Ireland he would not be discriminated against either on grounds of homosexuality or for having lodged his petition with the Commission. Subsequent to making this submission, he was appointed to a post in the Northern Ireland civil service. He nevertheless maintained his request, believing it to be "not unreasonable in the light of the currently precarious economic situation in the United Kingdom as a whole and Northern Ireland in particular".

The Court is not empowered under the Convention to direct a Contracting State to make a declaration of the kind requested by the applicant (see, for example, mutatis mutandis, the above-mentioned Le Compte, Van Leuven and De Meyere judgment, Series A no. 54, p. 7, § 13).

II. DAMAGE ALLEGEDLY CAUSED BY THE POLICE INVESTIGATION

16. The applicant alleged that the police investigation carried out in regard to him in 1976 (see the judgment of 22 October 1981, Series A no. 45, p. 15, § 33) had caused him distress, suffering, anxiety and inconvenience. He put forward £5,000 as a suitable figure for compensation.

As their main submission, the Government invited the Court to find that, under this head also, the judgment of 22 October 1981 provided sufficient just satisfaction. In the alternative, they contended that the figure of £5,000 was excessive.

17. As a consequence of the existence of the impugned legislation, the police had a duty to investigate the possible commission of offences. There has been no suggestion that in the instant case the police acted at all illegally under domestic law. Furthermore, Mr. Dudgeon, being under no legal constraint, could have refused their request to accompany them to the police station. The Court does not therefore accept the applicant’s contention that his position was analogous to that of persons wrongfully detained.

Nonetheless, the questioning of the applicant about the commission by him of illegal homosexual acts in private with other males aged over 21 years, together with the seizure of his private papers, constituted an intrusion into his private life. It follows from the Court’s judgment of 22 October 1981 that this intrusion was unjustified in terms of Article 8 (art. 8)

of the Convention. In addition, he was confronted for more than a year with the prospect of a criminal prosecution.

The Court is thus satisfied that at least some degree of distress, suffering, anxiety and inconvenience as alleged was sustained.

18. The police investigation carried out in 1976 was, however, simply a specific measure of implementation under the laws allowing this kind of intrusion into the applicant's private life; its significance lay in showing that the threat hanging over him was real (ibid., p. 19, § 41 in fine). The judgment of 22 October 1981 has prompted an amendment of the laws in question (see paragraph 5 above) and, in holding there to have been a breach of Article 8 (art. 8), afforded Mr. Dudgeon adequate just satisfaction for the damage caused by their existence (see paragraph 14 above). In the particular circumstances, the additional element of prejudice suffered as a consequence of the police investigation is not such as to call for further compensation by way of just satisfaction.

III. COSTS

19. The applicant has claimed a total of £4,655 for legal and other expenses referable to the proceedings before the Commission and the Court.

A. Introduction

20. Costs and expenses are recoverable under Article 50 (art. 50) provided that they were incurred by the injured party in order to seek, through the domestic legal order, prevention or rectification of a violation, to have the same established by the Commission and later by the Court or to obtain redress therefore (see, inter alia, the Neumeister judgment of 7 May 1974, Series A no. 17, pp. 20-21, § 43). Furthermore, it has to be established that the costs and expenses were actually incurred, were necessarily incurred and were also reasonable as to quantum (see, inter alia, the above-mentioned Sunday Times judgment, Series A no. 38, pp. 13-18, §§ 23-42).

21. In the submission of the Government, in so far as certain items of costs were in fact settled by the Northern Ireland Gay Rights Association ("NIGRA"), those costs are not recoverable since they were not actually incurred by the applicant himself.

The Court does not agree with this line of argument. As Mr. Dudgeon pointed out and subject to the immediately following paragraph, the legal costs of his case were incurred by him in the sense that he, as client, made himself legally liable to pay his lawyers on an agreed basis. The wholly private arrangements he made to cover his financial obligations to his lawyers are not material for the purposes of Article 50 (art. 50). Such private arrangements are to be distinguished from the situation where, the lawyer having accepted to act on the basis of receiving only the fees granted

by the Commission under its legal aid scheme, the applicant in question never was under any liability to pay any or any additional fees (see the addendum to the Commission's Rules of Procedure and the Luedicke, Belkacem and Koç judgment of 10 March 1980, Series A no. 36, p. 8, § 15). Similar reasoning applies to the other costs claimed.

B. Legal costs

1. Before the Commission

22. The applicant claimed £1,805 in respect of professional services rendered by his then legal advisers prior to the grant of legal aid by the Commission, which was effective only as from the date of the admissibility decision (3 March 1978).

Of this sum, fees amounting to £1,290 were paid by agreement on a contingency basis, that is to say, they became payable only if the application was declared admissible. Under the domestic law of Northern Ireland, an agreement to charge legal fees for contentious business on a contingency basis would be unenforceable against the client. Accordingly, Mr. Dudgeon was not under any legal liability to pay these fees; nor, since they were settled on his behalf by NIGRA, did he in fact pay them. This being so, he cannot be said in any sense actually to have incurred these fees.

With regard to the remaining items, the Court has no cause to doubt that they were actually incurred, necessarily incurred and reasonable as to quantum.

To sum up, under this head the Court awards £515.

2. Before the Court

23. The applicant claimed reimbursement of fees of £500 for junior counsel and £1,150 for senior counsel at the merits stage, and £460 for junior counsel at the Article 50 (art. 50) stage. The first two items claimed were, by agreement, charged in addition to the total sum of FF. 11,835.92 granted by the Commission as legal aid; no legal aid payment was made in regard to the proceedings concerning the application of Article 50 (art. 50).

24. Neither the Commission nor, except as indicated above (at paragraph 21), the Government suggested that the applicant had incurred no liability for costs over and above those covered by legal aid (cf., inter alia, the Airey judgment of 6 February 1981, Series A no. 41, p. 9, § 13).

In the circumstances, the Court has no cause to doubt that the fees claimed were actually incurred, necessarily incurred and reasonable as to quantum. On the latter point, it is to be noted that the sum of FF. 11,835.92 mentioned above included FF. 10,135.92 for expenses and disbursements,

as compared with FF. 1,700 only for lawyers' fees as such, and that the solicitor instructed by the applicant acted without fee.

C. Administrative costs

25. A sum of £150, additional to the FF 230 received in legal aid from the Commission for out-of-pocket expenses, was sought for photocopying, postal and telephone costs in connection with preparing the hearing before the Court and the submissions under Article 50 (art. 50).

In the circumstances, the Court has no cause to doubt that the supplementary expenses were actually incurred, necessarily incurred and reasonable as to quantum.

D. Other costs

26. Under this head, the applicant claimed firstly £540 in respect of travel and accommodation expenses incurred in attending four conferences in London with his legal advisers. The Government did not challenge the necessity of attending three conferences and accordingly stated their willingness to bear the related expenses provided that these expenses had in fact been paid by the applicant himself and not by NIGRA (as to which, see paragraph 21 above).

In the circumstances, the Court has no cause to doubt that the full costs claimed were actually incurred, necessarily incurred and reasonable as to quantum.

27. Finally, a sum of £50 was claimed for the travel and accommodation expenses of an expert who came to Strasbourg at the applicant's instance for the hearing on 23 April 1981.

The applicant's request for the expert in question to be heard as a witness was submitted at short notice before the hearing and was supported by neither the Commission nor the Government. The Court did not accede to the proposal made, but even if it had done so it could have taken evidence from the expert at a subsequent date either at a hearing before the full Court (Rule 38 § 1 read with Rule 48 § 3) or through one of its members deputed for that purpose (Rule 38 § 2 read with Rule 48 § 3). The expert's presence in Strasbourg on 23 April 1981 was thus not essential and the attendant costs cannot be regarded as having been necessarily incurred.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Declares inadmissible the claim for just satisfaction in so far as it seeks an order for a declaration by the United Kingdom;

2. Holds that the United Kingdom is to pay to the applicant, in respect of costs and expenses incurred, the sum of three thousand three hundred and fifteen pounds sterling (£3,315);

3. Rejects the remainder of the claim.

Done in English and in French, the English text being authentic, at the Human Rights Building, Strasbourg, this twenty-fourth day of February, one thousand nine hundred and eighty-three.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

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

COURT (CHAMBER)

CASE OF FUNKE v. FRANCE

(Application no. 10828/84)

JUDGMENT

STRASBOURG

25 February 1993

In the case of Funke v. France[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[***] and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr Thór VILHJÁLMSSON,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr C. RUSSO,
Mr N. VALTICOS,
Mr J.M. MORENILLA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 24 September 1992 and 27 January 1993,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 13 December 1991, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 10828/84) against the French Republic lodged with the Commission under Article 25 (art. 25) by a German national, Mr Jean-Gustave Funke, on 13 February 1984.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 paras. 1 and 2 and Article 8 (art. 6-1, art. 6-2, art. 8).

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[*] The case is numbered 82/1991/334/407. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[***] As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Mrs Ruth Funke, née Monney, who, as Mr Funke's widow, had continued the proceedings before the Commission, stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30). For reasons of convenience Mr Funke will continue to be referred to as "the applicant" although it is now Mrs Funke who is to be regarded as having this status (see, among other authorities, mutatis mutandis, the Giancarlo Lombardo v. Italy judgment of 26 November 1992, Series A no. 249-C, p. 39, para. 2).

3. On 24 January 1992 the President of the Court decided, under Rule 21 para. 6 and in the interests of the proper administration of justice, that a single Chamber should be constituted to consider the instant case and the cases of Crémieux and Miailhe v. France*.

* Cases nos. 83/1991/335/408 and 86/1991/338/411.

The Chamber to be constituted for this purpose included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On the same day, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Matscher, Mr C. Russo, Mr N. Valticos, Mr J.M. Morenilla, Mr M.A. Lopes Rocha and Mr L. Wildhaber (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the French Government ("the Government"), the Delegate of the Commission and the applicant's lawyer on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 11 June 1992 and the Government's memorial on 19 June. On 17 July the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

On 24 July the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 September 1992. The Court had held a preparatory meeting beforehand. Mr R. Bernhardt, the Vice-President of the Court, replaced Mr Ryssdal, who was unable to take part in the further consideration of the case (Rule 21 para. 5, second sub-paragraph).

There appeared before the Court:

- for the Government

Mr B. GAIN, Head of the Human Rights Section,
Department of Legal Affairs, Ministry of Foreign Affairs, *Agent*,
Miss M. PICARD, magistrat,
on secondment to the Department of Legal Affairs, Ministry of

Foreign Affairs,
Mr J. CARRÈRE, magistrat,
on secondment to the Department of Criminal Affairs and Pardons, Ministry of Justice,
Mrs C. SIGNERINICRE, Head
of the Legal Affairs Office, Department of Customs, Ministry of the Budget,
Mrs R. CODEVELLE, Inspector of Customs,
Department of Customs, Ministry of the Budget,
Mr G. ROTUREAU, Chief Inspector of Customs,
Strasbourg Regional Head Office of Customs, *Counsel*;

- for the Commission
Mr S. TRECHSEL, *Delegate*;
- for the applicant
Mr R. GARNON, avocat, *Counsel*.

The Court heard addresses by Mr Gain for the Government, Mr Trechsel for the Commission and Mr Garnon for the applicant.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. Mr Jean-Gustave Funke, a German national, was born in 1925 and died on 22 July 1987. He worked as a sales representative and lived in France, at Lingolsheim (Bas-Rhin). His widow, Mrs Ruth Funke, née Monney, is French and lives in Strasbourg.

A. The house search and the seizures

7. On 14 January 1980 three Strasbourg customs officers, accompanied by a senior police officer (officier de police judiciaire), went to the house of the applicant and his wife to obtain "particulars of their assets abroad"; they were acting on information received from the tax authorities in Metz.

Mr Funke admitted having, or having had, several bank accounts abroad for professional and family reasons and said that he did not have any bank statements at his home.

The customs officers searched the premises from 10.30 a.m. to 3.00 p.m., and discovered statements and cheque-books from foreign banks, together with a German car-repair bill and two cameras. They seized all these items and on the same day drew up a report.

B. The court proceedings

8. The customs officers' search and the seizures did not lead to any criminal proceedings for offences against the regulations governing financial dealings with foreign countries. They did, however, give rise to parallel proceedings for disclosure of documents and for interim orders.

1. The proceedings for disclosure of documents (14 January 1980 - 18 December 1990)

(a) The main proceedings

9. During their search on 14 January 1980 the customs officers asked the applicant to produce the statements for the previous three years - that is to say 1977, 1978 and 1979 - of his accounts at the Postsparkasse in Munich, the PKO in Warsaw, the Société de Banque suisse in Basle and the Deutsche Bank in Kehl and of his house-purchase savings plan at the Württembergische Bausparkasse in Leonberg and, lastly, his share portfolio at the Deutsche Bank in Kehl.

10. Mr Funke undertook to do so but later changed his mind.

(i) In the Strasbourg police court

11. On 3 May 1982 the customs authorities summoned him before the Strasbourg police court seeking to have him sentenced to a fine (amende) and a further penalty (astreinte) of 50 French francs (FRF) a day until such time as he produced the bank statements; they also made an application to have him committed to prison.

12. On 27 September 1982 the court imposed a fine of FRF 1,200 on the applicant and ordered him to produce to the customs authorities the bank statements of his accounts at the Société de Banque suisse in Basle, the PKO in Warsaw and the Deutsche Bank in Kehl and of his savings account at the Württembergische Bausparkasse in Leonberg and all documents concerning the financing of the flat he had bought at Schonach (Federal Republic of Germany), on penalty of FRF 20 per day's delay.

The reasons given for its judgment were the following:

"...

On 12.2.1980 Mr Funke told the Customs Service that he was unable to make available the documents that he had undertaken to produce.

He has provided no reason for this and has submitted no correspondence that would show he took the necessary steps to obtain the required documents or would prove that the foreign banks refused to supply him with any such document.

Mr Funke acknowledged that, together with his brother, he bought a bedsitter at Schonach (Federal Republic of Germany) and produced photocopies of the contract of

sale and of the entry in the land register; but he refused to produce documents concerning the financing of the purchase.

Article 65 of the Customs Code provides: ‘Customs officers with the rank of at least inspector ... may require production of papers and documents of any kind relating to operations of interest to their department’.

It appears from the present proceedings taken by the customs authorities that the prosecuting officer has the rank of inspector.

The documents sought, namely the bank statements and the documents relating to the financing of the purchase of the flat, can be brought within the category of documents covered by Article 65 of the Customs Code.

The same Article 65 provides in paragraph 1(i) that such requests for production may be made ‘on the premises of (chez) any natural or legal person directly or indirectly concerned in lawful or unlawful operations falling within the jurisdiction of the Customs Service’.

In this context the term ‘chez’ must not be restricted to ‘at the home of’ (au domicile de) but must be construed as meaning ‘wherever ... may be’ (auprès de).

Any other construction would enable the person concerned to evade the Customs Service’s investigations by keeping any compromising papers elsewhere than at his home.

The house search and Mr Funke’s own statements provided sufficient evidence that there were bank accounts and financing operations concerning the defendant to enable the Customs Service to exercise their right of inspection in relation to the relevant documents notwithstanding that these were not at Mr Funke’s home.

As the holder of an account used abroad, Mr Funke, like any account-holder, must receive statements following any transaction on the account. A statement is an extension, a reflection of the situation, of an account at a given time. The holder of the account is the owner of his statements and may at any time ask for them from his bank, which cannot refuse them."

(ii) In the Colmar Court of Appeal

13. Appeals were brought by Mr Funke, the public prosecutor and the customs authorities. On 14 March 1983 the Colmar Court of Appeal upheld the judgment of the court below other than as regards the inspection of documents relating to the flat at Schonach, and increased the pecuniary penalty to FRF 50 per day’s delay.

It dealt with Mr Funke’s argument based on the Convention as follows:

"Article 413 bis of the Customs Code, which applies to financial dealings with foreign countries by virtue of Article 451 of the same code, makes any refusal to produce documents and any concealment of documents in the cases provided for, inter alia, in Article 65 of the aforementioned code punishable by imprisonment for a period ranging from ten days to one month and a fine of FRF 400 to 2,000.

Under Article 65, customs officers may require production of documents of any kind relating to operations of interest to their department, in general, on the premises of any natural or legal person directly or indirectly concerned in lawful or unlawful operations falling within the jurisdiction of the Customs Service.

In the instant case Funke is liable only to a fiscal penalty: to a fine, therefore.

It does not appear that the power conferred by the aforementioned provisions on a revenue authority conflicts with the protection of human rights and fundamental freedoms which it is the purpose of the instrument of international law relied on to guarantee.

The defendant had a fair hearing.

Obviously, no offences which performance of the duty to produce documents may disclose are yet before the courts; that being so, Funke's objections of principle are premature.

Moreover, while everyone charged with a criminal offence is to be presumed innocent until proved guilty according to law, Article 6 para. 2 (art. 6-2) of the Convention does not otherwise restrict the type of evidence which the lex fori places at the disposal of the prosecuting party in order to satisfy the court.

Lastly, the obligation on a defendant to produce in proceedings evidence likely to be used against him by the opposing side is not a special feature of customs or tax proceedings since it is enacted in Article 11 of the New Code of Civil Procedure likewise.

On the other hand, while Article 8 (art. 8) of the Convention provides that everyone has the right to respect for his private life and his correspondence, there may be interference by a public authority with the exercise of this right so long as it is in accordance with the law and amounts to a measure which is necessary in a democratic society, inter alia in the interests of the economic well-being of the country or for the prevention of disorder or crime.

In most of the countries signatories to the Convention, moreover, the customs and revenue authorities have a right of direct investigation in banks."

(iii) In the Court of Cassation

14. On 21 November 1983 the Court of Cassation (Criminal Division) dismissed an appeal on points of law by Mr Funke. The third and final ground, in which Articles 6 and 8 (art. 6, art. 8) of the Convention were prayed in aid, was rejected in the following terms:

"The Court of Appeal held that, while everyone charged with a criminal offence was to be presumed innocent until proved guilty according to law, Article 6 (art. 6) of the Convention ... did not otherwise restrict the types of evidence that the lex fori placed at the disposal of the prosecuting party in order to satisfy the court; and that while it was true that Article 8 (art. 8) of the Convention provided that everyone has the right to respect for his private life and his correspondence, there might ... be interference by a public authority with the exercise of this right so long as the interference was in

accordance with the law and amounted to a measure which was necessary in a democratic society, inter alia in the interests of the economic well-being of the country or for the prevention of disorder or crime.

In so stating, and irrespective of any superfluous reasoning, the Court of Appeal justified its decision and the ground therefore cannot be upheld."

(b) The proceedings to enforce the customs penalty

15. In a report on 30 May 1984 the customs authorities noted Mr Funke's refusal to comply with the Colmar Court of Appeal's judgment of 14 March 1983 (see paragraph 13 above).

On 2 January 1985 they served a garnishee notice on the applicant's bank requiring it to pay a sum of FRF 10,750, representing the amount of the penalties owed by its customer for the period from 31 May to 31 December 1984.

(i) In the Strasbourg District Court

16. On an application by Mr Funke, the Strasbourg District Court upheld the notice in question on 27 March 1985, holding that the customs authorities were entitled to recover the sum owed in respect of a pecuniary penalty resulting from an enforceable court decision in the same way as a customs fine and notwithstanding that an application (which did not have any suspensive effect) had been made to the European Commission of Human Rights.

(ii) In the Colmar Court of Appeal

17. On an appeal by Mr Funke, the Colmar Court of Appeal delivered a judgment on 20 February 1989 reversing the lower court's judgment of 27 March 1985 and quashing the garnishee notice.

(iii) In the Court of Cassation

18. An appeal on points of law by the customs authorities was dismissed by the Court of Cassation on 18 December 1990. Like the Court of Appeal, the Court of Cassation held that the amount of the customs penalty could not be recovered by means of a garnishee notice.

19. Following this judgment, the customs authorities made no further attempt to collect payment of the penalty in question.

2. The proceedings relating to interim orders (16 April 1982 - July 1990)

(a) Making of the orders

(i) In the Strasbourg District Court

20. On 16 April 1982 the customs authorities applied for an order from the presiding judge of the Strasbourg District Court for attachment of Mr Funke's movable and immovable property to the value of FRF 100,220. Half of this sum was to be in lieu of confiscation of the undeclared funds, while the other half corresponded to the fine payable. Relying on Article 341 bis-1 (see paragraph 32 below) and Article 459 of the Customs Code, the customs authorities stated that they already had a definite right to payment from the applicant. The documents seized at Lingolsheim showed that he had contravened Article 1 of the decree of 24 November 1968, which provided that any payment made abroad by persons resident in France had to be effected through an approved intermediary (bank or post office) established in France.

21. The District Court made an order granting the application on 21 April 1982.

On 26 May 1982 it delivered a judgment dismissing an objection lodged by Mr Funke (Article 924 of the local Code of Civil Procedure).

(ii) In the Colmar Court of Appeal

22. On 28 July 1982 the Colmar Court of Appeal dismissed Mr Funke's appeal against that judgment, holding that unless attachment orders were granted, it was to be feared that enforcement of the decision to be expected in the criminal trial would become impossible or much more difficult; furthermore, the creditor had made his claim credible by producing reports (Articles 917 and 920 of the local Code of Civil Procedure).

23. The applicant did not appeal on points of law.

(b) Discharge of the orders

24. On 22 November 1989 Mrs Funke made an application for discharge of the attachment order (Article 926 of the local Code of Civil Procedure); by this means she wanted to compel the customs authorities to bring to trial the issue of the existence of the right to payment which had provided the justification for the attachment order. She also sought leave to sell a property.

25. In an order made on 31 May 1990 the Strasbourg District Court gave the Director-General of Customs one month in which to bring proceedings on the merits.

The customs authorities decided not to do so and in July 1990 agreed to the discharge of the attachment orders and of the associated mortgage.

II. RELEVANT CUSTOMS LAW

26. The criminal provisions of customs law in France are treated as a special body of criminal law.

A. Establishment of offences

1. Officials authorised to establish offences

27. Two provisions of the Customs Code are relevant as regards these officials:

Article 453

"The officials designated below shall be empowered to establish offences against the legislation and regulations governing financial dealings with foreign countries:

1. customs officers;

2. other officials of the Ministry of Finance with the rank of at least inspector;

3. senior police officers (officiers de police judiciaire).

The reports made by senior police officers shall be forwarded to the Minister for Economic Affairs and Finance, who shall refer cases to the prosecuting authorities if he thinks fit."

Article 454

"The officials referred to in the preceding Article shall be empowered to carry out house searches in any place as provided in Article 64 of this code."

2. House searches

(a) The rules applicable at the material time

28. When the house search was made (14 January 1980), Article 64 of the Customs Code was worded as follows:

"1. When searching for goods held unlawfully within the customs territory, except for built-up areas with a population of at least 2,000, and when searching in any place for goods subject to the provisions of Article 215 hereinafter, customs officers may make house searches if accompanied by a local municipal officer or a senior police officer (officier de police judiciaire).

2. In no case may such searches be made during the night.

3. Customs officers may act without the assistance of a local municipal officer or a senior police officer

(a) in order to make searches, livestock counts, and inspections at the homes of holders of livestock accounts or owners of rights of pasture; and

(b) in order to look for goods which, having been followed and kept under uninterrupted surveillance as provided in Article 332 hereinafter, have been taken into a house or other building, even if situated outside the customs zone.

4. If entry is refused, customs officials may force an entry in the presence of a local municipal officer or a senior police officer."

(b) The rules applicable later

29. The Budget Acts of 30 December 1986 (section 80-I and II) and 29 December 1989 (section 108-III, 1 to 3) amended Article 64, which now provides:

"1. In order to investigate and establish the customs offences referred to in Articles 414-429 and 459 of this code, customs officers authorised for the purpose by the Director- General of Customs and Excise may make searches of all premises, even private ones, where goods and documents relating to such offences are likely to be held and may seize them. They shall be accompanied by a senior police officer (officier de police judiciaire).

2. (a) Other than in the case of a flagrant offence (flagrant délit), every search must be authorised by an order of the President of the tribunal de grande instance of the locality in which the customs headquarters responsible for the department in charge of the proceedings is situated, or a judge delegated by him.

Against such an order there shall lie only an appeal on points of law as provided in the Code of Criminal Procedure; such an appeal shall not have a suspensive effect. The time within which an appeal on points of law must be brought shall run from the date of notification or service of the order.

The order shall contain:

(i) where applicable, a mention of the delegation by the President of the tribunal de grande instance;

(ii) the address of the premises to be searched;

(iii) the name and position of the authorised official who has sought and obtained leave to make the searches.

The judge shall give reasons for his decision by setting out the matters of fact and law that he has accepted and which create a presumption in the case that there have been unlawful activities of which proof is sought.

If, during the search, the authorised officials discover the existence of a bank strongbox which belongs to the person occupying the premises searched and in which documents, goods or other items relating to the activities referred to in paragraph 1 above are likely to be found, they may, with leave given by any means by the judge who made the original order, immediately search the strongbox. Such leave shall be mentioned in the report provided for in paragraph 2(b) below.

The judge shall take practical steps to check that each application for leave made to him is well-founded; each application shall contain all information in the possession of the customs authorities that may justify the search.

He shall designate the senior police officer responsible for being present at the operations and keeping him informed of their progress.

The search shall be carried out under the supervision of the judge who has authorised it. Where it takes place outside the territorial jurisdiction of his tribunal de grande instance, he shall issue a rogatory letter, for the purposes of such supervision, to the President of the tribunal de grande instance in the jurisdiction of which the search is being made.

The judge may go to the scene during the operation.

He may decide at any time to suspend or halt the search.

The judicial order shall be notified orally to the occupier of the premises or his representative on the spot at the time of the search, who shall receive a complete copy against acknowledgement of receipt or signature in the report provided for in paragraph 2(b) below. If the occupier of the premises or his representative is absent, the judicial order shall be notified after the search by means of a registered letter with recorded delivery. Notification shall be deemed to have been made on the date of receipt entered in the record of delivery.

Failing receipt, the order shall be served as provided in Articles 550 et seq. of the Code of Criminal Procedure.

The time-limits and procedures for appeal shall be indicated on notification and service documents.

(b) Searches may not be commenced before 6 a.m. or after 9 p.m. They shall be made in the presence of the occupier of the premises or his representative; if this is impossible, the senior police officer shall requisition two witnesses chosen from persons not under his authority or that of the customs.

Only the customs officers mentioned in paragraph 1 above, the occupier of the premises or his representative and the senior police officer may inspect documents before they are seized.

The senior police officer shall ensure that professional confidentiality and the rights of the defence are respected in accordance with the provisions of the third paragraph of Article 56 of the Code of Criminal Procedure; Article 58 of that code shall apply.

The report, to which shall be appended an inventory of the goods and documents seized, shall be signed by the customs officers, the senior police officer and the persons mentioned in the first sub-paragraph of this section (b); in the event of a refusal to sign, mention of that fact shall be made in the report.

Where an on-the-spot inventory presents difficulties, the documents seized shall be placed under seal. The occupier of the premises or his representative shall be informed that he may be present at the removal of the seals, which shall take place in the presence of the senior police officer; the inventory shall then be made.

A copy of the report and of the inventory shall be given to the occupier of the premises or his representative.

A copy of the report and the inventory shall be sent to the judge who made the order within three days of its being drawn up.

3. Customs officers may act without the assistance of a senior police officer

(a) in order to make searches, livestock counts and inspections at the homes of holders of livestock accounts or owners of rights of pasture; and

(b) in order to look for goods which, having been followed and kept under uninterrupted surveillance as provided in Article 332 hereinafter, have been taken into a house or other building, even if situated outside the customs zone.

4. If entry is refused, customs officers may force an entry in the presence of a senior police officer."

3. Production of documents

(a) The duty

30. Article 65-1 of the Customs Code gives the customs authorities a special right of inspection:

"Customs officers with the rank of at least inspector (inspecteur or officier) and those performing the duties of collector may require production of papers and documents of any kind relating to operations of interest to their department;

...

(i) ... in general, on the premises of any natural or legal person directly or indirectly concerned in lawful or unlawful operations falling within the jurisdiction of the Customs Service."

(b) The sanction

31. Anyone refusing to produce documents is liable to imprisonment for a period ranging from ten days to one month and to a fine of FRF 600 to 3,000 (Article 413 bis-1 of the Customs Code).

Furthermore, a pecuniary penalty of not less than FRF 10 per day's delay may be imposed on him (Article 431) and he may be committed to prison for non-payment (Article 382).

4. Interim measures

32. Article 341 bis-1 of the Customs Code provides:

> "Customs reports, where they are conclusive unless challenged as forgeries, shall be a warrant for obtaining, in accordance with the ordinary law, leave to take any necessary interim measures against persons liable in criminal or in civil law, for the purpose of securing customs debts of any kind appearing from the said reports."

B. Prosecution of offences

33. Article 458 of the Customs Code provides:

> "Offences against the legislation and regulations governing financial dealings with foreign countries may be prosecuted only on a complaint by the Minister for Economic Affairs and Finance or one of his representatives authorised for the purpose."

PROCEEDINGS BEFORE THE COMMISSION

34. Mr Funke applied to the Commission on 13 February 1984, raising several complaints. He claimed that his criminal conviction for refusal to produce the documents requested by the customs had violated his right to a fair trial (Article 6 para. 1 of the Convention) (art. 6-1) and disregarded the principle of presumption of innocence (Article 6 para. 2) (art. 6-2); that his case had not been heard within a reasonable time (Article 6 para. 1) (art. 6-1); and that the search and seizures effected at his home by customs officers had infringed his right to respect for his private and family life, his home and his correspondence (Article 8) (art. 8).

35. The Commission declared the application (no. 10828/84) admissible on 6 October 1988. In its report of 8 October 1991 (made under Article 31) (art. 31), the Commission expressed the opinion

(a) that there had been no breach of Article 6 para. 1 (art. 6-1) either as regards the principle of a fair trial (by seven votes to five) or on account of the length of the proceedings (by eight votes to four);

(b) that there had been no breach of Article 6 para. 2 (art. 6-2) (by nine votes to three); and

(c) that there had been no breach of Article 8 (art. 8) (by six votes to six, with the President's casting vote).

The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS TO THE COURT

36. In its memorial the Government asked the Court to "dismiss all the complaints brought by Mr Funke and taken up by Mrs Funke".

37. As to counsel for the applicant, he requested the Court to

"find that there has been a breach of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2), Article 8 paras. 1 and 2 (art. 8-1, art. 8-2) and Article 13 (art. 13) of the Convention;

note that the applicant requests just satisfaction of FRF 300,000;

order the respondent State to pay the applicant the sum of FRF 125,000 by way of costs and expenses, plus VAT; and

order that all the sums shall produce interest at the statutory rate one month after delivery of the judgment".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARAS. 1 AND 2 (art. 6-1, art. 6-2)

38. Mr Funke claimed to be the victim of breaches of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2), which provide:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

[*] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 256-A of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

A. Fairness of the proceedings and presumption of innocence

1. The Government's preliminary objection

39. As they had done before the Commission, the Government raised an objection of inadmissibility for lack of victim status. No criminal proceedings, they said, had been taken against Mr Funke for contravening the regulations governing financial dealings with foreign countries, and his death on 22 July 1987 finally precluded any prosecution.

40. The Court notes that the applicant's complaints under Article 6 (art. 6) relate to quite different proceedings, those concerning the production of documents. The objection must therefore be dismissed.

2. Merits of the complaint

(a) Article 6 para. 1 (art. 6-1)

41. In the applicant's submission, his conviction for refusing to disclose the documents asked for by the customs (see paragraphs 9-14 above) had infringed his right to a fair trial as secured in Article 6 para. 1 (art. 6-1). He claimed that the authorities had violated the right not to give evidence against oneself, a general principle enshrined both in the legal orders of the Contracting States and in the European Convention and the International Covenant on Civil and Political Rights, as although they had not lodged a complaint alleging an offence against the regulations governing financial dealings with foreign countries, they had brought criminal proceedings calculated to compel Mr Funke to co-operate in a prosecution mounted against him. Such a method of proceeding was, he said, all the more unacceptable as nothing prevented the French authorities from seeking international assistance and themselves obtaining the necessary evidence from the foreign States.

42. The Government emphasised the declaratory nature of the French customs and exchange-control regime, which saved taxpayers having their affairs systematically investigated but imposed duties in return, such as the duty to keep papers concerning their income and property for a certain length of time and to make them available to the authorities on request. This right of the State to inspect certain documents, which was strictly supervised by the Court of Cassation, did not mean that those concerned were obliged to incriminate themselves, a requirement that was prohibited by the United Nations Covenant (Article 14) and had been condemned by the Court of Justice of the European Communities (Orkem judgment of 18 October 1989, European Court Reports, 1989-9, pp. 3343-3354); it was not contrary to the guidelines laid down in the Convention institutions' case-law on what constituted a fair trial.

In the instant case the customs had not required Mr Funke to confess to an offence or to provide evidence of one himself; they had merely asked him to give particulars of evidence found by their officers and which he had admitted, namely the bank statements and cheque-books discovered during the house search. As to the courts, they had assessed, after adversarial proceedings, whether the customs' application was justified in law and in fact.

43. The Commission reached the same conclusion, mainly on the basis of the special features of investigation procedures in business and financial matters. It considered that neither the obligation to produce bank statements nor the imposition of pecuniary penalties offended the principle of a fair trial; the former was a reflection of the State's confidence in all its citizens in that no use was made of stricter supervisory measures, while responsibility for the detriment caused by the latter lay entirely with the person affected where he refused to co-operate with the authorities.

44. The Court notes that the customs secured Mr Funke's conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed. The special features of customs law (see paragraphs 30-31 above) cannot justify such an infringement of the right of anyone "charged with a criminal offence", within the autonomous meaning of this expression in Article 6 (art. 6), to remain silent and not to contribute to incriminating himself.

There has accordingly been a breach of Article 6 para. 1 (art. 6-1).

(b) Article 6 para. 2 (art. 6-2)

45. The foregoing conclusion makes it unnecessary for the Court to ascertain whether Mr Funke's conviction also contravened the principle of presumption of innocence.

B. Length of the proceedings

46. In view of the finding in paragraph 44 above, the Court considers it likewise unnecessary to examine the complaint that the proceedings relating to the making and discharge of the interim orders (see paragraphs 20-25 above) lasted for more than a "reasonable time" as required by Article 6 para. 1 (art. 6-1).

II. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

47. In the applicant's submission, the house search and seizures made in the instant case were in breach of Article 8 (art. 8), which provides:

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

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

48. The Government conceded that there had been an interference with Mr Funke's right to respect for his private life, and the Commission additionally found that there had been an interference with his right to respect for his home.

The Court considers that all the rights secured in Article 8 para. 1 (art. 8-1) are in issue, except for the right to respect for family life. It must accordingly be determined whether the interferences in question satisfied the conditions in paragraph 2 (art. 8-2).

A. "In accordance with the law"

49. The applicant contended that the interferences had no legal basis. As worded at the time, Article 64 of the Customs Code was, he claimed, contrary to the 1958 Constitution because it did not make house searches and seizures subject to judicial authorisation. Admittedly, its constitutionality could not be reviewed, since it had come into force before the Constitution had. Nevertheless, in the related field of taxation the Constitutional Council had rejected section 89 of the Budget Act for 1984, concerning the investigation of income-tax and turnover-tax offences, holding, inter alia:

"While the needs of the Revenue's work may dictate that tax officials should be authorised to make investigations in private places, such investigations can only be conducted in accordance with Article 66 of the Constitution, which makes the judiciary responsible for protecting the liberty of the individual in all its aspects, in particular the inviolability of the home. Provision must be made for judicial participation in order that the judiciary's responsibility and supervisory power may be maintained in their entirety." (Decision no. 83-164 DC of 29 December 1983, Official Gazette (Journal officiel), 30 December 1983, p. 3874)

50. The Government, whose arguments the Commission accepted in substance, maintained that in Article 64 of the Customs Code, as supplemented by a fairly substantial body of case-law, the power to search houses was defined very closely and represented a transposition to customs legislation and the regulations governing financial dealings with foreign countries of the power of search provided for in ordinary criminal procedure. Provision was first made for it in an Act of 6 August 1791 and subsequently in a legislative decree of 12 July 1934, and it had been widened in 1945 to cover investigations into exchange- control offences and

confirmed on several occasions. In the Government's submission, its constitutionality could not be put in doubt, any more than that of Article 454 of the same code, since review of the constitutionality of statutes took place between their enactment by Parliament and promulgation and was within the sole competence of the Constitutional Council, to the exclusion of all other courts.

As to the "quality" of the national legal rules vis-à-vis the Convention, it was ensured by the precision with which the legislation and case-law laid down the scope and manner of exercise of the relevant power, and this eliminated any risk of arbitrariness. Thus even before the reform of 1986-89 (see paragraph 29 above), the courts had supervised customs investigations ex post facto but very efficiently. And in any case, Article 8 (art. 8) of the Convention contained no requirement that house searches and seizures should be judicially authorised in advance.

51. The Court does not consider it necessary to determine the issue in this instance, as at all events the interferences complained of are incompatible with Article 8 (art. 8) in other respects (see paragraphs 57-59 below).

B. Legitimate aim

52. The Government and the Commission considered that the interferences in question were in the interests of "the economic well-being of the country" and "the prevention of crime".

Notwithstanding the applicant's arguments to the contrary, the Court is of the view that the interferences were in pursuit of at any rate the first of these legitimate aims.

C. "Necessary in a democratic society"

53. In Mr Funke's submission, the interferences could not be regarded as "necessary in a democratic society". Their scope was unlimited and they went well beyond what was required in the public interest, since they were not subject to judicial supervision; furthermore, they had not only taken place in the absence of any flagrant offence (flagrant délit), circumstantial evidence or presumption but had also been carried out in an improper manner.

54. The Government, whose contentions the Commission accepted in substance, argued that house searches and seizures were the only means available to the authorities for investigating offences against the legislation governing financial dealings with foreign countries and thus preventing the flight of capital and tax evasion. In such fields there was a corpus delicti only very rarely if at all; the "physical manifestation" of the offence therefore lay mainly in documents which a guilty party could easily conceal

or destroy. Such persons, however, had the benefit of substantial safeguards, strengthened by very rigorous judicial supervision: decision-making by the head of the customs district concerned, the rank of the officers authorised to establish offences, the presence of a senior police officer (officier de police judiciaire), the timing of searches, the preservation of lawyers' and doctors' professional secrecy, the possibility of invoking the liability of the public authorities, etc. In short, even before the reform of 1986-89, the French system had ensured that there was a proper balance between the requirements of law enforcement and the protection of the rights of the individual.

55. The Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the need for an interference, but it goes hand in hand with European supervision. The exceptions provided for in paragraph 2 of Article 8 (art. 8-2) are to be interpreted narrowly (see the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 21, para. 42), and the need for them in a given case must be convincingly established.

56. Undoubtedly, in the field under consideration - the prevention of capital outflows and tax evasion - States encounter serious difficulties owing to the scale and complexity of banking systems and financial channels and to the immense scope for international investment, made all the easier by the relative porousness of national borders. The Court therefore recognises that they may consider it necessary to have recourse to measures such as house searches and seizures in order to obtain physical evidence of exchange-control offences and, where appropriate, to prosecute those responsible. Nevertheless, the relevant legislation and practice must afford adequate and effective safeguards against abuse (see, among other authorities and mutatis mutandis, the Klass and Others judgment previously cited, Series A no. 28, p. 23, para. 50).

57. This was not so in the instant case. At the material time - and the Court does not have to express an opinion on the legislative reforms of 1986 and 1989, which were designed to afford better protection for individuals (see paragraph 29 above) - the customs authorities had very wide powers; in particular, they had exclusive competence to assess the expediency, number, length and scale of inspections. Above all, in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law, which were emphasised by the Government (see paragraph 54 above), appear too lax and full of loopholes for the interferences with the applicant's rights to have been strictly proportionate to the legitimate aim pursued.

58. To these general considerations may be added a particular observation, namely that the customs authorities never lodged a complaint against Mr Funke alleging an offence against the regulations governing financial dealings with foreign countries (see paragraph 8 above).

59. In sum, there has been a breach of Article 8 (art. 8).

III. APPLICATION OF ARTICLE 50 (art. 50)

60. Under Article 50 (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

61. Mr Funke sought, firstly, compensation in the amount of 300,000 French francs (FRF), on the ground that the breaches of the Convention had had a serious impact on his person and on that of his wife as well as on their private life.

The Government and the Delegate of the Commission expressed no opinion.

62. The Court considers that the applicant must have suffered non-pecuniary damage, for which the findings of violations in this judgment do not afford sufficient satisfaction. Making its assessment on an equitable basis as required by Article 50 (art. 50), it awards him FRF 50,000 under this head.

B. Costs and expenses

63. Mr Funke also sought reimbursement of the costs and expenses he had incurred in the French courts (FRF 90,000) and in the proceedings before the Convention institutions (FRF 35,000, plus VAT).

The Government and the Delegate of the Commission did not put forward any view on the issue.

64. Applying its usual criteria, the Court awards the applicant FRF 70,000.

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government’s preliminary objection;

2. Holds by eight votes to one that, for want of a fair trial, there has been a violation of Article 6 para. 1 (art. 6-1);

3. Holds by eight votes to one that it is unnecessary to consider the other complaints raised under Article 6 (art. 6);

4. Holds by eight votes to one that there has been a breach of Article 8 (art. 8);

5. Holds unanimously that the respondent State is to pay the applicant, within three months, 50,000 (fifty thousand) French francs for non-pecuniary damage and 70,000 (seventy thousand) francs for costs and expenses;

6. Dismisses unanimously the remainder of the applicant's claims.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 February 1993.

Rudolf BERNHARDT
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr Thór Vilhjálmsson;

(b) concurring opinion of Mr Matscher.

R.B.
M.-A.E.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

I have voted against the finding of a violation of Articles 6 and 8 (art. 6, art. 8) of the Convention in this case. My reasons are much the same as those set out by the majority of the Commission in its report.

CONCURRING OPINION OF JUDGE MATSCHER CONCERNING PARAGRAPHS 41-44 OF THE JUDGMENT

(Translation)

Although I voted in favour of finding that there had been a violation of Article 6 para. 1 (art. 6-1), I should none the less like to point out the following. Under the fiscal legislation (on taxes, customs and exchange control), a person who does not submit the required returns or does not produce documents relating to them within the time-limits laid down in law (or by the authorities) has pecuniary penalties (astreintes) in the form of "reasonable" fines imposed on him or else his tax liability is estimated - also in a "reasonable" manner - by the appropriate authorities. This is not in itself inconsistent either with the requirements of a fair trial or with the presumption of innocence (in the sense that one cannot be obliged to give evidence against oneself).

Rules of this kind are indeed common in the countries of Europe.

In the present case, however, the French authorities brought criminal proceedings against the applicant in order to have a pecuniary penalty imposed on him, and this went beyond what I consider to be compatible with the principles I have just set out.

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

COURT (CHAMBER)

CASE OF GILLOW v. THE UNITED KINGDOM

(Application no. 9063/80)

JUDGMENT

STRASBOURG

24 November 1986

In the Gillow case*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr. G. WIARDA, *President*,
Mr. R. RYSSDAL,
Mr. Thór VILHJÁLMSSON,
Mr. G. LAGERGREN,
Mr. L.-E. PETTITI,
Sir Vincent EVANS,
Mr. R. MACDONALD,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 19 and 20 February and on 22 and 23 October 1986,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 19 December 1984, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. The case originated in an application (no. 9063/80) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission in January 1980 under Article 25 (art. 25) by Joseph and Yvonne Gillow, British citizens.

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The request sought a decision from the Court as to the existence of violations of Articles 6, 8 and 14 (art. 6, art. 8, art. 14) of the Convention and Article 1 of Protocol No. 1 (P1-1).

3. In response to the inquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the

* Note by the Registrar: The case is numbered 13/1984/85/132. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year. The last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

proceedings before the Court and they sought leave to present their case themselves. On 4 March 1985, the President granted this leave, subject to the applicants being assisted by an advocate or other person having the requisite legal knowledge (Rule 30 § 1, second sentence). On 30 April, the applicants appointed such a person but they were subsequently unable to agree with her as to the manner of presentation of the case. In these circumstances, the Court decided to hear the applicants at the hearing under Rule 40 § 1.

4. The Chamber of seven judges to be constituted included, as ex officio members, Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 § 3 (b)). On 23 January 1985, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. R. Ryssdal, Mr. Thór Vilhjálmsson, Mr. E. García de Enterría, Mr. L. Liesch and Mr. G. Lagergren (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). Subsequently, Mr. García de Enterría and Mr. Liesch, who were prevented from taking part in the consideration of the case, were replaced by Mr. L.-E. Pettiti and Mr. R. Macdonald, substitute judges (Rules 22 § 1 and 24 § 1).

5. Mr. Wiarda, who had assumed the office of President of the Chamber (Rule 21 § 5), consulted, through the Registrar, the Agent of the United Kingdom Government ("the Government"), the Delegate of the Commission and the lawyer nominated to assist the applicants as to the need for a written procedure (Rule 37 § 1). On 7 May, the President directed that the Agent of the Government and the applicants should each have until 9 August to file a memorial and that the Delegate should be entitled to file, within two months from the date of the transmission to him by the Registrar of whichever of the aforesaid documents should last be filed, a memorial in reply. The President subsequently agreed to extend the former time-limit until 13 September 1985.

The applicants' and the Government's memorials were lodged at the registry on 7 August and 17 September 1985, respectively. On 5 December 1985, the Secretariat of the Commission advised the registry that the Delegate would present his observations at the hearings.

On 26 April 1985, the Commission had produced certain documents which the Registrar had requested on the instructions of the President.

6. After consulting, through the Registrar, the Agent of the Government and the Delegate of the Commission, the President directed on 11 December that the oral proceedings should open on 18 February 1986.

7. The hearings were held in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately before they opened, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mrs. C. PRICE, Home Office, *Acting Agent*,
Mr. de V.G. CAREY, Attorney General
for Guernsey,
Mr. N. BRATZA, Barrister-at-Law, *Counsel*,
Ms. E. LINCOLN, President
of the Guernsey States Housing Authority,
Mr. L. BARBÉ, Administrator
of the Guernsey States Housing Authority, *Advisers*;

- for the Commission
Mr. Gaukur JÖRUNDSSON, *Delegate*.

The Court heard addresses by Mr. Carey and Mr. Bratza for the Government and by Mr. Gaukur Jörundsson for the Commission. During the hearings, the Government and the Delegate of the Commission filed their written replies to questions put by the Court. The Court also heard Mr. and Mrs. Gillow (see paragraph 3 above), who were given leave to file, within one month, comments on statistics lodged by the Government during the hearings. These comments were received at the registry on 10 March and 3 April 1986.

8. On 10 October 19867, the Agent of the Government provided certain information on the applicability of Protocol No. 1 in the present case; the Delegate of the Commission filed his comments in reply on 17 October (see paragraph 60 below).

AS TO THE FACTS

A. The particular facts of the case

9. Mr. Joseph Gillow and his wife Mrs. Yvonne Gillow were born in England in 1916 and 1918 respectively. They are both British citizens and retired.

10. In April 1956, Mr. Gillow was appointed Director of the recently-created States of Guernsey Horticultural Advisory Service. Consequently, the applicants, after selling their home in Lancashire, moved with their family and furniture to Guernsey. Initially, they occupied a house owned by the States of Guernsey. However, in 1957, Mr. Gillow bought a plot of land on Guernsey, on which, after obtaining the requisite planning permission, he built a house, called "Whiteknights". He and his family took occupation of this house on 1 September 1958.

The property’s rateable value was £51, of which £49 was attributable to the house itself. It was then, and still is, "controlled housing" (see paragraph 30 below). However, the applicants did not require a licence to occupy the

house, since they had "residence qualifications" by virtue of the Housing Control (Extension and Amendment) (Guernsey) Law 1957 ("the Housing Law 1957") (see paragraph 30 below).

11. In August 1960, after Mr. Gillow had resigned from his post in the Guernsey Horticultural Advisory Service, the applicants and their family left Guernsey and Mr. Gillow took up employment with the Food and Agriculture Organisation (F.A.O.). Thereafter, and until he retired in 1978, he worked overseas for various development Agencies on the basis of temporary contracts.

12. From August 1960 to July 1978, "Whiteknights" was let either to persons with the necessary "residence qualifications" or under a licence from the States of Guernsey Housing Authority ("the Housing Authority") in accordance with the Housing Law 1957 and its subsequent amendments (see paragraphs 30-33 below). During this period, the applicants corresponded periodically with the Housing Authority from various addresses, inter alia, to inquire as to the operation of the Housing Laws in the event of their selling the property.

In November 1963, Mr. Gillow transferred ownership of the house to his wife.

13. On 26 July 1978, the Housing Authority wrote to Mrs. Gillow advising her of the current tenant's intention to leave "Whiteknights" and enquiring who would be the next tenant. By letter of 31 August, Mrs. Gillow informed the Housing Authority that she and her husband proposed to return to Guernsey. The Authority replied, on 15 September, that the applicants were not entitled to occupy their house unless they were granted a licence under section 3 of the Housing (Control of Occupation)(Guernsey) Law 1975 (the "Housing Law 1975" - see paragraph 33 below).

"Whiteknights" was empty after the departure of the last-mentioned tenant on 31 July 1978. It appears that neither the Housing Authority nor the applicants received any request to let the house after that date.

14. In November 1978, the applicants returned to England from Hong Kong and they lived temporarily with Mrs. Gillow's mother in England.

On 21 April 1979, Mrs. Gillow wrote to the Housing Authority advising it that she and her husband intended to return to "Whiteknights" to retire. She added that she was currently seeking a teaching post in Guernsey. Furthermore, the house required various repairs, some of which the applicants proposed to carry out themselves. Accordingly, in addition to seeking a long-term occupation licence, Mrs. Gillow also requested a temporary licence, until September 1979, so that this work could be carried out.

15. On 29 April 1979, Mr. and Mrs. Gillow went back to Guernsey and re-occupied "Whiteknights". On 7 May, Mrs. Gillow, having received no reply from the Housing Authority, wrote again to it repeating her request and stating that she and her husband had returned to Guernsey.

The Housing Authority replied on 14 May, informing Mrs. Gillow that, after having been considered at a meeting on 3 May, her application for a long-term licence to occupy "Whiteknights" had been rejected in the light of the "present adverse housing situation". The reply also stated: firstly, that the applicants had at no time been granted a licence to occupy this house; secondly, that even assuming that Mrs. Gillow took up employment considered essential to the community (see paragraph 33 below), the applicants would not be permitted to stay in their property after her retirement, because she was too old to complete a minimum of ten consecutive years in such employment, as required by the Housing Law 1975.

No reference was made in the letter to the request for a temporary licence.

16. On 5 July 1979, a representative of the Housing Authority visited the applicants and furnished them with an official form of application for a temporary licence. They lodged the application four days later, but it was refused by decision of the Housing Authority on 19 July. Notification of the refusal was given to Mrs. Gillow on 27 July, and was accompanied by the reasons therefor, namely:

- that Mrs. Gillow had failed to adduce evidence showing that she would be employed in a position essential to the community;

- that "Whiteknights" was likely to be sought after by persons fulfilling the residential qualifications which the applicants lacked;

- that in the "present adverse housing situation", the Housing Authority was unable in principle to justify granting a licence to the applicants.

Mrs. Gillow was also informed of her right to appeal from this decision to the Royal Court, under section 19 of the Housing Law 1975 (see paragraph 33 below). Finally, she was notified that, unless she and her husband could show good reasons to the contrary, the Housing Authority would refer their occupation of "Whiteknights" to the Guernsey Law Officers with a view to prosecution if they did not vacate the house within seven days.

17. In their reply of 29 July 1979, the applicants repeated their request for a temporary licence at least until the end of August, in order to complete the necessary repairs to the property and to put it on the market for sale. They claimed that they had not been "occupying" the house, within the meaning of the Housing Law 1975. They maintained that the Law could not reasonably prevent them from carrying out the repairs necessitated by the fact that the property had been let for the previous eighteen years, and that the Law allowed them to take the steps required to sell the property, steps which precluded anyone else from occupying it in the meantime. The applicants also contended that they had not been informed until September 1978 that they required a licence to live in "Whiteknights"; in particular, they had not been notified of the entry into force on 2 February 1970 of the

Housing Control (Guernsey) Law 1969 ("the Housing Law 1969"), which contained new provisions under which they ceased to have "residence qualifications" (see paragraph 32 below).

18. That letter was considered at a meeting of the Housing Authority on 9 August 1979. A reply was sent to Mrs. Gillow on 15 August, confirming that she had not been notified before 15 September 1978 of the change in the law or of the need to obtain a licence. The Housing Authority also agreed that, if the applicants vacated "Whiteknights" by 1 September 1979, it would take no action in respect of their unlawful occupation.

19. On 23 August, Mrs. Gillow requested a further extension, until the end of September, of the applicants' permission to stay, since the property had not yet been sold. This request was refused on 30 August and Mrs. Gillow was so informed on 3 September. Furthermore, the applicants were given seven days to leave the house, on pain of prosecution.

On 11 September 1979, Mr. and Mrs. Gillow met the President of the Housing Authority and sought, inter alia, permission to remain in their property for a further six months, in order to effect the sale. On this occasion, they raised the question of compensation for their loss of residence rights.

The Housing Authority wrote to the applicants on 20 September, reporting that their application had been reconsidered on 13 September and refused. They were informed that proceedings would accordingly be instituted against them for unlawful occupation, unless they vacated "Whiteknights" by 31 October 1979.

20. Mr. and Mrs. Gillow consulted an advocate in early October and, on 13 October, instructed him to appeal to the Royal Court against all the Housing Authority's decisions. Such appeals could only be lodged by an advocate of the Royal Court, but the applicants' advocate failed to file them within the statutory time-limit (31 October 1979).

However, on 5 November he requested the Housing Authority to take no action against the applicants until he had had a further opportunity of advising them. On 9 November, he submitted on their behalf a fresh application for a licence to occupy "Whiteknights" until 30 April 1980, in order to effect its sale. In its reply of 13 November, the Housing Authority stated that:

> "On 8 November 1979 the Housing Authority noted the contents of your letter but resolved with regret that as [the applicants] took occupation without [a] licence and have been given an adequate time to vacate the premises, it is unable to justify withholding action in this matter. The documents in the case have been referred to the Law Officers."

On 16 November, the Authority notified the advocate that the further licence application had been refused on 12 November.

21. On 20 November, the advocate notified the Housing Authority, the police and the prosecuting authorities that the applicants intended to appeal.

However, on 17 December the police visited the applicants at "Whiteknights" and asked them to make a statement but they refused to do so unless their advocate was present. By letter of 19 December to the chief of police, they explained that an appeal was being lodged. They were nevertheless summoned to appear in court on 1 February 1980.

22. On 22 January 1980, the applicants discovered that the appeal to the Royal Court had not yet been lodged and addressed a complaint to the Chambre de Discipline of the Guernsey Bar against their advocate. He finally filed an appeal - in the name of Mrs. Gillow and directed against the Housing Authority's decisions of 3 May, 19 July and 12 November 1979 refusing the licences - on 1 February 1980 at about 9 a.m. This appeal sought the grant of either an unrestricted licence or, alternatively, permission to occupy "Whiteknights" until 30 April 1980, and alleged that the decisions in question were an unreasonable exercise of the Housing Authority's discretion and were ultra vires. The appeal was accepted by the Royal Court for examination, although it had been lodged out of time.

23. Later on the same day, the applicants appeared, in accordance with the summons, before the Magistrate's Court. They asked for an adjournment on the ground that Mrs. Gillow's appeal went to the heart of the question whether their occupation of "Whiteknights" was unlawful or not. However, the adjournment was refused on the insistence of the Law Officer.

The applicants cases were dealt with separately, the charges against Mr. Gillow being taken first. He was convicted of occupying "Whiteknights" without a licence and fined. Mrs. Gillow's trial was adjourned twice and then suspended sine die, the court having taken into account, inter alia, Mrs. Gillow's appeal to the Royal Court and the fact that Mr. Gillow had appealed against his conviction.

24. The applicants finally sold "Whiteknights" on 15 April 1980 for a price of £33,000, which in their view was less than its actual value.

25. On 8 July 1980, the Royal Court, which was composed of a President and eleven Jurats, dismissed Mrs. Gillow's appeal, unanimously as regards the Housing Authority's decisions of 3 May and 19 July 1979 (see paragraphs 15 and 16 above) and by a majority of 8 votes to 3 as regards the decision of 12 November 1979 (see paragraph 20 above). By virtue of section 19(4) of the Housing Law 1975, this judgment was final and conclusive.

26. Mr. Gillow's appeal against his conviction was heard and dismissed by the Royal Court on 26 August 1980. Before and during the hearing, Mr. Gillow challenged the accuracy of the transcript of the first-instance proceedings and asked for leave to hear the original tape. This request was refused, but the Registrar of the Court listened to the tape during a recess and pronounced the transcript accurate.

Mr. Gillow also alleged that the Royal Court was inherently biased because, with the exception of one Jurat, its composition was the same as

when it had determined his wife's appeal against the decisions of the Housing Authority. He further maintained that the composition of the Royal Court, as such, was archaic.

27. The complaint which the applicants lodged with the Bar Chambre de Discipline on 26 January 1980 against their advocate for delay in filing the appeals against the Housing Authority's decisions was found to be substantiated on 9 September 1980.

B. Relevant domestic law and practice

1. Constitutional background

28. The Bailiwick of Guernsey is a dependency of the British Crown. It has its own legislative assembly, courts of law and administrative and fiscal systems, which are separate from those of Great Britain and Northern Ireland.

The legislative assembly is the States of Deliberation, which has 60 members and is presided over by the Bailiff or Deputy Bailiff, both of whom are appointed by the Sovereign. The States legislate for the Island by way of "Laws" or, in some circumstances, by way of Ordinances; the former require approval by Her Majesty in Council before they can take effect. Although the United Kingdom Parliament has power to legislate for Guernsey, it would be contrary to constitutional convention for it do so in respect of matters domestic to the island, such as the Housing Laws.

The Royal Court of Guernsey is a court of unlimited jurisdiction which sits either at first instance or on appeal. It is composed of the Bailiff, the Deputy Bailiff or a Lieutenant Bailiff, as President, together with twelve Jurats appointed by the States of Election. The Magistrate's Court has summary jurisdiction in criminal matters and jurisdiction up to a limited amount in civil suits.

2. The Housing Laws

29. Following the liberation of the Island in 1945 after the Second World War, the return of many families and the influx of a large number of new residents created acute housing problems, which were followed by considerable increases in property prices. To meet this situation, the States enacted the Housing Control (Emergency Provisions)(Guernsey) Law 1948 (the "Housing Law 1948"), which came into force on 17 July 1948. The Law limited the right to reside in Guernsey without a licence to persons having "residence qualifications", that is persons who had been ordinarily resident there at some time between 1 January 1938 and 30 June 1940. The system of housing control introduced by this law has been modified from time to time to meet changing circumstances pertaining in the island.

30. On 12 October 1957, this Law was replaced by the Housing Law 1957, which replaced the above-mentioned final qualifying date of 30 June 1940 by 30 June 1957. Thus, persons, like the applicants, who had been ordinarily resident in Guernsey on or before that date had "residence qualifications" and were permitted to live there without a licence.

The new Law also freed from control all houses of a "rateable value" (for the purposes of local taxation) in excess of £50 per annum. Such properties, known as "open market houses", could be occupied by anyone, without any restrictions. Houses with a lower rateable value, on the other hand, fell into the category of "controlled housing" and could be occupied only by persons having either "residence qualifications" or a licence granted by the Housing Authority for the particular house.

31. The Housing Law 1957 was amended on matters of detail in 1962 and 1965 (with regard to furnished accommodation) and in 1966, when the Housing Control (Amendment) (Guernsey) Law 1966 raised the minimum rateable value for "open market houses" to £100. This was later reduced, by the Housing Control (Rateable Value) Ordinance, to £85.

The Housing Control (Guernsey) Law 1967 and the Housing Control Ordinance 1967 consolidated all the previous legislation in this area.

32. In the late 1960's, a significant number of people who had "residence qualifications" under the Housing Law 1957 but had subsequently left Guernsey, sought to return to the island. On 2 February 1970, there entered into force the Housing Law 1969, which added a further requirement as regards "residence qualifications": to possess these the person concerned should not only have been ordinarily resident in Guernsey at some time between 1 January 1938 and 30 June 1957 but also in occupation of a dwelling on 31 July 1968 or be the spouse or child of someone so resident. The Law, however, included a saving provision in favour of anyone in lawful occupation of controlled premises on 29 January 1969, but solely as regards those premises. The applicants therefore ceased to possess "residence qualifications" entitling them to occupy "Whiteknights" without a licence, since they were not resident in Guernsey on the relevant date.

As regards the grant of licences to persons without "residence qualifications" to occupy controlled houses, the Housing Law 1969 gave the Housing Authority discretionary powers which were limited by the enumeration of factors to be considered in deciding particular cases. Furthermore, the Law provided for appeals from the Housing Authority's decision to the Royal Court.

33. The Housing Law 1969, which was originally enacted for three years, was extended until 31 December 1975. On 1 January 1976, it was replaced by the Housing Law 1975. This statute preserved the basic distinction between "open market houses", available to all, and "controlled housing" for which "residence qualifications" or a licence were required.

The categories of persons having "residence qualifications" were set out in section 6 of the Law. It altered the basis of determining "residence qualifications" by allowing them also to be acquired by a certain period of lawful, licensed, residence in controlled housing and not only by residence on a particular date (section 6(1)(j)). At the same time, certain provisions were designed to preserve existing rights; in particular, "residence qualifications" continued to be possessed by persons who had been both ordinarily resident in Guernsey at some time between 1 January 1938 and 30 June 1957 and in occupation of a dwelling on 31 July 1968 (section 6(1)(h)). Since the applicants did not possess "residence qualifications", they needed a licence from the Housing Authority.

As far as the granting of a licence was concerned (section 3), section 5 of the Housing Law 1975 enumerated the factors to be taken into account by the Housing Authority, including, inter alia:

(a) whether the person concerned was engaged in employment considered essential to the community (sub-section 1 (a) - "essential licence" holder);

(b) whether the number of dwellings similar to that for which application was made and available for occupation was sufficient to meet the housing requirements of persons possessing "residence qualifications" (sub-section 1(b)).

However, the Housing Authority could, in the exercise of its discretion, take into account "such other factors as [it] may, from time to time, deem necessary or expedient" (sub-section 2). According to the Government, prolonged ownership was a factor which the Housing Authority took into account in this connection, but it was not given substantial weight in the absence of other special features. The fact that an applicant had formerly possessed "residence qualifications" under an earlier law was also a factor to which the Housing Authority would have regard but more weight would be attached to the time that the applicant had actually spent in Guernsey.

Section 19 of the Law provided for an appeal to the Royal Court against the refusal of a licence on the grounds that the decisions of the Housing Authority were ultra vires or constituted an unreasonable exercise of its powers.

Section 24 defined the offence of unlawful occupation as follows:

> "Any person
>
> (a) who occupies or causes or permits any other person to occupy a dwelling in contravention of any of the provisions of this Law; or
>
> (b) who contravenes any condition of a housing licence;
>
> shall be guilty of an offence and liable, on conviction, to a fine not exceeding five hundred pounds, and, in the case of a continuing offence, to a further fine not

exceeding fifty pounds for each day during which the offence continues after conviction."

34. The Housing (Control of Occupation) (Guernsey) Law 1982 entered into force on 1 November 1982. It is designed to replace gradually the old "residence qualifications" developed from the Housing Law 1948 by a system of periods of residence: 10 years for persons born in Guernsey or having a parent born in Guernsey; 15 years for essential workers and their families; and 20 years for other licence holders.

C. Statistics relevant to the housing situation in Guernsey

35. Guernsey is an island of 62 square kilometers (24 square miles). In 1939, the population of Guernsey was 43,800, and in 1951, three years after the introduction of the Housing Law 1948, it was 45,747. Between 1951 and 1976, the census data available showed an increase to 54,057, but by 1981 the population had dropped to 53,488. Today the island has an estimated overall population of 55,000 and an average population per square mile of 2,300 persons. This makes Guernsey one of the most densely populated areas within the member States of the Council of Europe. In addition, during the summer months there are up to 12,500 tourists on the island at any one time, giving an average population at that time of 2,750 per square mile.

The 1976 census reveals that in the period from 1971 to 1975 6,379 persons moved into Guernsey to live and 4,093 moved out. Between 1976 and 1981, which is the period relevant to the present case, 5,393 persons moved in and 5,817 moved out, giving an excess of outflow over inflow of 424.

The economy of the island depends on horticulture, agriculture and tourism and, in more recent years, the international finance industry. One of the island’s greatest problems has been finding sufficient housing accommodation, while protecting the relatively small area of countryside and other spaces from overdevelopment.

36. On 31 December 1981, 1,776 licences were in force, of which more than 25 per cent had been issued in the four-year period since 1977.

The statistics for the years 1978 to 1985 show that a certain balance had been maintained between the essential and non-essential licences granted by the Housing Authority (see paragraph 33 above). The number of essential licence holders exceeded that of non-essential licence holders for 1978, 1979, 1982, 1983 and 1984, but the contrary was the case in 1980 and 1985.

According to statistics supplied by the Government, the non-essential licences fall mainly into one or other of the following categories:

1. persons, principally in the tourist and horticultural industries, housed by their employer in staff quarters: 117 in 1978 and 119 in 1983;

2. returned Guernsey persons and persons with strong Guernsey connections: 152 in 1978 and 237 in 1983;

3. retired licence-holders and persons now qualified by virtue of long periods of residence under the 1975 and the 1982 Laws: 36 in 1978 and 154 in 1983;

4. compassionate and "en famille" (1982 Law) licences: 61 in 1978 and 184 in 1983;

5. miscellaneous (including licences from 1950's-1960's if house built): 190 in 1978 and 124 in 1983.

The strong demand for licences is also illustrated by the number of refusals: 84 in 1979, 109 in 1980, 158 in 1983 and 197 in 1985; the unsuccessful applicants included persons who had "residence qualifications" under previous Housing Laws and persons who had previously been in essential employment.

37. The official census statistics for 1981 show that there were a total of 18,716 dwellings on the island, of which 17,429 were occupied, leaving an unoccupied residue of 1,287 (as compared with 1,040 in 1976). The 1981 census stated that, of the vacant accommodation, 35 per cent consisted of "tourist units", 12 per cent were on sale, 10 per cent were being renovated and 29 per cent were "habitable and probably vacant pending new occupiers or for sale", leaving 14 per cent unexplained.

On the other hand, a limited survey, made in 1978 by the Housing Authority on the problem of the empty houses found that, after excluding holiday flats, flats over shops and partially-occupied houses, only 92 dwellings were unoccupied and available for long-term occupation. However, some of them were ruined or in very bad condition. Although the Housing Authority concluded that there had been "no significant deterioration in the situation since the last survey" made in 1974, it recommended, inter alia, the re-development of old buildings in town areas.

PROCEEDINGS BEFORE THE COMMISSION

38. In their application lodged with the Commission on 25 January 1980 (no. 9063/80), Mr. and Mrs. Gillow complained of the operation of the Housing Laws in their case. In particular, they claimed that the restrictions imposed on their occupation of "Whiteknights" constituted an interference with their rights to respect for their home and to the peaceful enjoyment of their possessions, which interference also had a discriminatory character. They further alleged that, in the proceedings which took place in Guernsey there had been a violation of their rights of access to court and to a fair hearing.

39. The Commission declared the application admissible on 9 December 1982. In its report adopted on 3 October 1984 (Article 31 of the Convention) (art. 31), the Commission expressed the opinion that there had been a breach of Article 8 of the Convention and Article 1 of Protocol No. 1 (art. 8, P1-1) (unanimously), but not of Article 6 (art. 6) of the Convention (ten votes to one) or of Article 14 (art. 14) of the Convention (unanimously). The full text of the Commission's opinion contained in the report is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS BY THE GOVERNMENT TO THE COURT

40. At the hearings on 18 February 1986, the Government maintained in substance the concluding submissions set out in their memorial, whereby they requested the Court to decide and declare: (1) that there had been a breach of Article 8 (art. 8) of the Convention having regard to the special circumstances obtaining in the applicants' case as identified by the Commission; (2) that the facts disclosed no breach of Article 1 of Protocol No. 1 (P1-1); (3) that there had been no breach of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1); and (4) that the facts disclosed no breach of Article 6 § 1 (art. 6-1) of the Convention on any of the grounds relied on by the applicants.

AS TO THE LAW

I. APPLICANTS' COMPLAINTS

41. The applicants' main complaint was directed against the Guernsey Housing Laws and their operation in their particular case, which they submitted had deprived them of their residence rights. This complaint was accompanied by the more general allegation that the said Laws were "surrogate immigration legislation" and therefore invalid since, by constitutional convention, Guernsey had no jurisdiction to legislate on immigration and nationality matters. The applicants also contended that the procedure followed in connection with the appeal against the refusals of licences to occupy their house "Whiteknights" and with their subsequent prosecution for unlawful occupation was unfair and had been conducted under an archaic legal and judicial system lacking independence. They relied, inter alia, on Articles 6, 8, 14 and 18 (art. 6, art. 8, art. 14, art. 18) of

the Convention, Article 1 of Protocol No. 1 and Article 2 of Protocol No. 4 (P1-1, P4-2).

42. It has to be noted first of all that the Court has no jurisdiction to investigate the applicants' complaint under Protocol No. 4 (P4), this instrument not having been ratified by the United Kingdom.

II. ALLEGED VIOLATION OF ARTICLE 8 (art. 8) OF THE CONVENTION

43. The applicants alleged that they had been victims of a violation of Article 8 (art. 8) of the Convention, which provides:

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

44. Before the Commission, the Government contested this allegation, arguing that "Whiteknights" was not the applicants' "home". Before the Court, however, they no longer maintained this argument in the light of facts which had emerged in the course of the consideration of the case by the Commission and from which it appeared in particular that the applicants had not established a home elsewhere, as had previously been believed. Furthermore, the Government accepted that, although the Housing Authority had acted throughout in good faith, there were special circumstances affecting the applicants' position which rendered the refusal of licences disproportionate. The Government therefore no longer disputed the existence of a violation of Article 8 (art. 8).

45. The Court notes the Government's present attitude, but considers that the responsibilities assigned to it extend to pronouncing on the non-contested allegation of violation of Article 8 (art. 8) (see, mutatis mutandis, the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 62, para. 154).

A. Was "Whiteknights" Mr. and Mrs. Gillow's "home" within the meaning of the Convention?

46. According to the applicants, they had established "Whiteknights" as their home in 1958. Although they had subsequently left Guernsey, they had retained ownership of the house, to which they always intended to return, and had kept their furniture in it. On their return in 1979, they lived in the property with a view to taking up permanent residence once the negotiations

with the Housing Authority about their residential status had been concluded and the necessary repairs had been carried out.

These statements, the accuracy of which the Court has no cause to doubt, are supported by the fact that in 1956 the applicants had sold their former home in Lancashire and moved with their family and furniture to Guernsey (see paragraph 9 above). Furthermore, the Court is satisfied that they had not established any other home elsewhere in the United Kingdom. Although the applicants had been absent from Guernsey for almost nineteen years, they had in the circumstances retained sufficient continuing links with "Whiteknights" for it to be considered their "home", for the purposes of Article 8 (art. 8) of the Convention, at the time of the disputed measures.

B. Was there any interference by a public authority with the exercise of the applicants' right to respect for their "home"?

47. Following the enactment of the Housing Law 1969 - which was not amended on this point by the Housing Law 1975 -, the applicants were obliged to seek a licence to occupy "Whiteknights" because, as a consequence of the change in the law, they had lost their "residence qualifications" (see paragraphs 32 and 33 above). In the Court's opinion, the fact that, on pain of prosecution, they were obliged to obtain a licence to live in their own house on their return to Guernsey in 1979, the refusal of the licences applied for, the institution of criminal proceedings against them for unlawful occupation of the property and, in Mr. Gillow's case, his conviction and the imposition of a fine constituted interferences with the exercise of the applicants' right to respect for their home.

C. Were the interferences justified?

48. In order to determine whether these interferences were justified under the terms of paragraph 2 of Article 8 (art. 8-2), the Court must examine in turn whether they were "in accordance with the law", whether they had an aim that was legitimate under that paragraph and whether they were "necessary in a democratic society" for the aforesaid aim.

1. "In accordance with the law"

49. The applicants alleged that the interferences in question were not "in accordance with the law". Firstly, the Housing Laws were immigration laws in disguise which were outside the legislative powers of the States of Guernsey. Secondly, the Housing Laws were obscure and difficult to understand and, in particular, there was a lack of clarity as to the meaning of the word "occupation" and the expression "employment essential to the community". Finally, these Laws left to the Housing Authority so wide a

discretion with regard to the issuing of licences that its decisions were unforeseeable.

The Government repudiated the first of these arguments, maintaining that the Housing Laws were designed to ensure that there was adequate local housing for persons with strong connections or associations with Guernsey and for those carrying on employment considered essential for the economic and social interests of the island. As to the second and third arguments, the Government, like the Commission, considered that the relevant provisions of the Housing Law 1975 satisfied the requirements of accessibility and foreseeability identified by the Court's case-law (see, inter alia, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 31, para. 49, and the Silver and Others judgment of 25 March 1983, Series A no. 61, p. 33, paras. 87-88).

50. As to the applicants' first argument, the Court observes that the Housing Law 1975 was duly sanctioned by the Sovereign in accordance with the normal legislative procedure, registered in the records of the Island of Guernsey and published. There can accordingly be no doubt as to the constitutional validity and accessibility of this statute.

51. With regard to the requirement of foreseeability, the Court refers to its established case-law (see the above-mentioned Sunday Times judgment, loc. cit., and the above-mentioned Silver and Others judgment, loc. cit.).

As to the facts of the present case, section 5 of the Housing Law 1975 prescribes the factors that the Housing Authority has to take into account in considering applications to occupy controlled market houses (see paragraph 33 above) and it was on the basis of these factors that the applicants were refused a licence (see paragraphs 15 and 16 above). It is true that some of the terms used (for example, "employment considered essential to the community") leave the Housing Authority a degree of discretion; this discretion is enlarged by the fact that section 5(2) permits the Housing Authority to have regard to "such other factors" as it deems necessary or expedient (see paragraph 33 above). However, as the Government pointed out, this allows the Housing Authority to consider not only the housing situation at each relevant moment but also the particular circumstances of each case and thus to weigh the public interest against that of the individual. In addition, the exercise of such discretion is subject to review by the Royal Court on appeal (section 19 of the Housing Law 1975).

A law which confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see the Malone judgment of 2 August 1984, Series A no. 82, p. 33, para. 68). In the present case, the Court finds that the scope of the discretion, coupled with the provision for

judicial control of its exercise, is sufficient to satisfy the requirements of the Convention inherent in the expression "in accordance with the law".

As to the absence in the Housing Law of any definition of the term "occupation", the Court observes that the meaning of this word, which is in common use, may be clearly inferred from the context in which it is employed and from the practice of the Housing Authority, which was fully explained to the applicants in several letters (see paragraphs 13, 15, 16, 18, 19 and 20 above). Whether there has been "occupation" is a question of fact determinable in each case.

52. The Court thus concludes that the interferences in question were "in accordance with the law".

2. Legitimate aim

53. The Government contended that the Housing Laws and the licensing system in general pursued the legitimate aim of ensuring that accommodation was available in Guernsey for persons with strong connections or associations with the island and of responding to the problem of potential overpopulation, taking account of the overall population density of the island and its economic, agricultural and tourist interests.

The applicants, although accepting that it was a legitimate aim for the State to ensure adequate housing for the poorer section of the community, argued that the Housing Laws had the primary purpose of stopping and controlling the movement of British people desiring to come to Guernsey, encouraged by its lower taxes. The said Laws were accordingly "surrogate immigration legislation" and their application also infringed Article 18 (art. 18) of the Convention.

54. The Court refers to the statistics supplied both by the Government and by the applicants concerning the population of Guernsey and the number of empty houses (see paragraphs 35 and 37 above). Although the situation could be said to have improved in some respects in the period between 1976 and 1981, this does not alter the fact that the island is very limited in area. It is therefore legitimate for the authorities to try to maintain the population within limits that permit the balanced economic development of the island. It is also legitimate, in this connection, to show a certain preference for persons who have strong attachments to the island or are engaged in an employment essential to the community when considering whether to grant licences to occupy premises let at a modest rent. The relevant legislation was thus designed to promote the economic well-being of the island. The Court does not find it to be established that the legislation pursued any other purpose (see Article 18 of the Convention) (art. 18).

3. "Necessary in a democratic society"

55. As to the principles relevant to the assessment of the "necessity" of a given measure "in a democratic society", reference should be made to the Court's case-law (see, notably, the Lingens judgment of 8 July 1986, Series A no. 103, pp. 25-26, paras. 39-40). The notion of necessity implies a pressing social need; in particular, the measure employed must be proportionate to the legitimate aim pursued. In addition, the scope of the margin of appreciation enjoyed by the national authorities will depend not only on the nature of the aim of the restriction but also on the nature of the right involved. In the instant case, the economic well-being of Guernsey must be balanced against the applicants' right to respect for their "home", a right which is pertinent to their own personal security and well-being. The importance of such a right to the individual must be taken into account in determining the scope of the margin of appreciation allowed to the Government.

56. It must first be examined whether the obligation imposed on the applicants by the Housing Laws to seek a licence to occupy their house complied with these principles (see paragraph 47 above).

The applicants attached considerable weight to the facts that there had been a slight decline in the population of Guernsey between 1976 and 1981 and that a certain number of dwellings were reported in the census statistics for 1981 to be unoccupied (see paragraphs 35 and 37 above); they concluded that there was no longer any pressing social need for the housing control legislation.

The Government replied that, although the legislation had succeeded in containing within acceptable limits the pressure on residential accommodation in the island, this did not mean that the control system could be abandoned without any significant detrimental effect on the interests of the island.

Whilst recognising the relevance of the facts relied on by the applicants, the Court considers that the Guernsey legislature is better placed than the international judge to assess the effects of any relaxation of the housing controls. Furthermore, when considering whether to grant a licence, the Housing Authority could exercise its discretion so as to avoid any disproportionality in a particular case (see paragraphs 33 and 51 above). It follows that the statutory obligation imposed on the applicants to seek a licence to live in their "home" cannot be regarded as disproportionate to the legitimate aim pursued.

There has accordingly been no breach of Article 8 (art. 8) as far as the terms of the contested legislation are concerned.

57. There remains, however, the question whether the manner in which the Housing Authority exercised its discretion in the applicants' case - refusal of permanent and temporary licences, and referral of the matter to the Law Officers with a view to prosecution (see paragraphs 15, 16, 19, 20,

21 and 23 above) - corresponded to a pressing social need and, in particular, was proportionate to the legitimate aim pursued.

The statistics submitted to the Court show that, during the relevant period - 1979 and 1980 - the population of the island had been kept within the levels of recent years, having even marginally declined (see paragraphs 35 above), and the availability of houses for occupation had not suffered any significant deterioration (see paragraph 37 above). Against this background, whilst not overlooking the fact that the average population per square mile of the island was still high in comparison with other countries, the Court considers that insufficient weight was given to the applicants' particular circumstances. They had built "Whiteknights" as a residence for themselves and their family. At that time, they possessed "residence qualifications" and continued to do so until the entry into force of the Housing Law 1969, so that during that period they were entitled to occupy the house without a licence. The property was Mr. and Mrs. Gillow's place of residence for two years before they left Guernsey in 1960. Thereafter, they had retained ownership of the house and left furniture there. By letting it over a period of eighteen years to persons approved by the Housing Authority, they contributed to the Guernsey housing stock. On their return in 1979, they had no other "home" in the United Kingdom or elsewhere; "Whiteknights" was vacant and there were no prospective tenants.

As for the refusals of the temporary licences, the decisions of the Housing Authority were, despite the granting of certain periods of grace, even more striking. "Whiteknights" needed repairs after eighteen years of rented use, with the result that it could not be occupied in the meantime by anyone other than the applicants.

Finally, as regards the referral of the case to the Law Officers with a view to prosecution, the Government stated that the Housing Authority deferred taking this course on several occasions (see paragraphs 18 and 19 above). This, however, in the Court's view did not materially alleviate Mr. and Mrs. Gillow's already precarious situation.

58. The Court therefore concludes that the decisions by the Housing Authority to refuse the applicants permanent and temporary licences to occupy "Whiteknights", as well as the conviction and fining of Mr. Gillow, constituted interferences with the exercise of their right to respect for their "home" which were disproportionate to the legitimate aim pursued.

There has accordingly been a breach of Article 8 (art. 8) of the Convention as far as the application of the legislation in the particular circumstances of the applicants' case was concerned.

III. ALLEGED VIOLATION OF ARTILCE 1 OF PROTOCOL NO. 1 (P1-1)

59. The applicants further submitted that there had been in their case a violation of Article 1 of Protocol No. 1 (P1-1) which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

60. By a letter of 10 October 1986, the Agent of the Government informed the Court - while expressing his profound regrets for doing so at so late a stage of the proceedings - that the United Kingdom had not extended the application of Protocol No. 1 (P1) to the Bailiwick of Guernsey in accordance with Article 4 of this Protocol (P1-4), which provides:

> "Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.
>
> ..."

On being informed of this letter the Delegate of the Commission commented that the Government "must be considered as having recognised ad hoc the competence of the Commission" to deal with the case under Article 1 of Protocol No. 1 (P1-1). He submitted that the Court might examine whether in the circumstances (including, in particular, the Government's acceptance of a violation of Article 8 of the Convention) (art. 8) "it finds it necessary to make any findings" in respect of the complaint under the Protocol. In the event that the Court considered it appropriate to give a ruling on the complaint, the Delegate "would be ready to make detailed submissions on the complex problems" raised by the Government's letter.

61. The Government's letter is not couched in the form of a preliminary objection within the meaning of Rule 47 of the Rules of Court. And indeed were it so, it would be out of time and could not be entertained. However, in the Court's view, the existence of a declaration under Article 4 of Protocol No. 1 (P1-4) is a matter for examination ex officio by the Court since it concerns the very applicability of Protocol No. 1 (P1) to the Island of Guernsey.

62. As to the applicability of Article 4 of Protocol No. 1 (P1-4) to the island of Guernsey, the Court has ascertained that a statement concerning the position of the Channel Islands in relation to treaties and international agreements applicable to the United Kingdom was issued on behalf of the Government of the United Kingdom on 16 October 1950 and communicated to all foreign Governments with whom the United Kingdom Government were in diplomatic relations, the United Nations and other international organisations concerned, including, inter alia, the Council of Europe. It was thereby established that the island of Guernsey should be regarded as a "territory for the international relations of which [the United Kingdom] is responsible" for the purposes of treaty provisions in the terms of Article 4 of this Protocol (P1-4); and this practice has been followed with regard to treaties concluded within the framework of the Council of Europe, including the Convention (Article 63) (art. 63). It thus clearly results from the text of Article 4 (P1-4) that an express declaration is required for the application of the Protocol to the island of Guernsey. According to the records of the Council of Europe, no such declaration extending the provisions of this Protocol (P1) to Guernsey has been communicated by the United Kingdom to the Secretary General of the Council of Europe.

In these circumstances, the Court concludes that Article 1 of Protocol No. 1 (P1-1) is not applicable in the present case and that it has no jurisdiction to entertain the complaints under this provision.

IV. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION (art. 14+8)

63. The applicants also contended that the Housing Laws discriminated in favour of people born or with roots in Guernsey, in comparison with other British citizens, as to the acquisition of "residence qualifications". They further alleged that the establishment of a category of "open market houses" by the Housing Laws (see paragraphs 30 and 33 above) constituted a discrimination in favour of the wealthy, who were able to purchase and occupy houses over a certain rateable value which were free from control by the Housing Authority. In this connection, they relied on Article 14 (art. 14) of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

64. The issues of alleged discrimination which arise in the present case thus relate not to a measure taken in exercise of the Housing Authority's discretionary powers under sections 3 and 5 of the 1975 Law, but to the preferential treatment accorded to specified groups of persons by section 6 of the Law (see paragraph 33 above) as compared with persons in the

applicants' situation who required a licence to occupy a property in Guernsey. The Court will examine the applicants' complaints in accordance with the well-established principles laid down in its case-law: for the purpose of Article 14 (art. 14), a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

65. The Court has already held that preferential treatment for persons with strong attachments to the island is legitimate for the purposes of the restrictions permitted under Article 8 (art. 8) of the Convention (see paragraph 54 above). It sees no cause to arrive at a different finding in respect of Article 14 taken together with Article 8 (art. 14+8). Moreover, the statistical information before the Court does not indicate that the control system established by the Housing Law 1975 was disproportionate to the aim pursued, particularly when account is taken of the flexibility allowed in the operation of the Law by the discretionary powers vested in the Housing Authority under sections 3 and 5 of the Law. The difference in treatment complained of therefore has, in the opinion of the Court, an objective and reasonable justification.

66. As to the alleged discrimination on the ground of property or wealth, the introduction of rateable-value limits reflects the Government's desire to exclude from the control of the Housing Authority the small percentage of expensive houses (10 per cent) likely to be sought after by better-off persons not considered to be in need of protection, while providing necessary protection for persons of more limited means who have strong connections with Guernsey. The applicants themselves have accepted that it was legitimate for a State to try to ensure adequate housing for the poorer section of the community (see paragraph 53 above). In view of the legitimate objectives being pursued in the general interest and having regard to the State's margin of appreciation, that policy of different treatment cannot be considered as unreasonable or as imposing a disproportionate burden on owners of more modest houses like the applicants, taking into account the possibilities open to them under the licencing system (see paragraph 33 above).

67. The Court therefore finds that the facts of the case do not disclose a breach of Article 14 of the Convention, taken in conjunction with Article 8 (art. 14+8).

V. ALLEGED VIOLATION OF ARTICLE 6 § 1 (art. 6-1) OF THE CONVENTION

68. Lastly, the applicants complained of a breach of the following provisions of Article 6 § 1 (art. 6-1):

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ..."

The applicants contested the fairness of two different sets of proceedings: firstly, the appeal lodged by Mrs. Gillow with the Royal Court against the decisions of the Housing Authority to refuse to grant licences to occupy "Whiteknights" (see paragraphs 20-22 and 25 above); and secondly, the prosecution of Mr. Gillow for unlawful occupation of the house, culminating in his conviction by the Magistrate's Court and subsequent appeal to the Royal Court (see paragraphs 23 and 26 above). The criminal proceedings against Mrs. Gillow are not in issue under Article 6 § 1 (art. 6-1).

The first set of proceedings was concerned with the applicants' right to occupy their own home, which is a civil right within the meaning of Article 6 § 1 (art. 6-1); the second set involved the determination of a criminal charge and thus falls under the criminal head of the Article. The applicability of Article 6 § 1 (art. 6-1) in these two respects was not in fact disputed.

69. With regard to the civil proceedings instituted by Mrs. Gillow, the applicants objected that her access to court was unfairly impeded because her appeal could only be lodged by an advocate, who, in their case, did not perform his duty; and also because they were put into the position that they had either to lodge the appeal from a hotel or from outside Guernsey, or to face prosecution. They also reiterated the allegations, made in the context of Article 8 (art. 8), as to the lack in the Housing Laws of any definition of the term "occupation".

On this last issue, the Court would reaffirm the conclusion it reached in connection with the lawfulness of the interferences under Article 8 (art. 8) (see paragraph 51 above). As regards the other complaints, the Court notes first that the requirement of a lawyer to lodge an appeal before a higher court is a common feature of the legal systems in several member States of the Council of Europe. It is true that in the present case the applicants' lawyer did not properly perform his duty and was therefore censured (see paragraph 27 above). The Royal Court nonetheless entertained the appeal even though it had been lodged out of time, and thus remedied the failure on the lawyer's part (see paragraph 22 above). Finally, the Court concurs with the Commission that the applicants have failed to show how their effective right of access to court has been interfered with by the refusal to allow them to occupy their house without facing prosecution.

70. With regard to the prosecution for unlawful occupation, the applicants complained that the Magistrate's Court had not adjourned the hearing of Mr. Gillow's case, as was allegedly the usual practice, to await the decision of the Royal Court on the civil appeal filed by Mrs. Gillow (see paragraph 23 above). In their opinion, this was unfair because Mr. Gillow's

conviction prejudiced the civil appeal decision, whereas the latter decision prejudiced Mr. Gillow's criminal appeal.

The Court considers that the adjournment of a hearing is a matter which falls in principle within the discretion of the competent national court. In addition, Mrs. Gillow's civil appeal was not lodged until the day already appointed for the criminal hearing (see paragraphs 22 and 23 above). In these circumstances, the decision of the Magistrate was not open to criticism.

71. The applicants further contended that during the hearing of Mr. Gillow's appeal against his conviction he was not permitted to check the correctness of the transcript of the first-instance proceedings by hearing the original tape.

The Court notes that the tape recording of hearings is not a practice common to the courts of all member States of the Council of Europe, and cannot be said to be a requirement of Article 6 (art. 6). Where such a recording exists, the Court agrees with the Commission that access to the original tape by the accused is in principle a question within the discretion of the domestic courts. In the present case, although access to the tape was refused, the Registrar of the Royal Court checked the transcript and pronounced it accurate (see paragraph 26 above). The evidence does not therefore disclose that any unfairness resulted in this connection.

72. Finally, the applicants pointed out that the Royal Court had sat in almost the same composition in both Mrs. Gillow's civil appeal and Mr. Gillow's criminal appeal (see paragraph 26 above), that one of the Jurats had acted as Magistrate in the criminal proceedings against Mrs. Gillow, first deciding to adjourn her trial and finally suspending it sine die (see paragraph 23 above); and that another Jurat had previously been President of the Housing Authority.

The issue raised by these complaints is whether the Royal Court when hearing the Gillows' appeals could be considered an "impartial tribunal" for the purposes of Article 6 § 1 (art. 6-1).

73. The Court notes first that, although there was a factual nexus between the two appeals heard by the Royal Court, they related to two different people and two different questions: a civil case concerning the propriety of the refusals by the Housing Authority to grant licences to Mrs. Gillow and a criminal case concerning Mr. Gillow's alleged unlawful occupation of "Whiteknights". Admittedly, with one exception, each member of the Royal Court who had sat in the first case also took part in the second, but this in itself is not reasonably capable of giving rise to legitimate doubts as to the impartiality of the Royal Court. It is in fact common in the Convention countries that higher courts deal with similar or related cases in turn.

There remain the allegations of partiality made by the applicants against two individual members of the Royal Court, namely the Jurat who had

earlier sat as Magistrate in the criminal proceedings against Mrs. Gillow and the other Jurat who had previously been President of the Housing Authority. The only decision taken by the first Jurat in his capacity as Magistrate had been to adjourn, ultimately sine die, the hearing on the charges against Mrs. Gillow. With regard to the former President of the Housing Authority, it does not appear from the evidence adduced before the Court that he had at any stage been involved, directly or indirectly, in the applicants' case. The Court therefore finds that the performance of these previous functions is not sufficient to give rise to legitimate doubt as to the impartiality of the two Jurats in question.

74. The Court accordingly concludes that there has been no violation of Article 6 § 1 (art. 6-1) of the Convention on the matters examined under paragraphs 69 to 73 above.

75. In their written submissions to the Court, the applicants also made some other complaints concerning the Royal Court. However, these complaints were not pursued during the hearings and the Court thus does not consider it necessary to examine them, also having regard to the fact that the decisions of the Royal Court in question have already been taken into account for the finding of a violation of Article 8 (art. 8).

VI. APPLICATION OF ARTICLE 50 (art. 50)

76. The applicants made no specific claims under Article 50 (art. 50) but reserved their position until after having knowledge of the Court's judgment on the merits. In these conditions, neither the Government nor the Commission were able to take any stand on the issue.

The question is thus not yet ready for decision and must be reserved (Rule 53 § 1 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been no breach of Article 8 (art. 8) of the Convention as far as the terms of the contested legislation were concerned;

2. Holds that there has been a breach of Article 8 (art. 8) of the Convention as far as the application of the contested legislation in the applicants' case was concerned;

3. Holds that there has been no breach of Article 14 of the Convention taken in conjunction with Article 8 (art. 14+8);

4. Holds that there has been no breach of Article 6 (art. 6) of the Convention in respect of the complaints examined by the Court in paragraphs 69 to 73 of this judgment, and that it is not necessary to deal with the other complaints made by the applicants under this Article (art. 6);

5. Holds that Protocols No. 1 and No. 4 (P1, P4) are not applicable to the present case;

6. Holds that the question of the application of Article 50 (art. 50) is not ready for decision, and accordingly,
(a) reserves the whole of the said question;
(b) invites the applicants, duly represented by a lawyer in accordance with Rule 30 of the Rules of Court, to file with the registry, within the forthcoming three months, any claims for just satisfaction that they might have;
(c) delegates to the President of the Chamber the power to fix the further procedure.

Done in English and in French at the Human Rights Building, Strasbourg, on 24 November 1986.

Gérard WIARDA
President

Marc-André EISSEN
Registrar

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

COURT (CHAMBER)

CASE OF GILLOW v. THE UNITED KINGDOM (ARTICLE 50)

(Application no. 9063/80)

JUDGMENT

STRASBOURG

14 September 1987

In the Gillow case*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr. G. WIARDA, *President*,
Mr. R. RYSSDAL,
Mr. J. CREMONA,
Mr. W. GANSHOF VAN DER MEERSCH,
Mr. F. GÖLCÜKLÜ,
Sir Vincent EVANS,
Mr. C. RUSSO,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 22 May and on 24 and 25 August 1987,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE AND FACTS

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 19 December 1984. The case originated in an application (no. 9063/80) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission in 1980 by Mr. Joseph and Mrs. Yvonne Gillow, British citizens.

2. By judgment of 24 November 1986, the Court held, inter alia, that there had been a breach of Article 8 (art. 8) of the Convention by reason of the way in which the Guernsey Housing Laws were applied in the applicants' case (Series A no. 109, paragraphs 57-58 of the reasons and point 2 of the operative provisions, pp. 23-24 and 29).

The only outstanding matter to be settled is the question of the application of Article 50 (art. 50) in the present case. Accordingly, as regards the facts, reference should be made to paragraphs 9-37 of the above-mentioned judgment (ibid., pp. 8-17).

3. The applicants had reserved their position on the application of Article 50 (art. 50) until after having knowledge of the Court's judgment on

* Note by the Registrar: The case is numbered 13/1984/85/132. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

the merits. In these conditions, neither the Government of the United Kingdom ("the Government") nor the Commission were able to take any stand on the issue.

In its judgment of 24 November 1986, the Court accordingly reserved the question, and invited the applicants, duly represented by a lawyer in accordance with Rule 30 of the Rules of Court, to file within the forthcoming three months any claim for just satisfaction that they might have (ibid., paragraph 76 of the reasons and point 6 of the operative provisions, p. 29).

4. Having duly appointed a lawyer, Mr. and Mrs. Gillow, in a memorial of 17 February 1987, claimed just satisfaction in respect of material and moral damage, as well as costs and expenses.

In accordance with the President's directions, the Government filed a memorial on 24 April. On 19 May, the Secretary to the Commission informed the Registrar that its Delegate did not intend to submit any observations.

5. On 22 May 1987, the Chamber decided that, in the particular circumstances, there was no need to hold oral hearings and directed the Registrar to ask the applicants for particulars of the costs and expenses claimed. This information was received on 20 July and 3 August 1987. The Government and the Commission commented thereon on 5 and 21 August 1987, respectively.

6. On 30 June, Mrs. Gillow informed the Court that her husband had died on 8 June 1987.

7. Subsequently, Mr. Cremona, Mr. Ganshof van der Meersch, Mr. Gölcüklü and Mr. Russo, substitute judges, replaced Mr. Thór Vilhjálmsson, Mr. Lagergren, Mr. Pettiti and Mr. Macdonald, who were prevented from taking part in the final deliberation on 24 and 25 August 1987 (Rules 22 § 1 and 24 § 1).

AS TO THE LAW

8. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

9. Mr. and Mrs. Gillow claimed just satisfaction in respect of both pecuniary and moral damage and costs and expenses.

In addition, throughout the proceedings before the Court, they sought an order directing the Government to restore their "residence qualifications" in

respect of Guernsey. The Court is not, however, empowered under the Convention to make an order of this kind (see, mutatis mutandis, the McGoff judgment of 26 October 1984, Series A no. 83, p. 28, § 31).

I. PECUNIARY DAMAGE

10. Mr. and Mrs. Gillow alleged that, as a result of the refusals of permanent and temporary licences (see the above-mentioned Gillow judgment, Series A no. 109, pp. 9-11, §§ 15, 16 and 20), they had been obliged to sell their home "Whiteknights" and, on account of their inferior bargaining position at the time, to accept a price less than the true market value. They further contended that the compensation payable to them should include a sum equal to the difference between the proceeds of sale of "Whiteknights" and what they would have to pay for a replacement property in Guernsey. Under these heads, they claimed a total sum of £50,000. They also sought reimbursement of estate agents' fees on the sale of "Whiteknights" and fees for a house survey, totalling £735.

The Government contested these claims. In their view, the sale in question had not been necessitated by the refusal of licences and, in any event, had been premature in that it was effected prior to the determination of Mrs. Gillow's appeal to the Royal Court (ibid., p. 12, §§ 24-25). Furthermore, the claims in respect of loss on the sale and the costs of a replacement property were imprecise and unsubstantiated by evidence.

11. It is true that the refusal of licences did not oblige the applicants to sell "Whiteknights", for there was nothing to prevent them from letting the property. However, since they were refused a licence to occupy the house themselves, the Court does not consider that they acted unreasonably in deciding to dispose of it. It is therefore appropriate that the above-mentioned fees of £735 should be reimbursed.

As regards the alleged loss on the sale, the Court notes that the applicants obtained a price which fell within the range of the initial valuation made by the estate agents (see paragraph 150 of the Commission's report). It is not established that the price was less than the market value at the time. This claim cannot therefore be accepted.

The claim relating to the costs of a replacement property is likewise unsubstantiated by evidence.

12. The applicants maintained that had they been permitted to continue to live in Guernsey, they would have been able to work there for a further four years, each at a salary of £8,000 a year - Mr. Gillow as a horticultural consultant and Mrs. Gillow as a teacher. They accordingly sought £64,000 for loss of earnings.

The Court agrees with the Government that this claim must be rejected, since there is no evidence establishing that the applicants would have been able to find employment in these capacities in Guernsey at the time.

II. MORAL DAMAGE

13. The applicants claimed £100,000 for "moral damage". In their submission, they had since 1978 sustained substantial prejudice as a result of the Housing Authority's decisions; during this long period, their inability to lead a settled existence had dominated their lives; and the denial of their right to respect for their home and the subsequent prolonged hardship occasioned by the repeated refusals of temporary licences had caused them severe stress and anxiety.

The Government contended that, in the circumstances of the case, the Court's finding of violation of the Convention constituted in itself sufficient just satisfaction under this head. In the alternative, they argued that the sum claimed was disproportionate and suggested a figure of £1,000.

14. In the Court's view, Mr. and Mrs. Gillow undoubtedly sustained significant moral damage which cannot be compensated solely by the finding of a violation. For one year, they lived with a feeling of insecurity, prompted by uncertainty as to whether they would finally be permitted to stay in their home or be expelled from it. Furthermore, their prosecution for unlawful occupation of their home added to their already precarious situation (see the above-mentioned Gillow judgment, Series A no. 109, p. 23, § 57). In the outcome, they felt obliged to dispose of their home in Guernsey and must have experienced considerable stress and anxiety in consequence of that and in settling elsewhere.

15. Taking all the relevant factors into account and making an assessment on an equitable basis, as is required by Article 50 (art. 50), the Court awards the sum of £10,000 under this head.

III. COSTS AND EXPENSES

16. The applicants sought reimbursement of various items of expenditure which they said they had incurred.

The Government pointed out that no vouchers had been supplied in respect of these items and contended that certain of them were either not necessary or not reasonable in amount.

17. The Court has examined the claims under this head in the light of the criteria which emerge from its established case-law (see, amongst other authorities, the Zimmermann and Steiner judgment of 13 July 1983, Series A no. 66, p. 14, § 36).

(a) Miscellaneous expenses

18. The applicants claimed £634 for legal and court costs incurred in Guernsey and for other sundry expenses. These items were not contested by the Government. The Court allows this sum, which it finds reasonable.

(b) Travel and subsistence expenses

19. The applicants sought reimbursement of travel and subsistence expenses relating to:

(i) five visits by them to Strasbourg for consultations with the Secretariat of the Commission and the registry of the Court (£1,950);

(ii) their attendance at the Commission's hearing on 9 December 1982 (£600);

(iii) their attendance at the delivery of the Court's judgment of 24 November 1986 (£600);

(iv) Mr. Dun's services in connection with the Court's hearing on 18 February 1986 (£1,300).

The applicants made no claim in respect of their attendance at the last-mentioned hearing, their expenses on this occasion having being paid by the Council of Europe.

20. No vouchers have been supplied in respect of item (i), but the Court is in any event unable to accept it. The matters discussed in the consultations could have been dealt with by correspondence, with the result that this expenditure cannot be regarded as necessarily incurred.

The same applies to item (iv). Mr. Dun attended the Court's hearing of his own free will and the Court had not been informed in advance of his presence. He acted neither as the representative of the applicants nor as a person approved by the President of the Chamber to assist them (Rule 30 of the Rules of Court).

21. On the other hand, the Court considers that items (ii) and (iii) can be regarded as necessarily incurred. The applicants presented their own case before the Commission and thus obviously had to be present at its hearing. The Court also finds that it was justified for them to attend at the delivery of its 1986 judgment; unlike the applicants in the Sunday Times case, on which the Government relied on this point (see the judgment of 6 November 1980, Series A no. 38, p. 16, § 35), Mr. and Mrs. Gillow were still not, at this stage, represented by a lawyer.

The amounts claimed for items (ii) and (iii) appear to the Court to be reasonable, and it therefore allows them both.

(c) Costs relating to the Article 50 (art. 50) proceedings

22. Finally, the applicants claimed £1,000 in respect of the fees of Mr. Bencini, the lawyer who represented them in the Article 50 (art. 50) proceedings. Fees for this purpose were incurred in compliance with the Court's own direction (see the above-mentioned Gillow judgment, Series A no. 109, point 6 (b) of the operative provisions, p. 29). As to quantum, the Court, in view of the limited role played by this lawyer at this final stage of the proceedings, considers £300 (three hundred pounds sterling) to be reasonable.

IV. PAYMENT OF THE AMOUNTS AWARDED

23. Since this case relates to events and their consequences which were experienced by Mr. and Mrs. Gillow together, the Court considers it equitable that all the sums awarded in this judgment should be paid to the survivor of them, Mrs. Gillow.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that the United Kingdom is to pay to Mrs. Gillow £10,735 (ten thousand seven hundred and thirty-five pounds) for damage and £2,134 (two thousand one hundred and thirty-four pounds) for costs and expenses;

2. Rejects the remainder of the claim for just satisfaction.

Done in English and in French, and notified in writing on 14 September 1987 pursuant to Rule 54 § 2, second sub-paragraph, of the Rules of Court.

Gérard WIARDA
President

Marc-André EISSEN
Registrar

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

COURT (PLENARY)

CASE OF GOLDER v. THE UNITED KINGDOM

(Application no. 4451/70)

JUDGMENT

STRASBOURG

21 February 1975

In the Golder case,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

Mr. G. BALLADORE PALLIERI, *President*,
Mr. H. MOSLER,
Mr. A. VERDROSS,
Mr. E. RODENBOURG,
Mr. M. ZEKIA,
Mr. J. CREMONA,
Mrs. I. H. PEDERSEN,
Mr. T. VILHJALMSSON,
Mr. R. RYSSDAL,
Mr. A. BOZER,
Mr. W. J. GANSHOF VAN DER MEERSCH,
Sir Gerald FITZMAURICE,

and also Mr. M.-A. EISSEN, *Registrar* and Mr. J.F. SMYTH, *Deputy Registrar,*

Having deliberated in private,

Decides as follows:

PROCEDURE

1. The Golder case was referred to the Court by the Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter called "the Government"). The case has its origin in an application against the United Kingdom lodged with the European Commission of Human Rights (hereinafter called "the Commission") under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"), by a United Kingdom citizen, Mr. Sidney Elmer Golder. The application was first submitted in 1969; it was supplemented in April 1970 and registered under no. 4451/70. The Commission's report in the case, drawn up in accordance with Article 31 (art. 31) of the Convention, was transmitted to the Committee of Ministers of the Council of Europe on 5 July 1973.

2. The Government's application, which was made under Article 48 (art. 48) of the Convention, was lodged with the registry of the Court on 27 September 1973 within the period of three months laid down in Articles 32 para. 1 and 47 (art. 32-1, art. 47). The purpose of the application is to submit the case for judgment by the Court. The Government therein express their disagreement with the opinion stated by the Commission in their report

and with the Commission's approach to the interpretation of the Convention.

3. On 4 October 1973, the Registrar received from the Secretary of the Commission twenty-five copies of their report.

4. On 9 October 1973, the then President of the Court drew by lot, in the presence of the Registrar, the names of five of the seven judges called upon to sit as members of the Chamber, Sir Humphrey Waldock, the elected judge of British nationality, and Mr. G. Balladore Pallieri, Vice-President of the Court, being ex officio members under Article 43 (art. 43) of the Convention and Rule 21 para. 3 (b) of the Rules of Court respectively. The five judges chosen were MM. R. Cassin, R. Rodenbourg, A. Favre, T. Vilhjálmsson and W. Ganshof van der Meersch, (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). The President also drew by lot the names of substitute judges (Rule 2l para. 4).

Mr. G. Balladore Pallieri assumed the office of President of the Chamber in accordance with Rule 21 para. 5.

5. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Government and of the Delegates of the Commission on the procedure to be followed. By Order of 12 October 1973, he decided that the Government should file a memorial within a time-limit expiring on 3l January 1974 and that the Delegates should be entitled to file a memorial in reply within two months of the receipt of the Government's memorial. The President of the Chamber also instructed the Registrar to request the Delegates to communicate to the Court the main documents listed in the report. These documents were received at the registry on 17 October.

The President later granted extensions of the times allowed, until 6 March 1974 for the Agent of the Government, and until 6 June and then 26 July for the Delegates (Orders of 21 January, 9 April and 5 June 1974). The Government's memorial was received at the registry on 6 March 1974 and that of the Commission - with observations by the applicant's counsel annexed - on 26 July.

6. The Chamber met in private on 7 May 1974. Sir Gerald Fitzmaurice, who had been elected a member of the Court in January 1974 in place of Sir Humphrey Waldock, took his seat in the Court as the elected judge of British nationality (Article 43 of the Convention and Rule 2 para. 3) (art. 43).

On the same day the Chamber, "considering that the case raise(d) serious questions affecting the interpretation of the Convention", decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court.

The new President of the Court, Mr. Balladore Pallieri, assumed the office of President.

7. After consulting the Agent of the Government and the Delegates of the Commission, the President decided, by Order of 6 August 1974, that the oral hearings should open on 11 October.

8. The public hearings took place on 11 and 12 October 1974 in the Human Rights Building at Strasbourg.

There appeared before the Court:

- for the Government:

Mr. P. FIFOOT, Legal Counsellor,
Foreign and Commonwealth Office, Barrister-at-Law,
Agent and *Counsel*,

Sir Francis VALLAT, K.C.M.G., Q.C., Professor of International Law,
King's College, London; formerly Legal Adviser to the Foreign Office,

Mr. G. SLYNN, Q.C., Recorder of Hereford, *Counsel*,

and

Sir William DALE, K.C.M.G., formerly Legal Adviser to the Commonwealth Office,

Mr. R. M. MORRIS, Principal, Home Office, *Advisers*;

- for the Commission:

Mr. G. SPERDUTI, *Principal Delegate*,

MM. T. OPSAHL and K. MANGAN, *Delegates*, and

Mr. N. TAPP, Q.C., who had represented the applicant before the Commission, assisting the Delegates under Rule 29 para. 1, second sentence.

The Court heard the addresses and submissions of Mr. Fifoot, Sir Francis Vallat and Mr. Slynn for the Government and of Mr. Sperduti, Mr. Opsahl and Mr. Tapp for the Commission, as well as their replies to questions put by the Court and by several judges.

At the hearings, the Government produced certain documents to the Court

AS TO THE FACTS

9. The facts of the case may be summarised as follows.

10. In 1965, Mr. Sidney Elmer Golder, a United Kingdom citizen born in 1923, was convicted in the United Kingdom of robbery with violence and was sentenced to fifteen years' imprisonment. In 1969, Golder was serving his sentence in Parkhurst Prison on the Isle of Wight.

11. On the evening of 24 October 1969, a serious disturbance occurred in a recreation area of the prison where Golder happened to be.

On 25 October, a prison officer, Mr. Laird, who had taken part and been injured in quelling the disturbance, made a statement identifying his

assailants, in the course of which he declared: "Frazer was screaming ... and Frape, Noonan and another prisoner whom I know by sight, I think his name is Golder ... were swinging vicious blows at me."

12. On 26 October Golder, together with other prisoners suspected of having participated in the disturbance, was segregated from the main body of prisoners. On 28 and 30 October, Golder was interviewed by police officers. At the second of these interviews he was informed that it had been alleged that he had assaulted a prison officer; he was warned that "the facts would be reported in order that consideration could be given whether or not he would be prosecuted for assaulting a prison officer causing bodily harm".

13. Golder wrote to his Member of Parliament on 25 October and 1 November, and to a Chief Constable on 4 November 1969, about the disturbance of 24 October and the ensuing hardships it had entailed for him; the prison governor stopped these letters since Golder had failed to raise the subject-matter thereof through the authorised channels beforehand.

14. In a second statement, made on 5 November 1969, Laird qualified as follows what he had said earlier:

> "When I mentioned the prisoner Golder, I said 'I think it was Golder', who was present with Frazer, Frape and Noonan, when the three latter were attacking me.
>
> "If it was Golder and I certainly remember seeing him in the immediate group who were screaming abuse and generally making a nuisance of themselves, I am not certain that he made an attack on me.
>
> "Later when Noonan and Frape grabbed me, Frazer was also present but I cannot remember who the other inmate was, but there were several there one of whom stood out in particular but I cannot put a name to him."

On 7 November, another prison officer reported that:

> "... during the riot of that night I spent the majority of the time in the T.V. room with the prisoners who were not participating in the disturbance.
>
> 740007, Golder was in this room with me and to the best of my knowledge took no part in the riot.
>
> His presence with me can be borne out by officer ... who observed us both from the outside."

Golder was returned to his ordinary cell the same day.

l5. Meanwhile, the prison authorities had been considering the various statements, and on 10 November prepared a list of charges which might be preferred against prisoners, including Golder, for offences against prison discipline. Entries relating thereto were made in Golder's prison record. No such charge was eventually preferred against him and the entries in his prison record were marked "charges not proceeded with". Those entries were expunged from the prison record in 1971 during the examination of the applicant's case by the Commission.

16. On 20 March 1970, Golder addressed a petition to the Secretary of State for the Home Department, that is, the Home Secretary. He requested a transfer to some other prison and added:

> "I understand that a statement wrongly accusing me of participation in the events of 24th October last, made by Officer Laird, is lodged in my prison record. I suspect that it is this wrong statement that has recently prevented my being recommended by the local parole board for parole.
>
> "I would respectfully request permission to consult a solicitor with a view to taking civil action for libel in respect of this statement .... Alternatively, I would request that an independent examination of my record be allowed by Mrs. G.M. Bishop who is magistrate. I would accept her assurance that this statement is not part of my record and be willing to accept then that the libel against me has not materially harmed me except for the two weeks I spent in the separate cells and so civil action would not be then necessary, providing that an apology was given to me for the libel ...."

17. In England the matter of contacts of convicted prisoners with persons outside their place of detention is governed by the Prison Act 1952, as amended and subordinate legislation made under that Act.

Section 47, sub-section I, of the Prison Act provides that "the Secretary of State may make rules for the regulation and management of prisoners ... and for the ... treatment ... discipline and control of persons required to be detained ...."

The rules made by the Home Secretary in the exercise of this power are the Prison Rules 1964, which were laid before Parliament and have the status of a Statutory Instrument. The relevant provisions concerning communications between prisoners and persons outside prison are contained in Rules 33, 34 and 37 as follows:

> "Letters and visits generally
>
> Rule 33
>
> (1) The Secretary of State may, with a view to securing discipline and good order or the prevention of crime in the interests of any persons, impose restrictions, either generally or in a particular case, upon the communications to be permitted between a prisoner and other persons.
>
> (2) Except as provided by statute or these Rules, a prisoner shall not be permitted to communicate with any outside person, or that person with him, without the leave of the Secretary of State.
>
> ...
>
> Personal letters and visits
>
> Rule 34
>
> ...

(8) A prisoner shall not be entitled under this Rule to communicate with any person in connection with any legal or other business, or with any person other than a relative or friend, except with the leave of the Secretary of State.

...

Legal advisers

Rule 37

(1) The legal adviser of a prisoner in any legal proceedings, civil or criminal, to which the prisoner is a party shall be afforded reasonable facilities for interviewing him in connection with those proceedings, and may do so out of hearing but in the sight of an officer.

(2) A prisoner's legal adviser may, with the leave of the Secretary of State, interview the prisoner in connection with any other legal business in the sight and hearing of an officer."

18. On 6 April 1970, the Home Office directed the prison governor to notify Golder of the reply to his petition of 20 March as follows:

"The Secretary of State has fully considered your petition but is not prepared to grant your request for transfer, nor can he find grounds for taking any action in regard to the other matters raised in your petition."

19. Before the Commission, Golder submitted two complaints relating respectively to the stopping of his letters (as mentioned above at paragraph 13) and to the refusal of the Home Secretary to permit him to consult a solicitor. On 30 March 1971, the Commission declared the first complaint inadmissible, as all domestic remedies had not been exhausted, but accepted the second for consideration of the merits under Articles 6 para. 1 and 8 (art. 6-1, art. 8) of the Convention.

20. Golder was released from prison on parole on 12 July 1972.

21. In their report, the Commission expressed the opinion:

- unanimously, that Article 6 para. 1 (art. 6-1) guarantees a right of access to the courts;

- unanimously, that in Article 6 para. 1 (art. 6-1), whether read alone or together with other Articles of the Convention, there are no inherent limitations on the right of a convicted prisoner to institute proceedings and for this purpose to have unrestricted access to a lawyer; and that consequently the restrictions imposed by the present practice of the United Kingdom authorities are inconsistent with Article 6 para. 1 (art. 6-1);

- by seven votes to two, that Article 8 para. 1 (art. 8-1) is applicable to the facts of the present case;

- that the same facts which constitute a violation of Article 6 para. 1 (art. 6-1) constitute also a violation of Article 8 (art. 8) (by eight votes to one, as explained to the Court by the Principal Delegate on 12 October 1974).

The Commission furthermore expressed the opinion that the right of access to the courts guaranteed by Article 6 para. 1 (art. 6-1) is not qualified by the requirement "within a reasonable time". In the application bringing the case before the Court, the Government made objection to this opinion of the Commission but stated in their memorial that they no longer wished to argue the issue.

22. The following final submissions were made to the Court at the oral hearing on 12 October 1974 in the afternoon.

- for the Government:

"The United Kingdom Government respectfully submit to the Court that Article 6 para. 1 (art. 6-1) of the Convention does not confer on the applicant a right of access to the courts, but confers only a right in any proceedings he may institute to a hearing that is fair and in accordance with the other requirements of the paragraph. The Government submit that in consequence the refusal of the United Kingdom Government to allow the applicant in this case to consult a lawyer was not a violation of Article 6 (art. 6). In the alternative, if the Court finds that the rights conferred by Article 6 (art. 6) include in general a right of access to courts, then the United Kingdom Government submit that the right of access to the courts is not unlimited in the case of persons under detention, and that accordingly the imposing of a reasonable restraint on recourse to the courts by the applicant was permissible in the interest of prison order and discipline, and that the refusal of the United Kingdom Government to allow the applicant to consult a lawyer was within the degree of restraint permitted, and therefore did not constitute a violation of Article 6 (art. 6) of the Convention.

The United Kingdom Government further submit that control over the applicant's correspondence while he was in prison was a necessary consequence of the deprivation of his liberty, and that the action of the United Kingdom Government was therefore not a violation of Article 8 para. 1 (art. 8-1), and that the action of the United Kingdom Government in any event fell within the exceptions provided by Article 8 para. 2 (art. 8-2), since the restriction imposed was in accordance with law, and it was within the power of appreciation of the Government to judge that the restriction was necessary in a democratic society for the prevention of disorder or crime.

In the light of these submissions, Mr. President, I respectfully ask this honourable Court, on behalf of the United Kingdom Government, to hold that the United Kingdom Government have not in this case committed a breach of Article 6 (art. 6) or Article 8 (art. 8) of the European Convention on Human Rights and Fundamental Freedoms."

- for the Commission:

"The questions to which the Court is requested to reply are the following:

(1) Does Article 6 para. 1 (art. 6-1) of the European Convention on Human Rights secure to persons desiring to institute civil proceedings a right of access to the courts?

(2) If Article 6 para. 1 (art. 6-1) secures such a right of access, are there inherent limitations relating to this right, or its exercise, which apply to the facts of the present case?

(3) Can a convicted prisoner who wishes to write to his lawyer in order to institute civil proceedings rely on the protection given in Article 8 (art. 8) of the Convention to respect for correspondence?

(4) According to the answers given to the foregoing questions, do the facts of the present case disclose the existence of a violation of Article 6 and of Article 8 (art. 6, art. 8) of the European Convention on Human Rights?"

AS TO THE LAW

I. ON THE ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

23. Paragraphs 73, 99 and 110 of the Commission's report indicate that the Commission consider unanimously that there was a violation of Article 6 para. 1 (art. 6-1). The Government disagree with this opinion.

24. Article 6 para. 1 (art. 6-1) provides:

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

25. In the present case the Court is called upon to decide two distinct questions arising on the text cited above:

(i) Is Article 6 para. 1 (art. 6-1) limited to guaranteeing in substance the right to a fair trial in legal proceedings which are already pending, or does it in addition secure a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined?

(ii) In the latter eventuality, are there any implied limitations on the right of access or on the exercise of that right which are applicable in the present case?

A. On the "right of access"

26. The Court recalls that on 20 March 1970 Golder petitioned the Home Secretary for permission to consult a solicitor with a view to bringing a civil action for libel against prison officer Laird and that his petition was refused on 6 April (paragraphs 16 and 18 above).

While the refusal of the Home Secretary had the immediate effect of preventing Golder from contacting a solicitor, it does not at all follow from this that the only issue which can arise in the present case relates to correspondence, to the exclusion of all matters of access to the courts.

Clearly, no one knows whether Golder would have persisted in carrying out his intention to sue Laird if he had been permitted to consult a solicitor. Furthermore, the information supplied to the Court by the Government gives reason to think that a court in England would not dismiss an action brought by a convicted prisoner on the sole ground that he had managed to cause the writ to be issued - through an attorney for instance - without obtaining leave from the Home Secretary under Rules 33 para. 2 and 34 para. 8 of the Prison Rules 1964, which in any event did not happen in the present case.

The fact nonetheless remains that Golder had made it most clear that he intended "taking civil action for libel"; it was for this purpose that he wished to contact a solicitor, which was a normal preliminary step in itself and in Golder’s case probably essential on account of his imprisonment. By forbidding Golder to make such contact, the Home Secretary actually impeded the launching of the contemplated action. Without formally denying Golder his right to institute proceedings before a court, the Home Secretary did in fact prevent him from commencing an action at that time, 1970. Hindrance in fact can contravene the Convention just like a legal impediment.

It is true that - as the Government have emphasised - on obtaining his release Golder would have been in a position to have recourse to the courts at will, but in March and April 1970 this was still rather remote and hindering the effective exercise of a right may amount to a breach of that right, even if the hindrance is of a temporary character.

The Court accordingly has to examine whether the hindrance thus established violated a right guaranteed by the Convention and more particularly by Article 6 (art. 6), on which Golder relied in this respect.

27. One point has not been put in issue and the Court takes it for granted: the "right" which Golder wished, rightly or wrongly, to invoke against Laird before an English court was a "civil right" within the meaning of Article 6 para. 1 (art. 6-1).

28. Again, Article 6 para. 1 (art. 6-1) does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this right.

29. The submissions made to the Court were in the first place directed to the manner in which the Convention, and particularly Article 6 para. 1 (art. 6-1), should be interpreted. The Court is prepared to consider, as do the

Government and the Commission, that it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties. That Convention has not yet entered into force and it specifies, at Article 4, that it will not be retroactive, but its Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion. In this respect, for the interpretation of the European Convention account is to be taken of those Articles subject, where appropriate, to "any relevant rules of the organization" - the Council of Europe - within which it has been adopted (Article 5 of the Vienna Convention).

30. In the way in which it is presented in the "general rule" in Article 3l of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article.

31. The terms of Article 6 para. 1 (art. 6-1) of the European Convention, taken in their context, provide reason to think that this right is included among the guarantees set forth.

32. The clearest indications are to be found in the French text, first sentence. In the field of "contestations civiles" (civil claims) everyone has a right to proceedings instituted by or against him being conducted in a certain way - "équitablement" (fairly), "publiquement" (publicly), "dans un délai raisonnable" (within a reasonable time), etc. - but also and primarily "à ce que sa cause soit entendue" (that his case be heard) not by any authority whatever but "par un tribunal" (by a court or tribunal) within the meaning of Article 6 para. 1 (art. 6-1) (Ringeisen judgment of 16 July 1971, Series A no. 13, p. 39, para. 95). The Government have emphasised rightly that in French "cause" may mean "procès qui se plaide" (Littré, Dictionnaire de la langue française, tome I, p. 509, 5°). This, however, is not the sole ordinary sense of this noun; it serves also to indicate by extension "l'ensemble des intérêts à soutenir, à faire prévaloir" (Paul Robert, Dictionnaire alphabétique et analogique de la langue française, tome I, p. 666, II-2°). Similarly, the "contestation" (claim) generally exists prior to the legal proceedings and is a concept independent of them. As regards the phrase "tribunal indépendant et impartial établi par la loi" (independent and impartial tribunal established by law), it conjures up the idea of organisation rather than that of functioning, of institutions rather than of procedure.

The English text, for its part, speaks of an "independent and impartial tribunal established by law". Moreover, the phrase "in the determination of his civil rights and obligations", on which the Government have relied in support of their contention, does not necessarily refer only to judicial proceedings already pending; as the Commission have observed, it may be taken as synonymous with "wherever his civil rights and obligations are being determined" (paragraph 52 of the report). It too would then imply the

right to have the determination of disputes relating to civil rights and obligations made by a court or "tribunal".

The Government have submitted that the expressions "fair and public hearing" and "within a reasonable time", the second sentence in paragraph 1 ("judgment", "trial"), and paragraph 3 of Article 6 (art. 6-1, art. 6-3) clearly presuppose proceedings pending before a court.

While the right to a fair, public and expeditious judicial procedure can assuredly apply only to proceedings in being, it does not, however, necessarily follow that a right to the very institution of such proceedings is thereby excluded; the Delegates of the Commission rightly underlined this at paragraph 21 of their memorial. Besides, in criminal matters, the "reasonable time" may start to run from a date prior to the seisin of the trial court, of the "tribunal" competent for the "determination ... of (the) criminal charge" (Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 26-27, para. 19; Neumeister judgment of 27 June l968, Series A no. 8, p. 41, para. 18; Ringeisen judgment of 16 July 1971, Series A no. 13, p. 45, para. 110). It is conceivable also that in civil matters the reasonable time may begin to run, in certain circumstances, even before the issue of the writ commencing proceedings before the court to which the plaintiff submits the dispute.

33. The Government have furthermore argued the necessity of relating Article 6 para. 1 (art. 6-1) to Articles 5 para. 4 and 13 (art. 5-4, art. 13). They have observed that the latter provide expressly or a right of access to the courts; the omission of any corresponding clause in Article 6 para. 1 (art. 6-1) seems to them to be only the more striking. The Government have also submitted that if Article 6 para. 1 (art. 6-1) were interpreted as providing such a right of access, Articles 5 para. 4 and 13 (art. 5-4, art. 13) would become superfluous.

The Commission’s Delegates replied in substance that Articles 5 para. 4 and 13 (art. 5-4, art. 13), as opposed to Article 6 para. 1 (art. 6-1), are "accessory" to other provisions. Those Articles, they say, do not state a specific right but are designed to afford procedural guarantees, "based on recourse", the former for the "right to liberty", as stated in Article 5 para. 1 (art. 5-1), the second for the whole of the "rights and freedoms as set forth in this Convention". Article 6 para. 1 (art. 6-1), they continue, is intended to protect "in itself" the "right to a good administration of justice", of which "the right that justice should be administered" constitutes "an essential and inherent element". This would serve to explain the contrast between the wording of Article 6 para. 1 (art. 6-1) and that of Articles 5 para. 4 and 13 (art. 5-4, art. 13).

This reasoning is not without force even though the expression "right to a fair (or good) administration of justice", which sometimes is used on account of its conciseness and convenience (for example, in the Delcourt judgment of 17 January 1970, Series A no. 11, p. 15, para. 25), does not

appear in the text of Article 6 para. 1 (art. 6-1), and can also be understood as referring only to the working and not to the organisation of justice.

The Court finds in particular that the interpretation which the Government have contested does not lead to confounding Article 6 para. 1 (art. 6-1) with Articles 5 para. 4 and 13 (art. 5-4, art. 13), nor making these latter provisions superfluous. Article 13 (art. 13) speaks of an effective remedy before a "national authority" ("instance nationale") which may not be a "tribunal" or "court" within the meaning of Articles 6 para. 1 and 5 para. 4 (art. 6-1, art. 5-4). Furthermore, the effective remedy deals with the violation of a right guaranteed by the Convention, while Articles 6 para. 1 and 5 para. 4 (art. 6-1, art. 5-4) cover claims relating in the first case to the existence or scope of civil rights and in the second to the lawfulness of arrest or detention. What is more, the three provisions do not operate in the same field. The concept of "civil rights and obligations" (Article 6 para. 1) (art. 6-1) is not co-extensive with that of "rights and freedoms as set forth in this Convention" (Article 13) (art. 13), even if there may be some overlapping. As to the "right to liberty" (Article 5) (art. 5), its "civil" character is at any rate open to argument (Neumeister judgment of 27 June 1968, Series A no. 8, p. 43, para. 23; Matznetter judgment of 10 November 1969, Series A no. 10, p. 35, para. 13; De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 44, para. 86). Besides, the requirements of Article 5 para. 4 (art. 5-4) in certain respects appear stricter than those of Article 6 para. 1 (art. 6-1), particularly as regards the element of "time".

34. As stated in Article 31 para. 2 of the Vienna Convention, the preamble to a treaty forms an integral part of the context. Furthermore, the preamble is generally very useful for the determination of the "object" and "purpose" of the instrument to be construed.

In the present case, the most significant passage in the Preamble to the European Convention is the signatory Governments declaring that they are "resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" of 10 December 1948.

In the Government’s view, that recital illustrates the "selective process" adopted by the draftsmen: that the Convention does not seek to protect Human Rights in general but merely "certain of the Rights stated in the Universal Declaration". Articles 1 and 19 (art. 1, art. 19) are, in their submission, directed to the same end.

The Commission, for their part, attach great importance to the expression "rule of law" which, in their view, elucidates Article 6 para. 1 (art. 6-1).

The "selective" nature of the Convention cannot be put in question. It may also be accepted, as the Government have submitted, that the Preamble does not include the rule of law in the object and purpose of the Convention,

but points to it as being one of the features of the common spiritual heritage of the member States of the Council of Europe. The Court however considers, like the Commission, that it would be a mistake to see in this reference a merely "more or less rhetorical reference", devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to "take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" was their profound belief in the rule of law. It seems both natural and in conformity with the principle of good faith (Article 31 para. 1 of the Vienna Convention) to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6 para. 1 (art. 6-1) according to their context and in the light of the object and purpose of the Convention.

This is all the more so since the Statute of the Council of Europe, an organisation of which each of the States Parties to the Convention is a Member (Article 66 of the Convention) (art. 66), refers in two places to the rule of law: first in the Preamble, where the signatory Governments affirm their devotion to this principle, and secondly in Article 3 (art. 3) which provides that "every Member of the Council of Europe must accept the principle of the rule of law ..."

And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.

35. Article 31 para. 3 (c) of the Vienna Convention indicates that account is to be taken, together with the context, of "any relevant rules of international law applicable in the relations between the parties". Among those rules are general principles of law and especially "general principles of law recognized by civilized nations" (Article 38 para. 1 (c) of the Statute of the International Court of Justice). Incidentally, the Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that "the Commission and the Court must necessarily apply such principles" in the execution of their duties and thus considered it to be "unnecessary" to insert a specific clause to this effect in the Convention (Documents of the Consultative Assembly, working papers of the 1950 session, Vol. III, no. 93, p. 982, para. 5).

The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) must be read in the light of these principles.

Were Article 6 para. 1 (art. 6-1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary

power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook (Lawless judgment of 1 July 1961, Series A no. 3, p. 52, and Delcourt judgment of 17 January 1970, Series A no. 11, pp. 14-15).

It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.

36. Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art. 6-1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (see the Wemhoff judgment of 27 June 1968, Series A no. 7, p. 23, para. 8), and to general principles of law.

The Court thus reaches the conclusion, without needing to resort to "supplementary means of interpretation" as envisaged at Article 32 of the Vienna Convention, that Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1 (art. 6-1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing. The Court has no need to ascertain in the present case whether and to what extent Article 6 para. 1 (art. 6-1) further requires a decision on the very substance of the dispute (English "determination", French "décidera").

B. On the "Implied Limitations"

37. Since the impediment to access to the courts, mentioned in paragraph 26 above, affected a right guaranteed by Article 6 para. 1 (art. 6-1), it remains to determine whether it was nonetheless justifiable by virtue of some legitimate limitation on the enjoyment or exercise of that right.

38. The Court considers, accepting the views of the Commission and the alternative submission of the Government, that the right of access to the courts is not absolute. As this is a right which the Convention sets forth (see Articles 13, 14, 17 and 25) (art. 13, art. 14, art. 17, art. 25) without, in the narrower sense of the term, defining, there is room, apart from the bounds

delimiting the very content of any right, for limitations permitted by implication.

The first sentence of Article 2 of the Protocol (P1-2) of 20 March 1952, which is limited to providing that "no person shall be denied the right to education", raises a comparable problem. In its judgment of 23 July 1968 on the merits of the case relating to certain aspects of the laws on the use of languages in education in Belgium, the Court ruled that:

> "The right to education ... by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention." (Series A no. 6, p. 32, para. 5).

These considerations are all the more valid in regard to a right which, unlike the right to education, is not mentioned in express terms.

39. The Government and the Commission have cited examples of regulations, and especially of limitations, which are to be found in the national law of states in matters of access to the courts, for instance regulations relating to minors and persons of unsound mind. Although it is of less frequent occurrence and of a very different kind, the restriction complained of by Golder constitutes a further example of such a limitation.

It is not the function of the Court to elaborate a general theory of the limitations admissible in the case of convicted prisoners, nor even to rule in abstracto on the compatibility of Rules 33 para. 2, 34 para. 8 and 37 para. 2 of the Prison Rules 1964 with the Convention. Seised of a case which has its origin in a petition presented by an individual, the Court is called upon to pronounce itself only on the point whether or not the application of those Rules in the present case violated the Convention to the prejudice of Golder (De Becker judgment of 27 March 1962, Series A no. 4, p. 26).

40. In this connection, the Court confines itself to noting what follows.

In petitioning the Home Secretary for leave to consult a solicitor with a view to suing Laird for libel, Golder was seeking to exculpate himself of the charge made against him by that prison officer on 25 October 1969 and which had entailed for him unpleasant consequences, some of which still subsisted by 20 March 1970 (paragraphs 12, 15 and 16 above). Furthermore, the contemplated legal proceedings would have concerned an incident which was connected with prison life and had occurred while the applicant was imprisoned. Finally, those proceedings would have been directed against a member of the prison staff who had made the charge in the course of his duties and who was subject to the Home Secretary’s authority.

In these circumstances, Golder could justifiably wish to consult a solicitor with a view to instituting legal proceedings. It was not for the Home Secretary himself to appraise the prospects of the action contemplated; it was for an independent and impartial court to rule on any

claim that might be brought. In declining to accord the leave which had been requested, the Home Secretary failed to respect, in the person of Golder, the right to go before a court as guaranteed by Article 6 para. 1 (art. 6-1).

II. ON THE ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

41. In the opinion of the majority of the Commission (paragraph 123 of the report) "the same facts which constitute a violation of Article 6 para. 1 (art. 6-1) constitute also a violation of Article 8 (art. 8)". The Government disagree with this opinion.

42. Article 8 (art. 8) of the Convention reads as follows:

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

43. The Home Secretary's refusal of the petition of 20 March 1970 had the direct and immediate effect of preventing Golder from contacting a solicitor by any means whatever, including that which in the ordinary way he would have used to begin with, correspondence. While there was certainly neither stopping nor censorship of any message, such as a letter, which Golder would have written to a solicitor – or vice-versa - and which would have been a piece of correspondence within the meaning of paragraph 1 of Article 8 (art. 8-1), it would be wrong to conclude therefrom, as do the Government, that this text is inapplicable. Impeding someone from even initiating correspondence constitutes the most far-reaching form of "interference" (paragraph 2 of Article 8) (art. 8-2) with the exercise of the "right to respect for correspondence"; it is inconceivable that that should fall outside the scope of Article 8 (art. 8) while mere supervision indisputably falls within it. In any event, if Golder had attempted to write to a solicitor notwithstanding the Home Secretary's decision or without requesting the required permission, that correspondence would have been stopped and he could have invoked Article 8 (art. 8); one would arrive at a paradoxical and hardly equitable result, if it were considered that in complying with the requirements of the Prison Rules 1964 he lost the benefit of the protection of Article 8 (art. 8).

The Court accordingly finds itself called upon to ascertain whether or not the refusal of the applicant's petition violated Article 8 (art. 8).

44. In the submission of the Government, the right to respect for correspondence is subject, apart from interference covered by paragraph 2

of Article 8 (art. 8-2), to implied limitations resulting, inter alia, from the terms of Article 5 para. 1 (a) (art. 5-1-a): a sentence of imprisonment passed after conviction by a competent court inevitably entails consequences affecting the operation of other Articles of the Convention, including Article 8 (art. 8).

As the Commission have emphasised, that submission is not in keeping with the manner in which the Court dealt with the issue raised under Article 8 (art. 8) in the "Vagrancy" cases (De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 45-46, para. 93). In addition and more particularly, that submission conflicts with the explicit text of Article 8 (art. 8). The restrictive formulation used at paragraph 2 (art. 8-2) ("There shall be no interference ... except such as ...") leaves no room for the concept of implied limitations. In this regard, the legal status of the right to respect for correspondence, which is defined by Article 8 (art. 8) with some precision, provides a clear contrast to that of the right to a court (paragraph 38 above).

45. The Government have submitted in the alternative that the interference complained of satisfied the explicit conditions laid down in paragraph 2 of Article 8 (art. 8-2).

It is beyond doubt that the interference was "in accordance with the law", that is Rules 33 para. 2 and 34 para. 8 of the Prison Rules 1964 (paragraph 17 above).

The Court accepts, moreover, that the "necessity" for interference with the exercise of the right of a convicted prisoner to respect for his correspondence must be appreciated having regard to the ordinary and reasonable requirements of imprisonment. The "prevention of disorder or crime", for example, may justify wider measures of interference in the case of such a prisoner than in that of a person at liberty. To this extent, but to this extent only, lawful deprivation of liberty within the meaning of Article 5 (art. 5) does not fail to impinge on the application of Article 8 (art. 8).

In its judgment of l8 June 1971 cited above, the Court held that "even in cases of persons detained for vagrancy" (paragraph 1 (e) of Article 5) (art. 5-1-e) - and not imprisoned after conviction by a court – the competent national authorities may have "sufficient reason to believe that it (is) ‘necessary’ to impose restrictions for the purpose of the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others". However, in those particular cases there was no question of preventing the applicants from even initiating correspondence; there was only supervision which in any event did not apply in a series of instances, including in particular correspondence between detained vagrants and the counsel of their choice (Series A no. 12, p. 26, para. 39, and p. 45, para. 93).

In order to show why the interference complained of by Golder was "necessary", the Government advanced the prevention of disorder or crime and, up to a certain point, the interests of public safety and the protection of

the rights and freedoms of others. Even having regard to the power of appreciation left to the Contracting States, the Court cannot discern how these considerations, as they are understood "in a democratic society", could oblige the Home Secretary to prevent Golder from corresponding with a solicitor with a view to suing Laird for libel. The Court again lays stress on the fact that Golder was seeking to exculpate himself of a charge made against him by that prison officer acting in the course of his duties and relating to an incident in prison. In these circumstances, Golder could justifiably wish to write to a solicitor. It was not for the Home Secretary himself to appraise - no more than it is for the Court today - the prospects of the action contemplated; it was for a solicitor to advise the applicant on his rights and then for a court to rule on any action that might be brought.

The Home Secretary's decision proves to be all the less "necessary in a democratic society" in that the applicant's correspondence with a solicitor would have been a preparatory step to the institution of civil legal proceedings and, therefore, to the exercise of a right embodied in another Article of the Convention, that is, Article 6 (art. 6).

The Court thus reaches the conclusion that there has been a violation of Article 8 (art. 8).

III. AS TO THE APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

46. Article 50 (art. 50) of the Convention provides that if the Court finds, as in the present case, "that a decision ... taken" by some authority of a Contracting State "is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of (that State) allows only partial reparation to be made for the consequences of this decision", the Court "shall, if necessary, afford just satisfaction to the injured party".

The Rules of Court state that when the Court "finds that there is a breach of the Convention, it shall give in the same judgment a decision on the application of Article 50 (art. 50) of the Convention if that question, after being raised under Rule 47 bis, is ready for decision; if the question is not ready for decision", the Court "shall reserve it in whole or in part and shall fix the further procedure" (Rule 50 para. 3, first sentence, read together with Rule 48 para. 3).

At the hearing in the afternoon of 11 October 1974, the Court invited the representatives, under Rule 47 bis, to present their observations on the question of the application of Article 50 (art. 50) of the Convention in this case. Those observations were submitted at the hearing on the following day.

Furthermore, in reply to a question from the President of the Court immediately following the reading of the Commission's final submissions, the Principal Delegate confirmed that the Commission were not presenting,

nor making any reservation as to the presentation of, a request for just satisfaction on the part of the applicant.

The Court considers accordingly that the above question, which was duly raised by the Court, is ready for decision and should therefore be decided without further delay. The Court is of opinion that in the circumstances of the case it is not necessary to afford to the applicant any just satisfaction other than that resulting from the finding of a violation of his rights.

FOR THESE REASONS, THE COURT,

1. Holds by nine votes to three that there has been a breach of Article 6 para. 1 (art. 6-1);

2. Holds unanimously that there has been a breach of Article 8 (art. 8);

3. Holds unanimously that the preceding findings amount in themselves to adequate just satisfaction under Article 50 (art. 50).

Done in French and English, the French text being authentic, at the Human Rights Building, Strasbourg, this twenty-first day of February one thousand nine hundred and seventy five.

Giorgio BALLADORE PALLIERI
President

Marc-André EISSEN
Registrar

Judges Verdross, Zekia and Sir Gerald Fitzmaurice have annexed their separate opinions to the present judgment, in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 50 para. 2 of the Rules of Court.

G.B.P.
M.-A.E.

SEPARATE OPINION OF JUDGE VERDROSS

(Translation)

I have voted in favour of the parts of the judgment which relate to the violation of Article 8 (art. 8) and the application of Article 50 (art. 50) of the Convention, but much to my regret I am unable to join the majority in their interpretation of Article 6 para. 1 (art. 6-1) for the following reasons.

The Convention makes a clear distinction between the rights and freedoms it secures itself (Article 1) (art. 1) and those which have their basis in the internal law of the Contracting States (Article 60) (art. 60). In the last recital in the Preamble, the Contracting States resolved to take steps for the collective enforcement of "certain of the Rights stated in the Universal Declaration" (certains des droits énoncés dans la Déclaration Universelle) and, according to Article 1 (art. 1), the category of rights guaranteed comprises only "the rights and freedoms defined in Section I" of the Convention. It thus seems that the words "stated" and "defined" are synonymous. As "to define" means to state precisely, it results, in my view, from Article 1 (art. 1) that among such rights and freedoms can only be numbered those which the Convention states in express terms or which are included in one or other of them. But in neither of these cases does one find the alleged "right of access to the courts".

It is true that the majority of the Court go to great lengths to trace that right in an assortment of clues detected in Article 6 para. 1 (art. 6-1) and other provisions of the Convention.

However, such an interpretation runs counter, in my opinion, to the fact that the provisions of the Convention relating to the rights and freedoms guaranteed by that instrument constitute also limits on the jurisdiction of the Court. This is a special jurisdiction, for it confers on the Court power to decide disputes arising in the course of the internal life of the Contracting States. The norms delimiting the bounds of that jurisdiction must therefore be interpreted strictly. In consequence, I do not consider it permissible to extend, by means of an interpretation depending on clues, the framework of the clearly stated rights and freedoms. Considerations of legal certainty too make this conclusion mandatory: the States which have submitted to supervision by the Commission and Court in respect of "certain" rights and freedoms "defined" (définis) in the Convention ought to be sure that those bounds will be strictly observed.

The above conclusion is not upset by the argument, sound in itself, whereby the right to a fair hearing before an independent and impartial tribunal, secured to everyone by Article 6 para. 1 (art. 6-1), assumes the existence of a right of access to the courts. The Convention in fact appears to set out from the idea that such a right has, with some exceptions, been so well implanted for a long time in the national legal order of the civilised

States that there is absolutely no need to guarantee it further by the procedures which the Convention has instituted. There can be no other reason to explain why the Convention has refrained from writing in this right formally. In my opinion, therefore, a distinction must be drawn between the legal institutions whose existence the Convention presupposes and the rights guaranteed by the Convention. Just as the Convention presupposes the existence of courts, as well as legislative and administrative bodies, so does it also presupposes, in principle, the existence of the right of access to the courts in civil matters; for without such a right no civil court could begin to operate.

Nor is my reasoning refuted by contending that, if the right of access had its basis solely in their national legal order, the member States of the Council of Europe could, by abolishing the right, reduce to nothing all the Convention’s provisions relating to judicial protection in civil matters. For if these States were really determined on destroying one of the foundations of Human Rights, they would be committing an act contrary to their own will to create a system based on "a common understanding and observance of the Human Rights upon which they depend" (fourth recital in the Preamble).

SEPARATE OPINION OF JUDGE ZEKIA

I adopt, with respect, the introductory part of the judgment dealing with procedure and facts and also the concluding part dealing with the application of Article 50 (art. 50) of the Convention to the present case. I agree also with the conclusion reached regarding the violation of Article 8 (art. 8) of the Convention subject to some variation in the reasoning.

I have felt unable, however, to agree with my eminent colleagues in the way Article 6 para. 1 (art. 6-1) of the Convention has been interpreted by them and with their conclusion that a right of access to the courts ought to be read into Article 6 para. 1 (art. 6-1) and that such right is to be considered as being embodied therein. The outcome of their interpretation is that the United Kingdom has committed a contravention of Article 6 para. 1 (art. 6-1) of the Convention by disallowing prisoner Golder to exercise his right of access to the courts.

I proceed to give hereunder, as briefly as I can, the main reasons for my dissenting opinion on this part of the judgment.

There is no doubt that the answer to the question whether right of access to courts is provided in Article 6 para. 1 (art. 6-1), depends on the construction of the said Article. We have been assisted immensely by the representatives of both sides in the fulfilment of our duties in this respect.

There appears to be a virtual consensus of opinion that Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties, although with no retroactive effect, contain the guiding principles of interpretation of a treaty. There remains the application of the rules of interpretation formulated in the aforesaid Convention to Article 6 para. 1 (art. 6-1) of the European Convention.

Article 31 para. 1 of the Vienna Convention reads "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". No question arises as to good faith, therefore what remains for consideration is (a) text, (b) context, (c) object and purpose. The last two elements might very well overlap on one another.

A. Text

Article 6 para. 1 (art. 6-1) of the European Convention on Human Rights reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the

parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The above Article (art. 6-1), read in its plain and ordinary meaning, refers to criminal charges brought against a person and to the civil rights and obligations of a person when such rights and obligations are sub judice in a court of law. The very fact that the words immediately following the opening words of the paragraph, that is, the words following the phrase "In the determination of his civil rights and obligations or of any criminal charge against him" deal exclusively with the conduct of proceedings, i.e., public hearings within a reasonable time before an impartial court and pronouncement of judgment in public, plus the further fact that exceptions and/or limitations given in detail in the same paragraph again exclusively relate to the publicity of the court proceedings and to nothing else, strongly indicate that Article 6 para. 1 (art. 6-1) deals only with court proceedings already instituted before a court and not with a right of access to the courts. In other words Article 6 para. 1 (art. 6-1) is directed to the incidents and attributes of a just and fair trial only.

Reference was made to the French version of Article 6 para. 1 (art. 6-1) and specifically to the words "contestations sur ses droits" in the said Article (art. 6-1). It has been maintained that the above quoted words convey a wider meaning than the corresponding English words in the English text. The words in the French text embrace, it is argued, claims which have not reached the stage of trial.

The English and French text are both equally authentic. If the words used in one text are capable only of a narrower meaning, the result is that both texts are reconcilable by attaching to them the less extensive meaning. Even if we apply Article 33 of the Vienna Convention in order to find which of the two texts is to prevail, we have to look to the preceding Articles 31 and 32 of the same Convention for guidance. Having done this I did not find sufficient reason to alter the view just expressed. So much for the reading of the text which no doubt constitutes "the primary source of its own interpretation".

B. Context

I pass now to the contextual aspect of Article 6 para. 1 (art. 6-1). As I said earlier, the examination of this aspect is bound to overlap with considerations appertaining to the object and purpose of a treaty. There is no doubt, however, that interpretation is a single combined operation which takes into account all relevant facts as a whole.

Article 6 para. 1 (art. 6-1) occurs in Section I of the European Convention on Human Rights and Fundamental Freedoms which section comprises Articles 2-18 (art. 2, art. 3, art. 4, art. 5, art. 6, art. 7, art. 8, art. 9, art. 10, art. 11, art. 12, art. 13, art. 14, art. 15, art. 16, art. 17, art. 18)

defining rights and freedoms conferred on people within the jurisdiction of the Contracting States. Article 1 (art. 1) requires the Contracting Parties to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". The obligations undertaken under this Convention by Contracting States relate to the rights and freedoms defined. It seems almost impossible for anyone to contend that Article 6 para. 1 (art. 6-1) defines a right of access to courts.

A study of Section I discloses: Article 5, paras. 4 and 5 (art. 5-4, art. 5-5), deals with proceedings to be taken before a court for deciding the lawfulness or otherwise of detention and gives to the victim of unlawful detention an enforceable right to compensation.

Articles 9, 10 and 11 (art. 9, art. 10, art. 11) deal with rights or freedoms in respect of thought, expression, religion, peaceful assembly and association, etc. What is significant about these Articles (art. 9, art. 10, art. 11) is the fact that each Article prescribes in detail the restrictions and limitations attached to such right.

Article 13 (art. 13) reads:

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

This Article (art. 13) indicates a right of access to the courts in respect of violations of rights and freedoms set forth in the Convention. In my view courts come within the ambit of "national authority" mentioned in the Article (art. 13).

Article 17 (art. 17) provides, inter alia, that no limitation to a greater extent than is provided for in the Convention is allowed to the rights and freedoms set forth therein.

The relevance of this Article (art. 17) lies in the fact that, if right of access is to be read into Article 6 para. 1 (art. 6-1), such right of access will have to be an absolute one because no restrictions or limitations are mentioned in regard to this right. No one can seriously argue that the Convention contemplates an absolute and unfettered right of access to courts.

It is common knowledge and it may be taken for granted that right of access to the national courts, as a rule, does exist in all civilised democratic societies. Such right, and its exercise, usually is regulated by constitution, legislation, custom and by subsidiary laws such as orders and court rules.

Article 60 (art. 60) of the Convention keeps intact such human rights as are provided by national legislation. Right of access being a human right is no doubt included in the human rights referred to in Article 60 (art. 60). This in a way fills up the gap for claims in respect of which no specific provision for right of access is made in the Convention.

The competence of the courts, as well as the right of the persons entitled to initiate proceedings before a court, are regulated by laws and rules as

above indicated. One commences proceedings by filing an action, petition or application in the registry of the court of first instance or of the superior court. One has to pay the prescribed fees (unless entitled to legal aid) and cause the issue of writs of summons or other notices. Persons might be debarred unconditionally or conditionally from instituting proceedings on account of age, mental condition, bankruptcy, frivolous and vexatious litigation. One may have to make provision for security of costs and so on.

After the institution of proceedings and before a case comes up for hearing there are many intervening procedural steps. A master, or a judge in chambers and not in open court, is empowered in a certain category of cases to deal summarily and finally with a claim in an action, petition or application. Such is the case for instance when claim as endorsed on a writ, or as stated in the pleadings, does not disclose any cause of action or, in the case of a defendant or respondent, his reply or points of defence do not disclose a valid defence in law.

All this, digression, is simply to emphasise the fact that if in the Convention it was intended to make the right of access an integral part of Article 6 para. 1 (art. 6-1), those responsible for drafting the Convention would, no doubt, have followed their invariable practice, after defining a human right and freedom, to prescribe therein the restrictions and limitations attached to such right and freedom.

Surely if a right of access, independently of those expressly referred to in the Convention, was to be recognised to everybody within the jurisdictions of the High Contracting Parties, unrestricted by laws and regulations imposed by national legislation, one would expect such right to be expressly provided in the Convention. The care and pains taken in defining human rights and freedoms in the Convention and minutely prescribing the restrictions, indicate strongly that right of access is neither expressly nor by necessary implication or intendment embodied in Article 6 para. 1 (art. 6-1).

One might also remark: if there is no right of access to courts, what is the use of making copious provisions for the conduct of proceedings before a court?

If, indeed, provisions relating to the right of access were altogether lacking in the Convention - although this is not the case - I would concede that by necessary implication and intendment such a right is to be read as being incorporated in the Convention, though not necessarily in the Article in question. I would have acted on the assumption that the Contracting Parties took the existence of such right of access for granted.

C. Object and purpose

Article 6 para. 1 (art. 6-1) could by no means be under-estimated, when it is read with its ordinary meaning, without any right of access being integrated into it. Public hearing within reasonable time before an impartial

tribunal, with delivery of judgment in open court, - although one might describe them as procedural matters – nevertheless are fundamentals in the administration of justice, and therefore Article 6 para. 1 (art. 6-1) has and deserves its raison d'être in the Charter of Human Rights, without grafting the right of access onto it. Its scope of operation will still be very wide.

The Preamble of the European Convention on Human Rights and Fundamental Freedoms in its concluding paragraph declares: "Being resolved, as the Governments of European countries which are like- minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first step for the collective enforcement of certain of the Rights stated in the Universal Declaration." I think the United Kingdom Government was not unjustified in drawing our attention to the words "to take the first steps" and to the words "enforcement of certain of the Rights", occurring in that paragraph.

As to the references made to the travaux préparatoires of the Convention, the Universal Declaration of Human Rights, the European Convention on Establishment, the International Covenant on Civil and Political Rights and other international instruments, I am content to make only very short observations. In the travaux préparatoires of the Declaration, the early drafts included expressly the words "right of access" but these words were dropped before the text took its final form.

Article 8 of the Universal Declaration contains a right of access to courts for violations of fundamental rights granted by constitution or by law.

Article 10 of the Universal Declaration more or less corresponds to the main part of Article 6 para. 1 (art. 6-1) of the European Convention and it does not refer to a right of access. It seems the main part of Article 6 para. 1 (art. 6-1) followed the pattern of Article 10 of the Universal Declaration. And so too does Article 14 para. 1 of the International Covenant.

Article 7 of the European Convention on Establishment provides expressly a "right of access to the competent judicial and administrative authorities". The same applies to Article 2 para. 3 of the International Covenant.

The above supports the view that when right of access to courts was intended to be incorporated in a treaty, this was done in express terms.

I have already endeavoured to touch the main elements of interpretation in some order. When all elements are put together and considered compositively, to my mind the combined effect lends greater force to the correctness of the opinion submitted.

As to Article 8 (art. 8)

The Home Secretary, by not allowing prisoner Golder to communicate with his solicitor with a view to bringing an action for libel against the prison officer, Mr. Laird, was depriving the former of obtaining independent legal advice.

In the circumstances of the case I find that Golder was denied right of respect for his correspondence and such denial amounts to a breach of the Article (art. 8) in question.

In an action for libel Mr. Laird might succeed in a plea of privilege and prove non-existence of malice. The Home Secretary or the Governor of Prisons might reasonably believe that Golder had no chance of sustaining an action, but in principle I am inclined to the view that unless there are overriding considerations of security a prisoner should be allowed to communicate with, and consult, a solicitor or a lawyer and obtain independent legal advice.

SEPARATE OPINION OF JUDGE SIR GERALD FITZMAURICE

Introduction

1. For the reasons given in Part I of this Opinion, I have – though with some misgivings - participated in the unanimous affirmative vote of the Court on the question of Article 8 (art. 8) of the European Convention on Human Rights. To that extent therefore, I must hold the United Kingdom to have been in breach of the Convention in the present case.

2. On the other hand I am quite unable to agree with the Court on what has been the principle issue of law in these proceedings, - namely that of the applicability, and interpretation, of Article 6, paragraph 1 (art. 6-1), of the Convention - the question of the alleged right of access to the courts - the point here being, not whether the Convention ought to provide for such a right, but whether it actually does. This is something that affects the whole question of what is legitimate by way of the interpretation of an international treaty while keeping within the confines of a genuinely interpretative process, and not trespassing on the area of what may border on judicial legislation. I deal with it in Part II below.

3. I need not set out what the facts in this case were as I agree with the statement of them contained in the Court's Judgment.

PART I. Article 8 (art. 8) of the Convention

4. The issue that arises on Article 8 (art. 8) of the Convention is whether the United Kingdom Home Secretary, by refusing Golder (then under penal detention in Parkhurst Prison) permission to consult a solicitor, infringed the provisions of that Article (art. 8) which read as follows:

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

Two principal categories of questions - or doubts - arise with regard to this provision: is it applicable at all to the circumstances of the present case? - and secondly, if it is applicable in principle, does the case fall within any limitations on, or exceptions to, the rule it embodies?

A. The question of applicability

5. The doubts about applicability coalesce around the meaning of the term "correspondence", and the notion of what constitutes an "interference" with the "exercise of the right of respect for ... correspondence". The term "correspondence", in this sort of context, denotes, according to its ordinarily received and virtually universal dictionary[1] meaning, something that is less wide than "communication" - or rather, is one of several possible forms of communication. It denotes in fact written correspondence, possibly including telegrams or telex messages, but not communication by person to person by word of mouth, by telephone[2] or signs or signals. It would therefore be wrong to equate the notion of "correspondence" with that of "communication". However, as there does not seem to have been any question of Golder telephoning to a solicitor, that point does not arise. What does arise is that, even as regards a letter, Golder never wrote at all to any solicitor. There was no letter, so none was stopped. In that sense therefore there was no interference with his correspondence because, as between himself and the solicitor he would have consulted, there was no correspondence to interfere with, such as there was in the case of his attempts to write to his Member of Parliament[3]. But the reason for this was that, having enquired whether he would be allowed to consult a solicitor "with a view to taking civil action for libel" - which I think one must assume would have meant (at least initially) writing to him[4] - he was informed that he would not be, - which meant, in effect, that any letter would be stopped - and so he did not write one. There was, accordingly, no literal or actual interference with his correspondence in this respect; - but in my view there was what amounted, in English terminology, to a "constructive" stoppage or interference; and I consider that it would be placing an undue and formalistic restriction on the concept of interference

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[1] Significantly the Oxford English Dictionary does admit an older meaning, in the sense of "intercourse, communication" or (the verb) "to hold communication or intercourse [with]", but pronounces these usages to be obsolete now except in the context of letters or other written communications.

[2] In his masterly work The Application of the European Convention on Human Rights, Mr. J.E.S. Fawcett draws attention to the practice of the German Courts of treating "conversation, whether direct or by telephone, as being part of private life" (op. cit., p. 194), respect for private life being another of the categories protected by Article 8 (art. 8) of the Convention.

[3] See paragraphs 13 and 19 of the Court's Judgment. Golder's claim under this head was found inadmissible by the European Commission of Human Rights because he had a right of appeal in the United Kingdom which he had failed to exercise. Thus he had not exhausted his local legal remedies.

[4] It would seem to be a matter of common sense to suppose that any attempt by Golder to telephone a solicitor from prison (of which there is no evidence) would have proved abortive, though no interference with his correspondence, contrary to Article 8 (art. 8), would have been involved, - but see the private life theory, note 2 above.

with correspondence not to regard it as covering the case of correspondence that has not taken place only because the competent authority, with power to enforce its ruling, has ruled that it will not be allowed. One must similarly I think reject the equally restrictive view that even if permission had been given, Golder might not in practice have availed himself of it, which is beside the real point.

6. The very important fact that this refusal would not in the long run have prevented Golder from bringing his claim, had he been advised to do so - because he would still have been in time for that after his release from prison - is not material on the question of Article 8 (art. 8). It is highly material on the question of the alleged right of access under Article 6.1 (art. 6-1), and I shall deal with it in that connexion.)

7. A point similar to those discussed in paragraph 5 above arises over what exactly is the "right" referred to in the phrase "There shall be no interference by a public authority with the exercise of this right", which appears at the beginning of the second paragraph of the Article (art. 8-2), - the right itself being stated in the first paragraph (art. 8-1) to be the right of the individual to "respect for his private and family life, his home and his correspondence". It would be easy to close the argument at once by saying that correspondence is not "respected" if it is not allowed to take place at all. But the matter is not so simple as that. It could undoubtedly be contended that correspondence is respected so long as there is no physical interference with whatever correspondence there is, but that the words used neither convey nor imply any guarantee that there will be any correspondence; so that, for instance, a total prohibition of correspondence would not amount to an interference with the right. Some colour would be lent to this argument by the context in which the word "correspondence" appears, viz. "private and family life", "home and ... correspondence", which does suggest the motion of something domiciliary and, in consequence, the type of interference that might take place if someone’s private papers in his home or hotel or on his person were searched, and actual letters were seized and removed. But is the notion confined to that sort of thing? This seems too narrow. The right which is not to be interfered with by the public authority, is the "right to respect" for correspondence, and it seems to me that, constructively at least, correspondence is not respected where, in order to avoid the seizure or stoppage of it that would otherwise take place, the public authority interdicts it a priori[5]. Hence, the Judgment of the Court makes the essential point when it suggests that it would be inadmissible to consider that Article 8 (art. 8) would have been applicable if Golder had

[5] This is perhaps not quite fair to the prison authorities, who acted entirely correctly within the scope of the Prison Rules. There was no general interdiction of correspondence. But when Golder asked for permission to consult a solicitor it was refused. It must therefore be assumed that had he attempted to effect a consultation in the only way practicable for him - at least initially - viz. by letter, the letter would have been stopped - and see note 4 supra.

actually consulted his solicitor by letter, and the letter had been stopped, but inapplicable because he was merely told (in effect) that it would be stopped if he wrote it, and so he did not write it.

B. Limitations and exceptions

8. I cannot agree with the view expressed in the Judgmnent of the Court that the structure of Article 8 (art. 8) rules out even the possibility of any unexpressed but inherent limitations on the operation of the rule stated in paragraph 1 and the first fifteen words of paragraph 2 of the Article (art. 8-1, art. 8-2). Since "respect" for correspondence - which is what (and also all that) paragraph 1 of Article 8 (art. 8-1) enjoins - is not to be equated with the notion of complete freedom of correspondence[6] (6), it would follow, even without the exceptions listed in the second paragraph (art. 8-2), that the first paragraph (art. 8-1) could legitimately be read as conferring something less than complete freedom in all cases, and in all circumstances. It would in my view have to be read subject to the understanding that the degree of respect required must to some extent be a function of the situation in general and of that of the individual concerned in particular. Hence - and not to stray beyond the confines of the present case - control of a lawfully detained prisoner’s correspondence is not incompatible with respect for it, even though control must, in order to be effective, carry the power in the last resort to prevent the correspondence, or particular pieces of it, from taking place. This must, in the true meaning of the term, be "inherent" in the notion of control of correspondence which, otherwise, would be a dead letter in all senses of that expression. The crucial question naturally remains whether, in the particular circumstances and in the particular case, the degree of control exercised was justifiable - that is, strictly, was compatible with the concept of "respect", as reasonable to be understood, - more especially when it involved a prohibition or implied threat of a stoppage.

9. It was doubtless because the originators of the Convention realised that the rule embodied in Article 8 (art. 8) would have to be understood in a very qualified way, if it was to be practicable at all, that they subjected it to a number of specific exceptions; - and although these do not in my opinion - for the reasons just given - necessarily exhaust all the possible limitations on the rule, they are sufficiently wide and general to cover most of the cases likely to arise. The drafting of these exceptions is unsatisfactory in one important respect: six heads or categories are mentioned, but they are placed in two groups of three, - and what is not clear is whether it is necessary for

[6] I am glad to be fortified in this view by no less an authority than that of the President of the European Commission of Human Rights, who says (op. cit. in note 2 supra, p. 196) that "'respect' for correspondence in Article 8 (1) (art. 8-1) does not, quite apart from Article 8 (2) (art. 8-2), involve an unlimited freedom in the matter".

an alleged case of exception to fall under one of the three heads in both groups, or whether it suffices for it to fall under any one of the three heads in either the one or the other group. This ambiguity, which certainly exists in the English text of the Article (art. 8) (see paragraph 4 supra)[7] (7), I fortunately do not need to resolve, because I am satisfied that, considered on a category basis, control of a prisoner's correspondence is capable of coming under the heads both of "public safety" and "the prevention of disorder or crime", thus ranking as an excepted category whichever of the two above described methods of interpreting this provision might be adopted.

10. There is however a further element of ambiguity or failure of clarity. What paragraph 2 of the Article (art. 8-2) requires is that there shall be "no interference [in effect with correspondence] except such as is ... necessary ... for [e.g.] the prevention of disorder and crime". The natural meaning of this would seem to be that, in order to justify interference in any particular case, the interference must be "necessary" in that case "for the prevention of crime" etc. On this basis, even though some control of correspondence might in principle be needed for the prevention etc. (e.g. prisoners could otherwise arrange their own escapes, or plan further crimes), the particular interference (here constructive stoppage) would still require to be justified as necessary in the case itself "for the prevention ..." etc. On behalf of the United Kingdom Government however, although at one point it seemed to be admitted that the necessity must be related to the particular case, a somewhat different view was also put forward, - on the face of it a not at all unreasonable, and quite tenable, view, - which came to this, namely that, provided the type of restriction involved could be justified in the light of, and as coming fairly within, one of the excepted categories specified in paragraph 2 of Article 8 (art. 8-2), the application of the restriction in the particular case must be left to the discretion of the prison authorities, or at least they must be allowed a certain latitude of appreciation, so long as they appeared to be acting responsibly and in good faith, - and of course there has never been any suggestion of anything else in the present case. If the matter is regarded in this way, so it was urged, the Court ought not to go behind the action of the prison authorities and sit in judgment upon the manner in which this discretion had been exercised. Another and more lapidary version of the same contention would be to say that it seeks to justify the act complained of by reference to the character of the restriction involved, rather than the character of what was done in the exercise of that restriction. Therefore, so long as the restriction belongs in principle to the class or category of exception invoked, and has been imposed in good faith, the enquiry should stop there.

[7] The point arises because it is not clear whether the categories beginning with the words "for the prevention of", etc., are governed by and relate directly back to the words "is necessary", or whether they relate only to the words "in the interests of".

11. I regret that I cannot accept this argument, despite its considerable persuasiveness. The matter seems to me to turn on the effect of the word "interference" in the phrase "There shall be no interference ... with ... except such as is ... necessary ... for the prevention ... etc." I think the better view is that this contemplates the act itself that is carried out in the exercise of the restriction, rather than the restriction or type of control from which it derives. It is the act - in this case the refusal of permission – that constitutes the interference, rather than the taking of power to do so under a regulation which, theoretically, might never be made use of. In other words, it does not suffice to show that in general some control over the correspondence of prisoners - and even on occasion a stoppage of it - is "necessary ... in the interests of ... public safety" or "for the prevention of disorder or crime". If that were all, it could be admitted at once that in principle such a necessity exists, - subject to questions of degree and particular application. But it has to be shown in addition that the particular act of interference involved was as such "necessary" on those grounds.

12. Accordingly, what has to be enquired into in the present case is the concrete refusal to allow Golder to consult a solicitor (regarding this, for reasons already given, as a constructive interference with his correspondence, - or rather - to use the cumbrous verbiage of Article 8 (art. 8) - with his "right to respect" for his correspondence). The question then is, whether this refusal was "necessary" on grounds of public safety, prevention of crime, etc. Put in that way, it seems to me that there can only be one answer: it was not, - and in saying this I have not overlooked the United Kingdom argument to the effect that if Golder had been allowed access to a solicitor over what was considered (by the authorities) as an entirely unmeritorious claim, the same facilities could not in fairness have been refused to other prisoners because, in the application of any rule, there must be consistency and adherence to some well defined and understood working principle. That is no doubt true, but it does not dispose of the need to show that refusing any one at all - that the practice itself of refusal on those particular grounds - is justified as being "necessary ... in the interests of public safety" or "for the prevention of disorder" etc. This brings me to what has to be regarded as the crucial question: - with whom does it properly lie to decide whether, as I have put it in recapitulation of the United Kingdom argument, claims such as Golder’s - in respect of which he wanted to consult a solicitor - was a "wholly unmeritorious one"? Is not such a matter one for judicial rather than executive determination?

13. Actually, the United Kingdom Home Secretary did not, in point of fact, make use of this form of words in replying to Golder, or indeed express any opinion as to the merits or otherwise of his claim: the language

employed was of the vaguest and most general kind[8]. However, the United Kingdom case has been argued throughout on the basis that the underlying reason for the refusal was the belief of the authorities that Golder had no good claim in law, and could not succeed in any libel action brought against the prison officer who had originally complained about him but had subsequently withdrawn the complaint. It must therefore be assumed that the rejection of Golder's request was de facto based on these grounds, and the alleged necessity of the rejection in the interests of public safety, prevention of disorder, etc., must be evaluated accordingly.

14. In the particular case of Golder it is imppossible to see how a refusal so based could be justified as necessary on any of the grounds specified in paragraph 2 of Article 8 (art. 8-2), even if it was in accordance with normal prison practice, as doubtless it was, - because then it would be the practice as such that was at fault. Even if the matter is looked at from the standpoint of the United Kingdom contention that the practice is justified because prisoners are, by definition as it were, litigious, and only too ready to start up frivolous, vexatious or unfounded actions if not prevented, the point remains that, however inconvenient this may be for the prison authorities, it is still difficult to see how many necessity in the interests of public safety or the prevention of disorder or crime can be involved. But even if, theoretically, it could be, none seems to have been satisfactorily established in Golder's case.

l5. More important however, is the fact that the real reason for the refusal in Golder's case does not seem to have been "necessity" at all, but the character of his claim; and here the true underlying issue is reached. A practice whereby contact with a solicitor about possible legal proceedings is refused because the executive authority has determined that the prisoner has no good legal ground of claim, not only cannot be justified as "necessary" etc. (does not even pretend so to be), - it cannot be justified at all, because it involves the usurpation of what is essentially a judicial function. To say this is not, even for a moment, to throw any doubt on the perfect good faith of the authorities in taking the view they did about Golder's claims. But that is not the point. The point is that it was motivated by what was in effect a judicial finding, - not, however, one emanating from any judicial authority, but from an executive one. Yet it is precisely one of the functions of a judicial system to provide, through judicial action, and after hearing argument if necessary, means for doing what the prison authorities, acting executively, and without hearing any argument - at least from Golder

[8] Golder had made two requests: to be transferred to another prison, and to be allowed either to consult a solicitor about the possibility of taking legal action or alternatively to obtain the advice of a certain named magistrate, in whose views he would have confidence. In reply, he was told that the Secretry of State had fully considered his petition "but is not prepared to grant your request for a transfer, nor can he find grounds for taking any action in regard to the other matters raised in your petition".

himself or his representative - did in the present case. All normal legal systems - including most certainly the English one – have procedures whereby, at a very early stage of the proceedings, a case can (to use English terminology) be "struck out" as frivolous or vexatious or as disclosing no cause of action - (grounds roughly analogous to the "abuse of the right of petition", or "manifestly illfounded" petition, in human rights terminology)[9]. This can be done, and usually is, long before the case would otherwise have reached the trial judge, had it gone forward for trial; but nevertheless it is done by a judicial authority, or one acting judicially. It may be a minor or lesser authority, but the judicial character both of the authority and of the proceedings remains.

16. It is difficult to see why - or at least it is difficult to see why as a matter of necessity under Article 8, paragraph 2 (art. 8-2), prisoners, just because they have that status, should be liable to be deprived of the right to have these preliminary objections to their claims (whether good or bad) judicially determined, especially as they are objections of a kind which it is for the defendant in an action to take, not a third party stranger to it. But here of course a further underlying element is reached. The Home Secretary was not a stranger to Golder's potential claim, even if he was not directly a prospective party to it, - for it was his own prison officer and the conduct of that officer which would be in issue in the claim, if it went forward. Again, there is, and can be, no suggestion that the Home Secretary was influenced by the fact that he was technically in interest. It is simply the principle of the thing that counts: nemo in re sua judex esse potest. Of course, both in logic and in law, this could not operate per se to cancel out any necessity that genuinely existed on the basis of one of the exceptions specified in paragraph 2 of the Article 8 (art. 8-2). If such necessity really did exist, then the interference would not be contrary to Article 8 (art. 8) as such. What the element of nemo in re sua does do however, is to make it incumbent on the authorities to justify the interference by reference to very clear and cogent considerations of necessity indeed, - and these were certainly not present in this case.

17. In concluding therefore, as I feel bound to do, that there has been a breach of Article 8 (art. 8), though clearly an involuntary one, I should like to add that having regard to the perplexing drafting of Article 8 (art. 8), of which I hope to have afforded some demonstration - (nor is it unique in that respect in this Convention) - it can cause no surprise if governments are uncertain as to what their obligations under it are. This applies a fortiori to the interpretation of Article 6, paragraph 1 (art. 6-1), of the Convention to which I now come.

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[9] These are amongst the grounds, specified in Article 27 (art. 27) of the European Convention, on which the Commission of Human Rights must refuse to deal with a petition.

PART II. Article 6, paragraph 1 (art. 6-1)

A. The applicability aspect

18. In the present case the chief issue that has arisen and been the subject of argument, is whether the Convention provides in favour of private persons and entities a right of access to the courts of law in the various countries parties to it. It is agreed - and admitted in the Court's Judgment (paragraph 28) - that the only provision that could have any relevance for this purpose - Article 6, paragraph 1 (art. 6-1) - does not directly or in terms give expression to such a right. Nevertheless this right is read into the Convention on the basis partly of general considerations external to Article 6.1 (art. 6-1) as such, partly of inferences said to be required by its provisions themselves. But before entering upon this matter there arises first an important preliminary issue upon which the question of the very applicability of this Article (art. 6-1) and of the relevance of the whole problem of access depends. There exists also another preliminary point of this order, consideration of which is however more conveniently postponed until later - see paragraphs 26-31 below.

19. Clearly, it would be futile to discuss whether or not Article 6.1 (art. 6-1) of the Convention afforded a right of access to the English courts unless Golder had in fact been denied such access, - and in my opinion he had not. He had, in the manner already described, been prevented from consulting a solicitor with a view - possibly – to having recourse to those courts; but this was not in itself a denial of access to them, and could not be since the Home Secretary and the prison authorities had no power de jure to forbid it. It might nevertheless be prepared to hold, as the Court evidently does, that there had been a "constructive" denial if, de facto, the act of refusing to allow Golder to consult a solicitor had had the effect of permanently and finally cutting him off from all chances of recourse to the courts for the purpose of the proceedings he wanted to bring. But this was not the case: he would still have been in time to act even if he had served his full term, which he did not do, being soon released on parole.

20. I of course appreciate the force of the point that the lapse of time could have been prejudicial in certain ways, - but it could not have amounted to a bar. The fact that the access might have been in less favourable circumstances does not amount to a denial of it. Access, provided it is allowed, or possible, does not mean access at precisely the litigant's own time or on his own terms. In the present case there was at the most a factual impediment of a temporary character to action then and there, but no denial of the right because there could not be, in law. The element of "remoteness", of which the English legal system takes considerable account, also enters into this. Some distance, conceptually, has to be travelled before

it can be said that a refusal to allow communication with a solicitor "now", amounts to a denial of access to the courts - either "now", or still less "then". In no reasonable sense can it be regarded as a proximate cause or determining factor. Golder was not prevented from bringing proceedings: he was only delayed, and then, in the end, himself failed to do so. A charge of this character cannot be substantiated on the basis of a series of contingencies. Either the action of the authorities once and for all prevented Golder's recourse or it did not. In my opinion it did not.

21. Just as the Court's Judgment (so it will be seen later) completely fails to distinguish between the quite separate concept of access to the courts and a fair hearing after access has been had, so also does it fail to distinguish between the even more clearly separate notions of a refusal of access to the courts and a refusal of access to a solicitor, which may - or may not - result in an eventual seeking of access to the courts. To say that a thing cannot be done now, is not to say it cannot be done at all, - especially when what is withheld "now" does not even constitute that which (possibly) might be sought "then". The way in which these two distinct matters are run together, almost as if they were synonymous, in, for instance, the last part of the fourth section of paragraph 26 of the Judgment, constitutes a gratuitous piece of elliptical reasoning that distorts normal concepts.

22. In consequence, even assuming that Article 6.1 (art. 6-1) of the Convention involves an obligation to afford access to the courts, the present case does not, in my view, fall under the head of a denial of access contrary to that provision. It is not an Article 6.1(art. 6-1) case at all, but a case of interference with correspondence contrary to Article 8 (art. 8); and the whole argument about the effect of Article 6.1 (art. 6-1) is misconceived; for, access not having been denied, there is no room for the application of that Article (art. 6-1). Logically therefore, this part of the case must, for me, and so far as its actual ratio decidendi is concerned, end at this point: but, because the question of whether Article 6.1 (art. 6-1) is to be understood as comprising a right of access to the courts involves an issue of treaty interpretation that is of fundamental importance, not only in itself, but also as opening windows on wider vistas of principle, philosophy and attitude, I feel it incumbent on me to state my views about it.

B. The interpretational aspect

23. It was a former President of this Court, Sir Humphrey Waldock who, when appearing as Counsel in a case before the International Court of Justice at the Hague[10] pointed out the difficulties that must arise over the

[10] This was either in the first (jurisdictional) phase of the Barcelona Traction Company case (1964), or in the North Sea Continental Shelf case; but I have lost track of the reference.

interpretational process when what basically divides the parties is not so much a disagreement about the meaning of terms as a difference of attitude or frame of mind. The parties will then be working to different co-ordinates; they will be travelling along parallel tracks that never meet - at least in Euclidean space or outside the geometries of a Lobachevsky, a Riemann or a Bolyai; or again, as Sir Humphrey put it, they are speaking on different wavelengths, - with the result that they do not so much fail to understand each other, as fail to hear each other at all. Both parties may, within their own frames of reference, be able to present a self-consistent and valid argument, but since these frames of reference are different, neither argument can, as such, override the other. There is no solution to the problem unless the correct – or rather acceptable - frame of reference can first be determined; but since matters of acceptability depend on approach, feeling, attitude, or even policy, rather than correct legal or logical argument, there is scarcely a solution along those lines either.

24. These are the kind of considerations which, it seems to me, account for the almost total irreconcilability that has characterized the arguments of the participants about the interpretation of Article 6.1 (art. 6-1); - on the one side chiefly the Commission, on the other the United Kingdom Government. Their approaches have been made from opposite ends of the spectrum. One has only to read the views and contentions of the Commission as set forth in, for instance, its Report for transmission to the Committee of Ministers[11], to find these seemingly convincing - given the premises on which they are based and the approach that underlies them. Equally convincing however are those advanced on behalf of the United Kingdom Government in its written memorial[12] and oral arguments[13] before the Court, on the basis of another approach and a quite different set of premises. The conclusion embodied in the Judgment of the Court, after taking into account the arguments of the United Kingdom, is to the same effect as that of the Commission. My own conclusion will be a different one, partly because I think a different approach is required, but partly also because I believe that the Court has proceeded on the footing of methods of interpretation that I regard as contrary to sound principle, and furthermore has given insufficient weight to certain features of the case that are very difficult to reconcile with the conclusion it reaches.

1. The question of approach

25. The significance of the question of approach or attitude in the present case lies in the fact that, as already mentioned, and as was generally

[11] Dated 1 June 1973: Convention, Article 31, paragraphs 1 and 2 (art. 31-1, art. 31-2).
[12] Document CDH (74) 6 of 26 March 1974.*
[13] Documents CDH/Misc (74) 63 and 64 of 12 October 1974.*
* Note by the Registry: These documents are reproduced in volume No 16 of Series B.

admitted, neither in the Convention as a whole nor in Article 6.1 (art. 6-1) in particular, is any provision expressly made for a specific general substantive right[14] (14) of access to the courts. It is in fact common ground that if the principle of such a right is provided for, or even recognized at all by any Article of the Convention, this can only result from an inference drawn from the first sentence of Article 6.1 (art. 6-1) - which reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

It is evident on the face of it that the direct (and the only direct right) right conveyed by this provision is a right to (i) "a fair and public hearing", (ii) "within a reasonable time", and (iii) by a tribunal which is "independent", "impartial", and "established by law". Naturally the question of these several matters, viz. of a not unduly delayed fair and public hearing before an impartial tribunal, etc., can only arise if some proceedings, civil or criminal, have actually been commenced and are currently going through their normal course of development. But that is not the point. The point is that this says nothing whatever in terms as to whether there shall be any proceedings. The Article (art. 6-1) assumes the factual existence of proceedings, in the sense (but no further) that, if there were none, questions of fair trial, etc. would have no relevance because they could not arise. The Article (art. 6-1) can therefore only come into play if there are proceedings. It is framed on the basis that there is a litigation which, as my colleague Judge Zekia puts it, is sub judice. But that is as far as its actual language goes. It does not say that there must be proceedings whenever anyone wants to bring them. To put the matter in another way, the Article simply assumes the existence of a fact, viz. that there are proceedings, and then, on the basis of that fact, conveys a right which is to operate in the postulated event (of proceedings), - namely a right to a fair trial, etc. But it makes no direct provision for the happening of the event itself - that is to say for any right to bring the event about. In short, so far as its actual terms go, it conveys no substantive right of access independently of and additional to the procedural guarantees for a fair trial, etc., which are clearly its primary object. The question is therefore, must it be regarded as doing so by a process of implication?

Digression: Article 1 (art. 1) of the Convention

26. However, before going on to consider the question of implication as it arises in connection with Article 6.1 (art. 6-1), a parenthesis of some

[14] Although I agree with the Judgment (paragraph 33) that provisions such as those in Article 5.4 and Article 13 (art. 5-4, art. 13) only confer procedural rights to a remedy in case a substantive right under the Convention is infringed, and not any substantive rights themselves, this finding, though correct in se, does not exhaust the point of the United Kingdom argument based on those Articles (art. 5-4, art. 13). I shall return to this matter later.

importance must be opened, concerning another factor that calls for a short-circuiting of the whole issue of Article 6.1 (art. 6-1). This concerns the effect to be given to Article 1 (art. 1) of the Convention which runs as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention."

The operative word here, in the present context, is "defined"; and in consequence, the effect of this provision - (since it is rights and freedoms "defined" in the Convention that the States parties to it are to secure to everyone within their jurisdiction) - is to exclude from that obligation anything not so defined. Therefore, even if, in order to avoid relying on what might be regarded as a technicality, one refrains from attempting a "definition of defining", as compared with, say, mentioning, indicating, or specifying[15], the question necessarily arises whether a right or freedom that is not even mentioned, indicated or specified, but merely - at the most - implied, can be said to be one that is "defined" in the Convention in any sense that can reasonably be attributed to the term "defined"? In my opinion, not; and on this question I am in entire agreement with the views expressed by my colleague Judge von Verdross.

27. This conclusion does not turn on a mere technicality. In the first place, even if one accepts the view that, as has been said[16], "the word ‘defined’ in this provision is not very apt" and that in the Convention "none of the rights or freedoms are defined in the strict sense", they are at least mentioned, indicated or specified - in short named. This is not so with the right of access which, as such, finds no mention in the Convention. Secondly, a large part of the proceedings in the case, and of the arguments of the participants - those relating to inherent or other limitations on the right of access, if considered to be implied by Article 6.1 (art. 6-1) - was taken up, precisely, with the question of how that right was to be understood, what it amounted to, - in short how it was to be defined, - conclusively establishing the need for a definition, even if only by limitation or circumscription; - and definitions must be expressed - they cannot rest on implication.

28. The necessary conclusion therefore seems to be that it is impossible - or would be inadmissible - to regard as falling under the obligation imposed by Article 1 (art. 1) of the Convention – an obligation that governs its whole application - a right or freedom which the Convention does not trouble to name, but at the most implies, and which cannot even usefully be implied without at the same time proceeding to a rather careful definition of it, or of

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[15] Clearly anything defined must ipso facto be mentioned, indicated, specified or at least named, etc. The reverse does not follow. A definition involves more than any of these, and a fortiori much more than something not specified at all, but merely inferred.

[16] J.E.S. Fawcett, op. cit., in note 2 supra, p.33.

the conditions subject to which it operates, and which, by circumscribing it, define it[17].

29. In this connexion it must also be noticed that the very notion of a right of access to the courts is itself an ambiguous one, unless defined. The need to define, or at least circumscribe, is indeed expressly recognized in paragraph 38 of the Court's judgment, and again by implication, at the end of paragraph 44. For instance does a right of access mean simply such right as the domestic law of the State concerned provides, or at any time may provide for? If so, would the Convention, in providing for a right of access, be doing anything more than would already be done if the Convention did not exist? If on the other hand the Convention, supposing it to provide for a right of access at all, must be deemed to impose an obligation to afford a degree of access that the domestic law of the contracting States, or of some of them, might not necessarily contemplate, then what degree? - an absolute right, or one conditioned in various ways, and if so how? More specifically, does a right of access mean a right both to bring a claim and also to have it determined on its substantive merits regardless of any preliminary question affecting the character or admissibility of the claim, the status or capacity of the parties to it, etc.? - and if not, then, since the laws of different countries vary considerably in these respects, would not some definition of the degree of derogation from the absolute, considered to be acceptable from a human rights standpoint, be requisite in a Convention on human rights? The fact that the European Convention contains no such (nor any) definition could only mean that if a right of access is to be implied by virtue of Article 6.1 (art. 6-1), the right would need to be defined separately, ad hoc, by the Court for the purposes of each individual case. This would be inadmissible since governments would never know beforehand where they stood.

30. The foregoing questions may be rhetorical in their form: they are not rhetorical in substance. They serve to show the need for a definition of access to the courts as a right or freedom, and hence that, the Convention containing none, this particular right or freedom is not amongst those which its Article 1 (art. 1) obliges the contracting States to secure to those within

[17] It was common ground in the proceedings that a right of access cannot mean that the courts must have unlimited jurisdiction (e.g. the case of diplomatic or parliamentary immunity); or that the right must be wholly uncontrolled (e.g. the case of lunatics, minors, etc.). Or again that lawful imprisonment does not have some effect on rights of access. But there was more than enough argument about the precise nature or extent of such curbs to make it abundantly clear that an implied right of access without specification or definition could not be viable, in the sense that its character and incidence would be the subject of continual controversy. Here, my colleague Judge Zekia makes an excellent point when he draws attention to the effect of Article 17 (art. 17) of the Convention, which prohibits the contracting States from engaging in anything aimed at limiting any rights or freedoms "to a greater extent than is provided for in the Convention", - the significance being that if any right of access were to be implied by Article 6.1 (art. 6-1), it would have to be an absolute one, since that Article provides for no restrictions.

their respective jurisdictions. To put the matter in another way, the parties cannot be expected to implement what would be an important international obligation when it is not defined sufficiently to enable them to know exactly what it involves - indeed is not defined at all because (in so far as it exists) it rests on an implication that is never particularized or spelt out. The fleeting, and scarcely comprehensible[18], references contained in paragraphs 28 and 38 (first section) of the Court's Judgment to the question of a definition, as it arises by virtue of Article 1 (art. 1) of the Convention, are in no way an adequate substitute for a considered discussion of the matter, which the Judgment wholly fails to provide.

3l. In consequence, there is here a further point at which, as in the case of what was discussed in paragraphs 19-22 of this Opinion, a term could, so far as I am concerned, logically be put to the question of the effect of Article 6.1 (art. 6-1) - for since that provision does not define, then whatever is the right or freedom it might imply, that right or freedom would not come within the scope of Article 1 (art. 1) and its overall governing obligation. This is also precisely Judge von Verdross' view. That this conclusion may legitimately suggest the deduction that Article 6.1 (art. 6-1) does not in fact imply any such right or freedom, but deals only with the modalities of litigation, leads naturally to a resumption of the discussion broken off at the end of paragraph 25 above where, it having emerged quite clearly from the analysis previously made, that Article 6.1 (art. 6-1), while assuming the existence of proceedings, did not in terms give expression to any positive right to bring them, the question was asked whether the Article (art. 6-1) must nevertheless be regarded as doing so by a process of implication or inference. Also raised was the further question of what it would be proper and legitimate to imply by means of such a process.

Resumption on the question of approach

i. The Court's approach

32. It is an understandable, reasonable and legitimate point of view that access to the courts of law is, or should be, regarded as an important human right. Yet it is an equally justifiable view to say that the very importance of the right requires (more especially in a convention based on inter-State agreement, not sovereign legislative power) that it should be given explicit expression, not left to be deduced as a matter of inference. This leads up to an essential point. There is a considerable difference between the case of "law-giver's law" edicted in the exercise of sovereign power, and law based on convention, itself the outcome of a process of agreement, and limited to what has been agreed, or can properly be assumed to have been agreed. Far

[18] For instance, what is meant by the allusions to a definition "in the narrower sense of the term"? Narrower than what? - and what would be the "broader" sense? Such vagueness can only give rise to "confusion worse confounded": Milton, Paradise Lost, Book I, 1, 995, - (lost indeed!).

greater interpretational restraint is requisite in the latter case, in which, accordingly, the convention should not be construed as providing for more than it contains, or than is necessarily to be inferred from what it contains. The whole balance tilts from (in the case of law-giver's law) the negatively orientated principle of an interpretation that seems reasonable and does not run counter to any definite contra-indication, and an interpretation that needs to have a positive foundation in the convention that alone represents what the parties have agreed to, - a positive foundation either in the actual terms of the convention or in inferences necessarily to be drawn from these; - and the word "necessarily" is the decisive one.

33. That word is significant because the attitude of the Commission to this case and, though more guardedly, that of the Court, seems to me to have amounted to this, - that it is inconceivable, or at least inadmissible, that a convention on human rights should fail in some form or other to provide for a right of access to the courts: therefore it must be presumed to do so if such an inference is at all possible from any of its terms. This attitude clearly underlies what is said in the last section of paragraph 35 of the Court's Judgment, that it would, in the opinion of the Court "be inconceivable ... that Article 6.1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it possible to benefit from such guarantees, that is, access to a court". As a matter of logical reasoning however, this is a complete non-sequitur. It might perhaps seem natural that procedural guarantees of this kind should "first" be preceded by a protection of the right of access: the fact remains that, in terms, they are not, and that the inference that they must be deemed so to be is at best a possible and in no way a necessary one; - for it is a perfectly conceivable situation that a right of access to the courts should not necessarily always be afforded, or should be limited to certain cases, or excluded in certain cases, but that where it is afforded there should be safeguards as to the character of the ensuing proceedings.

34. Generally speaking, at least in this type of provision, an inference or implication can only be regarded as a "necessary" one if the provision cannot operate, or will not function, without it. As has already been indicated (supra, paragraph 25), in Article 6.1 (art. 6-1) the necessary, and the only necessary inferential element lies in the assumption (without which the provision makes no sense but more than which it does not require in order to make sense) that legal proceedings of some kind have been started and are in progress. It is in no way necessary, either to the operation of this text, or to give it significant meaning and scope, that the further and quite gratuitous assumption should be made that the text implies not only the existence of proceedings but an a priori right to bring them, - which is to enter upon a distinct order or category of concept, for doing which there is no warrant, since the Article (art. 6-1) has ample scope without that. To

quote my colleague Judge Zekia, it "has ... its raison d'être ... without grafting the right of access onto it". May I be permitted in the general context of the process of implication to refer to what I wrote more than a dozen years ago in an article on treaty interpretation having no specific connexion with any case such as the present one[19].

35. So compelling do these considerations seem to me to be that I am obliged to look to other factors in order to account for the line taken by the Court. A number of them, such as the rules of treaty interpretation embodied in the 1966 Vienna Convention on the Law of Treaties; the Statute of the Council of Europe - an instrument quite separate from the European Convention on Human Rights; the principle of the rule of law; and the "general principles of law recognized by civilized nations" mentioned in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice; - all these are factors external to Article 6.1 (art. 6-1) of the Human Rights Convention, and having little or no direct bearing on the precise point of interpretation involved, which is that discussed in paragraphs 25 and 33-34 of the present Opinion. They might be useful as straws to clutch at, or as confirmatory of a view arrive at aliter, - they are in no way determining in themselves, even taken cumulatively[20].

36. The really determining element in the conclusion arrived at by the Court seems to have been fear of the supposed consequences that might result from any failure to read a right of access into Article 6.1 (art. 6-1). This can clearly be seen from the following passages, the first of which completes that already quoted in paragraph 33 above by stating that the "fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings". Still more significant is the second passage (Judgment, paragraph 35, penultimate section), the first sentence of which reads as follows:

> "Were Article 6.1 (art. 6-1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government."

37. These motivations, as embodying what is clearly the real ratio decidendi of this part of the Judgment, seem to me to call for comment under three heads, - those of probability, the logic of the argument, and the nature of the operation they denote.

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[19] See a footnote entitled "The philosophy of the inference" in the British Year Book of International Law for 1963, p. 154.

[20] The importance attributed to the factor of the "rule of law" in paragraph 34 of the Court's Judgment is much exaggerated. That element, weighty though it is, is mentioned only incidentally in the Preamble to the Convention. What chiefly actuated the contracting States was not concern for the rule of law but humanitarian considerations.

(a) The consequences foreshadowed are completely unrealistic or at the best highly exaggerated.

(b) The argument embodies a well known logical fallacy, in so far as it proceeds on the basis that without a right of access the safeguards for a trial provided for by Article 6.1 (art. 6-1) would be rendered nugatory and objectless, - so that the one must necessarily entail the other. This is merely to perpetuate the type of fallacy arising out of what is known to philosophers as the "King of France" paradox, - the paradox of a sentence which, linguistically, makes sense, but actually is absurd, namely the assertion "the King of France is bald". The paradox vanishes however when it is seen that the assertion in no way logically implies that there is a King of France, but merely that, rightly or wrongly, if there is one, he is bald. But that there is one must be independently established; and, as is well known, there is in fact no King of France. Similarly, one could provide all the safeguards in the world for the well being of the King of France, did he exist, yet the fact that these would all be rendered nugatory and objectless did he not do so, would in no way establish, or be compelling ground for saying that he did, or must be assumed to. In the same way, the safeguards for a fair trial provided by Article 6.1 (art. 6-1) will operate if there is a trial, and if not, not. They in no way entail that there must be one, or that a right of access must be postulated in order to bring one about. The Judgment also abounds in the type of logical fallacy that derives B from A because A does not in terms exclude B. But non-exclusion is not ipso facto inclusion. The latter still remains to be demonstrated.

(c) Finally, it must be said that the above quoted passages from the Judgment of the Court are typical of the cry of the judicial legislator all down the ages - a cry which, whatever justification it may have on the internal or national plane[21], has little or none in the domain of the inter-State treaty or convention based on agreement and governed by that essential fact[22]. It may, or it may not be true that a failure to see the Human Rights

[21] It is one thing for a national constitution to allow part of its legislative processes to be effected by means of judge-made "case law": quite another for this method to be imposed ab extra on States parties to an international convention supposed to be based on agreement. It so happens however, that even in England, a country in which "case law", and hence - though to a diminishing extent – a certain element of judicial legislation has always been part of the legal system, a recent case led to severe criticism of this element, and another decision given by the highest appellate tribunal went far to endorse this criticism in the course of which it had been pointed out that the role of the judge is jus dicere not jus dare, and that the correct course for the judge faced with defective law was to draw the attention of the legislature to that fact, and not deal with it by judicial action. It was also pointed out that no good answer lay in saying that a big step in the right direction had been taken, - for when judges took big steps that meant that they were making new law. Such remarks as these are peculiarly applicable to the present case in my opinion.

[22] That is to say unless it can be shown that the treaty or convention itself concedes some legislative role to the tribunal called upon to apply it, or that the parties to it intended to delegate in some degree the function (otherwise exclusively to them pertaining) of

Convention as comprising a right of access to the courts would have untoward consequences - just as one can imagine such consequences possibly resulting from various other defects or lacunae in this Convention. But this is not the point. The point is that it is for the States upon whose consent the Convention rests, and from which consent alone it derives its obligatory force, to close the gap or put the defect right by an amendment, - not for a judicial tribunal to substitute itself for the convention-makers, to do their work for them. Once wide interpretations of the kind now in question are adopted by a court, without the clearest justification for them based solidly on the language of the text or on necessary inferences drawn from it, and not, as here, on a questionable interpretation of an enigmatic provision, considerations of consistency will, thereafter, make it difficult to refuse extensive interpretations in other contexts where good sense might dictate differently: freedom of action will have been impaired.

ii. A different approach

38. In my view, the correct approach to the interpretation of Article 6.1 (art. 6-1) is to bear in mind not only that it is a provision embodied in an instrument depending for its force upon the agreement - and indeed the continuing support - of governments, but also that it is an instrument of a very special kind[23], emulated in the field of human rights only by the Inter-American Convention on Human Rights signed at San José nearly twenty years later. This was in considerable measure founded on the European one, particularly as regards its "enforcement" machinery. But it has not been brought into force. Such machinery is not to be found in the United Nations Covenants on Human rights, which in any case also do not seem to be in force. Speaking generally, the various conventions and covenants on human rights, but more particularly the European Convention, have broken entirely new ground internationally, making heavy inroads on some of the most cherished preserves of governments in the sphere of their domestic jurisdiction or domaine réservé. Most especially, and most strikingly, is this the case as regards what is often known as the "right of individual petition", whereby private persons or entities are enabled to (in effect) sue their own governments before an international commission or tribunal, - something

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changing or enhancing its effects, - or again that they must be held to have agreed a priori to an extensive interpretation of its terms, possibly exceeding the original intention. In the present context none of these elements, but the reverse rather, are present, as I shall show later.

[23] The European Convention, signed in 1950 and in force since 1953, is unique as being the only one that both is operative and provides for the judicial determination of disputes arising under it. In any event it is the oldest, having been preceded (by two years) only by the U.N. Universal Declaration of Human Rights which was not, and is not, a binding instrument. There are only three others of the same general order as the European Convention, and only one that is comparable in respect of "enforcement machinery" - the American Convention of San José - which was signed only in 1969 and is not in force.

that, even as recently as thirty years ago, would have been regarded as internationally inconceivable. For these reasons governments have been hesitant to become parties to instruments most of which, apart from the European Convention, have apparently not so far attracted a sufficient number of ratifications to bring them into force. Other governments, that have ratified the European Convention, have hesitated long before accepting the compulsory jurisdiction of the Court of Human Rights set up under it. Similar delays have occurred in subscribing to the right of individual petition which, like the jurisdiction of the Court, has to be separately accepted. This right moreover, may require not only an initial, but a continuing acceptance, since it may be, and in several instances has been given only for a fixed, though renewable, period. It is indeed solely by reason of an acceptance of this kind that it has been possible for the present (Golder) case to be brought before the European Commission and Court of Human Rights at all.

39. These various factors could justify even a somewhat restrictive interpretation of the Convention but, without going as far as that, they must be said, unquestionably, not only to justify, but positively to demand, a cautious and conservative interpretation, particularly as regards any provisions the meaning of which may be uncertain, and where extensive constructions might have the effect of imposing upon the contracting States obligations they had not really meant to assume, or would not have understood themselves to be assuming. (In this connexion the passage quoted in the footnote below[24] from the oral argument of Counsel for the United Kingdom before the Commission should be carefully noted.) Any serious doubt must therefore be resolved in favour of, rather than against, the government concerned, - and if it were true, as the Judgment of the Court seeks to suggest, that there is no serious doubt in the present case, then one must wonder what it is the participants have been arguing about over approximately the last five years!

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[24] "As regards the question of access to the courts, this is not a case of a Government trying to repudiate obligations freely undertaken. That much is quite clear. If one thing has emerged from all the discussion in the case of Mr. Knechtl and the pleadings so far in the case of Mr. Golder, it is that the Government of the United Kingdom had no idea when it was accepting Article 6 (art. 6) of the Convention that it was accepting an obligation to accord a right of access to the courts without qualification. Whether we are right on the interpretation or whether we are wrong, I submit that that much is absolutely clear. I am not going to review in detail all the evidence or the views of the United Kingdom in this respect which have been placed before the Commission. But I submit that it is perfectly clear from all the constitutional material that has been submitted, from its part in the drafting of the European Establishment Convention, that the United Kingdom had no intention of assuming, and did not know that it was expected to assume, any such obligation." - (CDH (73) 33, at p. 36: Document no. 5 communicated by the Commission to the Court)*

* Note by the Registry: Verbatim record of the oral hearing on the merits held in Strasbourg before the Commission on 16-17 December 1971.

iii. Intentions and drafting method

40. It is hardly possible to establish what really were the intentions of the contracting States under this head; but that of course is all the more reason for not subjecting them to obligations which do not result clearly from the Convention, or at least in a manner free from reasonable doubt. The obligation now under discussion does not have that character. Moreover, speaking from a very long former experience as a practitioner in the field of treaty drafting, it is to me quite inconceivable that governments intending to assume an international[25] obligation to afford access to their courts, should have set about doing so in this roundabout way, - that is to say should, without stating the right explicitly, have left it to be deduced by a side-wind from a provision (Article 6.1) (art. 6-1) the immediate and primary purpose of which (whatever its other possible implications might be) - no one who gives an objective reading can doubt – was something basically distinct as a matter of category, namely to secure that legal proceedings were fairly and expeditiously conducted. No competent draftsman would ever have handled such a matter in this way.

41. I do not therefore propose to go into the drafting history of Article 6.1 (art. 6-1), which would be both tedious and unrewarding because, like so many drafting histories, the essential points are often obscure and inconclusive. But it is worth looking at the provisions comparable or parallel to Article 6.1 (art. 6-1) that figure in other major human rights instruments. In the only previous one of a similar order, the Universal Declaration (see footnote 23 supra) there was a provision (its Article 8) which read:

> "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

This, it will be seen, gave no general right of access, and was really a procedural article of the same basic type as Article 5, paragraph 4, and Article 13 (art. 5-4, art. 13), of the European Convention, to which I shall come later (see footnote 14 supra), - and which the Court's Judgment itself holds not to comprise the sort of right of access it professes to find in Article 6.1 (art. 6-1). Article 8 of the Universal Declaration was followed almost immediately by another provision (Article 10)[26] which simply says:

> "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him" - (my italics).

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[25] A right of access under domestic law such as, at least in a general way, the legal systems of most countries doubtless do in fact provide, is one thing. It is quite another matter to assume an international treaty obligation to do so - especially without the smallest attempt to define or condition it (see supra, paragraphs 27-30).

[26] The intervening provision (Article 9) is irrelevant here, forbiding arbitrary arrest, detention or exile.

I have italicized the last phrase of this Article in the Universal Declaration because it makes it quite clear that, subject to the change of order, which has no effect on the meaning, this was the source from which the first sentence of Article 6.1 (art. 6-1) of the European Convention was derived (see text set out in paragraph 25 supra). It no more expresses in terms any substantive right of access to the courts independently of, and over and above the purely procedural guarantee of a fair trial, etc., which is all its actual terms specify, than does the parallel passage in Article 6.1 (art. 6-1) of the European Convention.

42. These provisions (Articles 8 and 10) of the Universal Declaration deserve to be specially noted because, in the Preamble to the European Convention, what is recited is that the Parties were resolved collectively to enforce "certain of the Rights stated in the Universal Declaration". They were not therefore purporting to provide for any rights not so stated - i.e. stated in that Declaration.

43. The next comparable instrument, the International Covenant on Civil and Political Rights, adopted in the United Nations in 1966, but not yet in force, has an Article 14 clearly founded on Article 10 of the Universal Declaration, and therefore on Article 6.1 (art. 6-1) of the European Convention; but there is no need to quote its terms because, apart from an initial phrase about the equality of all before the courts, and a few minor and insubstantial changes of wording and order, plus the omission of the reference to a hearing "within a reasonable time", it is exactly to the same effect as Article 6.1 (art. 6-1). Finally, the Inter-American Convention of San José (1969 - also not in force) has a provision (Article 8, paragraph 1) which at first sight seems to get nearer to conveying an express right of access, but in fact does not do so. To begin with, it comes under the headed rubric "Right to a Fair Trial" (garanties judiciaires), which labels it as falling into the procedural guarantee category. Secondly, its language clearly shows it to be of the same family and origin as the other comparable clauses in earlier instruments. It reads:

> "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

If, in this provision, a full stop occurred after the word "hearing" in the opening line, and it then resumed separately with the rest of the text, it could be said that a general right of access was expressly formulated. It is quite clear however (omitting as irrelevant for present purposes the parenthetical phrase "with due guarantees and within a reasonable time") that the word "hearing" links up directly with (and is qualified by) the requirement of a hearing by a "competent ... tribunal". The emphasis, as in Article 6.1 (art. 6-

1) of the European Convention, is on the character of the hearing rather than on an a priori and independent right to have a hearing.

44. But the significant fact is that all the provisions above reviewed seem to have had their origin in a proposal of a much stronger and more explicit character. The point is succinctly made in the following passage from the statement made by counsel for the United Kingdom before the Commission when, speaking in particular of Article 8 of the Universal Declaration, he said[27]:

> "The text of Art. 8 was based upon an amendment introduced by the Mexican representative in the Third Committee of the General Assembly on 23 October 1948. The representative stated that his amendment only repeated the text of the Bogota Declaration which had recently been adopted unanimously by 21 Latin American Deputations. The relevant provision of the Bogota Declaration was Art. XVIII. This says: 'Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights'.
>
> The source of Art. 8 of the Universal Declaration in Art. XVIII of the Bogota Declaration is very interesting because Art. XVIII of the Bogota Declaration is in the first sentence talking about the right of every person to resort to the courts to ensure respect for his legal rights, and in Art. 8 of the Universal Declaration this has been inverted and narrowed to read: 'Everyone has a right to an effective remedy by the competent national tribunals'."

Counsel then subsequently[28] drew the following conclusion, which is also mine, namely that "if one looks at this history as a whole, what it amounts to is this: that what started in the Declaration of Bogota as a broad right of access has been narrowed down to a right of access related to the rights secured by the Convention".

45. Thus, over a period of some twenty years, there seems to have been what it would not be unfair to call a deliberate policy on the part of governments of avoiding coming to grips with the question of access, purely as such. This view is strengthened by the existence of evidence (see Document CDH (73) 33, at p. 45)* that Article 6.1 (art. 6-1) of the European Convention did at one stage of its drafting contain terms that might have been regarded as making provision for a right of access as such, but these subsequently disappeared, - the clearest possible indication of an intention not to proceed on those lines, especially as the concept equally never figured in terms in any of the human rights instruments drawn up subsequent to the European Convention (vide supra). In the technique of treaty interpretation there can never be a better demonstration of an

[27] Loc. cit. in note 24 supra, at p. 47.
[28] Ibid. at p. 50.
* See note by the Registry on Page 53.

intention not to provide for something than first including, and then dropping it.

46. The conclusion I draw from the nature of the successive texts, combined with the considerations to which I have drawn attention in paragraph 38 above, is that the contracting States were content to rely de facto on the situation whereby, in practice, in all European countries a very wide measure of access to the courts was afforded; but without any definite intention on their part to convert this into, or commit themselves to the extent of, a binding international obligation on the matter (and see footnote 25 supra), - and more especially an obligation of the character which the Court, in the present case, has found to exist, - an obligation which, as the present case equally shows, is of a far more rigorous and far-reaching kind than the United Kingdom Government (obviously - see footnote 24 above) and a number of other governments parties to the Convention (most probably) had never anticipated as being mandatory[29]. This type of obligation cannot, for reasons already stated, be internationally acceptable unless it is defined and particularized, and its incidence and modalities specified. The Convention does not do this; and the Court, with good reason, does not compound the misconceptions of the Judgment by attempting a task that lies primarily within the competence of governments. As the Judgment itself in terms recognizes (paragraph 39, second section) - "It is not the function of the Court to elaborate a general theory of the limitations admissible in the case of convicted prisoners, nor even to rule in abstracto on the compatibility of ... the [United Kingdom] Prison Rules ... with the Convention". But if it is not the function of the Court to elaborate restrictions on the right, then a fortiori can it not be its function to postulate the right itself which is one that cannot operate in practice without the very restrictions the Court declines to elaborate.

2. Particular texts and terms

47. On the basis of the foregoing approach, the various relevant provisions of the Convention give rise to no difficulties of interpretation or necessity for vindicatory explanations, as they certainly do on the basis of the Court's approach. I will list and comment on these provisions, broadly in the order in which they occur: -

(a) The Preamble - This (as has already been mentioned in paragraph 42) recites specifically that the signatory Governments are resolved "to take the

[29] The United Kingdom argument based on the purely national treatment in the matter of access to the courts afforded by ordinary commercial treaties and by such multilateral conventions as the modern European Convention on Establishment, points to the probability that, squarely faced with having to do something about the question of access, governments would not have been willing to go beyond providing for national treatment in the matter; and of course Golder, a United Kingdom national, did receive treatment which was correct under the local national law and regulations.

first steps" for the collective enforcement of "certain of the Rights" stated in the Universal Declaration of Human Rights which, as has been seen (paragraph 41 supra) makes no provision for any independent right of access as such, so that such a right does not even enter into the category of those that the European Convention might cover. But even if it figured in that category as a right possibly to be covered - as, so to speak, a "qualifying right" – it would be a compelling implication of the language used in the Preamble, that it would not necessarily be included. Only "certain" of the qualifying rights were to figure, and a general right of access was not, on the basis of the Universal Declaration, even a qualifying right. In addition, the Parties were only proposing to take "the first steps", and to cover only "certain" of the rights. Thus, so far from it being "inconceivable" that provision for a right of access should not be found in the European Convention, that result becomes a fully conceivable one that need cause no surprises nor seizures.

(b) Article 1 (art. 1) of the Convention (see paragraphs 26-31 supra) has the effect of requiring that before it becomes incumbent on the contracting States to "secure to everyone within their jurisdiction" the rights and freedoms figuring in that part of the Convention that comprises Article 6.1 (art. 6-1), such rights and freedoms shall be "defined". No right of access however is there even mentioned, let alone "defined". Definitions must necessarily be express. No undefined right of access can therefore result by simple inference or implication from Article 6.1 (art. 6-1). The effect of Article 17 (art. 17) of the Convention (see footnote 17 supra) confirms and fortifies this view.

(c) Article 5, paragraph 4, and Article 13 (art. 5-4, art. 13)

(i) The Court’s Judgment is correct in taking the view of these provisions described in footnote 14 above; but it is a view that, though correct, is incomplete, and misses an important part of what the United Kingdom was seeking to contend.

(ii) What these two Articles (art. 5-4, art. 13) provide is that the contracting States must furnish a remedy in their courts for contraventions of substantive rights or freedoms embodied in the Convention (this description is somewhat of a paraphrase of Article 5, paragraph 4 (art. 5-4), but basically true, and literally true of Article 13 (art. 13)). I agree with the Court that these provisions do not themselves embody any substantive rights or freedoms, or any general right of access, and therefore would not render any provision that did have that effect superfluous, as the United Kingdom Government contended. However, that Government also put forward what might be called the complement of this proposition, namely, that if a general right of access must, as the Court held, be deemed to be implied by Article 6.1 (art. 6-1) then Article 5, paragraph 4, and Article 13 (art. 5-4, art. 13), would in their turn be rendered superfluous because the right of access under Article 6.1 (art. 6-1) would provide all that was

needed. Hence the existence of these other two provisions tended to show that no right of access was comprised by Article 6.1 (art. 6-1). This argument is logically correct, but is not completely watertight since Articles 5.4 and 13 (art. 5-4, art. 13) speak of affording a remedy; and mere access does not necessarily entail a remedy: there can be access but no remedy available upon access. Nevertheless, if one were prepared to take a leaf out of the Court's book and employ the kind, or order, of argument the Court employs, one might say that since access without a remedy is of no avail, a right of access implies a right to a remedy - which is patently absurd. This would however precisely parallel the Court's conclusion that because right to a fair trial is of no avail without a trial, therefore a right to bring proceedings resulting in a trial must be implied. It would be difficult to make the non-sequitur clearer.

(d) The provisions of Article 6, paragraph 1 (art. 6-1) - The vital first sentence of this paragraph has already been quoted in paragraph 25 of the present Opinion, and the remaining sentence will be found set out in paragraph 24 of the Court's Judgment. It need not be quoted here because all it does, with obvious reference to the requirement of a "public hearing" stated in the first sentence, is to specify that judgment also must be "pronounced publicly", but that the press and the public may be excluded from all or part of the trial in certain circumstances which are then particularized in some detail. This sentence is therefore irrelevant for present purposes except that it is entirely of the same order as the first, and is linked to it, ejusdem generis, as an essentially procedural provision concerned solely with the incidents and modalities of trial in court. On the first sentence, and generally, the following comments are supplementary to those already made in paragraphs 25 and 33-34 supra (and see also paragraph 40 in fine):

(i) The "ejusdem generis" rule - The previous paragraphs of this Opinion just referred to, were directed to showing that Article 6.1 (art. 6-1) is a self-contained provision, complete in itself and needing no importations, supplements or elucidations in order to make its effect clear; and belonging to a particular order or category of clause, procedural in character and concerned exclusively with the modalities of trial in court. Its whole tenour is to that effect, and that effect only, as was eloquently pointed out in argument (CDH (73) 33 at p. 51)[*]. The ejusdem generis rule therefore requires that, if any implictions are to be drawn from the text for the purpose of importing into it, or supplementing it by, something that is not actually expressed there (and it is common ground that the right of access does not find expression in this text), these implications should be, or should relate to, something of the same order, or be in the same category of concept, as figures in the text itself. This would not be the case here. Any

[*] See note by the Registry on page 53.

right of access as such, while it has a procedural aspect, is basically a substantive right of a fundamental character. Even in its procedural aspects it is quite distinct from matters relating to the modalities of trial. As has already been pointed out, the concept of the incidents of a trial has only one necessary implication, viz. that a trial is taking place - that proceedings are in progress. It implies nothing in itself about the right to initiate them, which belongs to a different order of concept. Consequently it is not a legitimate process, and it contravenes accepted canons of interpretation, to imply the one from the other.

(ii) The rule "expressio unius est exclusio alterius" - This rule also is infringed by the conclusion arrived at in the Court's Judgment. This occurs more than once, but is best illustrated by the manner in which Article 6. 1 (art. 6-1) is dealt with at the beginning of paragraph 28 of the Judgment, where it is said that although the Article "does not state a right of access ... in express terms", it "enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term" - (actually, not defined at all[30]). What is conveniently overlooked here is that the only rights in fact "enunciated" in Article 6.1 (art. 6-1) (and ex hypothesi "enunciation" means expressed in terms) are not "distinct" rights, but rights all of the same order or category, viz. rights relating to the timing, conduct and course of a trial. There is nothing in this with which to constitute the pretended "single right" that is said to include a right of access in addition to the actually specified procedural rights. The latter, on the other hand, are explicitly stated in such a way as to call for the application of the expressio unius rule, - and since, for the reasons already given (paragraphs 25 and 34 supra), there is nothing in the Article that necessitates a right of access apart from the fact of access already had, this rule should be applied. At the risk of repetition, let the true position be stated once more, namely that the provisions of Article 6.1 (art. 6-1) will operate perfectly well as they are, whenever proceedings are in fact brought, without postulating any inherent right to bring them. The Article will operate automatically when, and if, there are proceedings. If for whatever reason – absence of right or other - they are not brought, then cadit quaestio: the occasion that would have brought the Article into play has simply not arisen. In consequence, there is no justification in this case for the failure to apply the expressio unius rule.

(iii) Equal treatment of civil and criminal proceedings - there is a further compelling, and perhaps more concrete, reason why no right of access, as opposed to a right to a fair trial, etc., can be implied in Article 6.1 (art. 6-1). This Article (art. 6-1) manifestly places civil and criminal proceedings on the same footing, - it deals with the matter of a fair trial in both contexts.

[30] This is one of the places where the Court recognizes the undefined character of the right - see supra paragraphs 26-31, especially 29 and 30 and appurtenant footnotes.

Yet the question of a right of access as such must arise chiefly in connexion with civil proceedings where it is the plaintiff or claimant who initiates the action. Apart from the very limited and special class of case in which the private citizen can originate proceedings of a penal character, it is the authorities who start criminal proceedings; and in that context it would be manifestly absurd to speak of a right of access. It is no real answer to this to say that the right inheres only when it is needed and it is needed in the one case but not the other (or in any event the authorities can look after themselves). This is not the point. The point is that the Article (art. 6-1) is as much concerned with the criminal as with the civil field - indeed its importance probably lies chiefly in the former field, - yet this, the criminal field, is one in relation to which it is totally inapt in the vast majority of cases to speak of a right of access for the authorities who will be initiating the proceedings. This is a strong pointer to, or confirmation of, the conclusion that the Article (art. 6-1) is concerned solely with the proceedings themselves, not the right to bring them.

(iv) A public hearing "within a reasonable time" - There are other pointers in the same direction, which also involve the principle of maintaining a due congruity between the civil and criminal aspects of Article 6.1 (art. 6-1). One such pointer is afforded by the United Kingdom argument (only referred to in the Judgment (paragraph 32) in a manner that fails to bring out its relevance - indeed seems wholly to misunderstand it[31]) concerning the implications of the requirement in the Article (art. 6-1) that trial shall take place within a reasonable time. "Within a reasonable time" of what? The Article does not say. In the case of criminal proceedings there can be no room for doubt that the starting point must be the time of arrest or of formal charge. It is only common sense to suppose that it could not lie in an indeterminate preceding period when the authorities were perhaps considering whether they would make a charge, and were taking legal advice about that - or were trying to find the accused in order to arrest him. In my view exactly the same principle must apply mutatis mutandis to civil proceedings, not only because otherwise a serious degree of incommensurate treatment would be introduced between the two types of proceedings, but for practical reasons also. In civil proceedings, the period of reasonable time must begin to run from the moment the complaint is formalized by the issue of a writ, summons or other official instrument under, or in accordance with, which the defendant is notified of the action. This again is only common sense. Any period previous to that, while the plaintiff is considering whether to act, is taking legal advice, or is gathering evidence, is irrelevant or too indeterminate to serve, since no fixed moment could be found within it to act as a starting point for the lapse of a

[31] It is of course the trial that has to take place within a reasonable time after access has been had, not the access that has to be afforded within a reasonable time.

"reasonable time". If this were not so, the starting point could be "related back" for months or even, in some cases, years, thus making nonsense of the whole requirement of trial "within a reasonable time", the sole real object of which is to prevent undue delay in bringing causes to trial. But the effect of the Court's view is that since Article 6.1 (art. 6-1) itself does not specify any starting point; the Court would have to determine this ad hoc for, and in, each particular case. In consequence, governments could never know in advance within what precise period causes must be brought to trial in order to satisfy the requirements of the Article (art. 6-1), - a wholly unacceptable situation.

(v) The significance of all this is of course that anything relating to a right of access must concern the period prior to the formal initiation of proceedings, for once these have been started, access to the courts has been had, and therefore cadit quaestio. In consequence, any occurences relating to the right of access as such - in particular any alleged interference with or denial of it - must relate exclusively to the period before access is actually had by the initiation of proceedings, - i.e. before the period of a fair and public hearing within a reasonable time to which alone Article 6.1 (art. 6-1) refers; - and this again points directly to the conclusion that the Article does not purport to deal with access at all, since that matter relates to an antecedent period or stage.

(vi) The term "public hearing" also gives rise to difficulties if Article 6.1 (art. 6-1) is to be understood as providing for a right of access. Confining myself here to the case of civil proceedings, the term "public" suggests a hearing on the merits in open court such as will ordinarily occur if the proceedings run their normal course. But as has been seen (supra, paragraph 15), they may not do so, they may be stopped on various grounds at an earlier stage. The point is that if they are, this will very often not be at any public hearing, but before a minor judicial officer or a judge sitting in private (anglice "in chambers"), at which, usually, only the parties and their legal advisers will be present. If therefore a right of access were held to be implied by Article 6.1 (art. 6-1), this might, on the language of the Article have to be held to involve a sort of indefeasible right to a public hearing in all circumstances, anything less not being "access". This view is strongly confirmed by the tenour of the second sentence of Article 6.1 (art. 6-1) – see sub-paragraph (d) above. Here therefore is one of the connexions in which the correct meaning and scope of a right of access has not been thought out (see paragraphs 28 and 29 supra), - failing which the concept lacks both clarity and certainty. It is also the connexion in which Article 17 (art. 17) of the Convention is relevant – see footnote 17 supra, and sub-paragraph (b) of the present paragraph (47).

48. Conclusion on the question of right of access - I omit other points in order not further to overload this Opinion. But I have to conclude that - like it or not, so to speak - a right of access is not to be implied as being

comprehended by Article 6.1 (art. 6-1) of the Convention, except by a process of interpretation that I do not regard as sound or as being in the best interests of international treaty law. If the right does not find a place in Article 6.1 (art. 6-1), it clearly does not find a place anywhere in the Convention. This is no doubt a serious deficiency that ought to be put right. But it is a task for the contracting States to accomplish, and for the Court to refer to them, not seek to carry out itself.

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

COURT (PLENARY)

CASE OF GOLDER v. THE UNITED KINGDOM

(Application no. 4451/70)

JUDGMENT

STRASBOURG

21 February 1975

In the Golder case,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

Mr. G. BALLADORE PALLIERI, *President*,
Mr. H. MOSLER,
Mr. A. VERDROSS,
Mr. E. RODENBOURG,
Mr. M. ZEKIA,
Mr. J. CREMONA,
Mrs. I. H. PEDERSEN,
Mr. T. VILHJALMSSON,
Mr. R. RYSSDAL,
Mr. A. BOZER,
Mr. W. J. GANSHOF VAN DER MEERSCH,
Sir Gerald FITZMAURICE,

and also Mr. M.-A. EISSEN, *Registrar* and Mr. J.F. SMYTH, *Deputy Registrar,*

Having deliberated in private,

Decides as follows:

PROCEDURE

1. The Golder case was referred to the Court by the Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter called "the Government"). The case has its origin in an application against the United Kingdom lodged with the European Commission of Human Rights (hereinafter called "the Commission") under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"), by a United Kingdom citizen, Mr. Sidney Elmer Golder. The application was first submitted in 1969; it was supplemented in April 1970 and registered under no. 4451/70. The Commission's report in the case, drawn up in accordance with Article 31 (art. 31) of the Convention, was transmitted to the Committee of Ministers of the Council of Europe on 5 July 1973.

2. The Government's application, which was made under Article 48 (art. 48) of the Convention, was lodged with the registry of the Court on 27 September 1973 within the period of three months laid down in Articles 32 para. 1 and 47 (art. 32-1, art. 47). The purpose of the application is to submit the case for judgment by the Court. The Government therein express their disagreement with the opinion stated by the Commission in their report

and with the Commission's approach to the interpretation of the Convention.

3. On 4 October 1973, the Registrar received from the Secretary of the Commission twenty-five copies of their report.

4. On 9 October 1973, the then President of the Court drew by lot, in the presence of the Registrar, the names of five of the seven judges called upon to sit as members of the Chamber, Sir Humphrey Waldock, the elected judge of British nationality, and Mr. G. Balladore Pallieri, Vice-President of the Court, being ex officio members under Article 43 (art. 43) of the Convention and Rule 21 para. 3 (b) of the Rules of Court respectively. The five judges chosen were MM. R. Cassin, R. Rodenbourg, A. Favre, T. Vilhjálmsson and W. Ganshof van der Meersch, (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). The President also drew by lot the names of substitute judges (Rule 2l para. 4).

Mr. G. Balladore Pallieri assumed the office of President of the Chamber in accordance with Rule 21 para. 5.

5. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Government and of the Delegates of the Commission on the procedure to be followed. By Order of 12 October 1973, he decided that the Government should file a memorial within a time-limit expiring on 3l January 1974 and that the Delegates should be entitled to file a memorial in reply within two months of the receipt of the Government's memorial. The President of the Chamber also instructed the Registrar to request the Delegates to communicate to the Court the main documents listed in the report. These documents were received at the registry on 17 October.

The President later granted extensions of the times allowed, until 6 March 1974 for the Agent of the Government, and until 6 June and then 26 July for the Delegates (Orders of 21 January, 9 April and 5 June 1974). The Government's memorial was received at the registry on 6 March 1974 and that of the Commission - with observations by the applicant's counsel annexed - on 26 July.

6. The Chamber met in private on 7 May 1974. Sir Gerald Fitzmaurice, who had been elected a member of the Court in January 1974 in place of Sir Humphrey Waldock, took his seat in the Court as the elected judge of British nationality (Article 43 of the Convention and Rule 2 para. 3) (art. 43).

On the same day the Chamber, "considering that the case raise(d) serious questions affecting the interpretation of the Convention", decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court.

The new President of the Court, Mr. Balladore Pallieri, assumed the office of President.

7. After consulting the Agent of the Government and the Delegates of the Commission, the President decided, by Order of 6 August 1974, that the oral hearings should open on 11 October.

8. The public hearings took place on 11 and 12 October 1974 in the Human Rights Building at Strasbourg.

There appeared before the Court:

- for the Government:

Mr. P. FIFOOT, Legal Counsellor,
Foreign and Commonwealth Office, Barrister-at-Law,
Agent and *Counsel*,

Sir Francis VALLAT, K.C.M.G., Q.C., Professor of International Law,
King's College, London; formerly Legal Adviser to the Foreign Office,

Mr. G. SLYNN, Q.C., Recorder of Hereford, *Counsel*,

and

Sir William DALE, K.C.M.G., formerly Legal Adviser to the Commonwealth Office,

Mr. R. M. MORRIS, Principal, Home Office, *Advisers*;

- for the Commission:

Mr. G. SPERDUTI, *Principal Delegate*,

MM. T. OPSAHL and K. MANGAN, *Delegates*, and

Mr. N. TAPP, Q.C., who had represented the applicant before the Commission, assisting the Delegates under Rule 29 para. 1, second sentence.

The Court heard the addresses and submissions of Mr. Fifoot, Sir Francis Vallat and Mr. Slynn for the Government and of Mr. Sperduti, Mr. Opsahl and Mr. Tapp for the Commission, as well as their replies to questions put by the Court and by several judges.

At the hearings, the Government produced certain documents to the Court

AS TO THE FACTS

9. The facts of the case may be summarised as follows.

10. In 1965, Mr. Sidney Elmer Golder, a United Kingdom citizen born in 1923, was convicted in the United Kingdom of robbery with violence and was sentenced to fifteen years' imprisonment. In 1969, Golder was serving his sentence in Parkhurst Prison on the Isle of Wight.

11. On the evening of 24 October 1969, a serious disturbance occurred in a recreation area of the prison where Golder happened to be.

On 25 October, a prison officer, Mr. Laird, who had taken part and been injured in quelling the disturbance, made a statement identifying his

assailants, in the course of which he declared: "Frazer was screaming ... and Frape, Noonan and another prisoner whom I know by sight, I think his name is Golder ... were swinging vicious blows at me."

12. On 26 October Golder, together with other prisoners suspected of having participated in the disturbance, was segregated from the main body of prisoners. On 28 and 30 October, Golder was interviewed by police officers. At the second of these interviews he was informed that it had been alleged that he had assaulted a prison officer; he was warned that "the facts would be reported in order that consideration could be given whether or not he would be prosecuted for assaulting a prison officer causing bodily harm".

13. Golder wrote to his Member of Parliament on 25 October and 1 November, and to a Chief Constable on 4 November 1969, about the disturbance of 24 October and the ensuing hardships it had entailed for him; the prison governor stopped these letters since Golder had failed to raise the subject-matter thereof through the authorised channels beforehand.

14. In a second statement, made on 5 November 1969, Laird qualified as follows what he had said earlier:

> "When I mentioned the prisoner Golder, I said 'I think it was Golder', who was present with Frazer, Frape and Noonan, when the three latter were attacking me.
>
> "If it was Golder and I certainly remember seeing him in the immediate group who were screaming abuse and generally making a nuisance of themselves, I am not certain that he made an attack on me.
>
> "Later when Noonan and Frape grabbed me, Frazer was also present but I cannot remember who the other inmate was, but there were several there one of whom stood out in particular but I cannot put a name to him."

On 7 November, another prison officer reported that:

> "... during the riot of that night I spent the majority of the time in the T.V. room with the prisoners who were not participating in the disturbance.
>
> 740007, Golder was in this room with me and to the best of my knowledge took no part in the riot.
>
> His presence with me can be borne out by officer ... who observed us both from the outside."

Golder was returned to his ordinary cell the same day.

l5. Meanwhile, the prison authorities had been considering the various statements, and on 10 November prepared a list of charges which might be preferred against prisoners, including Golder, for offences against prison discipline. Entries relating thereto were made in Golder's prison record. No such charge was eventually preferred against him and the entries in his prison record were marked "charges not proceeded with". Those entries were expunged from the prison record in 1971 during the examination of the applicant's case by the Commission.

16. On 20 March 1970, Golder addressed a petition to the Secretary of State for the Home Department, that is, the Home Secretary. He requested a transfer to some other prison and added:

> "I understand that a statement wrongly accusing me of participation in the events of 24th October last, made by Officer Laird, is lodged in my prison record. I suspect that it is this wrong statement that has recently prevented my being recommended by the local parole board for parole.
>
> "I would respectfully request permission to consult a solicitor with a view to taking civil action for libel in respect of this statement .... Alternatively, I would request that an independent examination of my record be allowed by Mrs. G.M. Bishop who is magistrate. I would accept her assurance that this statement is not part of my record and be willing to accept then that the libel against me has not materially harmed me except for the two weeks I spent in the separate cells and so civil action would not be then necessary, providing that an apology was given to me for the libel ...."

17. In England the matter of contacts of convicted prisoners with persons outside their place of detention is governed by the Prison Act 1952, as amended and subordinate legislation made under that Act.

Section 47, sub-section I, of the Prison Act provides that "the Secretary of State may make rules for the regulation and management of prisoners ... and for the ... treatment ... discipline and control of persons required to be detained ...."

The rules made by the Home Secretary in the exercise of this power are the Prison Rules 1964, which were laid before Parliament and have the status of a Statutory Instrument. The relevant provisions concerning communications between prisoners and persons outside prison are contained in Rules 33, 34 and 37 as follows:

> "Letters and visits generally
>
> Rule 33
>
> (1) The Secretary of State may, with a view to securing discipline and good order or the prevention of crime in the interests of any persons, impose restrictions, either generally or in a particular case, upon the communications to be permitted between a prisoner and other persons.
>
> (2) Except as provided by statute or these Rules, a prisoner shall not be permitted to communicate with any outside person, or that person with him, without the leave of the Secretary of State.
>
> ...
>
> Personal letters and visits
>
> Rule 34
>
> ...

(8) A prisoner shall not be entitled under this Rule to communicate with any person in connection with any legal or other business, or with any person other than a relative or friend, except with the leave of the Secretary of State.

...

Legal advisers

Rule 37

(1) The legal adviser of a prisoner in any legal proceedings, civil or criminal, to which the prisoner is a party shall be afforded reasonable facilities for interviewing him in connection with those proceedings, and may do so out of hearing but in the sight of an officer.

(2) A prisoner's legal adviser may, with the leave of the Secretary of State, interview the prisoner in connection with any other legal business in the sight and hearing of an officer."

18. On 6 April 1970, the Home Office directed the prison governor to notify Golder of the reply to his petition of 20 March as follows:

"The Secretary of State has fully considered your petition but is not prepared to grant your request for transfer, nor can he find grounds for taking any action in regard to the other matters raised in your petition."

19. Before the Commission, Golder submitted two complaints relating respectively to the stopping of his letters (as mentioned above at paragraph 13) and to the refusal of the Home Secretary to permit him to consult a solicitor. On 30 March 1971, the Commission declared the first complaint inadmissible, as all domestic remedies had not been exhausted, but accepted the second for consideration of the merits under Articles 6 para. 1 and 8 (art. 6-1, art. 8) of the Convention.

20. Golder was released from prison on parole on 12 July 1972.

21. In their report, the Commission expressed the opinion:

- unanimously, that Article 6 para. 1 (art. 6-1) guarantees a right of access to the courts;

- unanimously, that in Article 6 para. 1 (art. 6-1), whether read alone or together with other Articles of the Convention, there are no inherent limitations on the right of a convicted prisoner to institute proceedings and for this purpose to have unrestricted access to a lawyer; and that consequently the restrictions imposed by the present practice of the United Kingdom authorities are inconsistent with Article 6 para. 1 (art. 6-1);

- by seven votes to two, that Article 8 para. 1 (art. 8-1) is applicable to the facts of the present case;

- that the same facts which constitute a violation of Article 6 para. 1 (art. 6-1) constitute also a violation of Article 8 (art. 8) (by eight votes to one, as explained to the Court by the Principal Delegate on 12 October 1974).

The Commission furthermore expressed the opinion that the right of access to the courts guaranteed by Article 6 para. 1 (art. 6-1) is not qualified by the requirement "within a reasonable time". In the application bringing the case before the Court, the Government made objection to this opinion of the Commission but stated in their memorial that they no longer wished to argue the issue.

22. The following final submissions were made to the Court at the oral hearing on 12 October 1974 in the afternoon.

- for the Government:

"The United Kingdom Government respectfully submit to the Court that Article 6 para. 1 (art. 6-1) of the Convention does not confer on the applicant a right of access to the courts, but confers only a right in any proceedings he may institute to a hearing that is fair and in accordance with the other requirements of the paragraph. The Government submit that in consequence the refusal of the United Kingdom Government to allow the applicant in this case to consult a lawyer was not a violation of Article 6 (art. 6). In the alternative, if the Court finds that the rights conferred by Article 6 (art. 6) include in general a right of access to courts, then the United Kingdom Government submit that the right of access to the courts is not unlimited in the case of persons under detention, and that accordingly the imposing of a reasonable restraint on recourse to the courts by the applicant was permissible in the interest of prison order and discipline, and that the refusal of the United Kingdom Government to allow the applicant to consult a lawyer was within the degree of restraint permitted, and therefore did not constitute a violation of Article 6 (art. 6) of the Convention.

The United Kingdom Government further submit that control over the applicant's correspondence while he was in prison was a necessary consequence of the deprivation of his liberty, and that the action of the United Kingdom Government was therefore not a violation of Article 8 para. 1 (art. 8-1), and that the action of the United Kingdom Government in any event fell within the exceptions provided by Article 8 para. 2 (art. 8-2), since the restriction imposed was in accordance with law, and it was within the power of appreciation of the Government to judge that the restriction was necessary in a democratic society for the prevention of disorder or crime.

In the light of these submissions, Mr. President, I respectfully ask this honourable Court, on behalf of the United Kingdom Government, to hold that the United Kingdom Government have not in this case committed a breach of Article 6 (art. 6) or Article 8 (art. 8) of the European Convention on Human Rights and Fundamental Freedoms."

- for the Commission:

"The questions to which the Court is requested to reply are the following:

(1) Does Article 6 para. 1 (art. 6-1) of the European Convention on Human Rights secure to persons desiring to institute civil proceedings a right of access to the courts?

(2) If Article 6 para. 1 (art. 6-1) secures such a right of access, are there inherent limitations relating to this right, or its exercise, which apply to the facts of the present case?

(3) Can a convicted prisoner who wishes to write to his lawyer in order to institute civil proceedings rely on the protection given in Article 8 (art. 8) of the Convention to respect for correspondence?

(4) According to the answers given to the foregoing questions, do the facts of the present case disclose the existence of a violation of Article 6 and of Article 8 (art. 6, art. 8) of the European Convention on Human Rights?"

AS TO THE LAW

I. ON THE ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

23. Paragraphs 73, 99 and 110 of the Commission's report indicate that the Commission consider unanimously that there was a violation of Article 6 para. 1 (art. 6-1). The Government disagree with this opinion.

24. Article 6 para. 1 (art. 6-1) provides:

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

25. In the present case the Court is called upon to decide two distinct questions arising on the text cited above:

(i) Is Article 6 para. 1 (art. 6-1) limited to guaranteeing in substance the right to a fair trial in legal proceedings which are already pending, or does it in addition secure a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined?

(ii) In the latter eventuality, are there any implied limitations on the right of access or on the exercise of that right which are applicable in the present case?

A. On the "right of access"

26. The Court recalls that on 20 March 1970 Golder petitioned the Home Secretary for permission to consult a solicitor with a view to bringing a civil action for libel against prison officer Laird and that his petition was refused on 6 April (paragraphs 16 and 18 above).

While the refusal of the Home Secretary had the immediate effect of preventing Golder from contacting a solicitor, it does not at all follow from this that the only issue which can arise in the present case relates to correspondence, to the exclusion of all matters of access to the courts.

Clearly, no one knows whether Golder would have persisted in carrying out his intention to sue Laird if he had been permitted to consult a solicitor. Furthermore, the information supplied to the Court by the Government gives reason to think that a court in England would not dismiss an action brought by a convicted prisoner on the sole ground that he had managed to cause the writ to be issued - through an attorney for instance - without obtaining leave from the Home Secretary under Rules 33 para. 2 and 34 para. 8 of the Prison Rules 1964, which in any event did not happen in the present case.

The fact nonetheless remains that Golder had made it most clear that he intended "taking civil action for libel"; it was for this purpose that he wished to contact a solicitor, which was a normal preliminary step in itself and in Golder’s case probably essential on account of his imprisonment. By forbidding Golder to make such contact, the Home Secretary actually impeded the launching of the contemplated action. Without formally denying Golder his right to institute proceedings before a court, the Home Secretary did in fact prevent him from commencing an action at that time, 1970. Hindrance in fact can contravene the Convention just like a legal impediment.

It is true that - as the Government have emphasised - on obtaining his release Golder would have been in a position to have recourse to the courts at will, but in March and April 1970 this was still rather remote and hindering the effective exercise of a right may amount to a breach of that right, even if the hindrance is of a temporary character.

The Court accordingly has to examine whether the hindrance thus established violated a right guaranteed by the Convention and more particularly by Article 6 (art. 6), on which Golder relied in this respect.

27. One point has not been put in issue and the Court takes it for granted: the "right" which Golder wished, rightly or wrongly, to invoke against Laird before an English court was a "civil right" within the meaning of Article 6 para. 1 (art. 6-1).

28. Again, Article 6 para. 1 (art. 6-1) does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this right.

29. The submissions made to the Court were in the first place directed to the manner in which the Convention, and particularly Article 6 para. 1 (art. 6-1), should be interpreted. The Court is prepared to consider, as do the

Government and the Commission, that it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties. That Convention has not yet entered into force and it specifies, at Article 4, that it will not be retroactive, but its Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion. In this respect, for the interpretation of the European Convention account is to be taken of those Articles subject, where appropriate, to "any relevant rules of the organization" - the Council of Europe - within which it has been adopted (Article 5 of the Vienna Convention).

30. In the way in which it is presented in the "general rule" in Article 3l of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article.

31. The terms of Article 6 para. 1 (art. 6-1) of the European Convention, taken in their context, provide reason to think that this right is included among the guarantees set forth.

32. The clearest indications are to be found in the French text, first sentence. In the field of "contestations civiles" (civil claims) everyone has a right to proceedings instituted by or against him being conducted in a certain way - "équitablement" (fairly), "publiquement" (publicly), "dans un délai raisonnable" (within a reasonable time), etc. - but also and primarily "à ce que sa cause soit entendue" (that his case be heard) not by any authority whatever but "par un tribunal" (by a court or tribunal) within the meaning of Article 6 para. 1 (art. 6-1) (Ringeisen judgment of 16 July 1971, Series A no. 13, p. 39, para. 95). The Government have emphasised rightly that in French "cause" may mean "procès qui se plaide" (Littré, Dictionnaire de la langue française, tome I, p. 509, 5°). This, however, is not the sole ordinary sense of this noun; it serves also to indicate by extension "l'ensemble des intérêts à soutenir, à faire prévaloir" (Paul Robert, Dictionnaire alphabétique et analogique de la langue française, tome I, p. 666, II-2°). Similarly, the "contestation" (claim) generally exists prior to the legal proceedings and is a concept independent of them. As regards the phrase "tribunal indépendant et impartial établi par la loi" (independent and impartial tribunal established by law), it conjures up the idea of organisation rather than that of functioning, of institutions rather than of procedure.

The English text, for its part, speaks of an "independent and impartial tribunal established by law". Moreover, the phrase "in the determination of his civil rights and obligations", on which the Government have relied in support of their contention, does not necessarily refer only to judicial proceedings already pending; as the Commission have observed, it may be taken as synonymous with "wherever his civil rights and obligations are being determined" (paragraph 52 of the report). It too would then imply the

right to have the determination of disputes relating to civil rights and obligations made by a court or "tribunal".

The Government have submitted that the expressions "fair and public hearing" and "within a reasonable time", the second sentence in paragraph 1 ("judgment", "trial"), and paragraph 3 of Article 6 (art. 6-1, art. 6-3) clearly presuppose proceedings pending before a court.

While the right to a fair, public and expeditious judicial procedure can assuredly apply only to proceedings in being, it does not, however, necessarily follow that a right to the very institution of such proceedings is thereby excluded; the Delegates of the Commission rightly underlined this at paragraph 21 of their memorial. Besides, in criminal matters, the "reasonable time" may start to run from a date prior to the seisin of the trial court, of the "tribunal" competent for the "determination ... of (the) criminal charge" (Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 26-27, para. 19; Neumeister judgment of 27 June l968, Series A no. 8, p. 41, para. 18; Ringeisen judgment of 16 July 1971, Series A no. 13, p. 45, para. 110). It is conceivable also that in civil matters the reasonable time may begin to run, in certain circumstances, even before the issue of the writ commencing proceedings before the court to which the plaintiff submits the dispute.

33. The Government have furthermore argued the necessity of relating Article 6 para. 1 (art. 6-1) to Articles 5 para. 4 and 13 (art. 5-4, art. 13). They have observed that the latter provide expressly or a right of access to the courts; the omission of any corresponding clause in Article 6 para. 1 (art. 6-1) seems to them to be only the more striking. The Government have also submitted that if Article 6 para. 1 (art. 6-1) were interpreted as providing such a right of access, Articles 5 para. 4 and 13 (art. 5-4, art. 13) would become superfluous.

The Commission’s Delegates replied in substance that Articles 5 para. 4 and 13 (art. 5-4, art. 13), as opposed to Article 6 para. 1 (art. 6-1), are "accessory" to other provisions. Those Articles, they say, do not state a specific right but are designed to afford procedural guarantees, "based on recourse", the former for the "right to liberty", as stated in Article 5 para. 1 (art. 5-1), the second for the whole of the "rights and freedoms as set forth in this Convention". Article 6 para. 1 (art. 6-1), they continue, is intended to protect "in itself" the "right to a good administration of justice", of which "the right that justice should be administered" constitutes "an essential and inherent element". This would serve to explain the contrast between the wording of Article 6 para. 1 (art. 6-1) and that of Articles 5 para. 4 and 13 (art. 5-4, art. 13).

This reasoning is not without force even though the expression "right to a fair (or good) administration of justice", which sometimes is used on account of its conciseness and convenience (for example, in the Delcourt judgment of 17 January 1970, Series A no. 11, p. 15, para. 25), does not

appear in the text of Article 6 para. 1 (art. 6-1), and can also be understood as referring only to the working and not to the organisation of justice.

The Court finds in particular that the interpretation which the Government have contested does not lead to confounding Article 6 para. 1 (art. 6-1) with Articles 5 para. 4 and 13 (art. 5-4, art. 13), nor making these latter provisions superfluous. Article 13 (art. 13) speaks of an effective remedy before a "national authority" ("instance nationale") which may not be a "tribunal" or "court" within the meaning of Articles 6 para. 1 and 5 para. 4 (art. 6-1, art. 5-4). Furthermore, the effective remedy deals with the violation of a right guaranteed by the Convention, while Articles 6 para. 1 and 5 para. 4 (art. 6-1, art. 5-4) cover claims relating in the first case to the existence or scope of civil rights and in the second to the lawfulness of arrest or detention. What is more, the three provisions do not operate in the same field. The concept of "civil rights and obligations" (Article 6 para. 1) (art. 6-1) is not co-extensive with that of "rights and freedoms as set forth in this Convention" (Article 13) (art. 13), even if there may be some overlapping. As to the "right to liberty" (Article 5) (art. 5), its "civil" character is at any rate open to argument (Neumeister judgment of 27 June 1968, Series A no. 8, p. 43, para. 23; Matznetter judgment of 10 November 1969, Series A no. 10, p. 35, para. 13; De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 44, para. 86). Besides, the requirements of Article 5 para. 4 (art. 5-4) in certain respects appear stricter than those of Article 6 para. 1 (art. 6-1), particularly as regards the element of "time".

34. As stated in Article 31 para. 2 of the Vienna Convention, the preamble to a treaty forms an integral part of the context. Furthermore, the preamble is generally very useful for the determination of the "object" and "purpose" of the instrument to be construed.

In the present case, the most significant passage in the Preamble to the European Convention is the signatory Governments declaring that they are "resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" of 10 December 1948.

In the Government’s view, that recital illustrates the "selective process" adopted by the draftsmen: that the Convention does not seek to protect Human Rights in general but merely "certain of the Rights stated in the Universal Declaration". Articles 1 and 19 (art. 1, art. 19) are, in their submission, directed to the same end.

The Commission, for their part, attach great importance to the expression "rule of law" which, in their view, elucidates Article 6 para. 1 (art. 6-1).

The "selective" nature of the Convention cannot be put in question. It may also be accepted, as the Government have submitted, that the Preamble does not include the rule of law in the object and purpose of the Convention,

but points to it as being one of the features of the common spiritual heritage of the member States of the Council of Europe. The Court however considers, like the Commission, that it would be a mistake to see in this reference a merely "more or less rhetorical reference", devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to "take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" was their profound belief in the rule of law. It seems both natural and in conformity with the principle of good faith (Article 31 para. 1 of the Vienna Convention) to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6 para. 1 (art. 6-1) according to their context and in the light of the object and purpose of the Convention.

This is all the more so since the Statute of the Council of Europe, an organisation of which each of the States Parties to the Convention is a Member (Article 66 of the Convention) (art. 66), refers in two places to the rule of law: first in the Preamble, where the signatory Governments affirm their devotion to this principle, and secondly in Article 3 (art. 3) which provides that "every Member of the Council of Europe must accept the principle of the rule of law ..."

And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.

35. Article 31 para. 3 (c) of the Vienna Convention indicates that account is to be taken, together with the context, of "any relevant rules of international law applicable in the relations between the parties". Among those rules are general principles of law and especially "general principles of law recognized by civilized nations" (Article 38 para. 1 (c) of the Statute of the International Court of Justice). Incidentally, the Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that "the Commission and the Court must necessarily apply such principles" in the execution of their duties and thus considered it to be "unnecessary" to insert a specific clause to this effect in the Convention (Documents of the Consultative Assembly, working papers of the 1950 session, Vol. III, no. 93, p. 982, para. 5).

The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) must be read in the light of these principles.

Were Article 6 para. 1 (art. 6-1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary

power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook (Lawless judgment of 1 July 1961, Series A no. 3, p. 52, and Delcourt judgment of 17 January 1970, Series A no. 11, pp. 14-15).

It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.

36. Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art. 6-1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (see the Wemhoff judgment of 27 June 1968, Series A no. 7, p. 23, para. 8), and to general principles of law.

The Court thus reaches the conclusion, without needing to resort to "supplementary means of interpretation" as envisaged at Article 32 of the Vienna Convention, that Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1 (art. 6-1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing. The Court has no need to ascertain in the present case whether and to what extent Article 6 para. 1 (art. 6-1) further requires a decision on the very substance of the dispute (English "determination", French "décidera").

B. On the "Implied Limitations"

37. Since the impediment to access to the courts, mentioned in paragraph 26 above, affected a right guaranteed by Article 6 para. 1 (art. 6-1), it remains to determine whether it was nonetheless justifiable by virtue of some legitimate limitation on the enjoyment or exercise of that right.

38. The Court considers, accepting the views of the Commission and the alternative submission of the Government, that the right of access to the courts is not absolute. As this is a right which the Convention sets forth (see Articles 13, 14, 17 and 25) (art. 13, art. 14, art. 17, art. 25) without, in the narrower sense of the term, defining, there is room, apart from the bounds

delimiting the very content of any right, for limitations permitted by implication.

The first sentence of Article 2 of the Protocol (P1-2) of 20 March 1952, which is limited to providing that "no person shall be denied the right to education", raises a comparable problem. In its judgment of 23 July 1968 on the merits of the case relating to certain aspects of the laws on the use of languages in education in Belgium, the Court ruled that:

> "The right to education ... by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention." (Series A no. 6, p. 32, para. 5).

These considerations are all the more valid in regard to a right which, unlike the right to education, is not mentioned in express terms.

39. The Government and the Commission have cited examples of regulations, and especially of limitations, which are to be found in the national law of states in matters of access to the courts, for instance regulations relating to minors and persons of unsound mind. Although it is of less frequent occurrence and of a very different kind, the restriction complained of by Golder constitutes a further example of such a limitation.

It is not the function of the Court to elaborate a general theory of the limitations admissible in the case of convicted prisoners, nor even to rule in abstracto on the compatibility of Rules 33 para. 2, 34 para. 8 and 37 para. 2 of the Prison Rules 1964 with the Convention. Seised of a case which has its origin in a petition presented by an individual, the Court is called upon to pronounce itself only on the point whether or not the application of those Rules in the present case violated the Convention to the prejudice of Golder (De Becker judgment of 27 March 1962, Series A no. 4, p. 26).

40. In this connection, the Court confines itself to noting what follows.

In petitioning the Home Secretary for leave to consult a solicitor with a view to suing Laird for libel, Golder was seeking to exculpate himself of the charge made against him by that prison officer on 25 October 1969 and which had entailed for him unpleasant consequences, some of which still subsisted by 20 March 1970 (paragraphs 12, 15 and 16 above). Furthermore, the contemplated legal proceedings would have concerned an incident which was connected with prison life and had occurred while the applicant was imprisoned. Finally, those proceedings would have been directed against a member of the prison staff who had made the charge in the course of his duties and who was subject to the Home Secretary’s authority.

In these circumstances, Golder could justifiably wish to consult a solicitor with a view to instituting legal proceedings. It was not for the Home Secretary himself to appraise the prospects of the action contemplated; it was for an independent and impartial court to rule on any

claim that might be brought. In declining to accord the leave which had been requested, the Home Secretary failed to respect, in the person of Golder, the right to go before a court as guaranteed by Article 6 para. 1 (art. 6-1).

II. ON THE ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

41. In the opinion of the majority of the Commission (paragraph 123 of the report) "the same facts which constitute a violation of Article 6 para. 1 (art. 6-1) constitute also a violation of Article 8 (art. 8)". The Government disagree with this opinion.

42. Article 8 (art. 8) of the Convention reads as follows:

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

43. The Home Secretary's refusal of the petition of 20 March 1970 had the direct and immediate effect of preventing Golder from contacting a solicitor by any means whatever, including that which in the ordinary way he would have used to begin with, correspondence. While there was certainly neither stopping nor censorship of any message, such as a letter, which Golder would have written to a solicitor – or vice-versa - and which would have been a piece of correspondence within the meaning of paragraph 1 of Article 8 (art. 8-1), it would be wrong to conclude therefrom, as do the Government, that this text is inapplicable. Impeding someone from even initiating correspondence constitutes the most far-reaching form of "interference" (paragraph 2 of Article 8) (art. 8-2) with the exercise of the "right to respect for correspondence"; it is inconceivable that that should fall outside the scope of Article 8 (art. 8) while mere supervision indisputably falls within it. In any event, if Golder had attempted to write to a solicitor notwithstanding the Home Secretary's decision or without requesting the required permission, that correspondence would have been stopped and he could have invoked Article 8 (art. 8); one would arrive at a paradoxical and hardly equitable result, if it were considered that in complying with the requirements of the Prison Rules 1964 he lost the benefit of the protection of Article 8 (art. 8).

The Court accordingly finds itself called upon to ascertain whether or not the refusal of the applicant's petition violated Article 8 (art. 8).

44. In the submission of the Government, the right to respect for correspondence is subject, apart from interference covered by paragraph 2

of Article 8 (art. 8-2), to implied limitations resulting, inter alia, from the terms of Article 5 para. 1 (a) (art. 5-1-a): a sentence of imprisonment passed after conviction by a competent court inevitably entails consequences affecting the operation of other Articles of the Convention, including Article 8 (art. 8).

As the Commission have emphasised, that submission is not in keeping with the manner in which the Court dealt with the issue raised under Article 8 (art. 8) in the "Vagrancy" cases (De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 45-46, para. 93). In addition and more particularly, that submission conflicts with the explicit text of Article 8 (art. 8). The restrictive formulation used at paragraph 2 (art. 8-2) ("There shall be no interference ... except such as ...") leaves no room for the concept of implied limitations. In this regard, the legal status of the right to respect for correspondence, which is defined by Article 8 (art. 8) with some precision, provides a clear contrast to that of the right to a court (paragraph 38 above).

45. The Government have submitted in the alternative that the interference complained of satisfied the explicit conditions laid down in paragraph 2 of Article 8 (art. 8-2).

It is beyond doubt that the interference was "in accordance with the law", that is Rules 33 para. 2 and 34 para. 8 of the Prison Rules 1964 (paragraph 17 above).

The Court accepts, moreover, that the "necessity" for interference with the exercise of the right of a convicted prisoner to respect for his correspondence must be appreciated having regard to the ordinary and reasonable requirements of imprisonment. The "prevention of disorder or crime", for example, may justify wider measures of interference in the case of such a prisoner than in that of a person at liberty. To this extent, but to this extent only, lawful deprivation of liberty within the meaning of Article 5 (art. 5) does not fail to impinge on the application of Article 8 (art. 8).

In its judgment of l8 June 1971 cited above, the Court held that "even in cases of persons detained for vagrancy" (paragraph 1 (e) of Article 5) (art. 5-1-e) - and not imprisoned after conviction by a court – the competent national authorities may have "sufficient reason to believe that it (is) ‘necessary’ to impose restrictions for the purpose of the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others". However, in those particular cases there was no question of preventing the applicants from even initiating correspondence; there was only supervision which in any event did not apply in a series of instances, including in particular correspondence between detained vagrants and the counsel of their choice (Series A no. 12, p. 26, para. 39, and p. 45, para. 93).

In order to show why the interference complained of by Golder was "necessary", the Government advanced the prevention of disorder or crime and, up to a certain point, the interests of public safety and the protection of

the rights and freedoms of others. Even having regard to the power of appreciation left to the Contracting States, the Court cannot discern how these considerations, as they are understood "in a democratic society", could oblige the Home Secretary to prevent Golder from corresponding with a solicitor with a view to suing Laird for libel. The Court again lays stress on the fact that Golder was seeking to exculpate himself of a charge made against him by that prison officer acting in the course of his duties and relating to an incident in prison. In these circumstances, Golder could justifiably wish to write to a solicitor. It was not for the Home Secretary himself to appraise - no more than it is for the Court today - the prospects of the action contemplated; it was for a solicitor to advise the applicant on his rights and then for a court to rule on any action that might be brought.

The Home Secretary's decision proves to be all the less "necessary in a democratic society" in that the applicant's correspondence with a solicitor would have been a preparatory step to the institution of civil legal proceedings and, therefore, to the exercise of a right embodied in another Article of the Convention, that is, Article 6 (art. 6).

The Court thus reaches the conclusion that there has been a violation of Article 8 (art. 8).

III. AS TO THE APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

46. Article 50 (art. 50) of the Convention provides that if the Court finds, as in the present case, "that a decision ... taken" by some authority of a Contracting State "is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of (that State) allows only partial reparation to be made for the consequences of this decision", the Court "shall, if necessary, afford just satisfaction to the injured party".

The Rules of Court state that when the Court "finds that there is a breach of the Convention, it shall give in the same judgment a decision on the application of Article 50 (art. 50) of the Convention if that question, after being raised under Rule 47 bis, is ready for decision; if the question is not ready for decision", the Court "shall reserve it in whole or in part and shall fix the further procedure" (Rule 50 para. 3, first sentence, read together with Rule 48 para. 3).

At the hearing in the afternoon of 11 October 1974, the Court invited the representatives, under Rule 47 bis, to present their observations on the question of the application of Article 50 (art. 50) of the Convention in this case. Those observations were submitted at the hearing on the following day.

Furthermore, in reply to a question from the President of the Court immediately following the reading of the Commission's final submissions, the Principal Delegate confirmed that the Commission were not presenting,

nor making any reservation as to the presentation of, a request for just satisfaction on the part of the applicant.

The Court considers accordingly that the above question, which was duly raised by the Court, is ready for decision and should therefore be decided without further delay. The Court is of opinion that in the circumstances of the case it is not necessary to afford to the applicant any just satisfaction other than that resulting from the finding of a violation of his rights.

FOR THESE REASONS, THE COURT,

1. Holds by nine votes to three that there has been a breach of Article 6 para. 1 (art. 6-1);

2. Holds unanimously that there has been a breach of Article 8 (art. 8);

3. Holds unanimously that the preceding findings amount in themselves to adequate just satisfaction under Article 50 (art. 50).

Done in French and English, the French text being authentic, at the Human Rights Building, Strasbourg, this twenty-first day of February one thousand nine hundred and seventy five.

Giorgio BALLADORE PALLIERI
President

Marc-André EISSEN
Registrar

Judges Verdross, Zekia and Sir Gerald Fitzmaurice have annexed their separate opinions to the present judgment, in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 50 para. 2 of the Rules of Court.

G.B.P.
M.-A.E.

SEPARATE OPINION OF JUDGE VERDROSS

(Translation)

I have voted in favour of the parts of the judgment which relate to the violation of Article 8 (art. 8) and the application of Article 50 (art. 50) of the Convention, but much to my regret I am unable to join the majority in their interpretation of Article 6 para. 1 (art. 6-1) for the following reasons.

The Convention makes a clear distinction between the rights and freedoms it secures itself (Article 1) (art. 1) and those which have their basis in the internal law of the Contracting States (Article 60) (art. 60). In the last recital in the Preamble, the Contracting States resolved to take steps for the collective enforcement of "certain of the Rights stated in the Universal Declaration" (certains des droits énoncés dans la Déclaration Universelle) and, according to Article 1 (art. 1), the category of rights guaranteed comprises only "the rights and freedoms defined in Section I" of the Convention. It thus seems that the words "stated" and "defined" are synonymous. As "to define" means to state precisely, it results, in my view, from Article 1 (art. 1) that among such rights and freedoms can only be numbered those which the Convention states in express terms or which are included in one or other of them. But in neither of these cases does one find the alleged "right of access to the courts".

It is true that the majority of the Court go to great lengths to trace that right in an assortment of clues detected in Article 6 para. 1 (art. 6-1) and other provisions of the Convention.

However, such an interpretation runs counter, in my opinion, to the fact that the provisions of the Convention relating to the rights and freedoms guaranteed by that instrument constitute also limits on the jurisdiction of the Court. This is a special jurisdiction, for it confers on the Court power to decide disputes arising in the course of the internal life of the Contracting States. The norms delimiting the bounds of that jurisdiction must therefore be interpreted strictly. In consequence, I do not consider it permissible to extend, by means of an interpretation depending on clues, the framework of the clearly stated rights and freedoms. Considerations of legal certainty too make this conclusion mandatory: the States which have submitted to supervision by the Commission and Court in respect of "certain" rights and freedoms "defined" (définis) in the Convention ought to be sure that those bounds will be strictly observed.

The above conclusion is not upset by the argument, sound in itself, whereby the right to a fair hearing before an independent and impartial tribunal, secured to everyone by Article 6 para. 1 (art. 6-1), assumes the existence of a right of access to the courts. The Convention in fact appears to set out from the idea that such a right has, with some exceptions, been so well implanted for a long time in the national legal order of the civilised

States that there is absolutely no need to guarantee it further by the procedures which the Convention has instituted. There can be no other reason to explain why the Convention has refrained from writing in this right formally. In my opinion, therefore, a distinction must be drawn between the legal institutions whose existence the Convention presupposes and the rights guaranteed by the Convention. Just as the Convention presupposes the existence of courts, as well as legislative and administrative bodies, so does it also presupposes, in principle, the existence of the right of access to the courts in civil matters; for without such a right no civil court could begin to operate.

Nor is my reasoning refuted by contending that, if the right of access had its basis solely in their national legal order, the member States of the Council of Europe could, by abolishing the right, reduce to nothing all the Convention’s provisions relating to judicial protection in civil matters. For if these States were really determined on destroying one of the foundations of Human Rights, they would be committing an act contrary to their own will to create a system based on "a common understanding and observance of the Human Rights upon which they depend" (fourth recital in the Preamble).

SEPARATE OPINION OF JUDGE ZEKIA

I adopt, with respect, the introductory part of the judgment dealing with procedure and facts and also the concluding part dealing with the application of Article 50 (art. 50) of the Convention to the present case. I agree also with the conclusion reached regarding the violation of Article 8 (art. 8) of the Convention subject to some variation in the reasoning.

I have felt unable, however, to agree with my eminent colleagues in the way Article 6 para. 1 (art. 6-1) of the Convention has been interpreted by them and with their conclusion that a right of access to the courts ought to be read into Article 6 para. 1 (art. 6-1) and that such right is to be considered as being embodied therein. The outcome of their interpretation is that the United Kingdom has committed a contravention of Article 6 para. 1 (art. 6-1) of the Convention by disallowing prisoner Golder to exercise his right of access to the courts.

I proceed to give hereunder, as briefly as I can, the main reasons for my dissenting opinion on this part of the judgment.

There is no doubt that the answer to the question whether right of access to courts is provided in Article 6 para. 1 (art. 6-1), depends on the construction of the said Article. We have been assisted immensely by the representatives of both sides in the fulfilment of our duties in this respect.

There appears to be a virtual consensus of opinion that Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties, although with no retroactive effect, contain the guiding principles of interpretation of a treaty. There remains the application of the rules of interpretation formulated in the aforesaid Convention to Article 6 para. 1 (art. 6-1) of the European Convention.

Article 31 para. 1 of the Vienna Convention reads "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". No question arises as to good faith, therefore what remains for consideration is (a) text, (b) context, (c) object and purpose. The last two elements might very well overlap on one another.

A. Text

Article 6 para. 1 (art. 6-1) of the European Convention on Human Rights reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the

parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The above Article (art. 6-1), read in its plain and ordinary meaning, refers to criminal charges brought against a person and to the civil rights and obligations of a person when such rights and obligations are sub judice in a court of law. The very fact that the words immediately following the opening words of the paragraph, that is, the words following the phrase "In the determination of his civil rights and obligations or of any criminal charge against him" deal exclusively with the conduct of proceedings, i.e., public hearings within a reasonable time before an impartial court and pronouncement of judgment in public, plus the further fact that exceptions and/or limitations given in detail in the same paragraph again exclusively relate to the publicity of the court proceedings and to nothing else, strongly indicate that Article 6 para. 1 (art. 6-1) deals only with court proceedings already instituted before a court and not with a right of access to the courts. In other words Article 6 para. 1 (art. 6-1) is directed to the incidents and attributes of a just and fair trial only.

Reference was made to the French version of Article 6 para. 1 (art. 6-1) and specifically to the words "contestations sur ses droits" in the said Article (art. 6-1). It has been maintained that the above quoted words convey a wider meaning than the corresponding English words in the English text. The words in the French text embrace, it is argued, claims which have not reached the stage of trial.

The English and French text are both equally authentic. If the words used in one text are capable only of a narrower meaning, the result is that both texts are reconcilable by attaching to them the less extensive meaning. Even if we apply Article 33 of the Vienna Convention in order to find which of the two texts is to prevail, we have to look to the preceding Articles 31 and 32 of the same Convention for guidance. Having done this I did not find sufficient reason to alter the view just expressed. So much for the reading of the text which no doubt constitutes "the primary source of its own interpretation".

B. Context

I pass now to the contextual aspect of Article 6 para. 1 (art. 6-1). As I said earlier, the examination of this aspect is bound to overlap with considerations appertaining to the object and purpose of a treaty. There is no doubt, however, that interpretation is a single combined operation which takes into account all relevant facts as a whole.

Article 6 para. 1 (art. 6-1) occurs in Section I of the European Convention on Human Rights and Fundamental Freedoms which section comprises Articles 2-18 (art. 2, art. 3, art. 4, art. 5, art. 6, art. 7, art. 8, art. 9, art. 10, art. 11, art. 12, art. 13, art. 14, art. 15, art. 16, art. 17, art. 18)

defining rights and freedoms conferred on people within the jurisdiction of the Contracting States. Article 1 (art. 1) requires the Contracting Parties to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". The obligations undertaken under this Convention by Contracting States relate to the rights and freedoms defined. It seems almost impossible for anyone to contend that Article 6 para. 1 (art. 6-1) defines a right of access to courts.

A study of Section I discloses: Article 5, paras. 4 and 5 (art. 5-4, art. 5-5), deals with proceedings to be taken before a court for deciding the lawfulness or otherwise of detention and gives to the victim of unlawful detention an enforceable right to compensation.

Articles 9, 10 and 11 (art. 9, art. 10, art. 11) deal with rights or freedoms in respect of thought, expression, religion, peaceful assembly and association, etc. What is significant about these Articles (art. 9, art. 10, art. 11) is the fact that each Article prescribes in detail the restrictions and limitations attached to such right.

Article 13 (art. 13) reads:

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

This Article (art. 13) indicates a right of access to the courts in respect of violations of rights and freedoms set forth in the Convention. In my view courts come within the ambit of "national authority" mentioned in the Article (art. 13).

Article 17 (art. 17) provides, inter alia, that no limitation to a greater extent than is provided for in the Convention is allowed to the rights and freedoms set forth therein.

The relevance of this Article (art. 17) lies in the fact that, if right of access is to be read into Article 6 para. 1 (art. 6-1), such right of access will have to be an absolute one because no restrictions or limitations are mentioned in regard to this right. No one can seriously argue that the Convention contemplates an absolute and unfettered right of access to courts.

It is common knowledge and it may be taken for granted that right of access to the national courts, as a rule, does exist in all civilised democratic societies. Such right, and its exercise, usually is regulated by constitution, legislation, custom and by subsidiary laws such as orders and court rules.

Article 60 (art. 60) of the Convention keeps intact such human rights as are provided by national legislation. Right of access being a human right is no doubt included in the human rights referred to in Article 60 (art. 60). This in a way fills up the gap for claims in respect of which no specific provision for right of access is made in the Convention.

The competence of the courts, as well as the right of the persons entitled to initiate proceedings before a court, are regulated by laws and rules as

above indicated. One commences proceedings by filing an action, petition or application in the registry of the court of first instance or of the superior court. One has to pay the prescribed fees (unless entitled to legal aid) and cause the issue of writs of summons or other notices. Persons might be debarred unconditionally or conditionally from instituting proceedings on account of age, mental condition, bankruptcy, frivolous and vexatious litigation. One may have to make provision for security of costs and so on.

After the institution of proceedings and before a case comes up for hearing there are many intervening procedural steps. A master, or a judge in chambers and not in open court, is empowered in a certain category of cases to deal summarily and finally with a claim in an action, petition or application. Such is the case for instance when claim as endorsed on a writ, or as stated in the pleadings, does not disclose any cause of action or, in the case of a defendant or respondent, his reply or points of defence do not disclose a valid defence in law.

All this, digression, is simply to emphasise the fact that if in the Convention it was intended to make the right of access an integral part of Article 6 para. 1 (art. 6-1), those responsible for drafting the Convention would, no doubt, have followed their invariable practice, after defining a human right and freedom, to prescribe therein the restrictions and limitations attached to such right and freedom.

Surely if a right of access, independently of those expressly referred to in the Convention, was to be recognised to everybody within the jurisdictions of the High Contracting Parties, unrestricted by laws and regulations imposed by national legislation, one would expect such right to be expressly provided in the Convention. The care and pains taken in defining human rights and freedoms in the Convention and minutely prescribing the restrictions, indicate strongly that right of access is neither expressly nor by necessary implication or intendment embodied in Article 6 para. 1 (art. 6-1).

One might also remark: if there is no right of access to courts, what is the use of making copious provisions for the conduct of proceedings before a court?

If, indeed, provisions relating to the right of access were altogether lacking in the Convention - although this is not the case - I would concede that by necessary implication and intendment such a right is to be read as being incorporated in the Convention, though not necessarily in the Article in question. I would have acted on the assumption that the Contracting Parties took the existence of such right of access for granted.

C. Object and purpose

Article 6 para. 1 (art. 6-1) could by no means be under-estimated, when it is read with its ordinary meaning, without any right of access being integrated into it. Public hearing within reasonable time before an impartial

tribunal, with delivery of judgment in open court, - although one might describe them as procedural matters – nevertheless are fundamentals in the administration of justice, and therefore Article 6 para. 1 (art. 6-1) has and deserves its raison d'être in the Charter of Human Rights, without grafting the right of access onto it. Its scope of operation will still be very wide.

The Preamble of the European Convention on Human Rights and Fundamental Freedoms in its concluding paragraph declares: "Being resolved, as the Governments of European countries which are like- minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first step for the collective enforcement of certain of the Rights stated in the Universal Declaration." I think the United Kingdom Government was not unjustified in drawing our attention to the words "to take the first steps" and to the words "enforcement of certain of the Rights", occurring in that paragraph.

As to the references made to the travaux préparatoires of the Convention, the Universal Declaration of Human Rights, the European Convention on Establishment, the International Covenant on Civil and Political Rights and other international instruments, I am content to make only very short observations. In the travaux préparatoires of the Declaration, the early drafts included expressly the words "right of access" but these words were dropped before the text took its final form.

Article 8 of the Universal Declaration contains a right of access to courts for violations of fundamental rights granted by constitution or by law.

Article 10 of the Universal Declaration more or less corresponds to the main part of Article 6 para. 1 (art. 6-1) of the European Convention and it does not refer to a right of access. It seems the main part of Article 6 para. 1 (art. 6-1) followed the pattern of Article 10 of the Universal Declaration. And so too does Article 14 para. 1 of the International Covenant.

Article 7 of the European Convention on Establishment provides expressly a "right of access to the competent judicial and administrative authorities". The same applies to Article 2 para. 3 of the International Covenant.

The above supports the view that when right of access to courts was intended to be incorporated in a treaty, this was done in express terms.

I have already endeavoured to touch the main elements of interpretation in some order. When all elements are put together and considered compositively, to my mind the combined effect lends greater force to the correctness of the opinion submitted.

As to Article 8 (art. 8)

The Home Secretary, by not allowing prisoner Golder to communicate with his solicitor with a view to bringing an action for libel against the prison officer, Mr. Laird, was depriving the former of obtaining independent legal advice.

In the circumstances of the case I find that Golder was denied right of respect for his correspondence and such denial amounts to a breach of the Article (art. 8) in question.

In an action for libel Mr. Laird might succeed in a plea of privilege and prove non-existence of malice. The Home Secretary or the Governor of Prisons might reasonably believe that Golder had no chance of sustaining an action, but in principle I am inclined to the view that unless there are overriding considerations of security a prisoner should be allowed to communicate with, and consult, a solicitor or a lawyer and obtain independent legal advice.

SEPARATE OPINION OF JUDGE SIR GERALD FITZMAURICE

Introduction

1. For the reasons given in Part I of this Opinion, I have – though with some misgivings - participated in the unanimous affirmative vote of the Court on the question of Article 8 (art. 8) of the European Convention on Human Rights. To that extent therefore, I must hold the United Kingdom to have been in breach of the Convention in the present case.

2. On the other hand I am quite unable to agree with the Court on what has been the principle issue of law in these proceedings, - namely that of the applicability, and interpretation, of Article 6, paragraph 1 (art. 6-1), of the Convention - the question of the alleged right of access to the courts - the point here being, not whether the Convention ought to provide for such a right, but whether it actually does. This is something that affects the whole question of what is legitimate by way of the interpretation of an international treaty while keeping within the confines of a genuinely interpretative process, and not trespassing on the area of what may border on judicial legislation. I deal with it in Part II below.

3. I need not set out what the facts in this case were as I agree with the statement of them contained in the Court's Judgment.

PART I. Article 8 (art. 8) of the Convention

4. The issue that arises on Article 8 (art. 8) of the Convention is whether the United Kingdom Home Secretary, by refusing Golder (then under penal detention in Parkhurst Prison) permission to consult a solicitor, infringed the provisions of that Article (art. 8) which read as follows:

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

Two principal categories of questions - or doubts - arise with regard to this provision: is it applicable at all to the circumstances of the present case? - and secondly, if it is applicable in principle, does the case fall within any limitations on, or exceptions to, the rule it embodies?

A. The question of applicability

5. The doubts about applicability coalesce around the meaning of the term "correspondence", and the notion of what constitutes an "interference" with the "exercise of the right of respect for ... correspondence". The term "correspondence", in this sort of context, denotes, according to its ordinarily received and virtually universal dictionary[1] meaning, something that is less wide than "communication" - or rather, is one of several possible forms of communication. It denotes in fact written correspondence, possibly including telegrams or telex messages, but not communication by person to person by word of mouth, by telephone[2] or signs or signals. It would therefore be wrong to equate the notion of "correspondence" with that of "communication". However, as there does not seem to have been any question of Golder telephoning to a solicitor, that point does not arise. What does arise is that, even as regards a letter, Golder never wrote at all to any solicitor. There was no letter, so none was stopped. In that sense therefore there was no interference with his correspondence because, as between himself and the solicitor he would have consulted, there was no correspondence to interfere with, such as there was in the case of his attempts to write to his Member of Parliament[3]. But the reason for this was that, having enquired whether he would be allowed to consult a solicitor "with a view to taking civil action for libel" - which I think one must assume would have meant (at least initially) writing to him[4] - he was informed that he would not be, - which meant, in effect, that any letter would be stopped - and so he did not write one. There was, accordingly, no literal or actual interference with his correspondence in this respect; - but in my view there was what amounted, in English terminology, to a "constructive" stoppage or interference; and I consider that it would be placing an undue and formalistic restriction on the concept of interference

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[1] Significantly the Oxford English Dictionary does admit an older meaning, in the sense of "intercourse, communication" or (the verb) "to hold communication or intercourse [with]", but pronounces these usages to be obsolete now except in the context of letters or other written communications.

[2] In his masterly work The Application of the European Convention on Human Rights, Mr. J.E.S. Fawcett draws attention to the practice of the German Courts of treating "conversation, whether direct or by telephone, as being part of private life" (op. cit., p. 194), respect for private life being another of the categories protected by Article 8 (art. 8) of the Convention.

[3] See paragraphs 13 and 19 of the Court's Judgment. Golder's claim under this head was found inadmissible by the European Commission of Human Rights because he had a right of appeal in the United Kingdom which he had failed to exercise. Thus he had not exhausted his local legal remedies.

[4] It would seem to be a matter of common sense to suppose that any attempt by Golder to telephone a solicitor from prison (of which there is no evidence) would have proved abortive, though no interference with his correspondence, contrary to Article 8 (art. 8), would have been involved, - but see the private life theory, note 2 above.

with correspondence not to regard it as covering the case of correspondence that has not taken place only because the competent authority, with power to enforce its ruling, has ruled that it will not be allowed. One must similarly I think reject the equally restrictive view that even if permission had been given, Golder might not in practice have availed himself of it, which is beside the real point.

6. The very important fact that this refusal would not in the long run have prevented Golder from bringing his claim, had he been advised to do so - because he would still have been in time for that after his release from prison - is not material on the question of Article 8 (art. 8). It is highly material on the question of the alleged right of access under Article 6.1 (art. 6-1), and I shall deal with it in that connexion.)

7. A point similar to those discussed in paragraph 5 above arises over what exactly is the "right" referred to in the phrase "There shall be no interference by a public authority with the exercise of this right", which appears at the beginning of the second paragraph of the Article (art. 8-2), - the right itself being stated in the first paragraph (art. 8-1) to be the right of the individual to "respect for his private and family life, his home and his correspondence". It would be easy to close the argument at once by saying that correspondence is not "respected" if it is not allowed to take place at all. But the matter is not so simple as that. It could undoubtedly be contended that correspondence is respected so long as there is no physical interference with whatever correspondence there is, but that the words used neither convey nor imply any guarantee that there will be any correspondence; so that, for instance, a total prohibition of correspondence would not amount to an interference with the right. Some colour would be lent to this argument by the context in which the word "correspondence" appears, viz. "private and family life", "home and ... correspondence", which does suggest the motion of something domiciliary and, in consequence, the type of interference that might take place if someone’s private papers in his home or hotel or on his person were searched, and actual letters were seized and removed. But is the notion confined to that sort of thing? This seems too narrow. The right which is not to be interfered with by the public authority, is the "right to respect" for correspondence, and it seems to me that, constructively at least, correspondence is not respected where, in order to avoid the seizure or stoppage of it that would otherwise take place, the public authority interdicts it a priori[5]. Hence, the Judgment of the Court makes the essential point when it suggests that it would be inadmissible to consider that Article 8 (art. 8) would have been applicable if Golder had

[5] This is perhaps not quite fair to the prison authorities, who acted entirely correctly within the scope of the Prison Rules. There was no general interdiction of correspondence. But when Golder asked for permission to consult a solicitor it was refused. It must therefore be assumed that had he attempted to effect a consultation in the only way practicable for him - at least initially - viz. by letter, the letter would have been stopped - and see note 4 supra.

actually consulted his solicitor by letter, and the letter had been stopped, but inapplicable because he was merely told (in effect) that it would be stopped if he wrote it, and so he did not write it.

B. Limitations and exceptions

8. I cannot agree with the view expressed in the Judgmnent of the Court that the structure of Article 8 (art. 8) rules out even the possibility of any unexpressed but inherent limitations on the operation of the rule stated in paragraph 1 and the first fifteen words of paragraph 2 of the Article (art. 8-1, art. 8-2). Since "respect" for correspondence - which is what (and also all that) paragraph 1 of Article 8 (art. 8-1) enjoins - is not to be equated with the notion of complete freedom of correspondence[6] (6), it would follow, even without the exceptions listed in the second paragraph (art. 8-2), that the first paragraph (art. 8-1) could legitimately be read as conferring something less than complete freedom in all cases, and in all circumstances. It would in my view have to be read subject to the understanding that the degree of respect required must to some extent be a function of the situation in general and of that of the individual concerned in particular. Hence - and not to stray beyond the confines of the present case - control of a lawfully detained prisoner’s correspondence is not incompatible with respect for it, even though control must, in order to be effective, carry the power in the last resort to prevent the correspondence, or particular pieces of it, from taking place. This must, in the true meaning of the term, be "inherent" in the notion of control of correspondence which, otherwise, would be a dead letter in all senses of that expression. The crucial question naturally remains whether, in the particular circumstances and in the particular case, the degree of control exercised was justifiable - that is, strictly, was compatible with the concept of "respect", as reasonable to be understood, - more especially when it involved a prohibition or implied threat of a stoppage.

9. It was doubtless because the originators of the Convention realised that the rule embodied in Article 8 (art. 8) would have to be understood in a very qualified way, if it was to be practicable at all, that they subjected it to a number of specific exceptions; - and although these do not in my opinion - for the reasons just given - necessarily exhaust all the possible limitations on the rule, they are sufficiently wide and general to cover most of the cases likely to arise. The drafting of these exceptions is unsatisfactory in one important respect: six heads or categories are mentioned, but they are placed in two groups of three, - and what is not clear is whether it is necessary for

[6] I am glad to be fortified in this view by no less an authority than that of the President of the European Commission of Human Rights, who says (op. cit. in note 2 supra, p. 196) that "'respect' for correspondence in Article 8 (1) (art. 8-1) does not, quite apart from Article 8 (2) (art. 8-2), involve an unlimited freedom in the matter".

an alleged case of exception to fall under one of the three heads in both groups, or whether it suffices for it to fall under any one of the three heads in either the one or the other group. This ambiguity, which certainly exists in the English text of the Article (art. 8) (see paragraph 4 supra)[7] (7), I fortunately do not need to resolve, because I am satisfied that, considered on a category basis, control of a prisoner's correspondence is capable of coming under the heads both of "public safety" and "the prevention of disorder or crime", thus ranking as an excepted category whichever of the two above described methods of interpreting this provision might be adopted.

10. There is however a further element of ambiguity or failure of clarity. What paragraph 2 of the Article (art. 8-2) requires is that there shall be "no interference [in effect with correspondence] except such as is ... necessary ... for [e.g.] the prevention of disorder and crime". The natural meaning of this would seem to be that, in order to justify interference in any particular case, the interference must be "necessary" in that case "for the prevention of crime" etc. On this basis, even though some control of correspondence might in principle be needed for the prevention etc. (e.g. prisoners could otherwise arrange their own escapes, or plan further crimes), the particular interference (here constructive stoppage) would still require to be justified as necessary in the case itself "for the prevention ..." etc. On behalf of the United Kingdom Government however, although at one point it seemed to be admitted that the necessity must be related to the particular case, a somewhat different view was also put forward, - on the face of it a not at all unreasonable, and quite tenable, view, - which came to this, namely that, provided the type of restriction involved could be justified in the light of, and as coming fairly within, one of the excepted categories specified in paragraph 2 of Article 8 (art. 8-2), the application of the restriction in the particular case must be left to the discretion of the prison authorities, or at least they must be allowed a certain latitude of appreciation, so long as they appeared to be acting responsibly and in good faith, - and of course there has never been any suggestion of anything else in the present case. If the matter is regarded in this way, so it was urged, the Court ought not to go behind the action of the prison authorities and sit in judgment upon the manner in which this discretion had been exercised. Another and more lapidary version of the same contention would be to say that it seeks to justify the act complained of by reference to the character of the restriction involved, rather than the character of what was done in the exercise of that restriction. Therefore, so long as the restriction belongs in principle to the class or category of exception invoked, and has been imposed in good faith, the enquiry should stop there.

[7] The point arises because it is not clear whether the categories beginning with the words "for the prevention of", etc., are governed by and relate directly back to the words "is necessary", or whether they relate only to the words "in the interests of".

11. I regret that I cannot accept this argument, despite its considerable persuasiveness. The matter seems to me to turn on the effect of the word "interference" in the phrase "There shall be no interference ... with ... except such as is ... necessary ... for the prevention ... etc." I think the better view is that this contemplates the act itself that is carried out in the exercise of the restriction, rather than the restriction or type of control from which it derives. It is the act - in this case the refusal of permission – that constitutes the interference, rather than the taking of power to do so under a regulation which, theoretically, might never be made use of. In other words, it does not suffice to show that in general some control over the correspondence of prisoners - and even on occasion a stoppage of it - is "necessary ... in the interests of ... public safety" or "for the prevention of disorder or crime". If that were all, it could be admitted at once that in principle such a necessity exists, - subject to questions of degree and particular application. But it has to be shown in addition that the particular act of interference involved was as such "necessary" on those grounds.

12. Accordingly, what has to be enquired into in the present case is the concrete refusal to allow Golder to consult a solicitor (regarding this, for reasons already given, as a constructive interference with his correspondence, - or rather - to use the cumbrous verbiage of Article 8 (art. 8) - with his "right to respect" for his correspondence). The question then is, whether this refusal was "necessary" on grounds of public safety, prevention of crime, etc. Put in that way, it seems to me that there can only be one answer: it was not, - and in saying this I have not overlooked the United Kingdom argument to the effect that if Golder had been allowed access to a solicitor over what was considered (by the authorities) as an entirely unmeritorious claim, the same facilities could not in fairness have been refused to other prisoners because, in the application of any rule, there must be consistency and adherence to some well defined and understood working principle. That is no doubt true, but it does not dispose of the need to show that refusing any one at all - that the practice itself of refusal on those particular grounds - is justified as being "necessary ... in the interests of public safety" or "for the prevention of disorder" etc. This brings me to what has to be regarded as the crucial question: - with whom does it properly lie to decide whether, as I have put it in recapitulation of the United Kingdom argument, claims such as Golder’s - in respect of which he wanted to consult a solicitor - was a "wholly unmeritorious one"? Is not such a matter one for judicial rather than executive determination?

13. Actually, the United Kingdom Home Secretary did not, in point of fact, make use of this form of words in replying to Golder, or indeed express any opinion as to the merits or otherwise of his claim: the language

employed was of the vaguest and most general kind[8]. However, the United Kingdom case has been argued throughout on the basis that the underlying reason for the refusal was the belief of the authorities that Golder had no good claim in law, and could not succeed in any libel action brought against the prison officer who had originally complained about him but had subsequently withdrawn the complaint. It must therefore be assumed that the rejection of Golder's request was de facto based on these grounds, and the alleged necessity of the rejection in the interests of public safety, prevention of disorder, etc., must be evaluated accordingly.

14. In the particular case of Golder it is imppossible to see how a refusal so based could be justified as necessary on any of the grounds specified in paragraph 2 of Article 8 (art. 8-2), even if it was in accordance with normal prison practice, as doubtless it was, - because then it would be the practice as such that was at fault. Even if the matter is looked at from the standpoint of the United Kingdom contention that the practice is justified because prisoners are, by definition as it were, litigious, and only too ready to start up frivolous, vexatious or unfounded actions if not prevented, the point remains that, however inconvenient this may be for the prison authorities, it is still difficult to see how many necessity in the interests of public safety or the prevention of disorder or crime can be involved. But even if, theoretically, it could be, none seems to have been satisfactorily established in Golder's case.

l5. More important however, is the fact that the real reason for the refusal in Golder's case does not seem to have been "necessity" at all, but the character of his claim; and here the true underlying issue is reached. A practice whereby contact with a solicitor about possible legal proceedings is refused because the executive authority has determined that the prisoner has no good legal ground of claim, not only cannot be justified as "necessary" etc. (does not even pretend so to be), - it cannot be justified at all, because it involves the usurpation of what is essentially a judicial function. To say this is not, even for a moment, to throw any doubt on the perfect good faith of the authorities in taking the view they did about Golder's claims. But that is not the point. The point is that it was motivated by what was in effect a judicial finding, - not, however, one emanating from any judicial authority, but from an executive one. Yet it is precisely one of the functions of a judicial system to provide, through judicial action, and after hearing argument if necessary, means for doing what the prison authorities, acting executively, and without hearing any argument - at least from Golder

[8] Golder had made two requests: to be transferred to another prison, and to be allowed either to consult a solicitor about the possibility of taking legal action or alternatively to obtain the advice of a certain named magistrate, in whose views he would have confidence. In reply, he was told that the Secretry of State had fully considered his petition "but is not prepared to grant your request for a transfer, nor can he find grounds for taking any action in regard to the other matters raised in your petition".

himself or his representative - did in the present case. All normal legal systems - including most certainly the English one – have procedures whereby, at a very early stage of the proceedings, a case can (to use English terminology) be "struck out" as frivolous or vexatious or as disclosing no cause of action - (grounds roughly analogous to the "abuse of the right of petition", or "manifestly illfounded" petition, in human rights terminology)[9]. This can be done, and usually is, long before the case would otherwise have reached the trial judge, had it gone forward for trial; but nevertheless it is done by a judicial authority, or one acting judicially. It may be a minor or lesser authority, but the judicial character both of the authority and of the proceedings remains.

16. It is difficult to see why - or at least it is difficult to see why as a matter of necessity under Article 8, paragraph 2 (art. 8-2), prisoners, just because they have that status, should be liable to be deprived of the right to have these preliminary objections to their claims (whether good or bad) judicially determined, especially as they are objections of a kind which it is for the defendant in an action to take, not a third party stranger to it. But here of course a further underlying element is reached. The Home Secretary was not a stranger to Golder's potential claim, even if he was not directly a prospective party to it, - for it was his own prison officer and the conduct of that officer which would be in issue in the claim, if it went forward. Again, there is, and can be, no suggestion that the Home Secretary was influenced by the fact that he was technically in interest. It is simply the principle of the thing that counts: nemo in re sua judex esse potest. Of course, both in logic and in law, this could not operate per se to cancel out any necessity that genuinely existed on the basis of one of the exceptions specified in paragraph 2 of the Article 8 (art. 8-2). If such necessity really did exist, then the interference would not be contrary to Article 8 (art. 8) as such. What the element of nemo in re sua does do however, is to make it incumbent on the authorities to justify the interference by reference to very clear and cogent considerations of necessity indeed, - and these were certainly not present in this case.

17. In concluding therefore, as I feel bound to do, that there has been a breach of Article 8 (art. 8), though clearly an involuntary one, I should like to add that having regard to the perplexing drafting of Article 8 (art. 8), of which I hope to have afforded some demonstration - (nor is it unique in that respect in this Convention) - it can cause no surprise if governments are uncertain as to what their obligations under it are. This applies a fortiori to the interpretation of Article 6, paragraph 1 (art. 6-1), of the Convention to which I now come.

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[9] These are amongst the grounds, specified in Article 27 (art. 27) of the European Convention, on which the Commission of Human Rights must refuse to deal with a petition.

PART II. Article 6, paragraph 1 (art. 6-1)

A. The applicability aspect

18. In the present case the chief issue that has arisen and been the subject of argument, is whether the Convention provides in favour of private persons and entities a right of access to the courts of law in the various countries parties to it. It is agreed - and admitted in the Court's Judgment (paragraph 28) - that the only provision that could have any relevance for this purpose - Article 6, paragraph 1 (art. 6-1) - does not directly or in terms give expression to such a right. Nevertheless this right is read into the Convention on the basis partly of general considerations external to Article 6.1 (art. 6-1) as such, partly of inferences said to be required by its provisions themselves. But before entering upon this matter there arises first an important preliminary issue upon which the question of the very applicability of this Article (art. 6-1) and of the relevance of the whole problem of access depends. There exists also another preliminary point of this order, consideration of which is however more conveniently postponed until later - see paragraphs 26-31 below.

19. Clearly, it would be futile to discuss whether or not Article 6.1 (art. 6-1) of the Convention afforded a right of access to the English courts unless Golder had in fact been denied such access, - and in my opinion he had not. He had, in the manner already described, been prevented from consulting a solicitor with a view - possibly – to having recourse to those courts; but this was not in itself a denial of access to them, and could not be since the Home Secretary and the prison authorities had no power de jure to forbid it. It might nevertheless be prepared to hold, as the Court evidently does, that there had been a "constructive" denial if, de facto, the act of refusing to allow Golder to consult a solicitor had had the effect of permanently and finally cutting him off from all chances of recourse to the courts for the purpose of the proceedings he wanted to bring. But this was not the case: he would still have been in time to act even if he had served his full term, which he did not do, being soon released on parole.

20. I of course appreciate the force of the point that the lapse of time could have been prejudicial in certain ways, - but it could not have amounted to a bar. The fact that the access might have been in less favourable circumstances does not amount to a denial of it. Access, provided it is allowed, or possible, does not mean access at precisely the litigant's own time or on his own terms. In the present case there was at the most a factual impediment of a temporary character to action then and there, but no denial of the right because there could not be, in law. The element of "remoteness", of which the English legal system takes considerable account, also enters into this. Some distance, conceptually, has to be travelled before

it can be said that a refusal to allow communication with a solicitor "now", amounts to a denial of access to the courts - either "now", or still less "then". In no reasonable sense can it be regarded as a proximate cause or determining factor. Golder was not prevented from bringing proceedings: he was only delayed, and then, in the end, himself failed to do so. A charge of this character cannot be substantiated on the basis of a series of contingencies. Either the action of the authorities once and for all prevented Golder's recourse or it did not. In my opinion it did not.

21. Just as the Court's Judgment (so it will be seen later) completely fails to distinguish between the quite separate concept of access to the courts and a fair hearing after access has been had, so also does it fail to distinguish between the even more clearly separate notions of a refusal of access to the courts and a refusal of access to a solicitor, which may - or may not - result in an eventual seeking of access to the courts. To say that a thing cannot be done now, is not to say it cannot be done at all, - especially when what is withheld "now" does not even constitute that which (possibly) might be sought "then". The way in which these two distinct matters are run together, almost as if they were synonymous, in, for instance, the last part of the fourth section of paragraph 26 of the Judgment, constitutes a gratuitous piece of elliptical reasoning that distorts normal concepts.

22. In consequence, even assuming that Article 6.1 (art. 6-1) of the Convention involves an obligation to afford access to the courts, the present case does not, in my view, fall under the head of a denial of access contrary to that provision. It is not an Article 6.1(art. 6-1) case at all, but a case of interference with correspondence contrary to Article 8 (art. 8); and the whole argument about the effect of Article 6.1 (art. 6-1) is misconceived; for, access not having been denied, there is no room for the application of that Article (art. 6-1). Logically therefore, this part of the case must, for me, and so far as its actual ratio decidendi is concerned, end at this point: but, because the question of whether Article 6.1 (art. 6-1) is to be understood as comprising a right of access to the courts involves an issue of treaty interpretation that is of fundamental importance, not only in itself, but also as opening windows on wider vistas of principle, philosophy and attitude, I feel it incumbent on me to state my views about it.

B. The interpretational aspect

23. It was a former President of this Court, Sir Humphrey Waldock who, when appearing as Counsel in a case before the International Court of Justice at the Hague[10] pointed out the difficulties that must arise over the

[10] This was either in the first (jurisdictional) phase of the Barcelona Traction Company case (1964), or in the North Sea Continental Shelf case; but I have lost track of the reference.

interpretational process when what basically divides the parties is not so much a disagreement about the meaning of terms as a difference of attitude or frame of mind. The parties will then be working to different co-ordinates; they will be travelling along parallel tracks that never meet - at least in Euclidean space or outside the geometries of a Lobachevsky, a Riemann or a Bolyai; or again, as Sir Humphrey put it, they are speaking on different wavelengths, - with the result that they do not so much fail to understand each other, as fail to hear each other at all. Both parties may, within their own frames of reference, be able to present a self-consistent and valid argument, but since these frames of reference are different, neither argument can, as such, override the other. There is no solution to the problem unless the correct – or rather acceptable - frame of reference can first be determined; but since matters of acceptability depend on approach, feeling, attitude, or even policy, rather than correct legal or logical argument, there is scarcely a solution along those lines either.

24. These are the kind of considerations which, it seems to me, account for the almost total irreconcilability that has characterized the arguments of the participants about the interpretation of Article 6.1 (art. 6-1); - on the one side chiefly the Commission, on the other the United Kingdom Government. Their approaches have been made from opposite ends of the spectrum. One has only to read the views and contentions of the Commission as set forth in, for instance, its Report for transmission to the Committee of Ministers[11], to find these seemingly convincing - given the premises on which they are based and the approach that underlies them. Equally convincing however are those advanced on behalf of the United Kingdom Government in its written memorial[12] and oral arguments[13] before the Court, on the basis of another approach and a quite different set of premises. The conclusion embodied in the Judgment of the Court, after taking into account the arguments of the United Kingdom, is to the same effect as that of the Commission. My own conclusion will be a different one, partly because I think a different approach is required, but partly also because I believe that the Court has proceeded on the footing of methods of interpretation that I regard as contrary to sound principle, and furthermore has given insufficient weight to certain features of the case that are very difficult to reconcile with the conclusion it reaches.

1. The question of approach

25. The significance of the question of approach or attitude in the present case lies in the fact that, as already mentioned, and as was generally

[11] Dated 1 June 1973: Convention, Article 31, paragraphs 1 and 2 (art. 31-1, art. 31-2).
[12] Document CDH (74) 6 of 26 March 1974.*
[13] Documents CDH/Misc (74) 63 and 64 of 12 October 1974.*
* Note by the Registry: These documents are reproduced in volume No 16 of Series B.

admitted, neither in the Convention as a whole nor in Article 6.1 (art. 6-1) in particular, is any provision expressly made for a specific general substantive right[14] (14) of access to the courts. It is in fact common ground that if the principle of such a right is provided for, or even recognized at all by any Article of the Convention, this can only result from an inference drawn from the first sentence of Article 6.1 (art. 6-1) - which reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

It is evident on the face of it that the direct (and the only direct right) right conveyed by this provision is a right to (i) "a fair and public hearing", (ii) "within a reasonable time", and (iii) by a tribunal which is "independent", "impartial", and "established by law". Naturally the question of these several matters, viz. of a not unduly delayed fair and public hearing before an impartial tribunal, etc., can only arise if some proceedings, civil or criminal, have actually been commenced and are currently going through their normal course of development. But that is not the point. The point is that this says nothing whatever in terms as to whether there shall be any proceedings. The Article (art. 6-1) assumes the factual existence of proceedings, in the sense (but no further) that, if there were none, questions of fair trial, etc. would have no relevance because they could not arise. The Article (art. 6-1) can therefore only come into play if there are proceedings. It is framed on the basis that there is a litigation which, as my colleague Judge Zekia puts it, is sub judice. But that is as far as its actual language goes. It does not say that there must be proceedings whenever anyone wants to bring them. To put the matter in another way, the Article simply assumes the existence of a fact, viz. that there are proceedings, and then, on the basis of that fact, conveys a right which is to operate in the postulated event (of proceedings), - namely a right to a fair trial, etc. But it makes no direct provision for the happening of the event itself - that is to say for any right to bring the event about. In short, so far as its actual terms go, it conveys no substantive right of access independently of and additional to the procedural guarantees for a fair trial, etc., which are clearly its primary object. The question is therefore, must it be regarded as doing so by a process of implication?

Digression: Article 1 (art. 1) of the Convention

26. However, before going on to consider the question of implication as it arises in connection with Article 6.1 (art. 6-1), a parenthesis of some

[14] Although I agree with the Judgment (paragraph 33) that provisions such as those in Article 5.4 and Article 13 (art. 5-4, art. 13) only confer procedural rights to a remedy in case a substantive right under the Convention is infringed, and not any substantive rights themselves, this finding, though correct in se, does not exhaust the point of the United Kingdom argument based on those Articles (art. 5-4, art. 13). I shall return to this matter later.

importance must be opened, concerning another factor that calls for a short-circuiting of the whole issue of Article 6.1 (art. 6-1). This concerns the effect to be given to Article 1 (art. 1) of the Convention which runs as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention."

The operative word here, in the present context, is "defined"; and in consequence, the effect of this provision - (since it is rights and freedoms "defined" in the Convention that the States parties to it are to secure to everyone within their jurisdiction) - is to exclude from that obligation anything not so defined. Therefore, even if, in order to avoid relying on what might be regarded as a technicality, one refrains from attempting a "definition of defining", as compared with, say, mentioning, indicating, or specifying[15], the question necessarily arises whether a right or freedom that is not even mentioned, indicated or specified, but merely - at the most - implied, can be said to be one that is "defined" in the Convention in any sense that can reasonably be attributed to the term "defined"? In my opinion, not; and on this question I am in entire agreement with the views expressed by my colleague Judge von Verdross.

27. This conclusion does not turn on a mere technicality. In the first place, even if one accepts the view that, as has been said[16], "the word ‘defined’ in this provision is not very apt" and that in the Convention "none of the rights or freedoms are defined in the strict sense", they are at least mentioned, indicated or specified - in short named. This is not so with the right of access which, as such, finds no mention in the Convention. Secondly, a large part of the proceedings in the case, and of the arguments of the participants - those relating to inherent or other limitations on the right of access, if considered to be implied by Article 6.1 (art. 6-1) - was taken up, precisely, with the question of how that right was to be understood, what it amounted to, - in short how it was to be defined, - conclusively establishing the need for a definition, even if only by limitation or circumscription; - and definitions must be expressed - they cannot rest on implication.

28. The necessary conclusion therefore seems to be that it is impossible - or would be inadmissible - to regard as falling under the obligation imposed by Article 1 (art. 1) of the Convention – an obligation that governs its whole application - a right or freedom which the Convention does not trouble to name, but at the most implies, and which cannot even usefully be implied without at the same time proceeding to a rather careful definition of it, or of

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[15] Clearly anything defined must ipso facto be mentioned, indicated, specified or at least named, etc. The reverse does not follow. A definition involves more than any of these, and a fortiori much more than something not specified at all, but merely inferred.

[16] J.E.S. Fawcett, op. cit., in note 2 supra, p.33.

the conditions subject to which it operates, and which, by circumscribing it, define it[17].

29. In this connexion it must also be noticed that the very notion of a right of access to the courts is itself an ambiguous one, unless defined. The need to define, or at least circumscribe, is indeed expressly recognized in paragraph 38 of the Court's judgment, and again by implication, at the end of paragraph 44. For instance does a right of access mean simply such right as the domestic law of the State concerned provides, or at any time may provide for? If so, would the Convention, in providing for a right of access, be doing anything more than would already be done if the Convention did not exist? If on the other hand the Convention, supposing it to provide for a right of access at all, must be deemed to impose an obligation to afford a degree of access that the domestic law of the contracting States, or of some of them, might not necessarily contemplate, then what degree? - an absolute right, or one conditioned in various ways, and if so how? More specifically, does a right of access mean a right both to bring a claim and also to have it determined on its substantive merits regardless of any preliminary question affecting the character or admissibility of the claim, the status or capacity of the parties to it, etc.? - and if not, then, since the laws of different countries vary considerably in these respects, would not some definition of the degree of derogation from the absolute, considered to be acceptable from a human rights standpoint, be requisite in a Convention on human rights? The fact that the European Convention contains no such (nor any) definition could only mean that if a right of access is to be implied by virtue of Article 6.1 (art. 6-1), the right would need to be defined separately, ad hoc, by the Court for the purposes of each individual case. This would be inadmissible since governments would never know beforehand where they stood.

30. The foregoing questions may be rhetorical in their form: they are not rhetorical in substance. They serve to show the need for a definition of access to the courts as a right or freedom, and hence that, the Convention containing none, this particular right or freedom is not amongst those which its Article 1 (art. 1) obliges the contracting States to secure to those within

[17] It was common ground in the proceedings that a right of access cannot mean that the courts must have unlimited jurisdiction (e.g. the case of diplomatic or parliamentary immunity); or that the right must be wholly uncontrolled (e.g. the case of lunatics, minors, etc.). Or again that lawful imprisonment does not have some effect on rights of access. But there was more than enough argument about the precise nature or extent of such curbs to make it abundantly clear that an implied right of access without specification or definition could not be viable, in the sense that its character and incidence would be the subject of continual controversy. Here, my colleague Judge Zekia makes an excellent point when he draws attention to the effect of Article 17 (art. 17) of the Convention, which prohibits the contracting States from engaging in anything aimed at limiting any rights or freedoms "to a greater extent than is provided for in the Convention", - the significance being that if any right of access were to be implied by Article 6.1 (art. 6-1), it would have to be an absolute one, since that Article provides for no restrictions.

their respective jurisdictions. To put the matter in another way, the parties cannot be expected to implement what would be an important international obligation when it is not defined sufficiently to enable them to know exactly what it involves - indeed is not defined at all because (in so far as it exists) it rests on an implication that is never particularized or spelt out. The fleeting, and scarcely comprehensible[18], references contained in paragraphs 28 and 38 (first section) of the Court's Judgment to the question of a definition, as it arises by virtue of Article 1 (art. 1) of the Convention, are in no way an adequate substitute for a considered discussion of the matter, which the Judgment wholly fails to provide.

3l. In consequence, there is here a further point at which, as in the case of what was discussed in paragraphs 19-22 of this Opinion, a term could, so far as I am concerned, logically be put to the question of the effect of Article 6.1 (art. 6-1) - for since that provision does not define, then whatever is the right or freedom it might imply, that right or freedom would not come within the scope of Article 1 (art. 1) and its overall governing obligation. This is also precisely Judge von Verdross' view. That this conclusion may legitimately suggest the deduction that Article 6.1 (art. 6-1) does not in fact imply any such right or freedom, but deals only with the modalities of litigation, leads naturally to a resumption of the discussion broken off at the end of paragraph 25 above where, it having emerged quite clearly from the analysis previously made, that Article 6.1 (art. 6-1), while assuming the existence of proceedings, did not in terms give expression to any positive right to bring them, the question was asked whether the Article (art. 6-1) must nevertheless be regarded as doing so by a process of implication or inference. Also raised was the further question of what it would be proper and legitimate to imply by means of such a process.

Resumption on the question of approach

i. The Court's approach

32. It is an understandable, reasonable and legitimate point of view that access to the courts of law is, or should be, regarded as an important human right. Yet it is an equally justifiable view to say that the very importance of the right requires (more especially in a convention based on inter-State agreement, not sovereign legislative power) that it should be given explicit expression, not left to be deduced as a matter of inference. This leads up to an essential point. There is a considerable difference between the case of "law-giver's law" edicted in the exercise of sovereign power, and law based on convention, itself the outcome of a process of agreement, and limited to what has been agreed, or can properly be assumed to have been agreed. Far

[18] For instance, what is meant by the allusions to a definition "in the narrower sense of the term"? Narrower than what? - and what would be the "broader" sense? Such vagueness can only give rise to "confusion worse confounded": Milton, Paradise Lost, Book I, 1, 995, - (lost indeed!).

greater interpretational restraint is requisite in the latter case, in which, accordingly, the convention should not be construed as providing for more than it contains, or than is necessarily to be inferred from what it contains. The whole balance tilts from (in the case of law-giver's law) the negatively orientated principle of an interpretation that seems reasonable and does not run counter to any definite contra-indication, and an interpretation that needs to have a positive foundation in the convention that alone represents what the parties have agreed to, - a positive foundation either in the actual terms of the convention or in inferences necessarily to be drawn from these; - and the word "necessarily" is the decisive one.

33. That word is significant because the attitude of the Commission to this case and, though more guardedly, that of the Court, seems to me to have amounted to this, - that it is inconceivable, or at least inadmissible, that a convention on human rights should fail in some form or other to provide for a right of access to the courts: therefore it must be presumed to do so if such an inference is at all possible from any of its terms. This attitude clearly underlies what is said in the last section of paragraph 35 of the Court's Judgment, that it would, in the opinion of the Court "be inconceivable ... that Article 6.1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it possible to benefit from such guarantees, that is, access to a court". As a matter of logical reasoning however, this is a complete non-sequitur. It might perhaps seem natural that procedural guarantees of this kind should "first" be preceded by a protection of the right of access: the fact remains that, in terms, they are not, and that the inference that they must be deemed so to be is at best a possible and in no way a necessary one; - for it is a perfectly conceivable situation that a right of access to the courts should not necessarily always be afforded, or should be limited to certain cases, or excluded in certain cases, but that where it is afforded there should be safeguards as to the character of the ensuing proceedings.

34. Generally speaking, at least in this type of provision, an inference or implication can only be regarded as a "necessary" one if the provision cannot operate, or will not function, without it. As has already been indicated (supra, paragraph 25), in Article 6.1 (art. 6-1) the necessary, and the only necessary inferential element lies in the assumption (without which the provision makes no sense but more than which it does not require in order to make sense) that legal proceedings of some kind have been started and are in progress. It is in no way necessary, either to the operation of this text, or to give it significant meaning and scope, that the further and quite gratuitous assumption should be made that the text implies not only the existence of proceedings but an a priori right to bring them, - which is to enter upon a distinct order or category of concept, for doing which there is no warrant, since the Article (art. 6-1) has ample scope without that. To

quote my colleague Judge Zekia, it "has ... its raison d'être ... without grafting the right of access onto it". May I be permitted in the general context of the process of implication to refer to what I wrote more than a dozen years ago in an article on treaty interpretation having no specific connexion with any case such as the present one[19].

35. So compelling do these considerations seem to me to be that I am obliged to look to other factors in order to account for the line taken by the Court. A number of them, such as the rules of treaty interpretation embodied in the 1966 Vienna Convention on the Law of Treaties; the Statute of the Council of Europe - an instrument quite separate from the European Convention on Human Rights; the principle of the rule of law; and the "general principles of law recognized by civilized nations" mentioned in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice; - all these are factors external to Article 6.1 (art. 6-1) of the Human Rights Convention, and having little or no direct bearing on the precise point of interpretation involved, which is that discussed in paragraphs 25 and 33-34 of the present Opinion. They might be useful as straws to clutch at, or as confirmatory of a view arrive at aliter, - they are in no way determining in themselves, even taken cumulatively[20].

36. The really determining element in the conclusion arrived at by the Court seems to have been fear of the supposed consequences that might result from any failure to read a right of access into Article 6.1 (art. 6-1). This can clearly be seen from the following passages, the first of which completes that already quoted in paragraph 33 above by stating that the "fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings". Still more significant is the second passage (Judgment, paragraph 35, penultimate section), the first sentence of which reads as follows:

> "Were Article 6.1 (art. 6-1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government."

37. These motivations, as embodying what is clearly the real ratio decidendi of this part of the Judgment, seem to me to call for comment under three heads, - those of probability, the logic of the argument, and the nature of the operation they denote.

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[19] See a footnote entitled "The philosophy of the inference" in the British Year Book of International Law for 1963, p. 154.

[20] The importance attributed to the factor of the "rule of law" in paragraph 34 of the Court's Judgment is much exaggerated. That element, weighty though it is, is mentioned only incidentally in the Preamble to the Convention. What chiefly actuated the contracting States was not concern for the rule of law but humanitarian considerations.

(a) The consequences foreshadowed are completely unrealistic or at the best highly exaggerated.

(b) The argument embodies a well known logical fallacy, in so far as it proceeds on the basis that without a right of access the safeguards for a trial provided for by Article 6.1 (art. 6-1) would be rendered nugatory and objectless, - so that the one must necessarily entail the other. This is merely to perpetuate the type of fallacy arising out of what is known to philosophers as the "King of France" paradox, - the paradox of a sentence which, linguistically, makes sense, but actually is absurd, namely the assertion "the King of France is bald". The paradox vanishes however when it is seen that the assertion in no way logically implies that there is a King of France, but merely that, rightly or wrongly, if there is one, he is bald. But that there is one must be independently established; and, as is well known, there is in fact no King of France. Similarly, one could provide all the safeguards in the world for the well being of the King of France, did he exist, yet the fact that these would all be rendered nugatory and objectless did he not do so, would in no way establish, or be compelling ground for saying that he did, or must be assumed to. In the same way, the safeguards for a fair trial provided by Article 6.1 (art. 6-1) will operate if there is a trial, and if not, not. They in no way entail that there must be one, or that a right of access must be postulated in order to bring one about. The Judgment also abounds in the type of logical fallacy that derives B from A because A does not in terms exclude B. But non-exclusion is not ipso facto inclusion. The latter still remains to be demonstrated.

(c) Finally, it must be said that the above quoted passages from the Judgment of the Court are typical of the cry of the judicial legislator all down the ages - a cry which, whatever justification it may have on the internal or national plane[21], has little or none in the domain of the inter-State treaty or convention based on agreement and governed by that essential fact[22]. It may, or it may not be true that a failure to see the Human Rights

[21] It is one thing for a national constitution to allow part of its legislative processes to be effected by means of judge-made "case law": quite another for this method to be imposed ab extra on States parties to an international convention supposed to be based on agreement. It so happens however, that even in England, a country in which "case law", and hence - though to a diminishing extent – a certain element of judicial legislation has always been part of the legal system, a recent case led to severe criticism of this element, and another decision given by the highest appellate tribunal went far to endorse this criticism in the course of which it had been pointed out that the role of the judge is jus dicere not jus dare, and that the correct course for the judge faced with defective law was to draw the attention of the legislature to that fact, and not deal with it by judicial action. It was also pointed out that no good answer lay in saying that a big step in the right direction had been taken, - for when judges took big steps that meant that they were making new law. Such remarks as these are peculiarly applicable to the present case in my opinion.

[22] That is to say unless it can be shown that the treaty or convention itself concedes some legislative role to the tribunal called upon to apply it, or that the parties to it intended to delegate in some degree the function (otherwise exclusively to them pertaining) of

Convention as comprising a right of access to the courts would have untoward consequences - just as one can imagine such consequences possibly resulting from various other defects or lacunae in this Convention. But this is not the point. The point is that it is for the States upon whose consent the Convention rests, and from which consent alone it derives its obligatory force, to close the gap or put the defect right by an amendment, - not for a judicial tribunal to substitute itself for the convention-makers, to do their work for them. Once wide interpretations of the kind now in question are adopted by a court, without the clearest justification for them based solidly on the language of the text or on necessary inferences drawn from it, and not, as here, on a questionable interpretation of an enigmatic provision, considerations of consistency will, thereafter, make it difficult to refuse extensive interpretations in other contexts where good sense might dictate differently: freedom of action will have been impaired.

ii. A different approach

38. In my view, the correct approach to the interpretation of Article 6.1 (art. 6-1) is to bear in mind not only that it is a provision embodied in an instrument depending for its force upon the agreement - and indeed the continuing support - of governments, but also that it is an instrument of a very special kind[23], emulated in the field of human rights only by the Inter-American Convention on Human Rights signed at San José nearly twenty years later. This was in considerable measure founded on the European one, particularly as regards its "enforcement" machinery. But it has not been brought into force. Such machinery is not to be found in the United Nations Covenants on Human rights, which in any case also do not seem to be in force. Speaking generally, the various conventions and covenants on human rights, but more particularly the European Convention, have broken entirely new ground internationally, making heavy inroads on some of the most cherished preserves of governments in the sphere of their domestic jurisdiction or domaine réservé. Most especially, and most strikingly, is this the case as regards what is often known as the "right of individual petition", whereby private persons or entities are enabled to (in effect) sue their own governments before an international commission or tribunal, - something

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changing or enhancing its effects, - or again that they must be held to have agreed a priori to an extensive interpretation of its terms, possibly exceeding the original intention. In the present context none of these elements, but the reverse rather, are present, as I shall show later.

[23] The European Convention, signed in 1950 and in force since 1953, is unique as being the only one that both is operative and provides for the judicial determination of disputes arising under it. In any event it is the oldest, having been preceded (by two years) only by the U.N. Universal Declaration of Human Rights which was not, and is not, a binding instrument. There are only three others of the same general order as the European Convention, and only one that is comparable in respect of "enforcement machinery" - the American Convention of San José - which was signed only in 1969 and is not in force.

that, even as recently as thirty years ago, would have been regarded as internationally inconceivable. For these reasons governments have been hesitant to become parties to instruments most of which, apart from the European Convention, have apparently not so far attracted a sufficient number of ratifications to bring them into force. Other governments, that have ratified the European Convention, have hesitated long before accepting the compulsory jurisdiction of the Court of Human Rights set up under it. Similar delays have occurred in subscribing to the right of individual petition which, like the jurisdiction of the Court, has to be separately accepted. This right moreover, may require not only an initial, but a continuing acceptance, since it may be, and in several instances has been given only for a fixed, though renewable, period. It is indeed solely by reason of an acceptance of this kind that it has been possible for the present (Golder) case to be brought before the European Commission and Court of Human Rights at all.

39. These various factors could justify even a somewhat restrictive interpretation of the Convention but, without going as far as that, they must be said, unquestionably, not only to justify, but positively to demand, a cautious and conservative interpretation, particularly as regards any provisions the meaning of which may be uncertain, and where extensive constructions might have the effect of imposing upon the contracting States obligations they had not really meant to assume, or would not have understood themselves to be assuming. (In this connexion the passage quoted in the footnote below[24] from the oral argument of Counsel for the United Kingdom before the Commission should be carefully noted.) Any serious doubt must therefore be resolved in favour of, rather than against, the government concerned, - and if it were true, as the Judgment of the Court seeks to suggest, that there is no serious doubt in the present case, then one must wonder what it is the participants have been arguing about over approximately the last five years!

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[24] "As regards the question of access to the courts, this is not a case of a Government trying to repudiate obligations freely undertaken. That much is quite clear. If one thing has emerged from all the discussion in the case of Mr. Knechtl and the pleadings so far in the case of Mr. Golder, it is that the Government of the United Kingdom had no idea when it was accepting Article 6 (art. 6) of the Convention that it was accepting an obligation to accord a right of access to the courts without qualification. Whether we are right on the interpretation or whether we are wrong, I submit that that much is absolutely clear. I am not going to review in detail all the evidence or the views of the United Kingdom in this respect which have been placed before the Commission. But I submit that it is perfectly clear from all the constitutional material that has been submitted, from its part in the drafting of the European Establishment Convention, that the United Kingdom had no intention of assuming, and did not know that it was expected to assume, any such obligation." - (CDH (73) 33, at p. 36: Document no. 5 communicated by the Commission to the Court)*

* Note by the Registry: Verbatim record of the oral hearing on the merits held in Strasbourg before the Commission on 16-17 December 1971.

iii. Intentions and drafting method

40. It is hardly possible to establish what really were the intentions of the contracting States under this head; but that of course is all the more reason for not subjecting them to obligations which do not result clearly from the Convention, or at least in a manner free from reasonable doubt. The obligation now under discussion does not have that character. Moreover, speaking from a very long former experience as a practitioner in the field of treaty drafting, it is to me quite inconceivable that governments intending to assume an international[25] obligation to afford access to their courts, should have set about doing so in this roundabout way, - that is to say should, without stating the right explicitly, have left it to be deduced by a side-wind from a provision (Article 6.1) (art. 6-1) the immediate and primary purpose of which (whatever its other possible implications might be) - no one who gives an objective reading can doubt – was something basically distinct as a matter of category, namely to secure that legal proceedings were fairly and expeditiously conducted. No competent draftsman would ever have handled such a matter in this way.

41. I do not therefore propose to go into the drafting history of Article 6.1 (art. 6-1), which would be both tedious and unrewarding because, like so many drafting histories, the essential points are often obscure and inconclusive. But it is worth looking at the provisions comparable or parallel to Article 6.1 (art. 6-1) that figure in other major human rights instruments. In the only previous one of a similar order, the Universal Declaration (see footnote 23 supra) there was a provision (its Article 8) which read:

> "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

This, it will be seen, gave no general right of access, and was really a procedural article of the same basic type as Article 5, paragraph 4, and Article 13 (art. 5-4, art. 13), of the European Convention, to which I shall come later (see footnote 14 supra), - and which the Court's Judgment itself holds not to comprise the sort of right of access it professes to find in Article 6.1 (art. 6-1). Article 8 of the Universal Declaration was followed almost immediately by another provision (Article 10)[26] which simply says:

> "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him" - (my italics).

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[25] A right of access under domestic law such as, at least in a general way, the legal systems of most countries doubtless do in fact provide, is one thing. It is quite another matter to assume an international treaty obligation to do so - especially without the smallest attempt to define or condition it (see supra, paragraphs 27-30).

[26] The intervening provision (Article 9) is irrelevant here, forbiding arbitrary arrest, detention or exile.

I have italicized the last phrase of this Article in the Universal Declaration because it makes it quite clear that, subject to the change of order, which has no effect on the meaning, this was the source from which the first sentence of Article 6.1 (art. 6-1) of the European Convention was derived (see text set out in paragraph 25 supra). It no more expresses in terms any substantive right of access to the courts independently of, and over and above the purely procedural guarantee of a fair trial, etc., which is all its actual terms specify, than does the parallel passage in Article 6.1 (art. 6-1) of the European Convention.

42. These provisions (Articles 8 and 10) of the Universal Declaration deserve to be specially noted because, in the Preamble to the European Convention, what is recited is that the Parties were resolved collectively to enforce "certain of the Rights stated in the Universal Declaration". They were not therefore purporting to provide for any rights not so stated - i.e. stated in that Declaration.

43. The next comparable instrument, the International Covenant on Civil and Political Rights, adopted in the United Nations in 1966, but not yet in force, has an Article 14 clearly founded on Article 10 of the Universal Declaration, and therefore on Article 6.1 (art. 6-1) of the European Convention; but there is no need to quote its terms because, apart from an initial phrase about the equality of all before the courts, and a few minor and insubstantial changes of wording and order, plus the omission of the reference to a hearing "within a reasonable time", it is exactly to the same effect as Article 6.1 (art. 6-1). Finally, the Inter-American Convention of San José (1969 - also not in force) has a provision (Article 8, paragraph 1) which at first sight seems to get nearer to conveying an express right of access, but in fact does not do so. To begin with, it comes under the headed rubric "Right to a Fair Trial" (garanties judiciaires), which labels it as falling into the procedural guarantee category. Secondly, its language clearly shows it to be of the same family and origin as the other comparable clauses in earlier instruments. It reads:

> "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

If, in this provision, a full stop occurred after the word "hearing" in the opening line, and it then resumed separately with the rest of the text, it could be said that a general right of access was expressly formulated. It is quite clear however (omitting as irrelevant for present purposes the parenthetical phrase "with due guarantees and within a reasonable time") that the word "hearing" links up directly with (and is qualified by) the requirement of a hearing by a "competent ... tribunal". The emphasis, as in Article 6.1 (art. 6-

1) of the European Convention, is on the character of the hearing rather than on an a priori and independent right to have a hearing.

44. But the significant fact is that all the provisions above reviewed seem to have had their origin in a proposal of a much stronger and more explicit character. The point is succinctly made in the following passage from the statement made by counsel for the United Kingdom before the Commission when, speaking in particular of Article 8 of the Universal Declaration, he said[27]:

> "The text of Art. 8 was based upon an amendment introduced by the Mexican representative in the Third Committee of the General Assembly on 23 October 1948. The representative stated that his amendment only repeated the text of the Bogota Declaration which had recently been adopted unanimously by 21 Latin American Deputations. The relevant provision of the Bogota Declaration was Art. XVIII. This says: 'Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights'.
>
> The source of Art. 8 of the Universal Declaration in Art. XVIII of the Bogota Declaration is very interesting because Art. XVIII of the Bogota Declaration is in the first sentence talking about the right of every person to resort to the courts to ensure respect for his legal rights, and in Art. 8 of the Universal Declaration this has been inverted and narrowed to read: 'Everyone has a right to an effective remedy by the competent national tribunals'."

Counsel then subsequently[28] drew the following conclusion, which is also mine, namely that "if one looks at this history as a whole, what it amounts to is this: that what started in the Declaration of Bogota as a broad right of access has been narrowed down to a right of access related to the rights secured by the Convention".

45. Thus, over a period of some twenty years, there seems to have been what it would not be unfair to call a deliberate policy on the part of governments of avoiding coming to grips with the question of access, purely as such. This view is strengthened by the existence of evidence (see Document CDH (73) 33, at p. 45)* that Article 6.1 (art. 6-1) of the European Convention did at one stage of its drafting contain terms that might have been regarded as making provision for a right of access as such, but these subsequently disappeared, - the clearest possible indication of an intention not to proceed on those lines, especially as the concept equally never figured in terms in any of the human rights instruments drawn up subsequent to the European Convention (vide supra). In the technique of treaty interpretation there can never be a better demonstration of an

[27] Loc. cit. in note 24 supra, at p. 47.
[28] Ibid. at p. 50.
* See note by the Registry on Page 53.

intention not to provide for something than first including, and then dropping it.

46. The conclusion I draw from the nature of the successive texts, combined with the considerations to which I have drawn attention in paragraph 38 above, is that the contracting States were content to rely de facto on the situation whereby, in practice, in all European countries a very wide measure of access to the courts was afforded; but without any definite intention on their part to convert this into, or commit themselves to the extent of, a binding international obligation on the matter (and see footnote 25 supra), - and more especially an obligation of the character which the Court, in the present case, has found to exist, - an obligation which, as the present case equally shows, is of a far more rigorous and far-reaching kind than the United Kingdom Government (obviously - see footnote 24 above) and a number of other governments parties to the Convention (most probably) had never anticipated as being mandatory[29]. This type of obligation cannot, for reasons already stated, be internationally acceptable unless it is defined and particularized, and its incidence and modalities specified. The Convention does not do this; and the Court, with good reason, does not compound the misconceptions of the Judgment by attempting a task that lies primarily within the competence of governments. As the Judgment itself in terms recognizes (paragraph 39, second section) - "It is not the function of the Court to elaborate a general theory of the limitations admissible in the case of convicted prisoners, nor even to rule in abstracto on the compatibility of ... the [United Kingdom] Prison Rules ... with the Convention". But if it is not the function of the Court to elaborate restrictions on the right, then a fortiori can it not be its function to postulate the right itself which is one that cannot operate in practice without the very restrictions the Court declines to elaborate.

2. Particular texts and terms

47. On the basis of the foregoing approach, the various relevant provisions of the Convention give rise to no difficulties of interpretation or necessity for vindicatory explanations, as they certainly do on the basis of the Court's approach. I will list and comment on these provisions, broadly in the order in which they occur: -

(a) The Preamble - This (as has already been mentioned in paragraph 42) recites specifically that the signatory Governments are resolved "to take the

[29] The United Kingdom argument based on the purely national treatment in the matter of access to the courts afforded by ordinary commercial treaties and by such multilateral conventions as the modern European Convention on Establishment, points to the probability that, squarely faced with having to do something about the question of access, governments would not have been willing to go beyond providing for national treatment in the matter; and of course Golder, a United Kingdom national, did receive treatment which was correct under the local national law and regulations.

first steps" for the collective enforcement of "certain of the Rights" stated in the Universal Declaration of Human Rights which, as has been seen (paragraph 41 supra) makes no provision for any independent right of access as such, so that such a right does not even enter into the category of those that the European Convention might cover. But even if it figured in that category as a right possibly to be covered - as, so to speak, a "qualifying right" – it would be a compelling implication of the language used in the Preamble, that it would not necessarily be included. Only "certain" of the qualifying rights were to figure, and a general right of access was not, on the basis of the Universal Declaration, even a qualifying right. In addition, the Parties were only proposing to take "the first steps", and to cover only "certain" of the rights. Thus, so far from it being "inconceivable" that provision for a right of access should not be found in the European Convention, that result becomes a fully conceivable one that need cause no surprises nor seizures.

(b) Article 1 (art. 1) of the Convention (see paragraphs 26-31 supra) has the effect of requiring that before it becomes incumbent on the contracting States to "secure to everyone within their jurisdiction" the rights and freedoms figuring in that part of the Convention that comprises Article 6.1 (art. 6-1), such rights and freedoms shall be "defined". No right of access however is there even mentioned, let alone "defined". Definitions must necessarily be express. No undefined right of access can therefore result by simple inference or implication from Article 6.1 (art. 6-1). The effect of Article 17 (art. 17) of the Convention (see footnote 17 supra) confirms and fortifies this view.

(c) Article 5, paragraph 4, and Article 13 (art. 5-4, art. 13)

(i) The Court’s Judgment is correct in taking the view of these provisions described in footnote 14 above; but it is a view that, though correct, is incomplete, and misses an important part of what the United Kingdom was seeking to contend.

(ii) What these two Articles (art. 5-4, art. 13) provide is that the contracting States must furnish a remedy in their courts for contraventions of substantive rights or freedoms embodied in the Convention (this description is somewhat of a paraphrase of Article 5, paragraph 4 (art. 5-4), but basically true, and literally true of Article 13 (art. 13)). I agree with the Court that these provisions do not themselves embody any substantive rights or freedoms, or any general right of access, and therefore would not render any provision that did have that effect superfluous, as the United Kingdom Government contended. However, that Government also put forward what might be called the complement of this proposition, namely, that if a general right of access must, as the Court held, be deemed to be implied by Article 6.1 (art. 6-1) then Article 5, paragraph 4, and Article 13 (art. 5-4, art. 13), would in their turn be rendered superfluous because the right of access under Article 6.1 (art. 6-1) would provide all that was

needed. Hence the existence of these other two provisions tended to show that no right of access was comprised by Article 6.1 (art. 6-1). This argument is logically correct, but is not completely watertight since Articles 5.4 and 13 (art. 5-4, art. 13) speak of affording a remedy; and mere access does not necessarily entail a remedy: there can be access but no remedy available upon access. Nevertheless, if one were prepared to take a leaf out of the Court's book and employ the kind, or order, of argument the Court employs, one might say that since access without a remedy is of no avail, a right of access implies a right to a remedy - which is patently absurd. This would however precisely parallel the Court's conclusion that because right to a fair trial is of no avail without a trial, therefore a right to bring proceedings resulting in a trial must be implied. It would be difficult to make the non-sequitur clearer.

(d) The provisions of Article 6, paragraph 1 (art. 6-1) - The vital first sentence of this paragraph has already been quoted in paragraph 25 of the present Opinion, and the remaining sentence will be found set out in paragraph 24 of the Court's Judgment. It need not be quoted here because all it does, with obvious reference to the requirement of a "public hearing" stated in the first sentence, is to specify that judgment also must be "pronounced publicly", but that the press and the public may be excluded from all or part of the trial in certain circumstances which are then particularized in some detail. This sentence is therefore irrelevant for present purposes except that it is entirely of the same order as the first, and is linked to it, ejusdem generis, as an essentially procedural provision concerned solely with the incidents and modalities of trial in court. On the first sentence, and generally, the following comments are supplementary to those already made in paragraphs 25 and 33-34 supra (and see also paragraph 40 in fine):

(i) The "ejusdem generis" rule - The previous paragraphs of this Opinion just referred to, were directed to showing that Article 6.1 (art. 6-1) is a self-contained provision, complete in itself and needing no importations, supplements or elucidations in order to make its effect clear; and belonging to a particular order or category of clause, procedural in character and concerned exclusively with the modalities of trial in court. Its whole tenour is to that effect, and that effect only, as was eloquently pointed out in argument (CDH (73) 33 at p. 51)[*]. The ejusdem generis rule therefore requires that, if any implictions are to be drawn from the text for the purpose of importing into it, or supplementing it by, something that is not actually expressed there (and it is common ground that the right of access does not find expression in this text), these implications should be, or should relate to, something of the same order, or be in the same category of concept, as figures in the text itself. This would not be the case here. Any

[*] See note by the Registry on page 53.

right of access as such, while it has a procedural aspect, is basically a substantive right of a fundamental character. Even in its procedural aspects it is quite distinct from matters relating to the modalities of trial. As has already been pointed out, the concept of the incidents of a trial has only one necessary implication, viz. that a trial is taking place - that proceedings are in progress. It implies nothing in itself about the right to initiate them, which belongs to a different order of concept. Consequently it is not a legitimate process, and it contravenes accepted canons of interpretation, to imply the one from the other.

(ii) The rule "expressio unius est exclusio alterius" - This rule also is infringed by the conclusion arrived at in the Court's Judgment. This occurs more than once, but is best illustrated by the manner in which Article 6. 1 (art. 6-1) is dealt with at the beginning of paragraph 28 of the Judgment, where it is said that although the Article "does not state a right of access ... in express terms", it "enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term" - (actually, not defined at all[30]). What is conveniently overlooked here is that the only rights in fact "enunciated" in Article 6.1 (art. 6-1) (and ex hypothesi "enunciation" means expressed in terms) are not "distinct" rights, but rights all of the same order or category, viz. rights relating to the timing, conduct and course of a trial. There is nothing in this with which to constitute the pretended "single right" that is said to include a right of access in addition to the actually specified procedural rights. The latter, on the other hand, are explicitly stated in such a way as to call for the application of the expressio unius rule, - and since, for the reasons already given (paragraphs 25 and 34 supra), there is nothing in the Article that necessitates a right of access apart from the fact of access already had, this rule should be applied. At the risk of repetition, let the true position be stated once more, namely that the provisions of Article 6.1 (art. 6-1) will operate perfectly well as they are, whenever proceedings are in fact brought, without postulating any inherent right to bring them. The Article will operate automatically when, and if, there are proceedings. If for whatever reason – absence of right or other - they are not brought, then cadit quaestio: the occasion that would have brought the Article into play has simply not arisen. In consequence, there is no justification in this case for the failure to apply the expressio unius rule.

(iii) Equal treatment of civil and criminal proceedings - there is a further compelling, and perhaps more concrete, reason why no right of access, as opposed to a right to a fair trial, etc., can be implied in Article 6.1 (art. 6-1). This Article (art. 6-1) manifestly places civil and criminal proceedings on the same footing, - it deals with the matter of a fair trial in both contexts.

[30] This is one of the places where the Court recognizes the undefined character of the right - see supra paragraphs 26-31, especially 29 and 30 and appurtenant footnotes.

Yet the question of a right of access as such must arise chiefly in connexion with civil proceedings where it is the plaintiff or claimant who initiates the action. Apart from the very limited and special class of case in which the private citizen can originate proceedings of a penal character, it is the authorities who start criminal proceedings; and in that context it would be manifestly absurd to speak of a right of access. It is no real answer to this to say that the right inheres only when it is needed and it is needed in the one case but not the other (or in any event the authorities can look after themselves). This is not the point. The point is that the Article (art. 6-1) is as much concerned with the criminal as with the civil field - indeed its importance probably lies chiefly in the former field, - yet this, the criminal field, is one in relation to which it is totally inapt in the vast majority of cases to speak of a right of access for the authorities who will be initiating the proceedings. This is a strong pointer to, or confirmation of, the conclusion that the Article (art. 6-1) is concerned solely with the proceedings themselves, not the right to bring them.

(iv) A public hearing "within a reasonable time" - There are other pointers in the same direction, which also involve the principle of maintaining a due congruity between the civil and criminal aspects of Article 6.1 (art. 6-1). One such pointer is afforded by the United Kingdom argument (only referred to in the Judgment (paragraph 32) in a manner that fails to bring out its relevance - indeed seems wholly to misunderstand it[31]) concerning the implications of the requirement in the Article (art. 6-1) that trial shall take place within a reasonable time. "Within a reasonable time" of what? The Article does not say. In the case of criminal proceedings there can be no room for doubt that the starting point must be the time of arrest or of formal charge. It is only common sense to suppose that it could not lie in an indeterminate preceding period when the authorities were perhaps considering whether they would make a charge, and were taking legal advice about that - or were trying to find the accused in order to arrest him. In my view exactly the same principle must apply mutatis mutandis to civil proceedings, not only because otherwise a serious degree of incommensurate treatment would be introduced between the two types of proceedings, but for practical reasons also. In civil proceedings, the period of reasonable time must begin to run from the moment the complaint is formalized by the issue of a writ, summons or other official instrument under, or in accordance with, which the defendant is notified of the action. This again is only common sense. Any period previous to that, while the plaintiff is considering whether to act, is taking legal advice, or is gathering evidence, is irrelevant or too indeterminate to serve, since no fixed moment could be found within it to act as a starting point for the lapse of a

[31] It is of course the trial that has to take place within a reasonable time after access has been had, not the access that has to be afforded within a reasonable time.

"reasonable time". If this were not so, the starting point could be "related back" for months or even, in some cases, years, thus making nonsense of the whole requirement of trial "within a reasonable time", the sole real object of which is to prevent undue delay in bringing causes to trial. But the effect of the Court's view is that since Article 6.1 (art. 6-1) itself does not specify any starting point; the Court would have to determine this ad hoc for, and in, each particular case. In consequence, governments could never know in advance within what precise period causes must be brought to trial in order to satisfy the requirements of the Article (art. 6-1), - a wholly unacceptable situation.

(v) The significance of all this is of course that anything relating to a right of access must concern the period prior to the formal initiation of proceedings, for once these have been started, access to the courts has been had, and therefore cadit quaestio. In consequence, any occurences relating to the right of access as such - in particular any alleged interference with or denial of it - must relate exclusively to the period before access is actually had by the initiation of proceedings, - i.e. before the period of a fair and public hearing within a reasonable time to which alone Article 6.1 (art. 6-1) refers; - and this again points directly to the conclusion that the Article does not purport to deal with access at all, since that matter relates to an antecedent period or stage.

(vi) The term "public hearing" also gives rise to difficulties if Article 6.1 (art. 6-1) is to be understood as providing for a right of access. Confining myself here to the case of civil proceedings, the term "public" suggests a hearing on the merits in open court such as will ordinarily occur if the proceedings run their normal course. But as has been seen (supra, paragraph 15), they may not do so, they may be stopped on various grounds at an earlier stage. The point is that if they are, this will very often not be at any public hearing, but before a minor judicial officer or a judge sitting in private (anglice "in chambers"), at which, usually, only the parties and their legal advisers will be present. If therefore a right of access were held to be implied by Article 6.1 (art. 6-1), this might, on the language of the Article have to be held to involve a sort of indefeasible right to a public hearing in all circumstances, anything less not being "access". This view is strongly confirmed by the tenour of the second sentence of Article 6.1 (art. 6-1) – see sub-paragraph (d) above. Here therefore is one of the connexions in which the correct meaning and scope of a right of access has not been thought out (see paragraphs 28 and 29 supra), - failing which the concept lacks both clarity and certainty. It is also the connexion in which Article 17 (art. 17) of the Convention is relevant – see footnote 17 supra, and sub-paragraph (b) of the present paragraph (47).

48. Conclusion on the question of right of access - I omit other points in order not further to overload this Opinion. But I have to conclude that - like it or not, so to speak - a right of access is not to be implied as being

comprehended by Article 6.1 (art. 6-1) of the Convention, except by a process of interpretation that I do not regard as sound or as being in the best interests of international treaty law. If the right does not find a place in Article 6.1 (art. 6-1), it clearly does not find a place anywhere in the Convention. This is no doubt a serious deficiency that ought to be put right. But it is a task for the contracting States to accomplish, and for the Court to refer to them, not seek to carry out itself.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF GORZELIK & OTHERS v. POLAND

(Application no. 44158/98)

JUDGMENT

STRASBOURG

20 December 2001

THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
17/02/2004

In the case of Gorzelik and Others v. Poland,

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

Mr G. RESS, *President*,
Mr A. PASTOR RIDRUEJO,
Mr L. CAFLISCH,
Mr J. MAKARCZYK,
Mr V. BUTKEVYCH,
Mr J. HEDIGAN,
Mrs S. BOTOUCHAROVA, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 17 May and 5 December 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 44158/98) against the Republic of Poland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Polish nationals, Jerzy Gorzelik, Rudolf Kołodziejczyk and Erwin Sowa ("the applicants"), on 18 June 1998.

2. The applicants, who had been granted legal aid, were represented before the Court by Mr S. Waliduda, a lawyer practising in Wrocław, Poland. The Polish Government ("the Government") were represented by their Agent, Mr K. Drzewicki, of the Ministry of Foreign Affairs, assisted by Ms R. Kowalska, Mr K.W. Czaplicki and Mr D. Rzemieniewski.

3. The applicants complained that the Polish authorities had arbitrarily refused to register their association under the name of "Union of People of Silesian Nationality". They alleged a violation of Article 11 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 17 May 2001, following a hearing on the admissibility and merits (Rule 54 § 4), the Chamber declared the application admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within former Section IV.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. On an unknown date the applicants (who all describe themselves as "Silesians"), together with one hundred and ninety other persons, decided to form an association (*stowarzyszenie*) entitled "Union of People of Silesian Nationality" (*Związek Ludności Narodowości Śląskiej*). The founders subsequently adopted a memorandum of association. The applicants were elected to the provisional management committee (*Komitet Założycielski*) and were authorised to proceed with the registration of the association.

9. On 11 December 1996 the applicants, acting on behalf of the provisional management committee of the "Union of People of Silesian Nationality", lodged an application for the registration of their association with the Katowice Regional Court (*Sąd Wojewódzki*). They relied on, *inter alia*, section 8(2) of the Law of 7 April 1989 on Associations (hereinafter referred to as the "Law on Associations"). They submitted the memorandum of association along with the other documents required by the Law on Associations. The relevant parts of the memorandum of association read:

> "1. The present association shall be called the "Union of People of Silesian Nationality" (hereinafter referred to as the "Union").
>
> 2. The Union shall conduct its activity within the territory of the Republic of Poland; it may establish local branches.
>
> ...
>
> 6 (1). The Union may join other domestic or international organisations if the aims pursued by [the latter] correspond to the aims pursued by the Union.
>
> ...
>
> 7. The aims of the Union are:
>
> (1) to awaken and strengthen the national consciousness of Silesians;
>
> (2) to restore Silesian culture;
>
> (3) to promote knowledge of Silesia;

(4) to protect the ethnic rights of persons of Silesian nationality; [and]

(5) to provide social care for members of the Union.

8. The Union shall accomplish its aims by the following means:

(1) organising lectures, seminars, training courses and meetings, establishing libraries and clubs, and carrying out scientific research;

(2) organising cultural and educational activities for members of the Union and other persons;

(3) carrying out promotional and publishing activities;

(4) promoting the emblems and colours of Silesia and Upper Silesia;

(5) organising demonstrations or [other] protest actions;

(6) organising sporting events ... and other forms of leisure activities;

(7) setting up schools and other educational establishments;

(8) cooperating with other organisations;

(9) conducting business activities for the purpose of financing the aims of the Union – this may include establishing commercial entities and co-operating with other [commercial] entities;

(10) establishing other entities or [legal] persons with a view to achieving the aims of the Union; and

(11) any other activities.

9. There shall be two categories of members of the Union, namely ordinary members and supporting members.

10. Any person of Silesian nationality may become an ordinary member of the Union.

...”

Paragraph 15 read, in so far as relevant:

“A person shall cease to be a member of the Union if:

…

2. (a) on a reasoned motion by the board of auditors, the management board decides to deprive him of his membership;

(b) the relevant motion of the board of auditors may be based on such reasons as the fact that the member in question has not fulfilled the requirements set out in the

memorandum of association for becoming a member or has failed to perform the duties of members as specified in paragraph 14.

... "

Paragraph 30 provided:

"The Union is an organisation of the Silesian national minority."

10. On an unknown later date the Katowice Regional Court, pursuant to section 13 (2) of the Law on Associations, served a copy of the applicants' application, together with copies of the relevant enclosures, on the Katowice Governor (*Wojewoda*).

11. On 27 January 1997 the Katowice Governor, acting through the Department of Civic Affairs (*Wydział Obywatelski*), submitted his comments on the application to the court. These comments contain lengthy arguments against allowing the association to be registered, the main thrust of which is as follows:

"(i) It cannot be said that there is a 'Silesian' (*Ślązak*), in the sense of a representative of a distinct 'Silesian nationality'. 'Silesian' is a word denoting a representative of a local ethnic group, not a nation. This is confirmed by paragraph 7 (1) of the memorandum of association, which aims merely to 'awake and strengthen the national consciousness of Silesians'. …

(ii) Social research relied on by the applicants to demonstrate the existence of a 'Silesian nationality' does not accord with numerous other scientific publications. Polish sociology distinguishes between two concepts of 'homeland', i.e. a 'local homeland' and a 'ideological homeland'. In German, this distinction is expressed by the terms Heimat (local homeland) and Vaterland (ideological homeland). The research relied on by the applicants merely refers to the self-identification of the inhabitants of Silesia, indicating that their local self-identification takes precedence over their national self-identification. …

(iii) Paragraph 10 of the memorandum of association states that any person of Silesian nationality may become an ordinary member of the association, but does not clearly specify the criteria for establishing whether or not a given person fulfils this requirement. This absence of unambiguous criteria is contrary to section 10 (1) and (4) of the Law on Associations. Moreover, it renders paragraph 15 (2) (b) of the memorandum unlawful, for that provision allows the board of management to deprive a person of his membership in the event of failure to satisfy the conditions set out in the memorandum of association. …

(iv) Paragraph 30 of the memorandum of association, which calls the Union an "organisation of the Silesian national minority", is misleading and does not correspond to the facts. There is no basis for regarding the Silesians as a national minority. Recognising them as such would have been in breach of Articles 67 § 2 and 81 § 1 of the [old] Constitution, which guarantee Polish citizens equal rights. In particular, under the relevant provisions of the Law of 28 May 1993 on Parliamentary Elections (hereinafter referred to as the "Law on Parliamentary Elections") (*Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej*), registration of the Union would give it a privileged position in respect of the distribution of seats in Parliament. The Union would obtain privileges and rights guaranteed to national minorities in respect of

education in their native language and access to the media. Registration of the association would have been to the detriment of other ethnic groups in Poland, such as Cracovians (*Krakowiacy*), Highlanders (*Górale*) and Mazurians (*Mazurzy*); this would have amounted to a return to the tribalism (*podziały plemienne*) which had existed prior to the formation of the Polish State. …

(v) We therefore propose that the memorandum of association should be amended so as to reflect the above observations. In particular, the misleading name of the association should be changed, the criteria for membership should be set out in an unambiguous manner and paragraph 30 should be deleted. In our opinion, these are the conditions for registration of the association."

12. On 13 March 1997 the applicants filed a pleading in reply to those arguments. They asserted that the fact that the majority of Poles failed to recognise the existence of a Silesian nation did not mean that there was no such nation. They cited various scientific publications and went on to explain that the fact that the Silesians formed a distinct group had already been acknowledged at the end of the First World War; moreover, the Silesians had always sought to preserve their identity and had always formed a distinct group, regardless of whether Upper Silesia had belonged to Germany or to Poland. Consequently, any comparison between them and the Cracovians or Highlanders was totally unjustified because the latter groups neither regarded themselves as a national minority, nor had they ever been perceived as such in the past. Finally, the applicants cited certain letters of the Ministry of the Interior, which had been published by the press and which explained that the National and Ethnic Minorities Bill had explicitly stated that a "declaration that a person belongs to a minority shall not be questioned or verified by the public authorities".

13. On 9 April 1997 the Katowice Governor filed a pleading with the court. He maintained his previous position. On 14 April 1997 he produced two letters from the Ministry of the Interior (dated 4 February and 10 April 1997 respectively, and addressed to the Department of Civic Affairs of the Office of the Katowice Governor). The relevant parts of the letter of 4 February 1997 read:

"We share your doubts as to whether certain inhabitants of Silesia should be deemed to be a national minority. We therefore propose that you submit your observations to the court, indicating those doubts, and that you ask the court to grant you leave to join the proceedings as a party.

We propose that you rely on the fact that the Framework Convention for the Protection of National Minorities has not been ratified by Poland, so that its provisions [do not apply in the domestic legal system]. ...

In our view, neither historical nor ethnographical circumstances justify the opinion that the inhabitants of Silesia can be recognised as a national minority."

The relevant parts of the letter of 10 April 1997 read as follows:

> "... The arguments advanced by the provisional management committee of the association [in their pleading of 13 March 1997] do not contain any new elements; [in particular] ... the Framework Convention does not constitute the law applicable in Poland.
>
> Likewise, the letters of the Ministry of the Interior [on the interpretation of the National and Ethnic Minorities Bill] do not change the situation.
>
> The sense of belonging to a nation falls within the realm of personal liberties; it does not in itself entail any legal consequences. [By contrast,] the formation of an organisation of a national minority is a legal fact which entails legal consequences such as, for instance, those referred to in the Law on Parliamentary Elections.
>
> In the circumstances, the registration of the association called the "Union of People of Silesian Nationality" could be allowed provided that the existence of such a nation had been established."

14. On 28 April 1997 the applicants submitted a further pleading to the court. They criticised the arguments of the Ministry of the Interior, pointing out that the latter had failed to indicate any legal basis for rejecting their application. In particular, the authorities had not shown that any provision of the memorandum of association was contrary to the law whereas, under section 1 (2) of the Law on Associations, "the exercise of the right to association may be subject only to such limitations as are prescribed by statute and are necessary for ensuring the interests of national security or public order and for the protection of health or morals, or for the protection of the rights and freedoms of others". Lastly, the applicants stated that they would not to amend the memorandum of association in the manner proposed by the authorities, in particular in respect of the name of the association and the content of paragraph 30. They agreed, however, to amend paragraph 10 of the memorandum and phrased it as follows:

> "Everyone who is a Polish citizen and who has submitted a written declaration stating that he is of Silesian nationality may become an ordinary member [of the Union]."

15. On 23 May 1997 the Katowice Regional Court held an "explanatory session" (*posiedzenie wyjaśniające*) aimed at obtaining comments and clarifications from the parties and settling the matters in dispute.

16. On 27 May 1997 the applicants lodged a pleading with the court, maintaining that in the course of the above-mentioned session the authorities had "*de facto* acknowledged that a Silesian nation exists", in particular by accepting the name of the association and certain provisions of the memorandum (i.e. paragraph 7 (1) and (4) and paragraph 10)". They stressed however that the authorities' insistence on deleting paragraph 30 was "unjustified and illogical" and, consequently, refused to alter or delete that provision.

Later, on 16 June 1997, the Katowice Governor submitted his final pleading to the court, opposing the registration of the association.

17. On 24 June 1997 a single judge, sitting *in camera* as the Katowice Regional Court, granted the applicants' application and registered their association under the name of the "Union of People of Silesian Nationality". The reasons for that decision read, in so far as relevant:

> "... There was a dispute between [the parties] over the concepts 'nation' and 'national minority'. Finally [the authorities concerned] pleaded that the application for registration of the association should be dismissed.
>
> This court has found that the application is well-founded [and as such should be granted].
>
> In the Preamble to the Law on Associations, the legislature guarantees [everyone] a cardinal right, the right to freedom of association, which enables citizens, regardless of their convictions, to participate actively in public life and to express different opinions, and to achieve individual interests.
>
> Freedom of association is one of the natural rights of a human being. [For this reason,] section 1(1) of the Law on Associations does not establish the right to freedom of association but merely sets out the manner and limits of its exercise, thus reflecting Poland's international obligations.
>
> Under section 1(2) of the Law on Associations, the right to form an association may be subject only to such limitations as are prescribed by statute either in the interests of national security or public safety, or in the interests of public order, or for the protection of health and morals, or for the protection of the rights and freedoms of others. No other restrictions may be placed on the exercise of the right to associate with others.
>
> As recently as 16 June 1997, in their pleading, the authorities advanced the argument that the registration of the present association would infringe the rights and freedoms of others because it would result in an unequal treatment of other local communities and would diminish their rights.
>
> This argument is unconvincing since it does not emerge from the content of the memorandum of association that the future activities of the association are aimed at [diminishing] the rights and freedoms of others.
>
> Pursuant to paragraph 7 of the memorandum of association, the aims of the association are [, for example,] to awaken and strengthen the national consciousness of Silesians, to restore Silesian culture, to promote knowledge of Silesia and to provide social care for members of the association. None whatsoever of these aims is directed against the rights and freedoms of others. The means to be used for accomplishing these aims are not directed against the rights and freedoms of others either. Those means include organising lectures and seminars, carrying out scientific research, establishing libraries, organising cultural and educational activities for members and other persons, carrying out promotional and publishing activities, promoting the emblems and colours of Silesia and Upper Silesia, organising demonstrations and protest actions, organising sporting events, setting up schools and other educational establishments, conducting business activities and co-operating with other organisations.

In sum, the argument that the association would infringe the rights and freedoms of others must definitely be rejected. Moreover, it should be noted that this argument refers to [a mere possibility] because only practical action taken by the association could possibly demonstrate whether, and if so to what extent, the [future] activities of the association would necessitate the use of measures aimed at protecting the rights of others.

As regards the terms 'Silesian nationality' or 'Silesian national minority', the problems involved in the determination of their proper meaning cannot be examined by this court in detail.

This court must, pursuant section 13(1) of the Law on Associations, rule on the present application within a period not exceeding three months from the date on which it was lodged. It is therefore not possible [in the course of the present proceedings] to determine such complicated issues (which involve problems falling within the sphere of international relations).

It is, however, possible to assume, for the purposes of making a ruling in these proceedings, that the nationality of an individual is a matter of choice for him; moreover, it is a matter of common knowledge that the original inhabitants of Silesia constitute a minority in Upper Silesia – at least for anyone who has ever spent some time in this region and has been willing to perceive this fact. After all, the authorities, although they rend their garments [sic], complaining that the applicants dared to establish an association, do not contest the fact that [the Silesians] are an ethnic minority.

In view of the foregoing this court, finding that the provisional management committee complied with the requirements laid down in sections 8(4), 12 and 16, read in conjunction with section 13 (2) of the Law on Associations and Article 516 of the Code of Civil Procedure, holds as in the operative part of the decision".

18. On 2 July 1997 the Katowice Governor lodged an appeal with the Katowice Court of Appeal (*Sąd Apelacyjny*), asking that the first-instance decision be quashed, that the case be remitted to the court of first instance, and that expert evidence be obtained in order to determine the meaning of the terms "nation" and "national minority". In his appeal, he alleged that the court of first instance had violated sections 1(1) and 2 of the Law on Associations and unspecified provisions of the Code of Civil Procedure. The reasons for the appeal read, in so far as relevant:

"[The court of first instance] formally recognised and legally sanctioned the existence of a distinct Silesian nation constituting a 'Silesian national minority'.

In our opinion, such an important and unprecedented ruling, which is of international significance, could not and should not be given without defining the concepts of 'nation' and 'national minority'. The Regional Court, leaving this issue aside – merely because of certain statutory time-limits –simplified the proceedings in an unacceptable manner. This led, in itself, to a failure on the part of the court to establish all the circumstances relevant to the outcome of the case and, furthermore, provided a sufficient basis for this appeal.

The appellant admits that Polish law does not define the terms 'nation' and 'national minority'. This, however, does not justify the conclusion of the Regional Court that 'the nationality of an individual is a matter of choice for him'.

The appellant does not contest the right of a person to decide freely to belong to a national minority; however, a precondition for making such a choice is the existence of a 'nation' with which that person identifies himself.

The decision appealed against proclaims the opinion that the subjective feelings of the person concerned suffice for the purposes of creating a 'nation' or a 'nationality. Having regard to the potential social repercussions of such an approach, it is not possible to agree with it.

In these circumstances, prior to making any decision on the registration of the 'Union of People of Silesian Nationality', it is necessary to determine whether a 'Silesian nation' exists – a distinct, non-Polish nation – and whether it is admissible in law to create a 'Silesian national minority'.

In the appellant's opinion, there are no objective arguments in favour of the finding that a distinct Silesian nation exists. In case of doubt, ... this question should be resolved by obtaining evidence from experts.

In the contested decision, the lower court in principle focused on determining whether the aims of the association and the means of accomplishing those aims were lawful. … The appellant does not contest the majority of these aims; it must be said that such activities as restoring Silesian culture, promoting knowledge of Silesia or providing social care for members of the association are worthy of respect and support. However, these aims can fully be accomplished without the contested provision of the memorandum of association, i.e. paragraph 30 ... . In addition, the applicants were not prevented from incorporating the above-mentioned aims into the memorandum of an existing association called the 'Movement for the Autonomy of Silesia' (*Ruch Autonomii Śląska*), the more so as the applicants belong to influential circles of the latter organisation.

The fact that the applicants have failed to do so but [instead] are creating a new association, and are describing themselves as a 'Silesian national minority', clearly demonstrates what their real objective is. In fact, their objective is to circumvent the provisions of the Law of 28 May 1993 on Parliamentary Elections, under which parties or other organisations standing in elections must reach a threshold of 5% or 7% of the vote in order to obtain seats in the Parliament. ...

Legal acts – including the act of adopting a memorandum of association – are null and void under Article 58 § 1 of the Civil Code if they aim at evading or circumventing the law. Legal theory formulates the opinion that defects in legal acts, as defined in Article 58 of the Civil Code, may constitute a basis for refusing to register an association.

Sanctioning the rights of the 'Silesian national minority' amounts to discrimination against other regional and ethnic groups or societies. This will be the case at least as regards electoral law and will be contrary to Article 67 § 2 of the Constitution. …"

19. The Katowice Court of Appeal heard the appeal on 24 September 1997. The Katowice Prosecutor of Appeal (*Prokurator Apelacyjny*)

appeared at the hearing and asked the court to grant him leave to join the proceedings as a party intervening on behalf of the Katowice Governor. The leave was granted. The court next heard addresses by the appellant, the prosecutor (who requested the court to set aside the first-instance decision and dismiss the applicants' application) and the representative of the applicants. On the same day the court set aside the first-instance decision and dismissed the applicants' application for their association to be registered. The reasons for that decision read, in so far as relevant:

> "... The lower court, by registering the association entitled 'Union of People of Silesian Nationality', approved paragraph 30 of the memorandum of association, which states that the Union is an organisation of the Silesian national minority. We therefore agree with the appellant that the Union, on the basis of the above-mentioned paragraph, would have the right to benefit from the statutory privileges laid down in section 5 of the Law on Parliamentary Elections. ...
>
> Furthermore, recognising the Silesians as a national minority may also result in further claims on their part [for privileges] granted to national minorities by other statutes. ...
>
> Contrary to the opinion expressed by the lower court, it is possible to determine whether or not the Silesians constitute a national minority in Poland; it is not necessary to obtain expert evidence in that connection.
>
> Under Article 228 § 1 of the Code of Civil Procedure, facts that are a matter of common knowledge, i.e. those which every sensible and experienced citizen should know, do not need to be proved. Common knowledge includes historical, economical, political and social phenomena and events.
>
> It is therefore clear that at present no legal definition of 'nation' and 'national minority' is commonly accepted in international relations,. ...
>
> On the other hand, an 'ethnic group' is understood as a group which has a distinct language, a specific culture and a sense of social ties, is aware of the fact that it differs from other groups, and has its own name.
>
> Polish ethnographic science of the 19th and 20th centuries describes 'Silesians' as an autochthonous population of Polish origin residing in Silesia – a geographical and historical region. At present, as a result of political and social changes, the term 'Silesians' refers equally to immigrant inhabitants who have been residing in this territory for several generations and who have been identifying themselves with their new region of residence. It also refers to the German-speaking population, linked with Silesia by [such factors as] birth, residence and tradition (see the Encyclopaedia published by the Polish Scientific Publishers in 1996). ...
>
> The applicants derive the rights they claim from the principles set out in the [Framework Convention for the Protection of National Minorities], stating that every person belonging to a national minority has the right freely to choose to belong or not to belong to such a minority. ... In invoking European standards, they fail, however, to remember that a national minority with which a given person identifies himself must exist. There must be a society, established on the basis of objective criteria, with

which this person wishes to identify. No one can determine his national identity in isolation from a fundamental element, which is the existence of a specific nation.

It emerges from the above-mentioned definition of a 'nation' that a nation is formed in a historical process which may last for centuries and that the crucial element which forms a nation is its self-identification, that is to say its national awareness established on the basis of the existing culture by a society residing on a specific territory.

Certainly, the Silesians belong to a regional group with a very deep sense of identity, including their cultural identity; no one can deny that they are distinct. This does not, however, suffice for them to be considered as a distinct nation. They have never commonly been perceived as a distinct nation and they have never tried to determine their identity in terms of [the criteria for a 'nation']. On the contrary, the history of Silesia unequivocally demonstrates that autochthonous inhabitants [of this region] have preserved their distinct culture and language (the latter having Polish roots from an ethnic point of view,), even though their territories were not within the borders of the Polish State and even though they were under strong German influence. They are therefore Silesians – in the sense of [inhabitants of the] region, not in the sense of [their] nationality. Thus, Upper Silesia, in its ethnic roots [sic], remained Polish; that was, without a doubt, demonstrated by three uprisings. The role played by the Silesians in building and preserving the Polish character of Silesia, even though they remained isolated from their homeland, is unquestionable.

However, a given nation exists where a group of individuals, considering themselves a 'nation', is in addition accepted and perceived as such by others. In the common opinion of Polish citizens, both the Silesians and other regional groups or communities [e.g. Highlanders or Mazurians] are perceived merely in terms of local communities. In the international sphere Poland and, similarly, France and Germany, are perceived as single-nation States, regardless of the fact that there exist distinct ethnic groups (e.g. the inhabitants of Alsace or Lorraine in France, or the inhabitants of Bavaria in Germany).

On the whole, sociologists agree that the Silesians constitute an ethnic group and that the autochthonous inhabitants [of Silesia] do have some features of a nation but that those features are not fully developed. That ... means that the awakening of their national identity is still at a very early stage. A nation exists only when there are no doubts as to its right to exist. ... In Poland national minorities do constitute only a small part of the society, that is to say about 3-4%. They comprise – and this has never been denied – Germans, Ukrainians, Belarusians, Lithuanians, Slovaks, Czechs, Jews, Roma, Armenians and Tatars.

In the Polish tradition, national minorities are perceived as groups linked to a majority outside Poland; in other words, a minority is an ethnic group which has support amongst a majority [residing] abroad. Moreover, traditionally, our society has not considered that groups which preserve a distinct culture but which do not belong to any State can be deemed to be national minorities. Accordingly, for a long time the Roma people were regarded as an ethnic, not a national group. ...

The applicants' opinion that the mere choice of the individual concerned is decisive for his nationality is reflected in paragraph 10 of the memorandum of association. Acceptance of this opinion would consequently lead to a situation in which the aims pursued by the association could be accomplished by groups of members who did not have any connection or links with Silesia and who had become members of the Union

solely to gain an advantage for themselves. Undoubtedly, such groups of members cannot [be allowed] to accomplish the aims of an association of a national minority. ...

The applicants have relied on the results of sociological research carried out in 1994 in Katowice Province. Indeed, the research demonstrates that 25% of persons requested to declare their ethnic and regional identity replied that they were Silesians. However, it transpires from [the material collected in the course of another piece of sociological research of 1996 which was submitted by the applicants during the appellate hearing] that two years later the number of persons considering themselves to be Silesians had decreased to 12.4% and that, moreover, the majority of inhabitants of Katowice Province considered themselves to be Poles (i.e. 81.9%, including 18.1% who stated that they were 'Polish Silesians'; only 3.5% of inhabitants considered themselves to be Germans, including 2.4 % who stated that they were 'German Silesians').

In the light of the above research it cannot be said that such a poorly established self-identity of a small (and decreasing) group of Silesians, as demonstrated by their refusal to declare that they belong to the [Polish] nation, provides a basis for recognising that all Silesians (who have lived in Silesia for generations and state that they belong to the Polish nation) constitute a separate nation. This would be contrary to the will of the majority, a will well known to the applicants.

We therefore find that the appellant is right in submitting that granting the applicants' application for their association to be registered is unjustified because the memorandum of association is contrary to the law, i.e. Article 5 of the Civil Code. Thus, the application is aimed at registering an organisation of a minority which cannot be regarded as a national minority and at circumventing the provisions of the Law on Parliamentary Elections and other statutes conferring particular privileges on national minorities. Granting such a request could lead to granting unwarranted rights to the association in question. This would, moreover, place their organisation at an advantage in relation to other regional or ethnic organisations.

In these circumstances, under section 14 of the Law on Associations and Article 58 of the Civil Code, read in conjunction with Articles 386 § 1 and 13 of the Code of Civil Procedure and section 8 of the Law on Associations, the appeal must be allowed ... ."

20. On 3 November 1997 the applicants lodged a cassation appeal (*kasacja*) with the Supreme Court (*Sąd Najwyższy*). They alleged that the Katowice Court of Appeal had wrongly interpreted the relevant provisions of the Law on Associations and that the impugned decision had contravened Article 84 of the Constitution, Article 22 of the International Covenant on Civil and Political Rights and Article 11 of the Convention. Their arguments may be summarised as follows:

"The principal issue to be determined by the Court of Appeal was whether the memorandum of the applicants' association complied with the statutory requirements. since a refusal to register an association could be justified only if an activity specified in the memorandum of association was banned by the law. That was clearly not the case and the court's fear that the registration of the applicants' association would in future lead to discrimination against other national or ethnic minorities was based on mere speculation. In any event, the Law on Associations [in sections 8(2), 25 et seq.]

provided for various means whereby the activity of an association could be supervised by the competent State authorities or, in the event that its activity was unlawful, the association could be dissolved.

However, the Court of Appeal, instead of assessing formal requirements of the registration, firstly decided that the core issue in the proceedings was to establish whether a Silesian nation existed. It consequently went on to lay down its own arbitrary and controversial definition of 'nation' and 'national minority' and finally concluded that there was no 'Silesian nation'. It did so without any effort to obtain expert evidence in respect of such an important matter."

21. On 27 November 1997 the Katowice Governor filed a pleading in reply to the applicants' cassation appeal. The relevant arguments may be summarised as follows:

"The refusal to register the applicants' association was fully justified. In the course of the proceedings at first instance, the Governor eventually proposed that the applicants amend paragraph 30 of the memorandum of association and alter the name of their association by deleting the word 'nationality'. Those arguments were based on section 10(1)(1) of the Law of Associations, which provides that a memorandum of association should enable the association in question to be differentiated from other associations. This means that the name of an association should not be misleading. Since the requirement set out in the above-mentioned section was not complied with, the refusal to register the applicants' association was justified under section 14(1).

It must be stressed that even in the explanatory report to the Framework Convention for the Protection of National Minorities it is clearly stated that the individual's subjective choice to belong to a national minority is inseparably linked to objective criteria relevant to the person's identity. That means that a given nation must exist prior to the individual making a decision to belong to this nation. That being so, the applicants' application for their association to be registered must be seen as a thoughtless and incomprehensible attempt to exploit the distinct characteristics [of the Silesians] with a view to achieving political aims."

22. On 28 November 1997 the Katowice Prosecutor of Appeal filed a pleading in reply to the applicants' cassation appeal. He submitted, *inter alia*, that it was clear that the content of the memorandum of association was contrary to the law since it explicitly stated that the Union was an association of a national minority, and thus ignored the fact that the Silesians could not be regarded as a minority of that kind. The Silesians, being merely an ethnic group, could not exercise the rights conferred on national minorities, in particular those referred to in the Law on Parliamentary Elections.

23. On 18 March 1998 a panel of three judges, sitting as the Administrative, Labour and Social Security Chamber of the Supreme Court, dismissed the applicants' cassation appeal. The relevant parts of the reasons for this decision read as follows:

"… [A] necessary prerequisite for the registration of an association is the conformity of its memorandum of association with the entire domestic legal order, including conformity with [the provisions of] international treaties ratified by Poland.

In the present case the Court of Appeal had no doubts as to the lawfulness of the aims pursued by [the applicants'] association but refused to register the association for the sole reason that [the applicants], in the memorandum of association, used such terms as 'Silesian nation' and 'Silesian national minority'.

We agree with the opinion [of the Court of Appeal]. 'National minority' is a legal term (Article 35 of the Constitution of 2 February 1997) although it is not defined either in Polish law, or in the conventions relied on in the cassation appeal. However, the explanatory report to the Framework Convention for the Protection of National Minorities states plainly that the individual's subjective choice of a nation is inseparably linked to objective criteria relevant to his national identity. That means that a subjective declaration of belonging to a specific national group implies prior social acceptance of the existence of the national group in question. …

An individual has the right to choose his nation but this, as the Court of Appeal rightly pointed out, does not in itself lead to the establishment of a new, distinct nation or national minority.

There was, and still is, a common perception that an ethnic group of Silesians does exist; however, this group has never been regarded as a national group and it has not claimed to be regarded as such. …

Registration of the association, which in paragraph 30 of its memorandum of association states that it is an organisation of a [specific] national minority, would be in breach of the law because it would result in a non-existent 'national minority' taking advantage of privileges conferred on [genuine] national minorities. This concerns, in particular, the privileges granted by the Law on Parliamentary Elections ... such as an exemption from the requirement that a party or other organisation standing in elections should receive at least 5% of the vote, which is a prerequisite for obtaining seats in Parliament ... [or] ... privileges in respect of the registration of electoral lists; thus, it suffices for an organisation of a national minority to have registered its electoral lists in at least five electoral constituencies [whereas the general requirement is to register an electoral list in at least a half of the electoral constituencies in the whole of Poland].

Pursuant to the relevant ruling of the Constitutional Court (*Trybunał Konstytucyjny*) on the interpretation of the Law on Parliamentary Elections, ... the privileges [referred to above] are conferred on electoral committees of registered national minorities and, in the event of any doubt [as to whether or not an electoral committee represents a national minority], the State Electoral College may request evidence.

The simplest means of proving the existence of a specific national minority is to present a memorandum of association confirming that fact. It is true that under the new Constitution resolutions of the Constitutional Court on the interpretation of statutes no longer have universally binding force; however, in view of the persuasiveness of the reasons given by the Constitutional Court and the requirements of practice, [we consider that] a memorandum of association still remains basic evidence demonstrating the existence of a national minority.

[Furthermore,] conferring on the Silesians, an ethnic group, the rights of a national minority would be contrary to Article 32 of the Constitution, stating that all persons are equal before the law, [because] other ethnic minorities would not enjoy the same rights.

The memorandum of association is contrary to section 10(1)(4) of the Law on Associations, which stipulates that a memorandum of association must set out rules concerning acquisition and loss of membership, and the rights and duties of members. Paragraph 10 of the memorandum provides that everyone who is a Polish citizen and has submitted a written declaration stating that he is of Silesian nationality, may become a member of the Union, whereas paragraph 15 states that a person ceases to be a member of the Union if, *inter alia*, he has not fulfilled the membership requirements set out in the memorandum of association. Since no Silesian nation exists, no one would, lawfully, be able to become a member of the Union because his declaration of Silesian nationality would be untrue. …

Furthermore, it must be pointed out that the refusal to register the association does not contravene Poland's international obligations. Both the International Covenant on Civil and Political Rights ... and the Convention for the Protection of Human Rights and Fundamental Freedoms allow [the State] to place restrictions on the freedom of association, [in particular such as] are prescribed by law and are necessary in a democratic society in the interests of national security or public safety or for the protection of health and morals or for the protection of the rights of others.

It is contrary to the public order to create a non-existent nation that would be able to benefit from the privileges conferred solely on national minorities. Such a situation would also lead to the infringement of the rights of others, not only national minorities but also all other citizens of Poland. Granting privileges to a [specific] group of citizens means that the situation of the other members of society becomes correspondingly less favourable.

This is particularly so in the sphere of election law: if certain persons may become members of Parliament [because of their privileged position], it means that other candidates must obtain a higher number of votes than what would be required in the absence of privileges [in that respect].

It also has to be noted that the essential aims of the association can be accomplished without the contested provisions of the memorandum and without the [specific] name of the association. Under the provisions of the Constitution of the Republic of Poland national and ethnic minorities have equal rights as regards their freedom to preserve and develop their own language, to maintain their customs and traditions, to develop their culture, to establish educational institutions or institutions designed to protect their religious identity and to participate in the resolution of matters relating to their cultural identity (Article 35). …"

II. RELEVANT DOMESTIC LAW

1. Constitutional provisions

24. Article 12 of the Constitution (which was adopted by the National Assembly on 2 April 1997 and entered into force on 17 October 1997) states:

"The Republic of Poland shall ensure freedom for the creation and functioning of trade unions, socio-occupational farmers' organisations, societies, citizens' movements, other voluntary associations and foundations."

Article 13 of the Constitution reads:

> "Political parties and other organisations whose programmes are based upon totalitarian methods or the models of nazism, fascism or communism, or whose programmes or activities foster racial or national hatred, recourse to violence for the purposes of obtaining power or to influence State policy, or which provide for their structure or membership to be secret, shall be forbidden."

Article 32 of the Constitution provides:

> "1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
>
> 2. No one shall be discriminated against in political, social or economic life for any reason whatsoever."

Article 35 of the Constitution provides:

> "1. The Republic of Poland shall ensure that Polish citizens belonging to national or ethnic minorities have the freedom to preserve and develop their own language, to maintain customs and traditions, and to develop their own culture.
>
> 2. National or ethnic minorities shall have the right to establish educational and cultural institutions and institutions designed to protect religious identity, as well as to participate in the resolution of matters relating to their cultural identity."

Article 58 of the Constitution, proclaiming the right to freedom of association, reads:

> "1. The freedom of association shall be guaranteed to everyone.
>
> 2. Associations whose purposes or activities are contrary to the Constitution or statute shall be prohibited. The courts shall decide whether to register an association and/or whether to prohibit an [activity of] an association.
>
> 3. Categories of associations requiring court registration, the procedure for such registration and the manner in which activities of associations may be monitored shall be specified by statute."

25. Chapter III of the Constitution, entitled "Sources of Law", refers to the relationship between domestic law and international treaties.

Article 87 § 1 provides:

> "The sources of universally binding law of the Republic of Poland shall be the Constitution, statutes, ratified international treaties and ordinances."

Article 91 states:

> "1. As soon as a ratified international treaty has been promulgated in the Journal of Laws of the Republic of Poland, it shall constitute a part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.
>
> 2. An international treaty ratified after prior consent has been given in the form of a statute shall have precedence over statutes where the provisions of such a treaty cannot be reconciled with their provisions.

3. Where a treaty ratified by the Republic of Poland establishing an international organisation so provides, the rules established by it shall be applied directly and have precedence in the event of a conflict of laws."

2. Law of 7 April 1989 on Associations (as amended)

26. Section 1 of the Law, in the version applicable at the material time, prescribed:

"1. Polish citizens shall exercise the right of association in accordance with the Constitution ... and the legal order as specified by statute.

2. The [exercise of the] right of association may be subject only to such limitations as are prescribed by law and are necessary for ensuring the interests of national security or public order and for the protection of health and morals or for the protection of the rights and freedoms of others.

3. Associations shall have the right to express their opinion on public matters."

Section 2 provides, in so far as relevant:

"1. An association is a voluntary, self-governing, stable union pursuing non-profit-making aims.

2. An association shall freely determine its objectives, its programmes of activity and organisational structures, and shall adopt internal resolutions concerning its activity.

... ".

Section 8, in the version applicable at the material time, stated, in so far as relevant:

"1. An association shall register itself in the National Court Register …, unless statute provides otherwise.

[Subsections 2-4 were repealed on 20 August 1997]

5. The activities of associations shall be supervised by [the Governor of the relevant Province], who shall be referred to hereinafter as 'supervisory organ'.

The relevant part of section 10 provides:

"1. An association's memorandum shall in particular specify:

(1) the name of the association which shall differentiate it from other associations, organisations or institutions;

...

(4) the conditions for the admission of members, the procedure and grounds for the loss of membership, and the rights and obligations of members."

Section 12 reads as follows:

"The management committee of an association shall lodge with the competent court an application for the registration of their association together with a memorandum of association, a list of the founders containing their first names, surnames, dates and places of birth, their places of residence and signatures, a record of the election of the management committee and the address of their provisional headquarters."

Section 13 stipulates:

"1. A court dealing with an application for the registration of an association shall rule on such an application promptly; a ruling should be given within three months from the date on which the application was lodged with the court.

2. The court shall serve a copy of the application for the registration, together with the accompanying documents specified in section 12 on [the relevant] supervisory organ. The supervisory organ shall have the right to comment on the application within fourteen days from the date of service and, with the court's leave, to join the proceedings as a party."

Section 14 reads:

"The court shall refuse to register an association if it has not fulfilled the conditions laid down in [this] Law."

Section 16 provides:

"The court shall allow an application for registration of an association if it is satisfied that the latter's memorandum of association is in conformity with the law and its members comply with the requirements laid down in [this] Law."

27. Chapter 3 of the Law, entitled "Supervision of associations", provides, in sections 25 et seq., for various means of monitoring the activities of associations and lays down the conditions for the dissolution of an association.

Under section 25 the relevant supervisory organ is entitled to request the management committee of an association to submit, within a specified time-limit, copies of resolutions passed by the general meeting of the association or to ask the officers of an association to provide it with "necessary explanations".

In the event that such requests are not complied with, the court, under section 26 and a motion from the supervisory organ, may impose a fine on the association concerned.

Under section 28, a supervisory organ, if it finds that activities of an association are contrary to the law or infringe the provisions of the memorandum of association in respect of matters referred to in section 10(1) and (2), may request that such breaches cease, or issue a reprimand, or request the competent court to take measures under section 29.

Section 29 provides, in so far as relevant:

"1. The court, at the request of a supervisory organ or a prosecutor, may:

(1) reprimand the authorities of the association concerned;

(2) annul [any] resolution passed by the association if such a resolution is contrary to the law or the provisions of the memorandum of association;

(3) dissolve the association if its activities have demonstrated a flagrant or repeated failure to comply with the law or with the provisions of the memorandum of association and if there is no prospect of the association reforming its activities so as to comply with the law and the provisions of the memorandum of association."

3. Law of 28 May 1993 on Parliamentary Elections (repealed after the entry into force of the Law of 12 April 2001 on Elections to the Sejm and Senate of the Republic of Poland)

28. Section 3 of the Law (hereafter referred to as the "1993 Law on Parliamentary Elections") provided:

"1. In the distribution of seats [in the Parliament] account shall be taken only of those regional electoral lists of electoral committees which have received at least 5% of the valid votes cast in the whole [of Poland].

2. The regional electoral lists of electoral committees referred to in section 77(2) (electoral coalitions) shall be taken into account in the distribution of seats [in Parliament], provided that they have received at least 8% of the valid votes cast in the whole [of Poland]."

Section 4 prescribed:

"In the distribution of seats among national electoral lists account shall be taken only of those lists of electoral committees which have received at least 7% of the valid votes cast in the whole [of Poland].

Section 5 stipulated:

"1. Electoral committees of registered organisations of national minorities may be exempted from one of the conditions referred to in section 3(1) or in section 4, provided that, not later than the fifth day before the date of the election, they submit to the State Electoral College a declaration to that effect.

2. The State Electoral College shall promptly acknowledge receipt of the declaration referred to in subsection 1. This declaration shall be binding on electoral colleges."

Section 91 provided, in so far as relevant:

"…

2. An electoral committee which has registered its regional electoral lists in at least half of the constituencies [in the whole of Poland] … shall be entitled to register a national electoral list.

3. Electoral committee[s] of organisations of national minorities shall be entitled to register a national electoral list, provided that [they] ha[ve] registered their regional electoral lists in at least five constituencies."

4. Civil Code

29. Article 5 of the Civil Code states:

> "No one shall exercise any right of his in a manner contrary to its socio-economic purpose or to the principles of co-existence with others (*zasady współżycia społecznego*). No act or omission [fulfilling this description] on the part of the holder of the right shall be deemed to be the exercise of the right and shall be protected [by law]."

Article 58 provides, in so far as relevant:

> "1. A[ny] act which is contrary to the law or aimed at evading the law shall be null and void, unless a statutory provision provides for other legal effects, such as the replacement of the void elements of such an act by elements provided for by statute.
>
> 2. Any act which is contrary to the principles of co-existence with others, shall be null and void."

5. Framework Convention for the Protection of National Minorities

30. At the material time Poland was a signatory to the Framework Convention for the Protection of National Minorities (ETS No. 157); the date of signature was 1 February 1995. Poland ratified that Convention on 20 December 2000. It has been in force since 1 April 2001.

31. The Framework Convention contains no definition of the notion of "national minority". Its explanatory report mentions that it was decided to adopt a pragmatic approach, based on the recognition that at that stage it was impossible to arrive at a definition capable of mustering the general support of all Council of Europe member States.

32. A number of the member States made declarations setting out definitions of "national minority" for the purposes of the Framework Convention. Poland, at the time of the deposit of the instrument of ratification, made the following declaration:

> "Taking into consideration the fact that the Framework Convention for the Protection of National Minorities contains no definition of the national minorities notion, the Republic of Poland declares that it understands this term as national minorities residing within the territory of the Republic of Poland at the same time whose members are Polish citizens."

THE LAW

ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

33. The applicants complained that the Polish authorities had arbitrarily refused to register their association under the name "Union of People of Silesian Nationality". They alleged a breach of Article 11 of the Convention, which provides:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

A. Whether there has been an interference

34. All those appearing before the Court accepted that the refusal to register the applicants' association amounted to an interference with their freedom of association. The Court takes the same view.

B. Whether the interference was justified

35. Such an interference will contravene Article 11 unless it was "prescribed by law", pursued one or more legitimate aims under paragraph 2 of that Article and was "necessary in a democratic society" for achieving them.

1. "Prescribed by law"

(a) The parties' submissions

i. The applicants

36. The applicants argued that the interference with their right to associate with others had not been "prescribed by law".

It was true, they maintained, that under the Law on Associations and the constitutional provisions courts might refuse to register an association. That

was only the case, however, if they found that a memorandum of association was not in conformity with the law.

That finding could not be of a general character. The courts were obliged to rely on specific legal provisions, which were, or would have been, infringed by the content of the memorandum of association before them. In the applicants' submission, neither the courts dealing with their case nor the Government had relied on any such provisions.

ii. The Government

37. In the Government's submission, there could be no doubt as to the fact that the interference in question was "prescribed by law". The courts had based their decisions on a number of domestic legal provisions, in particular on sections 14 and 16 of the Law on Associations. The former section provided that a court should refuse to register an association if it did not satisfy the conditions laid down in that Law. Moreover, constitutional provisions forbade the registration of associations whose purposes or activities were contrary to the Constitution or to statutes.

Lastly, the Government pointed out that the provisions setting out the conditions for the registration of associations were sufficiently clear and precise to allow a person to determine his or her conduct and, consequently, met the criterion of the "foreseeability" of the law" for the purposes of the Convention.

(b) The Court's assessment

38. The Court notes that the Supreme Court and the Katowice Court of Appeal, in refusing to register the applicants' association, relied on a number of domestic legal provisions, in particular on Article 32 of the Constitution, Articles 5 and 58 of the Civil Code and sections 8, 10(1)(4) and 14 of the Law on Associations (see paragraphs 19 and 23 above). It accordingly holds that the interference was "prescribed by law".

2. "Legitimate aim"

(a) The parties' submissions

i. The Government

39. The Government pointed out that the interference in question had pursued the legitimate aims of the prevention of disorder and the protection of the rights and freedoms of others.

As to the first limb of their contention, they argued that the applicants – in order to circumvent the provisions of the electoral law – had used the legal procedure designed for the registration of associations to obtain "national minority" status. That should not, in the Government's view, be

an avenue through which persons could seek to have themselves recognised as a "national minority".

40. The Government further stressed that – as the competent courts had correctly held in their decisions – the registration of the applicants' association as an organisation of a national minority would have entailed serious consequences for the legal order of the State. It would have enabled the Silesians – who were not a "nation" but only one of several ethnically distinct groups of Poles – to claim several privileges granted by Polish law to genuine national minorities. Most notably, the applicants' association would inevitably have acquired the special rights provided for by the 1993 Law on Parliamentary Elections. Under that Law, electoral committees of registered organisations of national minorities had had a right to be exempted from the 5 per cent threshold of votes required to participate in the distribution of seats in Parliament.

41. The Government went on to argue that the authorities had also had to pay due regard to the adverse consequences that the registration of the applicants' association would have entailed for the rights of other ethnic groups in Poland. Had the Silesian ethnic group acquired the status of a national minority through the procedure for the registration of their association, the principle of equality before the law would have been infringed. Other ethnic groups of Polish citizens, for instance Highlanders, Kashubians or Mazurians, would evidently have been discriminated against.

ii. The applicants

42. The applicants considered that the Government's submissions were based on several far-fetched presumptions and hypotheses, but not on documentary evidence produced by the founders of the Union of People of Silesian Nationality before the Polish courts.

They maintained that there had been nothing in their memorandum of association to suggest that the members of the Union had in reality sought to obtain judicial recognition of a national minority with the aim of benefiting from privileges granted by Polish law to such minorities.

Moreover, in the applicants' opinion, anticipating a situation where members of other ethnic minority groups would be discriminated against depended on additional prerequisites. First, those minorities would have had to declare aspirations similar to those of the Union of People of Silesian Nationality. Second, their aspirations would have had to be denied. Only in such circumstances could one speak of an infringement of the principle of equality before the law.

43. In conclusion, the applicants asked the Court to reject the Government's argument that the interference in question had pursued the aims of upholding the principle of equality before the law and of preventing discrimination against other ethnic or regional groups.

(b) The Court's assessment

44. The Court observes that both the Supreme Court and the Court of Appeal held that allowing to register the applicants' association would be contrary to the law, especially as the name of the association, which in their view was linked to a non-existent nation, would mislead the public. The courts also considered that registering the Union as an organisation of a national minority would entail serious consequences for other ethnic groups in Poland (see paragraphs 19 and 23 above).

The impugned measure was, accordingly, taken in furtherance of "the prevention of disorder" and "the protection of the rights of others", which are legitimate aims for the purposes of Article 11 of the Convention.

3. "Necessary in a democratic society"

(a) The parties' submissions

i. The applicants

45. The applicants maintained that the refusal to register their association had not been necessary to achieve the aims allegedly pursued by the authorities. In their submission, the arguments advanced by the Government and, earlier, by other domestic authorities did not correspond to the concept of a "pressing social need" as interpreted by the Court.

Nor had there been a reasonable balance of proportionality between the measure applied and the objectives pursued. In that context, the applicants stressed that the refusal to register their association had been based on the single fact that its proposed name had contained the expression "nationality". That term, in the authorities' view, could not apply to the Silesians as they allegedly were only an ethnic minority. However, their opinion was arbitrary because Polish legislation did not define the terms "ethnic" or "national" minority and did not provide for any procedure whereby minorities could seek legal recognition.

46. In that connection, the applicants strongly criticised the authorities for having used the procedure established for the registration of associations to prejudge the question of whether the Silesians were a "minority", instead of settling the issue before them, namely, whether the association had satisfied the conditions laid down in the Law on Associations and whether its memorandum of association had been in conformity with the law, as required by sections 14 and 16 of that Law.

47. Relying on the Court's case-law on the subject, the applicants further argued that what should have been relevant for a decision on whether or not to register their association was the content of its programme, setting out the intentions of its founders. There had been nothing in the memorandum of association to suggest that they were going to stand for parliamentary

elections. There had been no evidence to demonstrate that their true intentions had been different from those declared, or incompatible with the principles of the democratic State and the rule of law.

48. In any event, the applicants added, had their association been registered and had its subsequent activities been found incompatible with the legal order, or with the provisions of its memorandum of association, the authorities had powerful means at their disposal to ensure compliance with the law. They could, for instance, have had recourse to measures such as the annulment of unlawful resolutions passed by the association or the dissolution of the latter, pursuant to section 29 of the Law on Associations.

49. In the light of the foregoing, the applicants considered that the impugned interference with their right to associate with others had not been necessary in a democratic society for the prevention of disorder or for the protection of the rights of others.

ii. The Government

50. The Government accepted that the exceptions set out in Article 11 of the Convention should be interpreted strictly and that only compelling reasons justified restrictions on the freedom of association. They stressed, however, that States had a certain margin of appreciation in that sphere and that they had to be satisfied that the aims and activities of an association were in conformity with national law.

51. Consequently, the Government continued, the authorities had had to take steps in order to ensure that the name of the applicants' association would not be misleading for the public and would not arouse unnecessary controversy among the other members of society.

52. The Government acknowledged that an individual had a right to choose whether or not he or she wished to belong to a minority group. Yet that could not endow the group in question with the status of a national minority and, as the Supreme Court and the Court of Appeal had rightly held, the choice in question had to relate to an existing nation or nationality. That was not the case of the Silesians, who were merely an ethnic group.

53. Admittedly, the Government added, neither the Polish Constitution nor any other statute provided for any specific procedure whereby a minority could seek legal recognition. It was, however, possible for a group of persons to obtain such recognition through the procedure for the registration of associations. In the course of those proceedings the courts examined, as they had done in the present case, whether a given group fulfilled the requirements for recognition as a minority.

Apart from that, some national minorities – such as Germans, Belarusians, Ukrainians, Lithuanians, Slovaks and Czechs – had formally been recognised in bilateral treaties on good neighbourliness and friendly co-operation which Poland had concluded in recent years.

54. In conclusion, turning to the circumstances surrounding the refusal to register the applicants' association, the Government attached considerable importance to the fact that the applicants had refused to amend – even slightly – the most controversial provision of their memorandum of association and the name of their organisation. Had the applicants deleted or altered the disputed paragraph 30 of the memorandum, their association would have been registered without any difficulty.

In the Government's opinion it had not been disproportionate to require the applicants to delete that single provision, especially as the averred objectives of their association could have been achieved without it.

Against that background, the Government concluded that the interference with the applicants' right to associate with others could not be deemed to be so severe as to constitute a breach of Article 11.

(b) The Court's assessment

i. General principles deriving from the Court's case-law

55. The Court recalls at the outset that the right to form an association is inherent in the right laid down in Article 11, even if that provision only makes express reference to the right to form trade unions.

The most important aspect of the right to freedom of association is that citizens should be able to create a legal entity in order to act collectively in a field of mutual interest. Without this, that right would have no practical meaning.

The way in which national legislation protects the freedom of association and the manner in which the State authorities apply the relevant provisions in practice give an indication of the development of democracy in the country concerned.

While it is true that States are entitled to satisfy themselves that an association's objectives and activities are in conformity with the domestic legal order, they must do so in a manner compatible with their obligations under the Convention and subject to the Court's review (see the Sidiropoulos and Others v. Greece judgment of 10 July 1998, *Reports of Judgments and Decisions* 1998-IV, pp. 1614-15, § 40).

56. The Convention requires that any interference with the exercise of the right to freedom of association must be assessed by the yardstick of what is "necessary in a democratic society". The only type of necessity capable of justifying such interference is, therefore, one which may claim to spring from democratic society (see the United Communist Party of Turkey and Others v. Turkey judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, p. 21, § 45).

57. The term "necessary" in Article 11 does not have the flexibility of expressions such as "useful" or "desirable". In addition, pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although

individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see the Young, James and Webster v. the United Kingdom judgment of 13 August 1981, Series A no. 44, p. 25, § 63; and *Chassagnou and Others v. France* [GC], nos. 25088/95, 28331/95 and 28443/95, ECHR 1999-III, p. 65, § 112).

58. Consequently, the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on the freedom of association.

Thus, in determining whether a necessity within the meaning of Article 11 § 2 exists, States have only a limited margin of appreciation, which goes hand in hand with rigorous supervision by the Court. That supervision embraces both the law and the decisions applying it, including those given by independent courts (see the Socialist Party and Others v. Turkey judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, p 1258, § 50).

When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities, but rather to review under Article 11 the decisions they delivered in the exercise of their discretion. That does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith. It must also look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient".

In so doing, the Court also has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see the United Communist Party of Turkey and Others v. Turkey judgment cited above, in § 47).

59. In that connection, the Court further recalls that the freedom of association is not absolute and that in certain cases it has accepted that the need to protect Convention rights may lead States to restrict other rights or freedoms likewise set forth in the Convention (see, *mutatis mutandis*, the Otto-Preminger-Institut v. Austria judgment of 20 September 1994, Series A no. 295-A, pp. 18 and 19, §§ 47 and 50). The balancing of conflicting individual interests and rights is a difficult exercise. It may involve consideration of political and social issues on which opinions within a democratic society differ significantly.

In that sphere the Contracting States must have a broad margin of appreciation because, given their knowledge of the country, their authorities are in principle better placed than the European Court to assess whether or

not there is a "pressing social need" capable of justifying interference with one of the rights guaranteed by the Convention (see, *mutatis mutandis*, the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 22, § 48).

60. Still in that context, the Court has also held that the nature and severity of the impugned measure are factors to be taken into account when assessing the proportionality of the interference (see, *mutatis mutandis*, *Okçuoğlu v. Turkey* [GC], no. 24246/94, ECHR 1999-IV, § 49 *in fine*).

It has, moreover, accepted that in some cases the application of radical or even drastic measures, including the immediate and permanent dissolution of an organisation and confiscation of its assets, may be justified under Article 11 (see the Socialist Party and Others v. Turkey judgment cited above, § 51; and *Refah Partisi and Others v. Turkey*, nos. 41340/98, 41342/98, 41343/98, 41344/98, §§ 81 et seq., ECHR 2001-...).

ii. Application of the above principles to the instant case

61. The Court notes at the outset that the Polish authorities, in justifying their refusal to register the applicants' association under the name "Union of People of Silesian Nationality", relied on the ground that both the intended name and certain provisions of the Union's memorandum of association, which characterised Silesians as a "national minority", implied that their real intention was to circumvent the provisions of the electoral law (see paragraphs 19 and 23 above).

They also attached considerable importance to the fact that, had the members of the Union been recognised as a "national minority" in the process of the registration of their association, they would automatically have been afforded an unqualified and legally enforceable claim to special privileges granted to national minorities by the relevant legislation (see paragraphs 19, 23 and 40 above).

In that regard, the authorities relied heavily on a further argument - which was rejected by the applicants – that the Silesians were neither a "nation" nor a "national minority", but simply one of several ethnic groups of Polish citizens. They accordingly considered that the name chosen by the applicants for their association would be deceptive for the public and contrary to the law. In particular, they invoked the principle of equality before the law, holding that the registration of the applicants' association in the manner suggested by them would amount to discrimination against other ethnic groups (see paragraphs 19, 23 and 41 above).

62. The Court observes that it is not its task to express an opinion on whether or not the Silesians are a "national minority", let alone to formulate a definition of that concept. Indeed, the formulation of such a definition would have presented a most difficult task, given that no international treaty – not even the Council of Europe's Framework Convention for the

Protection of National Minorities – defines the notion of "national minority".

Nor did Polish law define that term at the material time. In the context of parliamentary elections it did, however, make a reference to "registered associations of national minorities" and provide for a number of privileges for such associations under the electoral law (see paragraph 28 above). But there was no legal procedure at the domestic level whereby a national or other minority could seek recognition (see paragraphs 45 *in fine* and 53).

Consequently, groups which were not recognised as national minorities by the bilateral treaties on good neighbourliness referred to in paragraph 53, could only obtain "indirect" recognition through the procedure for the registration of associations.

63. While the Court considers that that lacuna in the law left a degree of legal uncertainty for individuals and a degree of latitude for the authorities, especially since persons claiming to belong to a minority, in order to be recognised as such, had to make use of a procedure which was not designed for that purpose, it does not find that that fact in itself had consequences for the applicants' rights under Article 11. The Court considers that the central issue lies in a different aspect of the case.

64. That aspect consist in assessing whether the applicants would have been denied the opportunity of forming an association for the purposes listed in paragraph 7 of their memorandum of association – which included, for instance, the awakening and strengthening of the "national consciousness of Silesians" (see paragraph 9 above) – had they been prepared to compromise on points that were particularly sensitive for the State.

Those points concerned, as has already been mentioned, the name of the association and the content of paragraph 30 of its memorandum of association (see paragraphs 11, 13, 16 and 18 above).

It is further noted that the authorities' concern in that regard would not seem to have lacked a reasonable basis. Paragraph 30 of the memorandum of association stated that "The Union is an organisation of the Silesian national minority". The three crucial words in that phrase, namely "organisation", "national" and "minority", are precisely those also found in section 5(1) of the Law on Parliamentary Elections, laying down conditions for exemption from the threshold of votes required to participate in the distribution of seats in Parliament (see paragraph 28 above).

This coincidence, together with the name proposed for the applicants' association, gives the impression that in future the members of the association might, in addition to the pursuit of the objectives expressly set out in their programme, aspire to stand in elections.

65. In that connection, the Court cannot but note that the applicants could easily have dispelled the doubts voiced by the authorities, in particular by slightly changing the name of their association and by sacrificing, or

amending, a single provision of the memorandum of association (see paragraph 16 above). Those alterations would not, in the Court's view, have had harmful consequences for the Union's existence as an association and would not have prevented its members from achieving the objectives they set for themselves.

66. The Court would also point out that pluralism and democracy are, by the nature of things, based on a compromise that requires various concessions by individuals and groups of individuals. The latter must sometimes be prepared to limit some of their freedoms so as to ensure the greater stability of the country as a whole. This is particularly true as regards the electoral system, which is of paramount importance for any democratic State.

The Court accordingly considers that, in the particular circumstances of the present case, it was reasonable on the part of the authorities to act as they did in order to protect the electoral system of the State, a system which is an indispensable element of the proper functioning of a "democratic society" within the meaning of Article 11.

There has therefore been no breach of that provision.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 11 of the Convention.

Done in English, and notified in writing on 20 December 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President

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

CASE OF GORZELIK AND OTHERS v. POLAND

(Application no. 44158/98)

JUDGMENT

STRASBOURG

17 February 2004

In the case of Gorzelik and Others v. Poland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Mr G. BONELLO,
Mr P. KŪRIS,
Mrs V. STRÁŽNICKÁ,
Mr C. BÎRSAN,
Mr J. CASADEVALL,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE,
Mr E. LEVITS,
Mr A. KOVLER,
Mrs A. MULARONI,
Mrs E. STEINER,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI, *judges*,

and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 2 July 2003 and 28 January 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 44158/98) against the Republic of Poland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Polish nationals, Mr Jerzy Gorzelik, Mr Rudolf Kołodziejczyk and Mr Erwin Sowa ("the applicants"), on 18 June 1998.

2. The applicants, who had been granted legal aid, were represented by Mr S. Waliduda, a lawyer practising in Wrocław, Poland. The Polish Government ("the Government") were represented by their Agent, Mr K. Drzewicki, of the Ministry of Foreign Affairs.

3. The applicants alleged a breach of Article 11 of the Convention in that they had been refused permission to register an association called "Union of People of Silesian Nationality".

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. It was allocated to the Fourth Section of the Court. By a decision of 17 May 2001, following a hearing on admissibility and the merits (Rule 54 § 3 of the Rules of Court), the application was declared admissible by a Chamber of that Section, composed of Mr G. Ress, President, Mr A. Pastor Ridruejo, Mr L. Caflisch, Mr J. Makarczyk, Mr V. Butkevych, Mr J. Hedigan and Mrs S. Botoucharova, judges, and Mr V. Berger, Section Registrar.

6. On 20 December 2001 the Chamber gave judgment, holding unanimously that there had been no violation of Article 11 of the Convention.

7. On 20 March 2002 the applicants requested, under Article 43 of the Convention and Rule 73, that the case be referred to the Grand Chamber.

8. On 10 July 2002 a panel of the Grand Chamber decided to accept the request.

9. The composition of the Grand Chamber was determined in accordance with the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. On 1 July 2002 Mr Makarczyk, the judge who had sat in respect of Poland in the original Chamber (Article 27 § 3 of the Convention and Rule 24 § 2 (d)), resigned from the Court. Subsequently, on 16 June 2003, he withdrew from the case (Article 23 § 7 of the Convention and Rules 26 § 3 and 28). He was replaced by Mr L. Garlicki, his successor as the judge elected in respect of Poland.

10. The applicants and the Government each filed a memorial.

11. A hearing took place in public in the Human Rights Building, Strasbourg, on 2 July 2003 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr K. DRZEWICKI, *Agent*,
Ms R. KOWALSKA, *Counsel*,
Mr K.W. CZAPLICKI,
Ms M. KOSICKA,
Ms D. GŁOWACKA-MAZUR,
Mr D. RZEMIENIEWSKI,
Ms R. HLIWA, *Advisers*;

(b) *for the applicants*
Mr S. WALIDUDA, *Counsel*,
Mrs M. KRYGIEL-BARTOSZEWICZ,

Mr D. TYCHOWSKI, *Advisers.*

One of the applicants, Mr Gorzelik, was also present.

The Court heard addresses by Mr Waliduda, Mr Drzewicki and Ms Kowalska. Mr Gorzelik also made a short statement in reply to a question put by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicants were born in 1971, 1940 and 1944 respectively. All three live in Poland; Mr Gorzelik and Mr Sowa in Katowice, and Mr Kołodziejczyk in Rybnik.

A. General background

13. Silesia (*Śląsk*) is a historic region that is now in south-western Poland. It was originally a Polish province that became a possession of the Bohemian Crown in 1335. It passed with that Crown to the House of Habsburg in 1526, and was taken over by Prussia in 1742 under the Treaty of Berlin.

After the First World War, the 1919 Treaty of Versailles provided for a plebiscite to be held to determine if Upper Silesia should remain German or pass over to Poland. The results of the plebiscite in 1921 were favourable to Germany except in the easternmost part of Upper Silesia. After an armed uprising of the Poles in 1922, the League of Nations agreed to a partition of the territory; the larger part of the industrial area, including Katowice, passed over to Poland.

In the aftermath of the Munich Pact of 1938, most of Czech Silesia was divided between Germany and Poland. After the German conquest of Poland in 1939, the whole of Polish Silesia was annexed by Germany.

After the Second World War, the pre-1938 boundary between Poland and Czechoslovakia was restored. The western boundary of Poland was moved to the Oder and Lusatian Neisse rivers. In effect, all of former German Silesia east of the Lusatian Neisse was incorporated into Poland, while only a small sector of Lower Silesia west of the Neisse remained within the former East German *Land* of Saxony.

14. According to some linguists, although the Polish language is relatively unaffected by regional variations, it is possible to identify at least

two regional varieties: Kashubian and Silesian[1]. At the hearing, one of the applicants, Mr Gorzelik, described Silesian as a still uncodified language that was a mixture of Czech, German and Polish.

15. From 2 May to 8 June 2002 a census – the National Population and Housing Census – was carried out in Poland. Its purpose was to gather data relating to the distribution of the population, demographic and social factors, employment, standards of living and housing. It also addressed issues relating to citizenship and nationality. One of the questions relating to nationality gave the following definition:

> "Nationality is a declared (based on a subjective feeling) individual feature of every human being, expressing his or her emotional, cultural or genealogical (relating to parents' origin) link with a specific nation."

According to the census report prepared by the Central Statistical Office (*Główny Urząd Statystyczny*), 36,983,700 people (96.74% of the population) declared themselves Polish nationals. 471,500 persons (1.23% of the population) declared a non-Polish nationality, including 173,200 persons who declared that they were "Silesians".

B. Proceedings for the registration of the applicants' association

1. The first-instance proceedings

16. On an unspecified date the applicants, who describe themselves as "Silesians", decided together with 190 other persons to form an association (*stowarzyszenie*) called "Union of People of Silesian Nationality" (*Związek Ludności Narodowości Śląskiej*). The founders subsequently adopted a memorandum of association. The applicants were elected to the provisional management committee (*Komitet Założycielski*) and were authorised to proceed with the registration of the association.

17. On 11 December 1996 the applicants, acting on behalf of the provisional management committee of the "Union of People of Silesian Nationality", applied to the Katowice Regional Court (*Sąd Wojewódzki*) for their association to be registered. They relied on, *inter alia*, section 8(2) of the Law on associations (*Prawo o stowarzyszeniach*) of 7 April 1989. They produced the memorandum of association along with the other documents required by that Law.

18. The relevant general provisions of the memorandum of association read as follows:

> "1. The present association shall be called the "Union of People of Silesian Nationality" (hereafter referred to as "the Union").

1. Source: John A. Dunn, "The Slavonic Languages in the Post-Modern Era" (www.arts.gla.ac.uk).

2. The Union shall conduct its activity within the territory of the Republic of Poland; it may establish local branches.

...

6. (1) The Union may join other domestic or international organisations if the aims pursued by [the latter] correspond to the aims pursued by the Union."

19. The aims of the association and the means of achieving them were described as follows:

"7. The aims of the Union are:

(1) to awaken and strengthen the national consciousness of Silesians;

(2) to restore Silesian culture;

(3) to promote knowledge of Silesia;

(4) to protect the ethnic rights of persons of Silesian nationality; [and]

(5) to provide social care for members of the Union.

8. The Union shall accomplish its aims by the following means:

(1) organising lectures, seminars, training courses and meetings, establishing libraries and clubs, and carrying out scientific research;

(2) organising cultural and educational activities for members of the Union and other persons;

(3) carrying out promotional and publishing activities;

(4) promoting the emblems and colours of Silesia and Upper Silesia;

(5) organising demonstrations or [other] protest actions;

(6) organising sporting events ... and other forms of leisure activities;

(7) setting up schools and other educational establishments;

(8) cooperating with other organisations;

(9) conducting business activities for the purpose of financing the aims of the Union – this may include establishing commercial entities and cooperating with other [commercial] entities;

(10) establishing other entities or [legal] persons with a view to achieving the aims of the Union; and

(11) conducting any other activities."

20. Paragraphs 9 and 10 dealt with membership. They read as follows:

> 9. There shall be two categories of members of the Union, namely ordinary members and supporting members.
>
> 10. Any person of Silesian nationality may become an ordinary member of the Union."

21. The relevant part of paragraph 15 of the memorandum of association read as follows:

> "A person shall cease to be a member of the Union if:
>
> ...
>
> (2) (a) on a reasoned motion by the Board, the Management Committee decides to deprive him of his membership;
>
> (b) the relevant motion of the Board may be based on such reasons as the fact that the member in question has not fulfilled the requirements set out in the memorandum of association for becoming a member or has failed to perform the duties of members as specified in paragraph 14."

22. Paragraph 30 provided:

> "The Union is an organisation of the Silesian national minority."

23. Subsequently the Katowice Regional Court, pursuant to section 13(2) of the Law on associations (see paragraph 39 below), served a copy of the applicants' application, together with copies of the relevant enclosures, on the Governor (*Wojewoda*) of Katowice.

24. On 27 January 1997 the Governor of Katowice, acting through the Department of Civic Affairs (*Wydział Obywatelski*), submitted his comments on the application to the court. Those comments contained lengthy arguments against allowing the association to be registered, the main thrust of which was as follows:

> "(i) It cannot be said that there are 'Silesians' [*Ślązak*], in the sense of representatives of a distinct 'Silesian nationality'. 'Silesian' is a word denoting a representative of a local ethnic group, not a nation. This is confirmed by paragraph 7 (1) of the memorandum of association, which aims merely to 'awaken and strengthen the national consciousness of Silesians'. ...
>
> (ii) The social research relied on by the applicants to demonstrate the existence of a 'Silesian nationality' does not accord with numerous other scientific publications. Polish sociology distinguishes between two concepts of 'homeland', namely a 'local homeland' and an 'ideological homeland'. In German, this distinction is expressed by the terms *Heimat* (local homeland) and *Vaterland* (ideological homeland). The research relied on by the applicants merely refers to the self-identification of the inhabitants of Silesia, indicating that their local self-identification takes precedence over their national self-identification. ...

(iii) Paragraph 10 of the memorandum of association states that any person of Silesian nationality may become an ordinary member of the association, but does not clearly specify the criteria for establishing whether or not a given person fulfils this requirement. This absence of unambiguous criteria is contrary to section 10(1) (i) and (iv) of the Law on associations. Moreover, it renders paragraph 15 (2) (b) of the memorandum unlawful, for that provision allows the Management Committee to deprive a person of his membership in the event of failure to satisfy the conditions set out in the memorandum of association. ...

(iv) Paragraph 30 of the memorandum of association, which calls the Union an 'organisation of the Silesian national minority', is misleading and does not correspond to the facts. There is no basis for regarding the Silesians as a national minority. Recognising them as such would be in breach of Articles 67 § 2 and 81 § 1 of the [former] Constitution, which guarantee Polish citizens equal rights. In particular, under the relevant provisions of the Law on elections to the Sejm[1] of 28 May 1993 [*Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej* – 'the 1993 Elections Act'], registration of the Union would give it a privileged position in terms of distribution of seats in Parliament. The Union would obtain rights and privileges guaranteed to national minorities in respect of education in their native language and access to the media. Registration of the association would be to the detriment of other ethnic groups in Poland, such as Cracovians [*Krakowiacy*], Highlanders [*Górale*] and Mazurians [*Mazurzy*]; this would amount to a return to the tribalism [*podziały plemienne*] which existed prior to the formation of the Polish State. ...

(v) We therefore propose that the memorandum of association should be amended so as to reflect the above observations. In particular, the misleading name of the association should be changed, the criteria for membership should be set out in an unambiguous manner and paragraph 30 should be deleted. In our opinion, these are the conditions for registration of the association."

25. On 13 March 1997 the applicants filed a pleading in reply to those arguments. They asserted that the fact that the majority of Poles failed to recognise the existence of a Silesian nation did not mean that there was no such nation. They cited various scientific publications and went on to explain that the fact that the Silesians formed a distinct group had already been acknowledged at the end of the First World War; moreover, the Silesians had always sought to preserve their identity and had always formed a distinct group, regardless of whether Upper Silesia had belonged to Germany or to Poland. Consequently, any comparison between them and the Cracovians or Highlanders was totally unjustified, because the latter groups neither regarded themselves as national minorities, nor had they ever been perceived as such in the past. Finally, the applicants cited certain letters of the Ministry of the Interior that had been published by the press and which explained that the National and Ethnic Minorities Bill[2] had

1. The Sejm is the lower house of the Polish parliament.
2. Ultimately, that bill was never adopted by Parliament. A new bill on national and ethnic minorities in the Republic of Poland ("the 2002 National and Ethnic Minorities Bill") was submitted to Parliament on 11 January 2002.

explicitly stated that a "declaration that a person belongs to a minority shall not be questioned or verified by the public authorities".

26. On 9 April 1997 the Governor of Katowice filed a pleading with the court. He maintained his previous position. On 14 April 1997 he produced two letters from the Ministry of the Interior (dated 4 February and 10 April 1997 respectively, and addressed to the Department of Civic Affairs of the Office of the Governor of Katowice). The relevant parts of the letter of 4 February 1997 read:

> "We share your doubts as to whether certain inhabitants of Silesia should be deemed to be a national minority. We therefore suggest that you submit your observations to the court, indicating those doubts, and that you ask the court to grant you leave to join the proceedings as a party.
>
> We suggest that you rely on the fact that the [Council of Europe] Framework Convention for the Protection of National Minorities [('the Framework Convention')] has not been ratified by Poland, so that its provisions [do not apply in the domestic legal system]. ...
>
> In our view, neither historical nor ethnographical circumstances justify the opinion that the inhabitants of Silesia can be recognised as a national minority."

The relevant parts of the letter of 10 April 1997 read as follows:

> "... The arguments advanced by the provisional management committee of the association [in their pleading of 13 March 1997] do not contain any new elements; [in particular] ... the [Framework Convention] does not constitute the law applicable in Poland.
>
> Likewise, the letters of the Ministry of the Interior [on the interpretation of the National and Ethnic Minorities Bill] do not change the situation.
>
> The sense of belonging to a nation falls within the realm of personal liberties; it does not in itself entail any legal consequences. [By contrast,] the formation of an organisation of a national minority is a legal fact which entails legal consequences such as, for instance, those referred to in the 1993 Elections Act.
>
> In the circumstances, the registration of the association called 'Union of People of Silesian Nationality' could be allowed provided that the existence of such a nation had been established."

27. On 28 April 1997 the applicants submitted a further pleading to the court. They criticised the arguments of the Ministry of the Interior, pointing out that the latter had failed to indicate any legal basis for rejecting their application. In particular, the authorities had not shown that any provision of the memorandum of association was contrary to the law, whereas, under section 1(2) of the Law on associations, "the [exercise of the] right of association may be subject only to such limitations as are prescribed by law and are necessary for ensuring the interests of national security or public order and for the protection of health and morals or for the protection of the rights and freedoms of others". Lastly, the applicants stated that they would

not amend the memorandum of association in the manner proposed by the authorities, in particular in respect of the name of the association and the content of paragraph 30. They agreed, however, to amend paragraph 10 of the memorandum and rephrased it as follows:

> "Everyone who is a Polish citizen and who has submitted a written declaration stating that he is of Silesian nationality may become an ordinary member [of the Union]."

28. On 23 May 1997 the Katowice Regional Court held an "explanatory hearing" (*posiedzenie wyjaśniające*) aimed at obtaining comments and clarifications from the parties and settling the matters in dispute. The relevant parts of the minutes of that hearing read as follows:

> "The representatives of the [Governor] declared that the deletion of paragraph 30 from the memorandum of association would not be sufficient, and that they also required a change in the name of the association.
>
> They referred to the arguments set out in the pleadings filed in the case.
>
> The representatives of the applicants declared that paragraph 30 was modelled on a similar provision to be found in the statutes of the Socio-Cultural Society of Germans of the province of Katowice. ...
>
> The President urged the representatives of the [parties] to make certain concessions in their positions.
>
> He proposed to the provisional management committee that, for example, they delete paragraph 30 of the memorandum. However, the representatives of the committee absolutely refused to do away with this provision.
>
> The representatives of the [Governor] also adopted a harder position, in that they demanded not only the deletion of paragraph 30, but also a change of the name of the association.
>
> The two sides engaged in a polemic as to whether or not Silesians should be recognised as a nation or nationality. ...
>
> The representatives of the [Governor] argued with the applicants, claiming there were no grounds for ascribing Silesian nationality to people.
>
> [The hearing was adjourned and subsequently resumed]
>
> At this point the representative of the [Governor] declared that, if the applicants were to delete paragraph 30 from the memorandum, the [Governor] would not object to registration of the association.
>
> J. Gorzelik reacted vehemently to this proposal, but the President told him to think it over.

> In connection with the above, the [applicants] asked to be given a time-limit within which they could react in writing to this suggestion and consider the [Governor's] proposal.
>
> The Court decided to allow [the applicants] ten days in which to react to the proposal of the [Governor] ..."

29. On 27 May 1997 the applicants lodged a pleading with the court, maintaining that in the course of the above-mentioned hearing the authorities had "*de facto* acknowledged that a Silesian nation exists", in particular by accepting the name of the association and certain provisions of the memorandum (namely paragraph 7 (1) and (4) and paragraph 10). They stressed, however, that the authorities' insistence on the removal of paragraph 30 was "unjustified and illogical" and, consequently, refused to alter or delete that provision.

Later, on 16 June 1997, the Governor of Katowice submitted his final pleading to the court, opposing the registration of the association.

30. On 24 June 1997 the Katowice Regional Court, sitting with a single judge and in camera, granted the applicants' application and registered their association under the name "Union of People of Silesian Nationality". The relevant reasons for that decision read as follows:

> "... There was a dispute between [the parties] over the concepts 'nation' and 'national minority'. Finally [the authorities concerned] pleaded that the application for registration of the association should be rejected.
>
> This Court has found that the application is well-founded [and as such should be granted].
>
> In the preamble to the Law on associations, the legislature guarantees [everyone] a cardinal right – the right to freedom of association – which enables citizens, regardless of their convictions, to participate actively in public life and express different opinions, and to pursue individual interests.
>
> Freedom of association is one of the natural rights of a human being. [For this reason,] section 1(1) of the Law on associations does not establish the right to freedom of association but merely sets out the manner and limits of its exercise, thus reflecting Poland's international obligations.
>
> Under section 1(2) of the Law on associations, the right to form an association may be subject only to such limitations as are prescribed by law either in the interests of national security or public safety, or in the interests of public order, or for the protection of health and morals, or for the protection of the rights and freedoms of others. No other restrictions may be placed on the exercise of the right to associate with others.
>
> As recently as 16 June 1997, in their pleading, the authorities advanced the argument that the registration of the present association would infringe the rights and freedoms of others because it would result in an unequal treatment of other local communities and would diminish their rights.

This argument is unconvincing, since it does not emerge from the content of the memorandum of association that the future activities of the association are aimed at [diminishing] the rights and freedoms of others.

Under paragraph 7 of the memorandum of association, the aims of the association are[, for example,] to awaken and strengthen the national consciousness of Silesians, to restore Silesian culture, to promote knowledge of Silesia and to provide social care for members of the association. None whatsoever of these aims is directed against the rights and freedoms of others. The means to be used for accomplishing these aims are not directed against the rights and freedoms of others either. Those means include organising lectures and seminars, carrying out scientific research, establishing libraries, organising cultural and educational activities for members and other persons, carrying out promotional and publishing activities, promoting the emblems and colours of Silesia and Upper Silesia, organising demonstrations and protest actions, organising sporting events, setting up schools and other educational establishments, conducting business activities and cooperating with other organisations.

In sum, the argument that the association would infringe the rights and freedoms of others must definitely be rejected. Moreover, it should be noted that this argument refers to [a mere possibility] because only practical action taken by the association could possibly demonstrate whether, and if so to what extent, the [future] activities of the association would require taking measures aimed at protecting the rights of others.

As regards the terms 'Silesian nationality' or 'Silesian national minority', the problems involved in the determination of their proper meaning cannot be examined by this Court in detail.

This Court must, pursuant to section 13(1) of the Law on associations, rule on the present application within a period not exceeding three months from the date on which it was lodged. It is therefore not possible [in the course of the present proceedings] to determine such complicated issues (which involve problems falling within the sphere of international relations).

It is, however, possible to assume, for the purposes of making a ruling in these proceedings, that the nationality of an individual is a matter of personal choice; moreover, it is a matter of common knowledge that the original inhabitants of Silesia constitute a minority in Upper Silesia – at least for anyone who has ever spent some time in this region and has been willing to perceive this fact. After all, the authorities, although they 'rend their garments' [sic] complaining that the applicants dare establish an association, do not contest the fact that [the Silesians] are an ethnic minority.

In view of the foregoing, this Court, finding that the provisional management committee has complied with the requirements of sections 8(4), 12 and 16 read in conjunction with section 13(2) of the Law on associations and Article 516 of the Code of Civil Procedure, holds as in the operative part of the decision."

2. The appeal proceedings

31. On 2 July 1997 the Governor of Katowice lodged an appeal with the Katowice Court of Appeal (*Sąd Apelacyjny*), asking that the first-instance decision be quashed, that the case be remitted to the court of first instance, and that expert evidence be obtained in order to determine the meaning of the terms “nation” and “national minority”. In his appeal, he alleged that the court of first instance had violated sections 1(1) and 2 of the Law on associations and unspecified provisions of the Code of Civil Procedure. The relevant grounds of the appeal read as follows:

> “[The court of first instance] formally recognised and legally sanctioned the existence of a distinct Silesian nation constituting a 'Silesian national minority'.
>
> In our opinion, such an important and unprecedented ruling, which is of international significance, could not and should not be given without defining the concepts of 'nation' and 'national minority'. The Regional Court, leaving this issue aside – merely because of certain statutory time-limits – simplified the proceedings in an unacceptable manner. This led, in itself, to a failure on the part of the court to establish all the circumstances relevant to the outcome of the case and, furthermore, provided a sufficient basis for this appeal.
>
> The appellant admits that Polish law does not define the terms 'nation' and 'national minority'. This, however, does not justify the conclusion of the Regional Court that 'the nationality of an individual is a matter of personal choice'.
>
> The appellant does not contest the right of a person to decide freely to belong to a national minority; however, a precondition for making such a choice is the existence of a 'nation' with which that person identifies himself.
>
> The decision appealed against proclaims the opinion that the subjective feelings of the person concerned suffice for the purposes of creating a 'nation' or a 'nationality'. Having regard to the potential social repercussions of such an approach, it is not possible to agree with it.
>
> In these circumstances, prior to making any decision on the registration of the 'Union of People of Silesian Nationality', it is necessary to determine whether a 'Silesian nation' exists – a distinct, non-Polish nation – and whether it is admissible in law to create a 'Silesian national minority'.
>
> In the appellant's opinion, there are no objective arguments in favour of the finding that a distinct Silesian nation exists. In case of doubt, ... this question should be resolved by obtaining evidence from experts.
>
> In the contested decision, the lower court focused in principle on determining whether the aims of the association and the means of accomplishing those aims were lawful. ... The appellant does not contest the majority of these aims; it must be said that such activities as restoring Silesian culture, promoting knowledge of Silesia or providing social care for members of the association are worthy of respect and support. However, these aims can be fully accomplished without the contested provision of the memorandum of association, namely paragraph 30 ... In addition, the applicants were not prevented from incorporating the above-mentioned aims into the

memorandum of an existing association called 'Movement for the Autonomy of Silesia' [*Ruch Autonomii Śląska*], the more so as the applicants belong to influential circles of the latter organisation.

The fact that the applicants have failed to do so but [instead] are creating a new association, and are describing themselves as a 'Silesian national minority', clearly demonstrates what their real objective is. In fact, their objective is to circumvent the provisions of the 1993 Elections Act, under which parties or other organisations standing in elections must reach a threshold of 5% or 7% of votes in order to obtain seats in Parliament. ...

Legal acts – including the act of adopting a memorandum of association – are null and void under Article 58 § 1 of the Civil Code if they aim at evading or circumventing the law. According to legal theory, defects in legal acts, as defined in Article 58 of the Civil Code, may constitute a basis for refusing to register an association.

Sanctioning the rights of the 'Silesian national minority' amounts to discrimination against other regional and ethnic groups or societies. This will be the case at least as regards electoral law and will be contrary to Article 67 § 2 of the Constitution. ...”

32. The Katowice Court of Appeal heard the appeal on 24 September 1997. The prosecutor at the Court of Appeal (*Prokurator Apelacyjny*) appeared at the hearing and asked the court to grant him leave to join the proceedings as a party intervening on behalf of the Governor of Katowice. Leave was granted. The court next heard addresses by the appellant, the prosecutor (who requested the court to set aside the first-instance decision and reject the applicants' application) and the representative of the applicants. On the same day the court set aside the first-instance decision and rejected the applicants' application for their association to be registered. The reasons for that decision included the following:

“... The lower court, by registering the association under the name 'Union of People of Silesian Nationality', approved paragraph 30 of the memorandum of association, which states that the Union is an organisation of the Silesian national minority. We therefore agree with the appellant that the Union, on the basis of the above-mentioned paragraph, would have the right to benefit from the statutory privileges laid down in section 5 of the 1993 Elections Act. ...

Furthermore, recognising the Silesians as a national minority may also result in further claims on their part [for privileges] granted to national minorities by other statutes. ...

Contrary to the opinion expressed by the lower court, it is possible to determine whether or not the Silesians constitute a national minority in Poland; it is not necessary to obtain expert evidence in that connection.

Under Article 228 § 1 of the Code of Civil Procedure, facts that are common knowledge, that is, those which every sensible and experienced citizen should know, do not need to be proved. Common knowledge includes historical, economic, political and social phenomena and events.

It is therefore clear that at present no legal definition of 'nation' or 'national minority' is commonly accepted in international relations. ...

On the other hand, an 'ethnic group' is understood as a group which has a distinct language, a specific culture and a sense of social ties, is aware of the fact that it differs from other groups, and has its own name.

Polish ethnographic science of the nineteenth and twentieth centuries describes 'Silesians' as an autochthonous population of Polish origin residing in Silesia – a geographical and historical region. At present, as a result of political and social changes, the term 'Silesians' refers equally to immigrants who have been living in this territory for several generations and who identify themselves with their new region of residence. It also refers to the German-speaking population, linked with Silesia by [such factors as] birth, residence and tradition (see the encyclopaedia published by the Polish Scientific Publishers in 1996). ...

The applicants derive the rights they claim from the principles set out in the [Framework Convention], stating that every person belonging to a national minority has the right freely to choose to belong or not to belong to such a minority. ... In relying on European standards, they fail, however, to remember that a national minority with which a given person identifies himself must exist. There must be a society, established on the basis of objective criteria, with which this person wishes to identify. No one can determine his national identity independently of a fundamental element, which is the existence of a specific nation.

It emerges from the above-mentioned definition of a 'nation' that a nation is formed in a historical process which may last for centuries and that the crucial element which forms a nation is its self-identification, that is to say its national awareness established on the basis of the existing culture by a society residing on a specific territory.

Certainly, the Silesians belong to a regional group with a very deep sense of identity, including their cultural identity; no one can deny that they are distinct. This does not, however, suffice for them to be considered a distinct nation. They have never commonly been perceived as a distinct nation and they have never tried to determine their identity in terms of [the criteria for a 'nation']. On the contrary, the history of Silesia unequivocally demonstrates that the autochthonous inhabitants [of this region] have preserved their distinct culture and language (the latter having Polish roots from an ethnic point of view), even though their territories were not within the borders of the Polish State and even though they were under strong German influence. They are therefore Silesians – in the sense of [inhabitants of the] region, not in the sense of [their] nationality. Thus, Upper Silesia, in its ethnic roots [sic], remained Polish; that was, without a doubt, demonstrated by three uprisings. The role played by the Silesians in building and preserving the Polish character of Silesia, even though they remained isolated from their homeland, is unquestionable.

However, a given nation exists where a group of individuals, considering itself a 'nation', is in addition accepted and perceived as such by others. In the common opinion of Polish citizens, both the Silesians and other regional groups or communities [for example, the Highlanders or the Mazurians] are perceived merely as local communities. In the international sphere, Poland and, similarly, France and Germany are perceived as single-nation States, regardless of the fact that there exist distinct ethnic groups (for example, the inhabitants of Alsace or Lorraine in France, or the inhabitants of Bavaria in Germany).

On the whole, sociologists agree that the Silesians constitute an ethnic group and that the autochthonous inhabitants [of Silesia] do have some features of a nation but that those features are not fully developed. That ... means that the awakening of their national identity is still at a very early stage. A nation exists only when there are no doubts as to its right to exist. ... In Poland, national minorities constitute only a small part of society, that is to say about 3 to 4%. They include – and this has never been denied – Germans, Ukrainians, Belarusians, Lithuanians, Slovaks, Czechs, Jews, Roma, Armenians and Tatars.

In the Polish tradition, national minorities are perceived as groups linked to a majority outside Poland; in other words, a minority is an ethnic group that has support amongst a majority [residing] abroad. Moreover, traditionally, our society has not considered that groups which preserve a distinct culture but which do not belong to any State can be deemed to be national minorities. Accordingly, for a long time the Roma people were regarded as an ethnic, not a national group. ...

The applicants' opinion that the mere choice of the individual concerned is decisive for his nationality is reflected in paragraph 10 of the memorandum of association. Acceptance of this opinion would consequently lead to a situation in which the aims pursued by the association could be accomplished by groups of members who did not have any connection or links with Silesia and who had become members of the Union solely to gain an advantage for themselves. Undoubtedly, such groups of members cannot [be allowed] to accomplish the aims of an association of a national minority. ...

The applicants have relied on the results of sociological research carried out in 1994 in the province of Katowice. Indeed, the research demonstrates that 25% of persons requested to declare their ethnic and regional identity replied that they were Silesians. However, it transpires from [the material collected in the course of another piece of sociological research of 1996 which was submitted by the applicants during the appeal hearing] that two years later the number of persons who considered themselves to be Silesians had decreased to 12.4% and that, moreover, the majority of inhabitants of the province of Katowice considered themselves to be Poles (that is, 81.9%, including 18.1% who stated that they were 'Polish Silesians'; only 3.5% of inhabitants considered themselves to be Germans, including 2.4 % who stated that they were 'German Silesians').

In the light of the above research, it cannot be said that such a poorly established self-identity of a small (and decreasing) group of Silesians, as demonstrated by their refusal to declare that they belong to the [Polish] nation, provides a basis for recognising that all Silesians (who have lived in Silesia for generations and state that they belong to the Polish nation) constitute a separate nation. This would be contrary to the will of the majority, a will well known to the applicants.

We therefore find that the appellant is right in submitting that granting the applicants' application for their association to be registered is unjustified because the memorandum of association is contrary to the law, namely Article 5 of the Civil Code. Indeed, the application is aimed at registering an organisation of a minority which cannot be regarded as a national minority and at circumventing the provisions of the 1993 Elections Act and other statutes conferring particular privileges on national minorities. Granting such a request could lead to granting unwarranted rights to the association in question. This would, moreover, give it an advantage in relation to other regional or ethnic organisations.

In these circumstances, in accordance with section 14 of the Law on associations and Article 58 of the Civil Code, read in conjunction with Articles 386 § 1 and 13 of the Code of Civil Procedure and section 8 of the Law on associations, the appeal must be allowed."

3. The proceedings before the Supreme Court

33. On 3 November 1997 the applicants lodged an appeal on points of law (*kasacja*) with the Supreme Court (*Sąd Najwyższy*). They alleged that the Katowice Court of Appeal had wrongly interpreted the relevant provisions of the Law on associations and that the impugned decision had contravened Article 84 of the Constitution, Article 22 of the International Covenant on Civil and Political Rights and Article 11 of the Convention. Their arguments are summarised as follows:

"Since a refusal to register an association could be justified only if an activity specified in the memorandum of association was banned by the law, the principal issue to be determined by the Court of Appeal was whether the memorandum of the applicants' association complied with the statutory requirements. That was clearly not the case and the court's fear that the registration of the applicants' association would in future lead to discrimination against other national or ethnic minorities was based on mere speculation. In any event, the Law on associations [in sections 8(2), 25 et seq.] provided for various means whereby the activity of an association could be supervised by the competent State authorities or, in the event that its activity was unlawful, the association could be dissolved.

However, the Court of Appeal, instead of assessing the formal requirements of the registration, decided at the outset that the core issue in the proceedings was to establish whether a Silesian nation existed. It consequently went on to lay down its own arbitrary and controversial definition of 'nation' and 'national minority', and finally concluded that there was no 'Silesian nation'. It did so without any effort to obtain expert evidence in respect of such an important matter."

34. On 27 November 1997 the Governor of Katowice filed a pleading in reply to the applicants' appeal on points of law. The relevant arguments are summarised as follows:

"The refusal to register the applicants' association was fully justified. In the course of the proceedings at first instance, the Governor eventually proposed that the applicants amend paragraph 30 of the memorandum of association and alter the name of their association by deleting the word 'nationality'. Those arguments were based on section 10(1) (i) of the Law on associations, which provides that a memorandum of association should enable the association in question to be differentiated from other associations. This means that the name of an association should not be misleading. Since the requirement set out in the above-mentioned section was not complied with, the refusal to register the applicants' association was justified under section 14(1).

It must be stressed that even in the explanatory report to the [Framework Convention] it is clearly stated that the individual's subjective choice to belong to a national minority is inseparably linked to objective criteria relevant to the person's identity. That means that a given nation must exist prior to the individual making a decision to belong to this nation. That being so, the applicants' application for their

association to be registered must be seen as a thoughtless and incomprehensible attempt to exploit the distinct characteristics [of the Silesians] with a view to achieving political aims."

35. On 28 November 1997 the prosecutor at the Katowice Court of Appeal filed a pleading in reply to the applicants' appeal on points of law. He submitted, among other things, that it was clear that the content of the memorandum of association was contrary to the law since it explicitly stated that the Union was an association of a national minority, and thus ignored the fact that the Silesians could not be regarded as a minority of that kind. The Silesians, being merely an ethnic group, could not exercise the rights conferred on national minorities, in particular those referred to in the 1993 Elections Act.

36. On 18 March 1998 the Administrative, Labour and Social Security Division of the Supreme Court, sitting as a panel of three judges, dismissed the applicants' appeal on points of law. The relevant parts of the reasons for this decision read as follows:

"... [A] necessary prerequisite for the registration of an association is the conformity of its memorandum of association with the entire domestic legal order, including conformity with [the provisions of] international treaties ratified by Poland.

In the present case the Court of Appeal had no doubts as to the lawfulness of the aims pursued by [the applicants'] association, but refused to register the association for the sole reason that [the applicants], in the memorandum of association, used such terms as 'Silesian nation' and 'Silesian national minority'.

We agree with the opinion [of the Court of Appeal]. 'National minority' is a legal term (see Article 35 of the Constitution of 2 February 1997), although it is not defined either in Polish law or in the conventions relied on in the appeal on points of law. However, the explanatory report to the [Framework Convention] states plainly that the individual's subjective choice of a nation is inseparably linked to objective criteria relevant to his or her national identity. That means that a subjective declaration of belonging to a specific national group implies prior social acceptance of the existence of the national group in question. ...

An individual has the right to choose his or her nation but this, as the Court of Appeal rightly pointed out, does not in itself lead to the establishment of a new, distinct nation or national minority.

There was, and still is, a common perception that a Silesian ethnic group does exist; however, this group has never been regarded as a national group and has not claimed to be regarded as such. ...

Registration of the association, which in paragraph 30 of its memorandum of association states that it is an organisation of a [specific] national minority, would be in breach of the law because it would result in a non-existent 'national minority' taking advantage of privileges conferred on [genuine] national minorities. This concerns, in particular, the privileges granted by the 1993 Elections Act ... such as an exemption from the requirement that a party or other organisation standing in elections should get at least 5% of the votes, which is a prerequisite for obtaining seats in Parliament ...

[or] ... privileges in respect of the registration of electoral lists; thus, it suffices for an organisation of a national minority to have its electoral lists registered in at least five constituencies [whereas the general requirement is to register an electoral list in at least half of the constituencies in the whole of Poland].

Pursuant to the relevant ruling of the Constitutional Court [*Trybunał Konstytucyjny*][1] on the interpretation of the 1993 Elections Act, ... the privileges [referred to above] are conferred on electoral committees of registered national minorities and, in case of doubt [as to whether or not an electoral committee represents a national minority], the State Electoral College may request evidence.

The simplest means of proving the existence of a specific national minority is to present a memorandum of association confirming that fact. It is true that, under the new Constitution, resolutions of the Constitutional Court on the interpretation of statutes no longer have universally binding force; however, in view of the persuasiveness of the reasons given by the Constitutional Court and the requirements of practice, [we consider that] a memorandum of association still remains basic evidence demonstrating the existence of a national minority.

Conferring on the Silesians, an ethnic group, the rights of a national minority would be contrary to Article 32 of the Constitution, stating that all persons are equal before the law, [because] other ethnic minorities would not enjoy the same rights.

The memorandum of association is contrary to section 10(1) (iv) of the Law on associations, which stipulates that a memorandum of association must set out rules concerning acquisition and loss of membership, and the rights and duties of members. Paragraph 10 of the memorandum provides that everyone who is a Polish citizen and has submitted a written declaration stating that he is of Silesian nationality may become a member of the Union, whereas paragraph 15 states that a person ceases to be a member of the Union if, *inter alia*, he has not fulfilled the membership requirements set out in the memorandum of association. Since no Silesian nation exists, no one would lawfully be able to become a member of the Union, because his declaration of Silesian nationality would be untrue. ...

Furthermore, it must be pointed out that the refusal to register the association does not contravene Poland's international obligations. Both the International Covenant on Civil and Political Rights ... and the Convention allow [the State] to place restrictions on the freedom of association, [in particular such as] are prescribed by law and are necessary in a democratic society in the interests of national security or public safety or for the protection of health and morals or for the protection of the rights of others.

It is contrary to public order to create a non-existent nation that would be able to benefit from the privileges conferred solely on national minorities. Such a situation would also lead to the infringement of the rights of others, not only national minorities but also all other citizens of Poland. Granting privileges to a [specific] group of citizens means that the situation of the other members of society becomes correspondingly less favourable.

This is particularly so in the sphere of election law: if certain persons may become members of Parliament [because of their privileged position], it means that other

1. See paragraphs 42-43 below.

candidates must obtain a higher number of votes than what would be required in the absence of privileges [in that respect].

It also has to be noted that the essential aims of the association can be accomplished without the contested provisions of the memorandum and without the [specific] name of the association. Under the provisions of the Constitution of the Republic of Poland, national and ethnic minorities have equal rights as regards their freedom to preserve and develop their own language, to maintain their customs and traditions, to develop their culture, to establish educational institutions or institutions designed to protect their religious identity and to participate in the resolution of matters relating to their cultural identity (see Article 35). ...”

II. RELEVANT NATIONAL AND INTERNATIONAL LAW AND DOMESTIC PRACTICE

A. Constitutional provisions

37. Article 12 of the Constitution, which was adopted by the National Assembly on 2 April 1997 and came into force on 17 October 1997, states:

“The Republic of Poland shall ensure freedom for the creation and functioning of trade unions, socio-occupational farmers' organisations, societies, citizens' movements, other voluntary associations and foundations.”

Article 13 of the Constitution reads:

“Political parties and other organisations whose programmes are based on totalitarian methods or the models of naziism, fascism or communism, or whose programmes or activities foster racial or national hatred, recourse to violence for the purposes of obtaining power or to influence State policy, or which provide for their structure or membership to be secret, shall be forbidden.”

Article 32 of the Constitution provides:

“1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.

2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.”

Article 35 of the Constitution provides:

“1. The Republic of Poland shall ensure that Polish citizens belonging to national or ethnic minorities have the freedom to preserve and develop their own language, to maintain customs and traditions, and to develop their own culture.

2. National or ethnic minorities shall have the right to establish educational and cultural institutions and institutions designed to protect religious identity, as well as to participate in the resolution of matters relating to their cultural identity.”

Article 58 of the Constitution, proclaiming the right to freedom of association, reads:

"1. The freedom of association shall be guaranteed to everyone.

2. Associations whose purposes or activities are contrary to the Constitution or statute shall be prohibited. The courts shall decide whether to register an association and/or whether to prohibit an [activity of] an association.

3. Categories of associations requiring court registration, the procedure for such registration and the manner in which activities of associations may be monitored shall be specified by law."

38. Chapter III of the Constitution, entitled "Sources of law", refers to the relationship between domestic law and international treaties.

Article 87 § 1 provides:

"The sources of universally binding law of the Republic of Poland shall be the Constitution, statutes, ratified international treaties and ordinances."

Article 91 states:

"1. As soon as a ratified international treaty has been promulgated in the Journal of Laws of the Republic of Poland, it shall become part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.

2. An international treaty ratified after prior consent has been given in the form of a statute shall have precedence over statutes where the provisions of such a treaty cannot be reconciled with their provisions.

3. Where a treaty ratified by the Republic of Poland establishing an international organisation so provides, the rules it lays down shall be applied directly and have precedence in the event of a conflict of laws."

B. The Law on associations

39. The relevant part of section 1 of the Law on associations reads:

"(1) Polish citizens shall exercise the right of association in accordance with the Constitution ... and the legal order as specified by law.

(2) The [exercise of the] right of association may be subject only to such limitations as are prescribed by law and are necessary for ensuring the interests of national security or public order and for the protection of health and morals or for the protection of the rights and freedoms of others.

(3) Associations shall have the right to express their opinion on public matters."

The relevant part of section 2 provides:

"(1) An association is a voluntary, self-governing, stable union pursuing non profit-making aims.

(2) An association shall freely determine its objectives, its programmes of activity and organisational structures, and shall adopt internal resolutions concerning its activity."

The relevant part of section 8, in the version applicable at the material time, read as follows:

"(1) An association shall register, unless otherwise provided by law.

(2) Registration of an association shall be effected by the registering regional court (hereafter referred to as 'the registering court') within whose territorial jurisdiction that association has its headquarters.

(3) The regional court within whose territorial jurisdiction an association has its headquarters (hereafter referred to as 'the court') shall be competent to take the measures that are prescribed by this Law in respect of an association [for example, those listed in sections 25, 26, 28 and 29].

(4) In proceedings before it, the registering court or the court shall apply the provisions of the Code of Civil Procedure relating to non-contentious proceedings, unless otherwise provided by this Law.

(5) The activities of associations shall be supervised by [the governor of the relevant province] (referred to hereafter as 'the supervisory authority')."

Section 10, in its relevant part, provides:

"(1) An association's memorandum shall in particular specify:

(i) the name of the association which shall differentiate it from other associations, organisations or institutions;

...

(iv) the conditions for the admission of members, the procedure and grounds for the loss of membership, and the rights and obligations of members.

...

(2) An association that intends to set up regional branches shall specify in its memorandum of association the structure of the organisation and the principles on which such branches shall be formed."

Section 12 reads as follows:

"The management committee of an association shall lodge with the relevant court an application for the registration of their association, together with a memorandum of association, a list of the founders containing their first names, surnames, dates and places of birth, their places of residence and signatures, a record of the election of the management committee and the address of their provisional headquarters."

Section 13 stipulates:

"(1) A court dealing with an application for registration of an association shall rule on such an application promptly; a ruling should be given within three months from the date on which the application was lodged with the court.

(2) The court shall serve a copy of the application for the registration, together with the accompanying documents specified in section 12 on [the relevant] supervisory

authority. The supervisory authority shall have the right to comment on the application within fourteen days from the date of service and, with the court's leave, to join the proceedings as a party."

Section 14 reads:

"The court shall refuse to register an association if it does not fulfil the conditions laid down in [this] Law."

Section 16 provides:

"The court shall allow an application for registration of an association if it is satisfied that the latter's memorandum of association is in conformity with the law and its members comply with the requirements laid down in [this] Law."

40. Chapter 3 of the Law, entitled "Supervision of associations", provides in sections 25 and following for various means of monitoring the activities of associations and lays down the conditions for the dissolution of an association.

Under section 25, the relevant supervisory authority may request the management committee of an association to submit, within a specified time-limit, copies of resolutions passed by the general meeting of the association or to ask the officers of an association to provide it with "necessary explanations".

In the event that such requests are not complied with, the court, under section 26 and a motion from the supervisory authority, may impose a fine on the association concerned.

Under section 28, a supervisory authority, if it finds that activities of an association are contrary to the law or infringe the provisions of the memorandum of association in respect of matters referred to in section 10(1) and (2), may request that such breaches cease, or issue a reprimand, or request the competent court to take measures under section 29.

The relevant part of section 29 provides:

"(1) The court, at the request of a supervisory authority or a prosecutor, may:

(i) reprimand the authorities of the association concerned;

(ii) annul [any] resolution passed by the association if such a resolution is contrary to the law or the provisions of the memorandum of association;

(iii) dissolve the association if its activities have demonstrated a flagrant or repeated failure to comply with the law or with the provisions of the memorandum of association and if there is no prospect of the association reforming its activities so as to comply with the law and the provisions of the memorandum of association."

C. The 1993 Elections Act[1]

41. Section 3 of the 1993 Elections Act provided:

"(1) In the distribution of [seats in the Sejm] account shall be taken only of those regional electoral lists of electoral committees which have obtained at least 5% of the valid votes cast in the whole [of Poland].

(2) The regional electoral lists of electoral committees referred to in section 77(2) (electoral coalitions) shall be taken into account in the distribution of [seats in the Sejm], provided that they have obtained at least 8% of the valid votes cast in the whole [of Poland]."

Section 4 read:

"In the distribution of seats among national electoral lists, account shall be taken only of those lists of electoral committees which have obtained at least 7% of the valid votes cast in the whole [of Poland]."

Section 5 stipulated:

"(1) Electoral committees of registered organisations of national minorities may be exempted from one of the conditions referred to in section 3(1) or section 4, provided that, not later than the fifth day before the date of the election, they submit to the State Electoral College a declaration to that effect[2].

(2) The State Electoral College shall promptly acknowledge receipt of the declaration referred to in subsection (1). This declaration shall be binding on electoral colleges."

The relevant part of section 91 provided:

"...

(2) An electoral committee which has registered its regional electoral lists in at least half of the constituencies [in the whole of Poland] ... shall be entitled to register a national electoral list.

(3) The electoral committee[s] of organisations of national minorities shall be entitled to register a national electoral list, provided [they] ha[ve] registered their regional electoral lists in at least five constituencies. ..."

D. The Constitutional Court's interpretative ruling of 30 April 1997

42. On 23, 29 and 30 April 1997 the Constitutional Court dealt with an application by the President of the Supreme Administrative Court (*Naczelny Sąd Administracyjny*) seeking a universally binding interpretation of

1. This law was repealed on 31 May 2001, the date of entry into force of the Law on elections to the Sejm and Senate of the Republic of Poland of 12 April 2001 ("the 2001 Elections Act").
2. Section 134 of the 2001 Elections Act provides for a similar exemption from the threshold of votes. It is phrased in similar terms.

sections 5, 91(3), 79(3) and 87(4) of the 1993 Elections Act. In its ruling, the Constitutional Court addressed, among other things, the following question:

> "... whether it is implicit in the expression 'shall promptly acknowledge receipt of the declaration', as used in section 5(2) of the 1993 Elections Act, that, in order to issue such acknowledgment, the State Electoral College must verify whether an electoral committee that has submitted the declaration referred to in section 5(1) of the Act is in fact the electoral committee of a registered national minority organisation and may, for the purposes of such verification, require the committee to produce documents other than those listed in section 81(5) (i) of the 1993 Elections Act, such as the memorandum of association of the organisation ..."

43. The Constitutional Court held as follows:

> "... the State Electoral College, in performing its duties as set out in section 5(2) of the 1993 Elections Act shall verify whether the declaration referred to in section 5(1) of that Act was submitted by the authorised electoral committee of one or more registered national minority organisations, and may, in case of doubt, require documentary evidence of such authorisation."

It further explained that:

> "It must be stressed at the outset that the basis for section 5(1) of the 1993 Elections Act is to give Polish citizens belonging to national minorities an equal opportunity to participate in representative bodies. However, the possibility provided by this provision for electoral committees of registered national minority organisations to take advantage of exemptions from electoral thresholds is an exception to the principle of equality of electoral rights in a material sense. In practice, the electoral committee that has submitted a given national minority list [of candidates] will participate [in the distribution of seats in Parliament] ..., despite the fact that its list has not attained the corresponding threshold. This solution reflects a certain understanding of the equality principle that involves entities participating in elections being given equal opportunities ... This amounts to discrimination in favour of electoral committees of registered national minority organisations in comparison with other electoral committees. Since they constitute an exception to the equality principle, provisions governing such discrimination cannot be interpreted extensively.
>
> Secondly, section 5(1) reserves the privilege of exemption from electoral thresholds to lists of candidates supplied by the electoral committees of one or more registered national minority organisations, and only committees of that type may submit corresponding declarations to the State Electoral College. The emphasis should be placed on both the reference to 'registered organisations of national minorities' and to electoral committees acting in their name, for this privilege is available to 'national minority' organisations that are organised and act as such. [A] ... condition of the validity, and hence of effectiveness of a declaration seeking to take advantage of the exemption is that it must be submitted by an entity entitled to do so. It is therefore the responsibility of that entity to provide documentary evidence of its entitlement to submit the declaration. In practice, this amounts to a responsibility to submit to the State Electoral College documents unambiguously demonstrating that the electoral committee submitting the declaration is an entity entitled to do so, that is to say, the electoral committee of not just any organisation, but of one or more registered national minority organisations.

In accordance with section 5(2), the State Electoral College is required to acknowledge, without delay, receipt of the declaration referred to in subsection (1), in other words, a declaration that has been submitted by an entity entitled to do so. In that connection, the College has a duty to verify whether the declaration was submitted by such an entity, and if in doubt, may require documentation unambiguously confirming the entity's right to submit the declaration, as the declaration gives rise to legal consequences, so justifying the need for specific verification. ... If such documents are not submitted, the State Electoral College is precluded from acknowledging receipt of the declaration referred to in section 5(1), since, apart from the requirement that it be made at the prescribed time to the appropriate electoral college, a vital condition for the validity of the declaration is that it be made by an entitled entity. On the other hand, the State Electoral College does not verify the content of the declaration, for which the electoral committee takes full responsibility.

Determining which documents are to be accepted by the State Electoral College as confirmation of the electoral committee's entitlement to submit the declaration referred to in section 5(1) is a separate issue. ... [I]t can be assumed that the State Electoral College may require the presentation of appropriate documents, such as a memorandum of association, that will allow it unambiguously to ascertain that the entity submitting the declaration is the electoral committee of one or more registered national minority organisations."

E. The Civil Code

44. Article 5 of the Civil Code reads:

"No one shall exercise any right held by him or her in a manner contrary to its socio-economic purpose or to the principles of co-existence with others [*zasady współżycia społecznego*]. No act or omission [matching this description] on the part of the holder of the right shall be deemed to be the exercise of the right and be protected [by law]."

The relevant part of Article 58 provides:

"1. A[ny] act which is contrary to the law or aimed at evading the law shall be null and void, unless a statutory provision provides for other legal effects, such as the replacement of the void elements of such an act by elements provided for by statute.

2. Any act which is contrary to the principles of co-existence with others shall be null and void."

F. The Framework Convention for the Protection of National Minorities

45. At the material time Poland was a signatory to the Council of Europe Framework Convention for the Protection of National Minorities (European Treaty Series no. 157); the date of signature was 1 February 1995. Poland ratified the Framework Convention on 20 December 2000. It came into force in respect of Poland on 1 April 2001.

46. The Framework Convention contains no definition of the notion of "national minority". Its explanatory report mentions that it was decided to

adopt a pragmatic approach, based on the recognition that at that stage it was impossible to arrive at a definition capable of mustering the general support of all Council of Europe member States.

47. Poland, at the time of the deposit of the instrument of ratification, made the following declaration:

> "Taking into consideration the fact that the Framework Convention for the Protection of National Minorities contains no definition of the national minorities notion, the Republic of Poland declares that it understands this term as national minorities residing within the territory of the Republic of Poland at the same time whose members are Polish citizens."

THE LAW

ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

48. The applicants complained that the Polish authorities had arbitrarily refused to register their association, called "Union of People of Silesian Nationality", and alleged a breach of Article 11 of the Convention, which provides:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

49. In its judgment of 20 December 2001, the Chamber found that there had been no breach of Article 11. It held that the refusal to register the applicants' association, which had been prompted by the need to protect the State electoral system against the applicants' potential attempt to claim unwarranted privileges under electoral law, had been justified under paragraph 2 of that provision (see paragraphs 64 et seq. of the Chamber's judgment).

50. The applicants, in their letter of 20 March 2002 requesting that the case be referred to the Grand Chamber, stressed that a refusal to register an association could not – as had happened in their case – be based on mere impressions or suppositions about the association's future actions. They criticised the Chamber's conclusion that the statement in paragraph 30 of the

memorandum of association that their Union was to be an "organisation of the Silesian national minority" had given the impression that they might later aspire to stand in elections and acquire privileges under electoral law. In that connection, they argued that not only had that finding been unsupported by any evidence showing that that was indeed their intention, but also that registration of their association would not have conferred on them any such privileges automatically since, in the absence of any definition of the concept of "national minority" in Polish law, that issue had been left for the State Electoral College to decide.

51. The Government entirely agreed with the findings and conclusions of the Chamber and considered that the applicants' arguments should be rejected.

A. Whether there has been an interference

52. Both before the Chamber and the Grand Chamber, the parties agreed that there had been an interference with the exercise of the applicants' right to freedom of association within the meaning of paragraph 2 of Article 11. In that connection, the Court also notes that the central issue underlying the applicants' grievance is the refusal to register their association as an "organisation of the Silesian national minority" (see paragraphs 22, 48 and 50 above).

B. Whether the interference was justified

53. The impugned restriction will not be justified under the terms of Article 11 unless it was "prescribed by law", pursued one or more of the legitimate aims set out in paragraph 2 of that Article and was "necessary in a democratic society" for the achievement of those aims.

1. "Prescribed by law"

(a) The Chamber's judgment

54. The Chamber, finding that the refusal to register the applicants' association was based on a number of legal provisions, including Article 32 of the Constitution, Articles 5 and 58 of the Civil Code and sections 8, 10(1) (i) and (iv) and 14 of the Law on associations, held that the restriction on their freedom of association had been "prescribed by law" (see paragraph 38 of the Chamber's judgment).

(b) The parties' submissions to the Grand Chamber

(i) The applicants

55. The applicants contested the Chamber's conclusion. They argued, first and foremost, that they had been denied the right to form an association not because they had failed to meet the requirements for registration laid down in the Law on associations, or because their aims or the means of their achievement had been contrary to the law, but solely because the authorities considered that there was no Silesian national minority in Poland.

56. That opinion was, they stressed, completely arbitrary. It was based on purely political, not legal or factual, grounds. Thus, in reality, there had been no possibility of ascertaining whether or not a given group constituted a national minority, since under Polish law there was still no procedure whereby a minority could seek legal recognition or provision defining the notion of "national" or "ethnic" minority. They asserted that that lacuna in the law made it impossible for them to determine how to form an association comprising members of a minority group wishing to pursue common goals.

They also noted that the Chamber had already found that the absence of any such legal criteria left the authorities a degree of latitude and made the situation of the individual uncertain. In their view, the power of appreciation left to the authorities was practically unlimited and the rules they would apply were unpredictable.

57. Furthermore, the authorities had used the registration procedure under the Law on associations as a means of denying them a minority status. Yet that procedure could not act as an instrument for determining whether or not a national minority existed. It was purely formal and could serve only the purposes for which it was designed, namely to determine whether registration was admissible under section 14 of the Law on associations, and whether, as prescribed by section 16, the memorandum of association was in conformity with the law and the members satisfied the statutory requirements.

58. The applicants asserted that they had fulfilled all those conditions. Consequently, under the relevant Law, the authorities were obliged to register the association and, as the Katowice Regional Court rightly held, there had been no legal basis for their refusal to do so. However, instead of focusing on the requirements for registration, the higher courts had engaged in speculation about whether they intended to stand in elections and had tried the case as a dispute over the existence of Silesian nationality. In the absence of any legal definition of the concept of "national minority" or criteria for determining what might qualify as a "national minority", that approach had deprived the applicants of the ability to foresee what legal rules would be applied in their case.

(ii) The Government

59. The Government fully agreed with the Chamber's opinion and added that the relevant provisions were sufficiently clear, precise and accessible to allow the applicants to determine their conduct. Consequently, they met the standard of "foreseeability" of a "law" under the Convention.

60. At the hearing before the Grand Chamber, the Government acknowledged that Polish legislation, as it stood at the material time, had not defined the notions of "national" and "ethnic" minority, in particular for the purposes of electoral law. That, in their view, did not alter the position since it could not be said that the State had a duty to provide a definition. The fact that some States had chosen – either in their legislation or in their declarations under the Framework Convention – to give descriptive or enumerative definitions of minorities did not mean that the Polish State had to do likewise.

61. Indeed, in Poland national or ethnic minorities could be, and were, identified by reference to various legal sources such as the bilateral treaties on good neighbourliness and friendly cooperation it had entered into with Germany, Lithuania, Ukraine and other neighbouring states. They were also recognised in legal instruments, a specific example being the official report on the implementation of the Framework Convention, submitted by the Polish government to the Secretary General of the Council of Europe in 2002. The 2002 National and Ethnic Minorities Bill, which was currently before Parliament, also contained a list of national and ethnic minorities in Poland.

All those documents constituted bases for establishing the existence of national minorities, but none of them mentioned Silesians.

62. The Government further pointed out that, under both the 1993 Elections Act and the current 2001 Elections Act, there existed two other ways of recognising a "national minority" for the purposes of electoral law. First, a court dealing with an application for the registration of an association representing a national minority would examine whether it had the necessary attributes. Second, on receipt of a declaration under the 1993 Elections Act from an electoral committee of a registered organisation of a national minority, the State Electoral College was required to determine whether it had been submitted by a competent body and was supported by satisfactory evidence.

63. In conclusion, the Government considered that, although under Polish law there was no definition of "national minority" and no specific procedure for acquiring that status, the combination of the applicable rules had given the applicants sufficient guidance on conditions for recognition as a national minority and registration of an association of such a minority.

(c) The Court's assessment

(i) General principles

64. The Court reiterates that the expression "prescribed by law" requires firstly that the impugned measure should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct.

However, it is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. The interpretation and application of such enactments depend on practice (see *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III, and, as a recent authority, *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98,41343/98 and 41344/98, § 57, ECHR 2003-II, with further references).

65. The scope of the notion of foreseeability depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.

It must also be borne in mind that, however clearly drafted a legal provision may be, its application involves an inevitable element of judicial interpretation, since there will always be a need for clarification of doubtful points and for adaptation to particular circumstances. A margin of doubt in relation to borderline facts does not by itself make a legal provision unforeseeable in its application. Nor does the mere fact that such a provision is capable of more than one construction mean that it fails to meet the requirement of "foreseeability" for the purposes of the Convention. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice (see *Refah Partisi (the Welfare Party) and Others* and *Rekvényi*, cited above).

(ii) Application of the above principles to the present case

66. Turning to the circumstances of the present case, the Court observes that the applicants' arguments as to the alleged unforeseeablity of Polish law do not concern the legal provisions on which the refusal to register their association was actually based, namely Article 32 of the Constitution and various provisions of the Law on associations and the Civil Code (see paragraphs 32, 36, 54 and 55-58 above).

The Court notes in this respect that the Law on associations gives the courts the power to register associations (section 8) and in this context to verify, *inter alia*, the conformity with the law of the memorandum of association (section 16), including the power to refuse registration if it is found that the conditions of the Law on associations have not been met (section 14) (see paragraph 39 above).

In the present case the Polish courts refused registration because they considered that the applicants' association could not legitimately describe itself as an "organisation of a national minority", a description which would give it access to the electoral privileges conferred under section 5 of the 1993 Elections Act (see paragraph 41 above), as the Silesian people did not constitute a "national minority" under Polish law.

The applicants essentially criticised the absence of any definition of a national minority or any procedure whereby such a minority could obtain recognition under domestic law. They contended that that lacuna in the law made it impossible for them to foresee what criteria they were required to fulfil to have their association registered and left an unlimited discretionary power in that sphere to the authorities (see paragraphs 56-58 above).

67. It is not for the Court to express a view on the appropriateness of methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention.

With regard to the applicants' argument that Polish law did not provide any definition of a "national minority", the Court observes firstly, that, as the Chamber rightly pointed out, such a definition would be very difficult to formulate. In particular, the notion is not defined in any international treaty, including the Council of Europe Framework Convention (see paragraph 62 of the Chamber's judgment and paragraph 46 above and, for example, Article 27 of the United Nations International Covenant on Civil and Political Rights, Article 39 of the United Nations Convention on the Rights of the Child and the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities).

Likewise, practice regarding official recognition by States of national, ethnic or other minorities within their population varies from country to country or even within countries. The choice as to what form such recognition should take and whether it should be implemented through international treaties or bilateral agreements or incorporated into the Constitution or a special statute must, by the nature of things, be left largely to the State concerned, as it will depend on particular national circumstances.

68. While it appears to be a commonly shared European view that, as laid down in the preamble to the Framework Convention, "the upheavals of European history have shown that the protection of national minorities is

essential to stability, democratic security and peace on this continent" and that respect for them is a condition *sine qua non* for a democratic society, it cannot be said that the Contracting States are obliged by international law to adopt a particular concept of "national minority" in their legislation or to introduce a procedure for the official recognition of minority groups.

69. In Poland the rules applicable to national or ethnic minorities are not to be found in a single document, but are divided between a variety of instruments, including the Constitution, electoral law and international agreements. The constitutional guarantees are afforded to both national and ethnic minorities. The Constitution makes no distinction between national and ethnic minorities as regards their religious, linguistic and cultural identities, the preservation, maintenance and development of their language, customs, traditions and culture, or the establishment of educational and cultural institutions (see paragraph 37 above). In contrast, electoral law introduces special privileges only in favour of "registered organisations of national minorities" (see paragraph 41 above). It does not give any indication as to the criteria a "national minority" must fulfil in order to have its organisation registered.

However, the Court considers that the lack of an express definition of the concept of "national minority" in the domestic legislation does not mean that the Polish State was in breach of its duty to frame law in sufficiently precise terms. Nor does it find any breach on account of the fact that the Polish State chose to recognise minorities through bilateral agreements with neighbouring countries rather than under a specific internal procedure. The Court recognises that, for the reasons explained above, in the area under consideration it may be difficult to frame laws with a high degree of precision. It may well even be undesirable to formulate rigid rules. The Polish State cannot, therefore, be criticised for using only a general statutory categorisation of minorities and leaving interpretation and application of those notions to practice.

70. Consequently, the Court does not consider that leaving to the authorities a discretion to determine the applicable criteria with regard to the concept of "registered associations of national minorities" underlying section 5 of the 1993 Elections Act was, as the applicants alleged, tantamount to granting them an unlimited and arbitrary power of appreciation. As regards the registration procedure, it was both inevitable and consistent with the adjudicative role vested in them for the national courts to be left with the task of interpreting the notion of "national minority", as distinguished from "ethnic minority" within the meaning of the Constitution, and assessing whether the applicants' association qualified as an "organisation of a national minority" (see paragraph 65 above).

71. In reviewing the relevant principles, the Supreme Court and the Court of Appeal took into consideration all the statutory provisions applicable to associations and national minorities as well as social factors

and other legal factors, including all the legal consequences that registering the applicants' association in the form they proposed might entail (see paragraphs 32 and 36 above).

Contrary to what the applicants have alleged, those courts do not appear to have needlessly transformed the registration procedure into a dispute over the concept of Silesian nationality. Rather, it was the statement in paragraph 30 of the memorandum of association that made it necessary to consider that issue in the proceedings (see paragraphs 22, 25 and 28 above). The applicants must have been aware, when that paragraph was drafted, that the courts would have no alternative but to interpret the notion of "national minority" as it applied in their case.

Having regard to the foregoing, the Court is satisfied that the Polish law applicable in the present case was formulated with sufficient precision, for the purposes of paragraph 2 of Article 11 of the Convention, to enable the applicants to regulate their conduct.

2. Legitimate aim

(a) The Chamber's judgment

72. The Chamber found that the Polish authorities had sought to avoid the association using a name which the public might find misleading as it established a link to a non-existent nation. It also found that they had acted in order to protect other, similar ethnic groups whose rights might be affected by the registration of the association. The Chamber consequently held that the interference with the applicants' right had pursued legitimate aims under Article 11, namely "the prevention of disorder" and "the protection of the rights of others" (see paragraph 44 of the Chamber's judgment).

(b) The parties' submissions to the Grand Chamber

(i) The applicants

73. The applicants stressed that it was undisputed that all the aims of their association, as set out in paragraph 7 of the memorandum of association, were in conformity with the law. The name chosen for the association could not be seen as capable of causing "disorder" and, therefore, justify measures to "prevent disorder", especially as the authorities had eventually accepted the name and only insisted on the deletion of paragraph 30 of the memorandum.

74. They further submitted that the fact that that paragraph stated that "[t]he Union is an organisation of the Silesian national minority" did not by itself infringe the rights of other ethnic groups, in particular under electoral law. That single provision, in the absence of any attempt on their part to

stand in elections or to claim minority status under the 1993 Elections Act, and in the absence of any such objective in the memorandum of association, could not in any way affect the rights or freedoms of others.

In conclusion, the applicants invited the Grand Chamber to hold that the restriction on their right to freedom of association had not been imposed in pursuance of any legitimate aim within the meaning of Article 11 of the Convention.

(ii) The Government

75. The Government disagreed. They fully subscribed to the Chamber's conclusion and stood by their submissions to it, reiterating that it had been legitimate for the authorities to refuse to register the applicants' association as an organisation of a national minority. Had they allowed the registration, it would have had serious consequences for the domestic legal order because it would have enabled the applicants to claim privileges reserved for genuine national minorities. It would also have amounted to discrimination against other ethnic groups in the sphere of electoral law.

(c) The Court's assessment

76. When justifying the impugned decisions, the domestic courts expressly relied on the need to protect the domestic legal order and the rights of other ethnic groups against an anticipated attempt by the applicants' association to circumvent the provisions of the 1993 Elections Act or other statutes conferring particular rights on national minorities (see paragraphs 32 and 36 above).

Against that background, the Grand Chamber considers that the applicants have not put forward any arguments that would warrant a departure from the Chamber's finding that the interference in question was intended to prevent disorder and to protect the rights of others. Indeed, it could be said that, as the impugned measure purported to prevent a possible abuse of electoral law by the association itself or by other organisations in a similar situation, it served to protect the existing democratic institutions and procedures in Poland.

3. "Necessary in a democratic society"

(a) The Chamber's judgment

77. The Chamber held that the refusal to register the association without the deletion of the contested paragraph 30 of the memorandum of association satisfied the test of "necessity", as it was made with a view to protecting the electoral system of the State, which was an indispensable element of the proper functioning of a "democratic society" within the

meaning of Article 11 of the Convention (see paragraph 66 of the Chamber's judgment).

(b) The parties' submissions to the Grand Chamber

(i) The applicants

78. The applicants disagreed with the Chamber and stressed that the refusal had been an extreme measure that amounted to a prior, unjustifiable restraint on their freedom of association and could not be reconciled with the principles governing a democratic society. It had been based on entirely unfounded suspicions as to their true intentions and on speculation as to their future actions. In the applicants' opinion, there was always a hypothetical risk that a particular association might infringe the law or engage in activities incompatible with the aims it proclaimed. Yet the mere possibility of that happening could not justify a preventive blanket ban being imposed on its activities.

79. The principal argument put forward by the authorities had been the alleged need to protect the electoral system against a possible attempt by the applicants to claim national-minority status in parliamentary elections and special privileges under electoral law. In the authorities' view, that mere eventuality had become a certainty.

By taking that stance, they had overlooked the obvious fact that only a series of events and decisions – none of which were in the least bit certain – would have enabled the applicants to gain those privileges. First, they would have had to want to run for elections. Second, they would have had to set up an "electoral committee of a registered organisation of a national minority". Given that their memorandum of association had not envisaged such a form of activity, the authorities could have interfered at that stage, under sections 28 and 29 of the Law on Associations. Next, the committee would have had to submit to the State Electoral College a declaration under section 5 of the 1993 Elections Act. The College would have examined that declaration thoroughly so as to ascertain whether it had been submitted by an entity entitled to make such a declaration. In case of doubt, it could have ordered the committee to produce supporting evidence.

In consequence, the State Electoral College would have had the ultimate power to acknowledge or reject their claim to privileges under the 1993 Elections Act, as was apparent not only from section 5 but also from the general provisions of the Act, which obliged the College to ensure compliance with its provisions.

80. The applicants said that, in any event, it had not been necessary for the authorities to have recourse to so drastic a measure as preventing the very existence of the association. Under the Law on associations, they had a number of powerful legal tools at their disposal for regulating the activities of an existing association. They could reprimand its officers, annul any

unlawful resolution passed by the association or even dissolve it under section 29. In contrast to a preventive restriction on registration in anticipation of a particular scenario, such measures could be regarded as acceptable under Article 11 as their application depended on the actual conduct and actions of the association.

Accordingly, without needing to resort to a refusal of registration, the authorities could have effectively corrected or put an end to the association's future activity if the need to "prevent disorder" or to "protect the rights of others" had in fact arisen.

81. In view of the foregoing, the applicants concluded that the contested restriction had been disproportionate to the aims relied on by the authorities and could not, therefore, be regarded as necessary in a democratic society.

(ii) The Government

82. The Government maintained that the authorities' intention was not to put a preventive restraint on the applicants' right to associate freely with others in order to maintain distinctive features of Silesians or to promote Silesian culture. Their primary purpose had been to forestall their likely attempt to use the registration of the association as a legal means for acquiring special status under electoral law.

The authorities had not acted, as the applicants asserted, on unfounded suspicions as to their concealed intentions but on the basis of an objective assessment of the relevant facts and the legal consequences of the registration of an association that declared itself to be an organisation of a national minority.

83. Thus, the crucial issue between the applicants and the authorities was not the intended name of the association – as the latter had eventually been prepared to accept it – but the content of paragraph 30 of the memorandum of association, which corresponded to the wording of section 5 of the 1993 Elections Act. It was the provisions of the memorandum of association, not its name, that would subsequently have been decisive for the State Electoral College in determining whether the association constituted a "registered organisation of a national minority". It could be assumed that, even if the association had been registered as an organisation of "people of Silesian nationality" but with the disputed paragraph deleted from the memorandum, the applicants would not have been able to take advantage of the electoral privileges envisaged for national minorities. In the Government's submission, the applicants had been perfectly aware of that consequence as, otherwise, they would have accepted the Governor's proposal for the deletion of paragraph 30.

84. The Government added that, on the basis of that provision, the applicants would inevitably have acquired on registration of the association an unconditional right to benefit from preferential treatment under the 1993 Elections Act. Consequently, the authorities had had to act before that risk

had become real and immediate since, at election time, all the measures available under the Law on associations would have either been inadequate or come too late.

85. In reality, under Polish law an association could only be dissolved if its activities demonstrated a flagrant or repeated non-compliance with the law or its memorandum of association. To begin with, there had been nothing in the stated aims of the association to cast doubt on their conformity with the law; the prime objective, which had been to obtain minority status, had not been articulated expressly. Secondly, had the applicants, or other members, stood for future parliamentary elections, there would have been no legal means to prevent them from taking advantage of the privileges under electoral law.

86. Running for election, in the legitimate exercise of a political right, could not be considered an unlawful activity under the Law on associations. At that stage the State Electoral College would have had no power to reject the declaration stating that the applicants had constituted an electoral committee of a registered organisation of a national minority, because their status would have been confirmed officially by the content of their memorandum of association and, in particular, paragraph 30 thereof. It would only have had the power to ascertain whether the declaration had been made by an authorised legal entity.

87. In sum, the Government considered that the restriction imposed on the exercise of the applicants' right to freedom of association had been necessary in a democratic society since it corresponded to a “pressing social need” and had been proportionate to the legitimate aims pursued.

(c) The Court's assessment

(i) General principles

88. The right to freedom of association laid down in Article 11 incorporates the right to form an association. The ability to establish a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of freedom of association, without which that right would be deprived of any meaning (see *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1614, § 40).

Indeed, the state of democracy in the country concerned can be gauged by the way in which this freedom is secured under national legislation and in which the authorities apply it in practice (ibid.). In its case-law, the Court has on numerous occasions affirmed the direct relationship between democracy, pluralism and the freedom of association and has established the principle that only convincing and compelling reasons can justify restrictions on that freedom. All such restrictions are subject to a rigorous supervision by the Court (see, among many authorities, *United Communist*

Party of Turkey and Others v. Turkey, judgment of 30 January 1998, *Reports* 1998-I, pp. 20 et seq., §§ 42 et seq.; *Socialist Party and Others v. Turkey*, judgment of 25 May 1998, *Reports* 1998-III, pp. 1255, et seq,. §§ 41 et seq.; and *Refah Partisi (the Welfare Party) and Others*, cited above, §§ 86 et seq.).

(α) The rule of democracy and pluralism

89. As has been stated many times in the Court's judgments, not only is political democracy a fundamental feature of the European public order but the Convention was designed to promote and maintain the ideals and values of a democratic society. Democracy, the Court has stressed, is the only political model contemplated in the Convention and the only one compatible with it. By virtue of the wording of the second paragraph of Article 11, and likewise of Articles 8, 9 and 10 of the Convention, the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from "democratic society" (see, for instance, *United Communist Party of Turkey and Others*, cited above, pp. 20-21, §§ 43-45, and *Refah Partisi (the Welfare Party) and Others*, cited above, §§ 86-89).

90. Referring to the hallmarks of a "democratic society", the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context it has held that, although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see *Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A no. 44, p. 25, § 63, and *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 112, ECHR 1999-III).

91. Furthermore, given that the implementation of the principle of pluralism is impossible without an association being able to express freely its ideas and opinions, the Court has also recognised that the protection of opinions and the freedom of expression within the meaning of Article 10 of the Convention is one of the objectives of the freedom of association (see, for instance, *Refah Partisi (the Welfare Party) and Others*, cited above, § 88).

92. While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes, including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural

traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.

93. The Court recognises that freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities, and that, as laid down in the preamble to the Council of Europe Framework Convention, "a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity" . Indeed, forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights.

(β) The possibility of imposing restrictions and the Court's scrutiny

94. Freedom of association is not absolute, however, and it must be accepted that where an association, through its activities or the intentions it has expressly or implicitly declared in its programme, jeopardises the State's institutions or the rights and freedoms of others, Article 11 does not deprive the State of the power to protect those institutions and persons. This follows both from paragraph 2 of Article 11 and from the State's positive obligations under Article 1 of the Convention to secure the rights and freedoms of persons within its jurisdiction (see *Refah Partisi (the Welfare Party) and Others*, cited above, §§ 96-103).

95. Nonetheless, that power must be used sparingly, as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. Any interference must correspond to a "pressing social need"; thus, the notion "necessary" does not have the flexibility of such expressions as "useful" or "desirable" (see *Young, James and Webster*, and *Chassagnou and Others*, cited above).

96. It is in the first place for the national authorities to assess whether there is a "pressing social need" to impose a given restriction in the general interest. While the Convention leaves to those authorities a margin of appreciation in this connection, their assessment is subject to supervision by the Court, going both to the law and to the decisions applying it, including decisions given by independent courts.

When the Court carries out its scrutiny, its task is not to substitute its own view for that of the national authorities, which are better placed than an international court to decide both on legislative policy and measures of implementation, but to review under Article 11 the decisions they delivered

in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see, *mutatis mutandis*, *United Communist Party of Turkey and Others*, cited above, p. 27, §§ 46-47, and *Refah Partisi (the Welfare Party) and Others*, cited above, § 100).

(ii) Application of the above principles to the present case

(α) Pressing social need

97. The Court will first determine whether there could be said to have been, at the relevant time, a "pressing social need" to take the impugned measure – namely the refusal to register the association with the description in paragraph 30 of its memorandum of association (see paragraph 22 above) – in order to achieve the legitimate aims pursued.

The principal reason for the interference thereby caused with the applicants' enjoyment of their freedom of association was to pre-empt their anticipated attempt to claim special privileges under the 1993 Elections Act, in particular an exemption from the threshold of 5% of the votes normally required to obtain seats in Parliament and certain advantages in respect of the registration of electoral lists (see paragraphs 32, 36 and 41 above).

The applicants, for their part, asserted that the impugned restriction was premature and that the authorities had based their decisions on unfounded suspicions as to their true intentions and on speculation about their future actions. They stressed that running for elections was not one of the aims stated in their memorandum of association (see paragraphs 78-79 above).

98. It is true that the applicants' intentions could not be verified by reference to the conduct of the association in practice, as it was never registered. It is also true that the aim of securing representation in Parliament was not explicitly stated in the memorandum of association and that any unstated intention that the applicants may have had to secure electoral privileges would have depended on a combination of future events (see paragraphs 19, 32, 36 and 41-43 above).

99. In this connection, however, there was a dispute between the parties as to the repercussions, under Polish law, of registration as regards qualification for electoral privileges. The applicants submitted that the effective – and ultimate – power to acknowledge or reject their claim to privileges under section 5 of the 1993 Elections Act was vested in the State

Electoral College (see paragraph 79 above). The Government, on the other hand, contended that the College would have had no power to reject a declaration by the association notifying it that it had set up an "electoral committee of a registered organisation of a national minority" because that would have been the legal status enjoyed by the association as confirmed by documentary evidence in the form of the memorandum of their registered association and, more particularly, paragraph 30 thereof (see paragraph 86 above).

100. The Court reiterates that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation, the Court's role being confined to determining whether the effects of that interpretation are compatible with the Convention (see, among other authorities, *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I).

101. When considering the legal consequences of registering the association with the statement in its memorandum of association that it was "an organisation of the Silesian national minority", the Supreme Court evidently worked on the assumption that, had the members of the association run for election, the State Electoral College would have had no choice but to accept their declaration under section 5 of the 1993 Elections Act (see paragraph 36 above). Such a reading of the relevant provisions of domestic law, limiting the role of the State Electoral College to controlling technical and formal matters, with no competence to examine substantive criteria such as the existence or not of a "national minority", cannot, in the Court's opinion, be regarded as arbitrary. Under Polish law, as authoritatively interpreted by the Polish Supreme Court, therefore, the procedure before the State Electoral College could not – after the registration of the association – serve to prevent its members from acquiring special electoral status (see paragraphs 36 and 42-43 above).

Had registration been granted, a decision by the applicants to run as candidates in elections as members of the association would, as the Government have pointed out (see paragraph 86 above), have been no more than a legitimate exercise of their political rights. In consequence, the Court is not convinced that any of the drastic measures available under the Law on associations, such as annulment of a resolution to put up candidates in elections or dissolution of the association, which could be imposed only if "such a resolution [was] contrary to the law or the provisions of the memorandum of association" or "if its activities ... demonstrated a flagrant or repeated failure to comply with the law or with the provisions of the memorandum of association" (see paragraph 40 above), would have been applicable and, therefore, susceptible of avoiding the particular mischief which the authorities were seeking to avoid.

102. The Court will accordingly proceed on the understanding, which was the basis of the judgment by the Polish Supreme Court, that under

Polish law the registration of the applicants' association as an "organisation of a national minority" was capable by itself of setting in motion a chain of further events that would lead, subject only to voluntary actions by the association and its members, to the acquisition of electoral privileges. In other words, the risk that the association and its members might claim electoral privileges was inherent in any decision that allowed them to form the association without first amending paragraph 30 of the memorandum of association.

103. That being so, the appropriate time for countering the risk of the perceived mischief, and thereby ensuring that the rights of other persons or entities participating in parliamentary elections would not actually be infringed, was at the moment of registration of the association and not later. The Court does not therefore subscribe to the applicants' analysis of the impugned measure as being one of prior restraint in anticipation of any action which the association might or might not take in future and which could as well have been controlled by the exercise of the authorities' supervisory powers under sections 25 and 26 of the Law on associations. In reality, imposing as a condition for registration of the association that the reference to an "organisation of a national minority" be removed from paragraph 30 of the memorandum of association was no more than the legitimate exercise by the Polish courts of their power to control the lawfulness of this instrument, including the power to refuse any ambiguous or misleading clause liable to lead to an abuse of the law – in the event, a clause which would create for the association and its members a capacity, which could not be impeded, to enjoy electoral privileges to which they were not entitled (see the reasoning of the Supreme Court quoted in paragraph 36 above).

Consequently, the Court accepts that the national authorities, and in particular the national courts, did not overstep their margin of appreciation in considering that there was a pressing social need, at the moment of registration, to regulate the free choice of associations to call themselves an "organisation of a national minority", in order to protect the existing democratic institutions and election procedures in Poland and thereby, in Convention terms, prevent disorder and protect the rights of others (see paragraph 76 above).

(β) Proportionality of the measure

104. It remains for the Court to ascertain whether, in view of its adverse effects on the ability of the association and its members, including the applicants, to carry out their associative activities, the refusal to register the association with the description "organisation of the Silesian national minority" was proportionate to the legitimate aims pursued.

The applicants stressed the particular severity of the interference, which in their view had amounted to a preventive blanket ban on their activities.

They also argued that it had not been necessary for the authorities to take such a drastic measure, because they could have corrected their future actions using the means designed by the Law on associations to regulate the latter's activities (see paragraph 80 above).

The Government maintained that the authorities had not acted in order to prohibit the formation of an association preserving Silesian cultural identity but to prevent the applicants' possible attempt to obtain, through the registration of their association, a special legal status. They further submitted that the machinery established by the Law on associations for monitoring the activities of associations would not be sufficient to prevent them from taking advantage of privileges under electoral law (see paragraphs 82-86 above).

105. The Court, on the basis of Polish law as authoritatively interpreted by the Polish Supreme Court, has already rejected the applicants' argument that the provisions on the regulation of the activities of associations in the Law on associations would have provided an alternative and less onerous means of avoiding a future abuse of electoral privileges by the applicants' association (see paragraphs 101 and 103, first sub-paragraph, above). The Court does however accept that, in its impact on the applicants, the impugned measure was radical: it went so far as to prevent the association from even commencing any activity.

However, the degree of interference under paragraph 2 of Article 11 cannot be considered in the abstract and must be assessed in the particular context of the case. There may also be cases in which the choice of measures available to the authorities for responding to a “pressing social need” in relation to the perceived harmful consequences linked to the existence or activities of an association is unavoidably limited.

In the instant case the refusal was not a comprehensive, unconditional one directed against the cultural and practical objectives that the association wished to pursue, but was based solely on the mention, in the memorandum of association, of a specific appellation for the association. It was designed to counteract a particular, albeit only potential, abuse by the association of its status as conferred by registration. It by no means amounted to a denial of the distinctive ethnic and cultural identity of Silesians or to a disregard for the association's primary aim, which was to “awaken and strengthen the national consciousness of Silesians” (see paragraph 19 above). On the contrary, in all their decisions the authorities consistently recognised the existence of a Silesian ethnic minority and their right to associate with one another to pursue common objectives (see paragraphs 32 and 36 above). All the various cultural and other activities that the association and its members wished to undertake could have been carried out had the association been willing to abandon the appellation set out in paragraph 30 of its memorandum of association.

Like the Chamber, the Grand Chamber finds it hard to perceive any practical purpose for this paragraph in relation to the association's proposed activities other than to prepare the ground for enabling the association and its members to benefit from the electoral privileges accorded by section 5(1) of the 1993 Elections Act to "registered organisations of national minorities" (see also paragraph 64 of the Chamber's judgment). The disputed restriction on the establishment of the association was essentially concerned with the label which the association could use in law – with whether it could call itself a "national minority" – rather than with its ability "to act collectively in a field of mutual interest" (see paragraph 88 above). As such, it did not go to the core or essence of freedom of association.

Consequently, for the purposes of Article 11 of the Convention and the freedom of association which it guarantees, the interference in question cannot be considered disproportionate to the aims pursued.

(d) The Court's conclusion

106. The Court concludes, therefore, that it was not the applicants' freedom of association *per se* that was restricted by the State. The authorities did not prevent them from forming an association to express and promote distinctive features of a minority but from creating a legal entity which, through registration under the Law on associations and the description it gave itself in paragraph 30 of its memorandum of association, would inevitably become entitled to a special status under the 1993 Elections Act. Given that the national authorities were entitled to consider that the contested interference met a "pressing social need" and given that the interference was not disproportionate to the legitimate aims pursued, the refusal to register the applicants' association can be regarded as having been "necessary in a democratic society" within the meaning of Article 11 § 2 of the Convention.

There has accordingly been no violation of Article 11 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 11 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 17 February 2004.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint concurring opinion of Mr Costa and Mr Zupančič joined by Mr Kovler is annexed to this judgment.

L.W.
P.J.M.

JOINT CONCURRING OPINION OF JUDGES COSTA AND ZUPANČIČ JOINED BY JUDGE KOVLER

(Translation)

1. It was after much hesitation that we decided to join our colleagues in the Grand Chamber in finding that Poland had not violated Article 11 of the Convention in the instant case by refusing to register the association with the name "Union of People of Silesian Nationality".

2. Freedom of association is one of the most fundamental political freedoms and, in States that profess democratic values, the courts protect it, usually by according it constitutional status (examples include, in France: the *Conseil d'Etat*'s judgment of 11 July 1956, *Amicale des Annamites de Paris*, and the decision of the Constitutional Council no. 71-44 of 16 July 1971; and, in the United States: Supreme Court judgments such as *In re Primus*, 436 United States Reports 412 (1978), and *Roberts v. United States Jaycees*, 468 United States Reports 609 (1984).

3. The European Court of Human Rights itself views freedom of association as meriting special protection and considers that the limitations set out in paragraph 2 of Article 11 of the Convention must be construed narrowly (see, among other authorities, *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, p. 22, § 46, and *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, *Reports* 1998-IV, p. 1614, § 40; in both cases, the Court held unanimously that there had been a violation of Article 11).

4. So what is the present case about? It concerns an association that was formed with the name "Union of People of Silesian Nationality" and whose aims as stated in its memorandum of association included: "to awaken and strengthen the national consciousness of Silesians; to restore Silesian culture; to promote knowledge of Silesia; to protect the ethnic rights of persons of Silesian nationality ...". The memorandum of association afforded the Union very broad-ranging means with which to accomplish its aims, without, however, expressly giving it a right to put forward candidates for election. Lastly, paragraph 10 of the memorandum of association provided: "Any person of Silesian nationality may become an ordinary member of the Union", and paragraph 30 added: "The Union is an organisation of the Silesian national minority". It is important to note these points, since, behind its innocuous *appearance* as an ordinary association, the Union saw itself *in practice* as the incarnation of the "national" Silesian minority and it is this factor that helps to explain the reaction of the authorities of the respondent State.

5. The applicants sought to register the association. Under the Polish Law on associations, the decision whether or not to register is taken by the regional court with jurisdiction for the area in which the association has its headquarters, in this case, the Katowice Regional Court. The Regional Court granted registration. However, on an appeal by the Governor (in whom a supervisory power is vested by the Law on associations), the Court of Appeal overturned that order and rejected the application for registration of the Union. The Supreme Court then dismissed an appeal on points of law by the applicants against the Court of Appeal's judgment. Having exhausted domestic remedies, the applicants then turned their hopes to Strasbourg.

6. Both the Court of Appeal and the Supreme Court based their reasoning on the realities behind the appearances (a practice to which we are not averse on principle, provided of course that it does not lead to accusations on the basis of supposed intentions). They found that for the purposes of domestic and international law *no* Silesian national minority existed (however, as they acknowledged, there is no definition of a national minority in any international instrument, not even the Council Europe Framework Convention for the Protection of National Minorities, which Poland has signed and ratified). They also found that, through its choice of name and certain paragraphs in its memorandum of association, essentially paragraphs 10 and 30 cited above, the Union was effectively seeking to establish itself as the representative of that alleged national minority. Lastly, they were satisfied that the aim of the requested registration and its automatic consequence would be to enable the association to rely on section 5 of the 1993 Elections Act, in other words to gain an “advantage” at elections, as it would have an unchallengeable right to seats without having to reach the threshold which electoral lists were normally required to attain under the Act.

7. There is certainly room for doubt about these various points.

8. Admittedly, we would not venture to contest the argument regarding the lack of a Silesian “nation”, or the Court of Appeal's view that, in order to constitute a “national” minority, a group must be linked to a majority from outside Poland, such as the Germans, Ukrainians, Lithuanians or others. That is a political choice and a matter on which an international court could not dictate to a Contracting State without infringing upon the subsidiarity principle. Besides which, even though the Permanent Court of International Justice delivered two famous judgments concerning Polish Upper Silesia in 1926 and 1928 (*Germany v. Poland*, 25 May 1926, Series A no. 7, and 26 April 1928, Series A no. 15), questions relating to national minorities are complex and still somewhat vague.

9. More debatable, however, is the view that the Union's real intention was to gain electoral advantage (although that does seem probable from the case file at least), and, above all, the notion that the automatic consequence of registration of a national minority organisation was to gain exemption

from the electoral "threshold" requirement. Section 5 of the 1993 Elections Act, which is cited in paragraph 41 of the judgment, is not devoid of ambiguity. Outwardly, it appears to give the State Electoral College the power to grant or refuse exemption. The Supreme Court was alert to this problem of construction. In finding that, on the contrary, the Electoral College's hands were tied and it was bound to grant exemption if the applicant electoral committee was a *registered* organisation of a national minority, it followed the authoritative interpretation given by the Polish Constitutional Court in this respect in its decision of 30 April 1997 (reproduced in paragraphs 42 and 43 of the judgment). While the Supreme Court openly acknowledged (see paragraph 36 of the judgment) that decisions of the Constitutional Court no longer had universally binding force, it stressed the persuasiveness of the Constitutional Court's reasons, and that is indeed a factor that cannot be neglected.

10. At this point in our analysis, we have to admit that it would be presumptuous to contest the two highest Polish courts' interpretation of domestic law; here, the principle of subsidiarity commands restraint. We have, therefore, overcome our initial hesitations on this point: it must be accepted that registration would have permitted the Union to acquire electoral privileges which the Constitution and law restrict to purely "national" minorities and that such privileges derogate from the constitutional principle requiring equality before the law.

11. How, though, can the present decision be reconciled with the Court's decisions in two other, comparatively recent, cases? In one of these, *Sidiropoulos and Others*, which has already been cited, the applicants had formed a "Macedonian" association and the Court found that the Greek judicial authorities' refusal to register it had infringed Article 11 of the Convention. In the other, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (nos. 29221/95 and 29225/95, ECHR 2001-IX), the Court likewise found a violation of Article 11, owing to a ban on peaceful assembly. But is it the Court's role to treat the "Silesian minority" more severely and the "Macedonian minority" with greater indulgence?

12. That, of course, is not the issue. In *Sidiropoulos and Others*, the Court found that in the circumstances of the case the association did not represent a genuine danger to public order or the territorial integrity of Greece. Likewise, in *Stankov*, the Court considered on the facts that there was no foreseeable risk that the planned meetings would lead to violent action, incitement to violence or the rejection of democratic principles. The most important aspect for the Court, therefore, will be the factual assessment, at the risk of attracting the criticism of casuistry (which in our view is inevitable) that is often levelled at it. Ultimately, the decisive factor for us in the present case was the fact that the association would not only have existed, but also have been registered, if it had changed its name and amended paragraphs 10 and 30 of its memorandum of association, as it had

been asked to do by the Governor acting in his supervisory capacity (see paragraph 24 of the judgment). While this would have deprived it of the electoral "advantage" afforded national minorities, it would have acquired full legal capacity as an association. We thus return to the starting-point of this opinion: in practice, the measures the applicants complain of constitute not so much a real interference with their freedom of association as an attempt on the part of the domestic authorities to avoid the unforeseen consequences – which would infringe the principle of equality – of the exercise of that freedom.

13. For all these reasons, we were able to accept the finding that "it was not the applicants' freedom of association *per se* that was restricted by the State" (see paragraph 106 of the judgment). Indeed, in that regard, it seemed to us that *Cha'are Shalom Ve Tsedek v. France* ([GC], no. 27417/95, §§ 83-84, ECHR 2000-VII) might be of some relevance, *mutatis mutandis*. In the end, despite our initial reservations, we were able to concur with the majority in this very sensitive case, thus fully justifying its examination by the Grand Chamber of the Court.

In the case of Halford v. the United Kingdom (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Bernhardt, President,
Mr L.-E. Pettiti,
Mr C. Russo,
Mr A. Spielmann,
Mr I. Foighel,
Mr J.M. Morenilla,
Sir John Freeland,
Mr M.A. Lopes Rocha,
Mr P. Kuris,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 19 March and 27 May 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

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Notes by the Registrar

1. The case is numbered 73/1996/692/884. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 28 May 1996, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). The Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") also applied to refer the case to the Court on 27 August 1996 (see paragraph 6 below). It originated in an application (no. 20605/92) against the United Kingdom lodged with the Commission under Article 25 (art. 25) by Ms Alison Halford, a British citizen, on 22 April 1992.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent

State of its obligations under Articles 8, 10, 13 and 14 of the Convention (art. 8, art. 10, art. 13, art. 14).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 10 June 1996, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr C. Russo, Mr A. Spielmann, Mr I. Foighel, Mr J.M. Morenilla, Mr M.A. Lopes Rocha and Mr P. Kuris (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Deputy Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 2 January 1997 and the applicant's memorial on 6 January 1997.

5. On 20 August 1996 Mr Bernhardt had granted leave to Liberty, a non-governmental human rights organisation based in London, to submit written comments on specified aspects of the case (Rule 37 para. 2). These were received on 2 January 1997.

6. On 21 February 1997, the Chamber decided to reject the Government's application to refer the case to the Court, on the grounds that it was received after the expiry of the three-month period laid down by Articles 32 para. 1 and 47 of the Convention (art. 32-1, art. 47) and that there was no exceptional reason for extending the time-limit.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 17 March 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr M. Eaton, Deputy Legal Adviser,
Foreign and Commonwealth Office, Agent,
Mr J. Eadie, Barrister-at-Law, Counsel,
Mr H. Carter, Home Office,
Mr P. Regan, Home Office,
Mr C. Raikes, Department of Trade and Industry, Advisers;

(b) for the Commission

Mrs J. Liddy, Delegate;

(c) for the applicant

Mr R. Makin, Solicitor,

Mr P. Duffy, Barrister-at-Law, Counsel.

The Court heard addresses by Mrs Liddy, Mr Makin, Mr Duffy and Mr Eadie and also the answer to a question put by one of its members.

AS TO THE FACTS

I. Circumstances of the case

8. The applicant, Ms Alison Halford, was born in 1940 and lives in the Wirral. From 1962 until her retirement in 1992 she worked in the police service.

A. Background to the alleged telephone interceptions

9. In May 1983 Ms Halford was appointed to the rank of Assistant Chief Constable with the Merseyside police. As such she became the most senior-ranking female police officer in the United Kingdom.

10. On eight occasions during the following seven years, Ms Halford applied unsuccessfully to be appointed to the rank of Deputy Chief Constable, in response to vacancies arising within Merseyside and other police authorities. In order to be considered for promotion to this rank, Home Office approval was required. However, according to the applicant, this was consistently withheld on the recommendation of the Chief Constable of the Merseyside police, who objected to her commitment to equality of treatment between men and women.

11. Following a further refusal to promote her in February 1990, Ms Halford commenced proceedings on 4 June 1990 in the Industrial Tribunal against, inter alia, the Chief Constable of Merseyside and the Home Secretary, claiming that she had been discriminated against on grounds of sex.

On 14 June 1990, the Chairman and Vice-Chairman of the Merseyside Police Authority were designated a "Special Committee" to handle the issues arising from the discrimination case.

12. Ms Halford alleges that certain members of the Merseyside Police Authority launched a "campaign" against her in response to her complaint to the Industrial Tribunal. This took the form, inter alia, of leaks to the press, interception of her telephone calls (see paragraph 16 below) and the decision to bring disciplinary proceedings against her.

13. Thus, on 14 September 1990, the Special Committee referred to the Senior Officers' Disciplinary Committee a report written by the Chief Constable about an alleged incident of misconduct on the part of Ms Halford on 24 July 1990. The Disciplinary Committee resolved, on 20 September 1990, to hold a formal investigation and to refer the matter to the Police Complaints Authority and, on 8 February 1991, to press charges. Ms Halford was suspended from duty on full pay from 12 December 1990.

14. She challenged the above decisions by way of judicial review in the High Court. The matter was adjourned by Mr Justice MacPherson in September 1991 in view of a possible settlement. However, the parties failed to reach agreement and the matter came back before him on

20 December 1991. He found that the Chairman and Vice-Chairman of the Police Authority had acted ultra vires and, without imputing ill-motive to them, held that there had been an element of unfairness. He therefore quashed the relevant decisions.

15. The hearing before the Industrial Tribunal took place in June 1992. On 14 July 1992 the proceedings were adjourned pending negotiation between the parties, which led to settlement of the case. Ms Halford was given an ex gratia payment of 10,000 pounds sterling (GBP) by the Chief Constable (the statutory maximum which the Industrial Tribunal could have awarded), together with GBP 5,000 towards her personal expenses by the Home Secretary. It was agreed that she would retire from the police force on medical grounds (arising out of an injury to her knee in 1989). In addition, the Home Office agreed to implement various proposals put by the Equal Opportunities Commission, inter alia to update and review selection procedures for senior posts within the police force.

B. The alleged interceptions

16. As Assistant Chief Constable, Ms Halford was provided with her own office and two telephones, one of which was for private use. These telephones were part of the Merseyside police internal telephone network, a telecommunications system outside the public network. No restrictions were placed on the use of these telephones and no guidance was given to her, save for an assurance which she sought and received from the Chief Constable shortly after she instituted the proceedings in the Industrial Tribunal that she had authorisation to attend to the case while on duty, including by telephone.

In addition, since she was frequently "on call", a substantial part of her home telephone costs were paid by the Merseyside police. Her home telephone consisted of a telephone apparatus connected, through the "network termination point", to the public telecommunications network.

17. She alleges that calls made from her home and her office telephones were intercepted for the purposes of obtaining information to use against her in the discrimination proceedings. In support of these allegations she adduced various items of evidence before the Commission (see paragraph 21 of the Commission's report). In addition, she informed the Court that she was told by an anonymous source on 16 April 1991 that, shortly before, the source had discovered the Merseyside police checking transcripts of conversations made on her home telephone.

For the purposes of the case before the Court, the Government accepted that the applicant had adduced sufficient material to establish a reasonable likelihood that calls made from her office telephones were intercepted. They did not, however, accept that she had adduced sufficient material to establish such a reasonable likelihood in relation to her home telephone.

18. Ms Halford raised her concerns about the interception of her calls before the Industrial Tribunal on 17 June 1992. On 2 July 1992, in the course of the hearing, counsel for the Home Secretary expressed the opinion that it was not possible for her to adduce evidence about the alleged interceptions before the Industrial Tribunal because section 9 of the Interception of Communications Act 1985 ("the 1985 Act") expressly excluded the calling of evidence before any

court or tribunal which tended to suggest that an offence under section 1 of the Act had been committed (see paragraph 25 below).

19. On 6 December 1991 Ms Halford applied to the Interception of Communications Tribunal ("the Tribunal") for an investigation under section 7 of the 1985 Act (see paragraphs 30-32 below). In a letter dated 21 February 1992, the Tribunal informed her that its investigation had satisfied it that there had been no contravention of sections 2 to 5 of the 1985 Act in her case (see paragraphs 26-29 below). In a letter dated 27 March 1992, the Tribunal confirmed that it could not specify whether any interception had in fact taken place (see paragraph 32 below).

20. In a letter to Mr David Alton MP dated 4 August 1992, the Home Secretary explained that Ms Halford's complaint regarding the interception of calls made from her office telephones "[did] not fall within [his] responsibilities as Home Secretary nor within the terms of the [1985] Act".

II. Relevant domestic law and practice

A. Public telecommunications systems

1. The offence created by the Interception of Communications Act 1985

21. The Interception of Communications Act 1985 came into force on 10 April 1986 following the Court's judgment in Malone v. the United Kingdom (2 August 1984, Series A no. 82). Its objective, as outlined in the Home Office White Paper which preceded it, was to provide a clear statutory framework within which the interception of communications on public systems would be authorised and controlled in a manner commanding public confidence (Interception of Communications in the United Kingdom (February 1985) HMSO, Cmnd. 9438).

22. A "public" telecommunications system is defined as a telecommunications system which is run pursuant to a licence granted under the Telecommunications Act 1984 ("the 1984 Act") and which has been designated as such by the Secretary of State (section 10 (1) of the 1985 Act, by reference to section 4 (1) of the 1984 Act).

23. By section 1 (1) of the 1985 Act, anyone who intentionally intercepts a communication in the course of its transmission by means of a public communications system is guilty of a criminal offence.

24. Section 1 (2) and (3) provide four circumstances in which a person who intercepts communications in this way will not be guilty of the offence. The only one of these which is relevant to the present case is the interception of a communication pursuant to a warrant issued by the Secretary of State under section 2 of the Act (see paragraph 26 below).

2. Exclusion of evidence

25. Section 9 of the 1985 Act provides that no evidence shall be adduced by any party, in any proceedings before a court or tribunal, which tends to suggest either that an offence under section 1 of the 1985 Act has been committed by a public servant or that a warrant has been issued to such a person under section 2 of the 1985 Act.

3. Warrants

26. Sections 2 to 6 of the 1985 Act set out detailed rules for the issuing of warrants by the Secretary of State for the interception of communications and the disclosure of intercepted material. Thus, section 2 (2) of the 1985 Act provides:

> "The Secretary of State shall not issue a warrant ... unless he considers that the warrant is necessary -
>
> (a) in the interests of national security;
> (b) for the purpose of preventing or detecting serious crime; or
> (c) for the purposes of safeguarding the economic well-being of the United Kingdom."

When considering whether it is necessary to issue a warrant, the Secretary of State must take into account whether the information which it is considered necessary to acquire could reasonably be acquired by other means (section 2 (2) of the 1985 Act).

27. The warrant must specify the person who is authorised to do the interception, and give particulars of the communications to be intercepted, such as the premises from which the communications will be made and the names of the individuals concerned (sections 2 (1) and 3 of the 1985 Act).

28. A warrant cannot be issued unless it is under the hand of the Secretary of State himself or, in an urgent case, under the hand of a senior official where the Secretary of State has expressly authorised the issue of the warrant. A warrant issued under the hand of the Secretary of State is valid for two months; one issued under the hand of an official is only valid for two working days. In defined circumstances, warrants may be modified or renewed (sections 4 and 5 of the 1985 Act).

29. Section 6 of the Act provides, inter alia, for the limitation of the extent to which material obtained pursuant to a warrant may be disclosed, copied and retained.

4. The Interception of Communications Tribunal

30. The 1985 Act also provided for the establishment of an Interception of Communications Tribunal. The Tribunal consists of five members, each of whom must be a lawyer of not less than ten years' standing, who hold office for five years subject to reappointment (section 7 of and Schedule 1 to the 1985 Act).

31. Any person who believes, inter alia, that communications made by or to him may have been intercepted in the course of their transmission by means of a public telecommunications system can apply to the Tribunal for an investigation. If the application does not appear to the Tribunal to be frivolous or vexatious, it is under a duty to determine whether a warrant has been issued, and if so, whether it was issued in accordance with the 1985 Act. In making this determination, the Tribunal applies "the principles applicable by a court on application for judicial review" (section 7 (2)-(4) of the 1985 Act).

32. If the Tribunal determines that there has been no breach of the 1985 Act, it will inform the complainant, but it will not confirm

whether there was no breach because there was no authorised interception or because, although there was such an interception, it was justified under the terms of the 1985 Act. In cases where the Tribunal finds there has been a breach, it has a duty to make a report of its findings to the Prime Minister and a power to notify the complainant. It also has the power, inter alia, to order the quashing of the warrant and the payment of compensation to the complainant. The Tribunal does not give reasons for its decisions and there is no appeal from a decision of the Tribunal (section 7 (7)-(8) of the 1985 Act).

5. The Commissioner

33. The 1985 Act also makes provision for the appointment of a Commissioner by the Prime Minister. The first Commissioner was Lord Justice Lloyd (now Lord Lloyd), succeeded in 1992 by Lord Bingham, also a senior member of the judiciary, who was in turn succeeded in 1994 by another, Lord Nolan.

34. The Commissioner's functions include reviewing the carrying out by the Secretary of State of the functions conferred on him by sections 2 to 5 of the 1985 Act, reporting to the Prime Minister breaches of sections 2 to 5 of the 1985 Act which have not been reported by the Tribunal and making an annual report to the Prime Minister on the exercise of his functions. This report must be laid before Parliament, although the Prime Minister has the power to exclude any matter from it the publication of which would be prejudicial to national security, to the prevention or detection of serious crime or to the well-being of the United Kingdom. The report must state if any matter has been excluded (section 8 of the 1985 Act).

35. In general,the reports of the Commissioner to the Prime Minister have indicated an increase in new warrants issued, but the Commissioner has been satisfied that in all cases those new warrants were justified under section 2 of the 1985 Act.

B. Telecommunications systems outside the public network

36. The 1985 Act does not apply to telecommunications systems outside the public network, such as the internal system at Merseyside police headquarters, and there is no other legislation to regulate the interception of communications on such systems.

37. The English common law provides no remedy against interception of communications, since it "places no general constraints upon invasions of privacy as such" (Mr Justice Sedley in R. v. Broadcasting Complaints Commission, ex parte Barclay, 4 October 1996, unreported).

PROCEEDINGS BEFORE THE COMMISSION

38. In her application of 22 April 1992 (no. 20605/92) to the Commission, Ms Halford complained that the interception of calls made from her office and home telephones amounted to unjustifiable interferences with her rights to respect for her private life and freedom of expression, contrary to Articles 8 and 10 of the Convention (art. 8, art. 10), that she had no effective domestic remedy in relation to the interceptions, contrary to Article 13 of the Convention (art. 13), and that she was discriminated against on grounds of sex, contrary to Article 14 of the Convention in conjunction with Articles 8 and 10 (art. 14+8, art. 14+10).

39. The Commission declared the application admissible on 2 March 1995. In its report of 18 April 1996 (Article 31) (art. 31), it expressed the opinion, by twenty-six votes to one, that there had been violations of Articles 8 and 13 of the Convention (art. 8, art. 13) in relation to Ms Halford's office telephones and, unanimously, that there had been no violation of Articles 8, 10 or 13 (art. 8, art. 10, art. 13) in relation to her home telephone, that it was not necessary to consider the complaint under Article 10 (art. 10) in relation to her office telephones, and that there had been no violation of Article 14 taken in conjunction with Articles 8 or 10 (art. 14+8, art. 14+10). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment (1).

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Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-III), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS TO THE COURT

40. At the hearing, as they had done in their memorial, the Government asked the Court to hold that there had been no violation of the Convention.

The applicant maintained that there had been a violation, and asked the Court to award her compensation under Article 50 of the Convention (art. 50).

AS TO THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 8 OF THE CONVENTION (art. 8)

41. Ms Halford alleged that the interception of her telephone calls amounted to violations of Article 8 of the Convention (art. 8), which provides:

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

The Commission agreed that there had been a violation so far as the interception of calls from her office telephones was concerned. The Government denied that there had been any violation.

A. The office telephones

1. Applicability of Article 8 (art. 8) to the complaint relating to the office telephones

42. The applicant argued, and the Commission agreed, that the calls made on the telephones in Ms Halford's office at Merseyside police headquarters fell within the scope of "private life" and "correspondence" in Article 8 para. 1 (art. 8-1), since the Court in its case-law had adopted a broad construction of these expressions (see, for example, the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 21, para. 41; the Huvig v. France judgment of 24 April 1990, Series A no. 176-B, p. 41, para. 8, and p. 52, para. 25; the Niemietz v. Germany judgment of 16 December 1992, Series A no. 251-B; and the A. v. France judgment of 23 November 1993, Series A no. 277-B).

43. The Government submitted that telephone calls made by Ms Halford from her workplace fell outside the protection of Article 8 (art. 8), because she could have had no reasonable expectation of privacy in relation to them. At the hearing before the Court, counsel for the Government expressed the view that an employer should in principle, without the prior knowledge of the employee, be able to monitor calls made by the latter on telephones provided by the employer.

44. In the Court's view, it is clear from its case-law that telephone calls made from business premises as well as from the home may be covered by the notions of "private life" and "correspondence" within the meaning of Article 8 para. 1 (art. 8-1) (see the above-mentioned Klass and Others judgment, loc. cit.; the Malone v. the United Kingdom judgment of 2 August 1984, Series A no. 82, p. 30, para. 64; the above-mentioned Huvig judgment, loc. cit.; and, mutatis mutandis, the above-mentioned Niemietz judgment, pp. 33-35, paras. 29-33).

45. There is no evidence of any warning having been given to Ms Halford, as a user of the internal telecommunications system operated at the Merseyside police headquarters, that calls made on that system would be liable to interception. She would, the Court considers, have had a reasonable expectation of privacy for such calls, which expectation was moreover reinforced by a number of factors. As Assistant Chief Constable she had sole use of her office where there were two telephones, one of which was specifically designated for her private use. Furthermore, she had been given the assurance, in response to a memorandum, that she could use her office telephones for the purposes of her sex-discrimination case (see paragraph 16 above).

46. For all of the above reasons, the Court concludes that the conversations held by Ms Halford on her office telephones fell within the scope of the notions of "private life" and "correspondence" and that Article 8 (art. 8) is therefore applicable to this part of the complaint.

2. Existence of an interference

47. The Government conceded that the applicant had adduced sufficient material to establish a reasonable likelihood that calls made from her office telephones had been intercepted. The Commission also considered that an examination of the application revealed such a reasonable likelihood.

48. The Court agrees. The evidence justifies the conclusion that there was a reasonable likelihood that calls made by Ms Halford from her office were intercepted by the Merseyside police with the primary

aim of gathering material to assist in the defence of the sex-discrimination proceedings brought against them (see paragraph 17 above). This interception constituted an "interference by a public authority", within the meaning of Article 8 para. 2 (art. 8-2), with the exercise of Ms Halford's right to respect for her private life and correspondence.

3. Whether the interference was "in accordance with the law"

49. Article 8 para. 2 (art. 8-2) further provides that any interference by a public authority with an individual's right to respect for private life and correspondence must be "in accordance with the law".

According to the Court's well-established case-law, this expression does not only necessitate compliance with domestic law, but also relates to the quality of that law, requiring it to be compatible with the rule of law. In the context of secret measures of surveillance or interception of communications by public authorities, because of the lack of public scrutiny and the risk of misuse of power, the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights (art. 8). Thus, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to resort to any such secret measures (see the above-mentioned Malone judgment, p. 32, para. 67; and, mutatis mutandis, the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, p. 23, paras. 50-51).

50. In the present case, the Government accepted that if, contrary to their submission, the Court were to conclude that there had been an interference with the applicant's rights under Article 8 (art. 8) in relation to her office telephones, such interference was not "in accordance with the law" since domestic law did not provide any regulation of interceptions of calls made on telecommunications systems outside the public network.

51. The Court notes that the 1985 Act does not apply to internal communications systems operated by public authorities, such as that at Merseyside police headquarters, and that there is no other provision in domestic law to regulate interceptions of telephone calls made on such systems (see paragraphs 36-37 above). It cannot therefore be said that the interference was "in accordance with the law" for the purposes of Article 8 para. 2 of the Convention (art. 8-2), since the domestic law did not provide adequate protection to Ms Halford against interferences by the police with her right to respect for her private life and correspondence.

It follows that there has been a violation of Article 8 (art. 8) in relation to the interception of calls made on Ms Halford's office telephones.

B. The home telephone

1. Applicability of Article 8 (art. 8) to the complaint relating to the home telephone

52. It is clear from the Court's case-law (see the citations at paragraph 44 above) that telephone conversations made from the home are covered by the notions of "private life" and "correspondence" under

Article 8 of the Convention (art. 8). Indeed, this was not disputed by the Government.

Article 8 (art. 8) is, therefore, applicable to this part of Ms Halford's complaint.

2. Existence of an interference

53. The applicant alleged that calls made from her telephone at home also were intercepted by the Merseyside police for the purposes of defending the sex discrimination proceedings. She referred to the evidence of interception which she had adduced before the Commission, and to the further specification made to the Court (see paragraph 17 above). In addition she submitted that, contrary to the Commission's approach, she should not be required to establish that there was a "reasonable likelihood" that calls made on her home telephone were intercepted. Such a requirement would be inconsistent with the Court's pronouncement in the above-mentioned Klass and Others case that the menace of surveillance could in itself constitute an interference with Article 8 rights (art. 8). In the alternative, she contended that if the Court did require her to show some indication that she had been affected, the evidence brought by her was satisfactory; given the secrecy of the alleged measures it would undermine the effectiveness of the protection afforded by the Convention if the threshold of proof were set too high.

54. The Government explained that they could not disclose whether or not there had been any interception of calls made from the telephone in Ms Halford's home, since the finding which the Interception of Communications Tribunal was empowered to make under the 1985 Act was deliberately required to be couched in terms which did not reveal whether there had been an interception on a public telecommunications system properly authorised under the Act or whether there had in fact been no interception. They could, however, confirm that the Tribunal was satisfied that there had been no contravention of sections 2 to 5 of the 1985 Act in Ms Halford's case (see paragraphs 19 and 32 above).

55. The Commission, applying its case-law, required the applicant to establish that there was a "reasonable likelihood" that calls made on her home telephone had been intercepted (see, for example, the report of the Commission on application no. 12175/86, Hewitt and Harman v. the United Kingdom, 9 May 1989, Decisions and Reports 67, pp. 98-99, paras. 29-32). Having reviewed all the evidence, it did not find such a likelihood established.

56. The Court recalls that in the above-mentioned Klass and Others case it was called upon to decide, inter alia, whether legislation which empowered the authorities secretly to monitor the correspondence and telephone conversations of the applicants, who were unable to establish whether such measures had in fact been applied to them, amounted to an interference with their Article 8 rights (art. 8). The Court held in that case that "in the mere existence of the legislation itself there is involved, for all those to whom the legislation could be applied, a menace of surveillance; this menace necessarily strikes at freedom of communication between users of the postal and telecommunication services and thereby constitutes an 'interference by a public authority' with the exercise of the applicants' right to respect for private and family life and for correspondence" (p. 21, para. 41).

The Court further recalls that in its above-mentioned Malone judgment, in addition to finding that one telephone conversation to which the applicant had been a party had been intercepted at the request of the police under a warrant issued by the Home Secretary, it observed that "the existence in England and Wales of laws and practices which permit and establish a system for effecting secret surveillance of communications amounted in itself to an 'interference'" (pp. 30-31, para. 64).

57. However, the essence of Ms Halford's complaint, unlike that of the applicants in the Klass and Others case (cited above, p. 20, para. 38), was not that her Article 8 rights (art. 8) were menaced by the very existence of admitted law and practice permitting secret surveillance, but instead that measures of surveillance were actually applied to her. Furthermore, she alleged that the Merseyside police intercepted her calls unlawfully, for a purpose unauthorised by the 1985 Act (see paragraphs 26 and 53 above).

In these circumstances, since the applicant's complaint concerns specific measures of telephone interception which fell outside the law, the Court must be satisfied that there was a reasonable likelihood that some such measure was applied to her.

58. In this respect the Court notes, first, that the Commission, which under the Convention system is the organ primarily charged with the establishment and verification of the facts (see, for example, the Aksoy v. Turkey judgment of 18 December 1996, Reports of Judgments and Decisions 1996-VI, p. 2272, para. 38), considered that the evidence presented to it did not indicate a reasonable likelihood that calls made on the applicant's home telephone were being intercepted (see the report of the Commission, paragraph 65).

59. The Court observes that the only item of evidence which tends to suggest that calls made from Ms Halford's home telephone, in addition to those made from her office, were being intercepted, is the information concerning the discovery of the Merseyside police checking transcripts of conversations. Before the Court, the applicant provided more specific details regarding this discovery, namely that it was made on a date after she had been suspended from duty (see paragraph 17 above). However, the Court notes that this information might be unreliable since its source has not been named. Furthermore, even if it is assumed to be true, the fact that the police were discovered checking transcripts of the applicant's telephone conversations on a date after she had been suspended does not necessarily lead to the conclusion that these were transcripts of conversations made from her home.

60. The Court, having considered all the evidence, does not find it established that there was an interference with Ms Halford's rights to respect for her private life and correspondence in relation to her home telephone.

In view of this conclusion, the Court does not find a violation of Article 8 of the Convention (art. 8) with regard to telephone calls made from Ms Halford's home.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION (art. 13)

61. Ms Halford further alleged that she had been denied an effective

domestic remedy for her complaints, in violation of Article 13 of the Convention (art. 13), which states:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The office telephones

62. The applicant, with whom the Commission agreed, contended that there had been a violation of Article 13 (art. 13) in view of the fact that there was no avenue in domestic law by which to complain about interceptions of calls made on telecommunications systems outside the public network.

63. The Government submitted that Article 13 (art. 13) was not applicable in that Ms Halford had not made out an "arguable claim" to a violation of Articles 8 or 10 of the Convention (art. 8, art. 10). In the alternative, they submitted that no separate issue arose under this provision (art. 13) in relation to the office telephones.

64. The Court recalls that the effect of Article 13 (art. 13) is to require the provision of a remedy at national level allowing the competent domestic authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (art. 13) (see the Chahal v. the United Kingdom judgment of 15 November 1996, Reports 1996-V, pp. 1869-70, para. 145). However, such a remedy is only required in respect of grievances which can be regarded as "arguable" in terms of the Convention.

65. The Court observes that Ms Halford undoubtedly had an "arguable" claim that calls made from her office telephones were intercepted and that this amounted to a violation of Article 8 of the Convention (art. 8) (see paragraphs 42-51 above). She was, therefore, entitled to an effective domestic remedy within the meaning of Article 13 (art. 13). However, as the Government have conceded in relation to Article 8 of the Convention (art. 8) (see paragraph 50 above), there was no provision in domestic law to regulate interceptions of telephone calls made on internal communications systems operated by public authorities, such as the Merseyside police. The applicant was therefore unable to seek relief at national level in relation to her complaint concerning her office telephones.

It follows that there has been a violation of Article 13 of the Convention (art. 13) in relation to the applicant's office telephones.

B. The home telephone

66. The applicant also complained that there was no remedy available to her against an interception of telephone calls made from her home by the police acting without a warrant. She referred to the first report of the Commissioner appointed under the 1985 Act (see paragraphs 33-34 above) who observed that he "was not concerned with [the offence of unlawful interception created by the 1985 Act. He could] not in the nature of things know, nor could he well find out, whether there [had] been an unlawful interception ... That is a job for the police" (Interception of Communications Act 1985, Report of the

Commissioner for 1986, Cm 108, p. 2, para. 3).

67. The Government submitted that Ms Halford had not established an arguable claim of a violation of the Convention in relation to the interception of calls made from her home. In the alternative, they submitted that the aggregate of remedies available to her, including those provided by the 1985 Act (see paragraph 31 above), was sufficient to satisfy Article 13 (art. 13).

68. The Commission, in view of its conclusion as to the lack of a reasonable likelihood of interception of her home telephone calls, considered that she did not have an arguable claim warranting a remedy under Article 13 (art. 13).

69. The Court recalls its observation that, in order to find an "interference" within the meaning of Article 8 (art. 8) in relation to Ms Halford's home telephone, it must be satisfied that there was a reasonable likelihood of some measure of surveillance having been applied to the applicant (see paragraph 57 above). It refers in addition to its assessment of the evidence adduced by the applicant in support of her claim that calls made from her home telephone were intercepted (see paragraphs 58-60 above).

70. The Court considers that this evidence is not sufficient to found an "arguable" claim within the meaning of Article 13 (art. 13) (see paragraph 64 above).

It follows that there has been no violation of Article 13 of the Convention (art. 13) in relation to the applicant's complaint concerning her home telephone.

III. ALLEGED VIOLATION OF ARTICLES 10 AND 14 OF THE CONVENTION (art. 10, art. 14)

71. In her application to the Commission, Ms Halford had complained that the interception of calls made from both her home and office telephones amounted to violations of Articles 10 and 14 of the Convention (art. 10, art. 14). However, before the Court she accepted that it might not be necessary to examine, in relation to these provisions (art. 10, art. 14), matters which had already been considered under Article 8 (art. 8).

Article 10 of the Convention (art. 10) states (as far as relevant):

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Article 14 (art. 14) states:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

72. The Court considers that the allegations in relation to Articles 10 and 14 (art. 10, art. 14) are tantamount to restatements of the complaints under Article 8 (art. 8). It does not therefore find it necessary to examine them separately.

IV. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

73. Ms Halford asked the Court to grant her just satisfaction under Article 50 of the Convention (art. 50), which provides as follows:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

74. Ms Halford claimed compensation for the intrusion into her privacy and the distress it had caused. She informed the Court that in 1992 she had required medical treatment for stress.

75. The Government commented that no causal connection had been established between the stress suffered by the applicant at the time of proceedings before the Industrial Tribunal and the interception of her telephone calls.

76. The Court, bearing in mind that the interception of calls made by Ms Halford on her office telephones at Merseyside police headquarters, not subject to any regulation by domestic law, appears to have been carried out by the police with the primary purpose of gathering material to be used against her in sex-discrimination proceedings, considers what occurred to have amounted to a serious infringement of her rights by those concerned. On the other hand, there is no evidence to suggest that the stress Ms Halford suffered was directly attributable to the interception of her calls, rather than to her other conflicts with the Merseyside police.

Having taken these matters into account, the Court considers that GBP 10,000 is a just and equitable amount of compensation.

B. Pecuniary damage

77. Ms Halford requested reimbursement of her personal expenses incurred in bringing the Strasbourg proceedings, estimated at between GBP 1,000 and GBP 1,250.

78. The Government accepted that a sum could properly be awarded to

cover her costs in attending the hearing before the Court. However, they observed that she had not produced any evidence to substantiate any other expenses.

79. In view of the fact that no evidence was produced to substantiate Ms Halford's expenses but that she clearly attended the hearing in Strasbourg, the Court decides to award GBP 600 in respect of this item.

C. Costs and expenses

80. The applicant also claimed the costs and expenses of instructing solicitors and counsel. Her solicitors asked for payment at the rate of GBP 239 per hour. They estimated that they had undertaken the equivalent of 500 hours' work in connection with the Strasbourg proceedings and asked for GBP 119,500 (exclusive of value-added tax, "VAT") in respect of this. In addition, they asked for GBP 7,500 (exclusive of VAT) in respect of disbursements and expenses. Counsel's fees were GBP 14,875 plus expenses of GBP 1,000 (exclusive of VAT).

81. The Government considered that the hourly rate requested by Ms Halford's solicitors was too high: in domestic proceedings the appropriate rate would be GBP 120-150 per hour. Furthermore, they submitted that it had not been necessary to work for 500 hours on the case. By way of illustration, they observed that, although the case involved only a narrow range of issues, the applicant's solicitor had chosen to submit written pleadings of approximately 200 pages, with some 500 pages of annexes and appendices, containing for the most part information which was either irrelevant or of only peripheral relevance. They submitted that a total figure for legal costs of approximately GBP 25,000 would be entirely sufficient.

82. Bearing in mind the nature of the issues raised by the case, the Court is not satisfied that the amounts claimed by the applicant were necessarily incurred or reasonable as to quantum (see, for example, the Saunders v. the United Kingdom judgment of 17 December 1996, Reports 1996-VI, p. 2070, para. 93). Deciding on an equitable basis, it awards GBP 25,000 under this head, together with any VAT which may be chargeable.

D. Default interest

83. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT

1. Holds unanimously that Article 8 of the Convention (art. 8) is applicable to the complaints concerning both the office and the home telephones;

2. Holds unanimously that there has been a violation of Article 8 (art. 8) in relation to calls made on the applicant's office telephones;

3. Holds unanimously that there was no violation of Article 8 (art. 8) in relation to calls made on the applicant's home telephone;

4. Holds unanimously that there was a violation of Article 13 of the

Convention (art. 13) in relation to the applicant's complaint concerning her office telephones;

5. Holds by eight votes to one that there was no violation of Article 13 of the Convention (art. 13) in relation to the applicant's complaint concerning her home telephone;

6. Holds unanimously that it is not necessary to consider the complaints under Articles 10 and 14 of the Convention (art. 10, art. 14);

7. Holds unanimously

(a) that the respondent State is to pay the applicant, within three months, in respect of pecuniary and non-pecuniary damage, 10,600 (ten thousand six hundred) pounds sterling;

(b) that the respondent State is to pay the applicant, within three months, in respect of costs and expenses, 25,000 (twenty-five thousand) pounds sterling, together with any VAT which may be chargeable;

(c) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 June 1997.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the dissenting opinion of Mr Russo is annexed to this judgment.

Initialled: R. B.

Initialled: H. P.

DISSENTING OPINION OF JUDGE RUSSO

I disagree with the Court's conclusion that there was no violation of Article 13 of the Convention (art. 13) in relation to the applicant's complaint that calls made from her home telephone were intercepted.

Although I agree that no interference with her Article 8 rights (art. 8) was established with regard to her home telephone, I observe that her complaint in this connection was declared admissible by the Commission and examined by the Commission and the Court. In my view, it cannot therefore be said that she did not have an "arguable" claim of a violation of Article 8 (art. 8) in respect of her home telephone (see, for example, the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, p. 30, para. 79).

It follows that Ms Halford was entitled to an effective remedy

at national level in respect of this complaint. I am not satisfied
that she was provided with one.

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

CASE OF HASHMAN AND HARRUP v. THE UNITED KINGDOM

(Application no. 25594/94)

JUDGMENT

STRASBOURG

25 November 1999

In the case of Hashman and Harrup v. the United Kingdom,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr A. PASTOR RIDRUEJO,
Mr G. BONELLO,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mr J.-P. COSTA,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr P. LORENZEN,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mrs S. BOTOUCHAROVA,
Lord REED, ad hoc *judge*,

and also of Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 23 June and 27 October 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 2 November 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 25594/94) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under former Article 25 by two United Kingdom nationals, Mr Joseph Hashman and Ms Wanda Harrup, on 19 August 1994. The applicants were represented by Mr J. Bate, a solicitor practising in Woking.

1-2. *Note by the Registry.* Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

The Commission's request referred to former Articles 44 and 48 and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention.

2. In accordance with the provisions of Article 5 § 4 of Protocol No. 11 taken together with Rules 100 § 1 and 24 § 6 of the Rules of Court, a panel of the Grand Chamber decided on 20 January 1999 that the case would be examined by the Grand Chamber of the Court. The Grand Chamber included *ex officio* Sir Nicolas Bratza, the judge elected in respect of the United Kingdom (Article 27 § 2 of the Convention and Rule 24 § 4), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mr R. Türmen, Mrs F. Tulkens, Mrs V. Strážnická, Mr P. Lorenzen, Mr V. Butkevych, Mr A.B. Baka, Mr R. Maruste and Mrs S. Botoucharova (Rule 24 § 3).

Subsequently Sir Nicolas Bratza, who had taken part in the Commission's examination of the case, withdrew from sitting in the Grand Chamber (Rule 28). On 13 May 1999 the Government of the United Kingdom ("the Government") appointed Lord Reed to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1). Later Mr Makarczyk, who was unable to take part in the further consideration of the case, was replaced by Mr J. Casadevall (Rule 24 § 5 (b)).

3. In accordance with the President's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 23 June 1999.

There appeared before the Court:

(a) *for the Government*
Mr M. EATON, *Agent*,
Mr J. MORRIS QC, Attorney General,
Mr R. SINGH,
Ms M. DEMETRIOU, *Counsel*,
Ms C. STEWART,
Mr S. BRAMLEY, Home Office, *Advisers*;

(b) *for the applicants*
Mr P. CODNER, *Counsel*.

The Court heard addresses by Mr Codner and Mr Morris.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. On 3 March 1993 the applicants blew a hunting horn and engaged in hallooing with the intention of disrupting the activities of the Portman Hunt. A complaint was made to the Gillingham magistrates that the applicants should be required to enter into a recognisance with or without sureties to keep the peace and be of good behaviour pursuant to the Justices of the Peace Act 1361.

5. The applicants were bound over to keep the peace and be of good behaviour in the sum of 100 pounds sterling for twelve months on 7 September 1993. They appealed to the Crown Court, which heard their appeals on 22 April 1994 at Dorchester.

6. The Crown Court, comprising a Crown Court judge and two magistrates, found that the applicants had not committed any breach of the peace and that their conduct had not been likely to occasion a breach of the peace. It found the following facts:

> "(a) On 3rd March, 1993, Edward Lycett Green, a joint Master of the Portman Hunt, saw the [applicants] in the environs of the Ranston Estate, and heard the sound of a hunting horn being blown from that position. Later, at about 1.15 p.m., he saw the [applicants'] car on Iwerne Hill and again heard the sound of a hunting horn being blown. On that occasion he also heard [the second applicant] hallooing. Some hounds were drawn towards the [applicants], and hunt staff had to be deployed to recover them.
>
> (b) At about 1.45 p.m., a solitary hound ran out of Rolf's Wood along the Higher Shaftesbury Road. It suddenly, and for no apparent reason, ran across the road and was killed by a lorry travelling in the direction of Blandford Forum.
>
> (c) At about 3.45 p.m., [the first applicant] stated to a police constable that he had been blowing a hunting horn, but nowhere near where the hound was killed. The police officer seized the hunting horn.
>
> (d) Iwerne Hill is about a mile from where the hound was killed, and, at the time of its death, it was travelling away from the hunt and away from Iwerne Hill.
>
> (e) On their own admissions each [applicant] was a hunt saboteur. [The first applicant] admitted that he had blown the horn and [the second applicant] that she shouted at hounds. Their object was to distract hounds from hunting and killing foxes.
>
> (f) An expert, a Mr A. Downes, told us that he had observed hunts for many years and had frequently seen hounds running loose on the road away from the main pack. In his opinion, this caused danger to hounds and to other users of the road."

7. On the basis of these facts, the Crown Court was of the following opinion:

"(a) The [applicants'] behaviour had been a deliberate attempt to interfere with the Portman Hunt and to take hounds out of the control of the huntsman and the whippers-in.

(b) That in this respect the actions of the [applicants] were unlawful, and had exposed hounds to danger.

(c) That there had been no violence or threats of violence on this occasion, so that it could not be said that any breach of the peace had been committed or threatened.

(d) That the [applicants] would repeat their behaviour unless it were checked by the sanction of a bind over.

(e) That the [applicants'] conduct had been *contra bonos mores*.

(f) That *R. v. Howell* [see below] was distinguishable in that it related to the power of arrest for breach of the peace, which could only be exercised if there was violence or the immediate likelihood of violence.

(g) That the power to bind over 'to keep the peace and be of good behaviour' was wider than the power of arrest and could be exercised whenever it was proved either that there had been a breach of the peace or that there had been behaviour *contra bonos mores*, since a breach of the peace is *ex hypothesi contra bonos mores*, and the words 'to keep the peace' added nothing to what was required of the defendant by the words 'to be of good behaviour'."

8. The court noted that neither the Law Commission's report on binding over nor the European Convention was part of domestic law.

9. The Crown Court judge agreed to state a case to the High Court, but legal aid for the case stated was refused on 5 August 1994. The applicants' appeals against the decisions were dismissed on 19 September 1994.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Breach of the peace and conduct *contra bonos mores*

10. Breach of the peace – which does not constitute a criminal offence (*R. v. County of London Quarter Sessions Appeals Committee, ex parte Metropolitan Police Commissioner* [1948] 1 King's Bench Reports 670) – is a common-law concept of great antiquity. However, as Lord Justice Watkins, giving judgment in the Court of Appeal in the case of *R. v. Howell* ([1982] 1 Queen's Bench Reports 416), remarked in January 1981:

"A comprehensive definition of the term 'breach of the peace' has very rarely been formulated …" (p. 426)

He continued:

"We are emboldened to say that there is likely to be a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance." (p. 427)

11. In a subsequent case before the Divisional Court (*Percy v. Director of Public Prosecutions* [1995] 1 Weekly Law Reports 1382), Mr Justice Collins followed *Howell* in holding that there must be a risk of violence before there could be a breach of the peace. However, it was not essential that the violence be perpetrated by the defendant, as long as it was established that the natural consequence of his behaviour would be to provoke violence in others:

> "The conduct in question does not itself have to be disorderly or a breach of the criminal law. It is sufficient if its natural consequence would, if persisted in, be to provoke others to violence, and so some actual danger to the peace is established." (p. 1392)

12. In *Nicol and Selvanayagam v. Director of Public Prosecutions* ([1996] 160 Justice of the Peace Reports 155), Lord Justice Simon Brown stated:

> "… the court would surely not find a [breach of the peace] proved if any violence likely to have been provoked on the part of others would be not merely unlawful but wholly unreasonable – as of course, it would be if the defendant's conduct was not merely lawful but such as in no material way interfered with the other's rights. *A fortiori*, if the defendant was properly exercising his own basic rights, whether of assembly, demonstration or free speech." (p. 163)

13. Behaviour *contra bonos mores* has been described as "conduct which has the property of being wrong rather than right in the judgment of the majority of contemporary fellow citizens" (*per* Lord Justice Glidewell in *Hughes v. Holley* [1988] 86 Criminal Appeal Reports 130).

14. In *R. v. Sandbach, ex parte Williams* ([1935] 2 King's Bench Reports 192) the Divisional Court rejected the view that a person could not be bound over to be of good behaviour when there was no reason to apprehend a breach of the peace. As in the case of binding over to keep the peace, there had to be some reason to believe that there might be a repetition of the conduct complained of before an order to be of good behaviour could be made.

B. Binding over

15. Magistrates have powers to "bind over" under the Magistrates' Courts Act 1980 ("the 1980 Act"), under common law and under the Justices of the Peace Act 1361 ("the 1361 Act").

A binding-over order requires the person bound over to enter into a "recognisance", or undertaking secured by a sum of money fixed by the court, to keep the peace or be of good behaviour for a specified period of time. If he or she refuses to consent to the order, the court may commit him or her to prison, for up to six months in the case of an order made under the 1980 Act or for an unlimited period in respect of orders made under the 1361 Act or common law. If an order is made but breached within the specified time period, the person bound over forfeits the sum of the recognisance. A binding-over order is not a criminal conviction (*R. v.*

County of London Quarter Sessions, ex parte Metropolitan Police Commissioner [1948] 1 King's Bench Reports 670).

1. Binding over under the Magistrates' Courts Act 1980

16. Section 115 of the 1980 Act provides:

> "(1) The power of a magistrates' court on the complaint of any person to adjudge any other person to enter into a recognisance, with or without sureties, to keep the peace or to be of good behaviour towards the complainant shall be exercised by order on complaint.
>
> …
>
> (3) If any person ordered by a magistrates' court under subsection (1) above to enter into a recognisance, with or without sureties, to keep the peace or to be of good behaviour fails to comply with the order, the court may commit him to custody for a period not exceeding 6 months or until he sooner complies with the order."

2. Binding over at common law and under the Justices of the Peace Act 1361

17. In addition to the statutory procedure, magistrates have powers to bind over at common law and under the 1361 Act. These powers allow magistrates, at any stage in proceedings before them, to bind over any participant in the proceedings if they consider that the conduct of the person concerned is such that there might be a breach of the peace or that his or her behaviour has been *contra bonos mores*. It is not open to the justices to attach specific conditions to a binding-over order (*Ayu* [1959] 43 Criminal Appeal Reports 31; *Goodlad v. Chief Constable of South Yorkshire* [1979] Criminal Law Review 51).

3. Appeals

18. An order of the magistrates to require a person to enter into a recognisance to keep the peace or to be of good behaviour can be appealed either to the High Court or the Crown Court. An appeal to the High Court is limited to questions of law, and proceeds by way of "case stated". An appeal to the Crown Court, under the Magistrates' Courts (Appeals from Binding-Over Orders) Act 1956, section 1, proceeds as a rehearing of all issues of fact and law.

4. The Law Commission's report on binding over

19. In response to a request by the Lord Chancellor to examine binding-over powers, the Law Commission (the statutory law reform body for England and Wales) published in February 1994 its report entitled "Binding Over", in which it found that:

> "4.34 We regard reliance on *contra bonos mores* as certainly, and breach of the peace as very arguably, contrary to elementary notions of what is required by the principles of natural justice when they are relied on as definitional grounds justifying

> the making of a binding-over order. Because an order binding someone to be of good behaviour is made in such wide terms, it fails to give sufficient indication to the person bound over of the conduct which he or she must avoid in order to be safe from coercive sanctions …
>
> …
>
> 6.27 We are satisfied that there are substantial objections of principle to the retention of binding over to keep the peace or to be of good behaviour. These objections are, in summary, that the conduct which can be the ground for a binding-over order is too vaguely defined; that binding-over orders when made are in terms which are too vague and are therefore potentially oppressive; that the power to imprison someone if he or she refuses to consent to be bound over is anomalous; that orders which restrain a subject's freedom can be made without the discharge of the criminal, or indeed any clearly defined, burden of proof; and that witnesses, complainants or even acquitted defendants can be bound over without adequate prior information of any charge or complaint against them." (Law Commission Report no. 222)

The Law Commission recommended abolition of the power to bind over.

PROCEEDINGS BEFORE THE COMMISSION

20. The applicants applied to the Commission on 19 August 1994. They alleged violations of Articles 5, 10 and 11 of the Convention.

21. The Commission declared the application (no. 25594/94) partly admissible on 26 June 1996. In its report of 6 July 1998 (former Article 31 of the Convention), it expressed the opinion that there had been a violation of Article 10 of the Convention (twenty-five votes to four). The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

22. The Government asked the Court to find that the facts of the case disclosed no breach of the Convention. The applicants invited the Court to find a violation of Article 10 of the Convention and to award costs.

1. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

THE LAW

I. SCOPE OF THE CASE BEFORE THE COURT

23. Before the Commission the applicants made a complaint under Article 11 of the Convention (see paragraph 20 above).

24. This complaint was not pursued before the Court, which sees no reason to consider it of its own motion (see, for example, the Stallinger and Kuso v. Austria judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-II, p. 680, § 52).

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

25. The applicants alleged a violation of Article 10 of the Convention. In particular, they claimed that the finding that they had behaved in a manner *contra bonos mores* and the subsequent binding-over order constituted an interference with their rights under Article 10 which was not "prescribed by law" within the meaning of that provision. The relevant parts of Article 10 read as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the prevention of disorder or crime ... [or] for the protection of the reputation or rights of others ..."

26. The Court must determine whether the case discloses any interference with the applicants' right to freedom of expression, and if so, whether any such interference was "prescribed by law", pursued a legitimate aim and was "necessary in a democratic society" within the meaning of Article 10 § 2.

A. As to the existence of an interference with the applicants' freedom of expression

27. The applicants, "hunt saboteurs", disrupted the Portman Hunt on 3 March 1993. Proceedings were brought as a result of which they were bound over in the sum of 100 pounds sterling not to breach the peace and to be of good behaviour for twelve months.

28. The Court recalls that proceedings were brought against the applicants in respect of their behaviour while protesting against fox hunting by disrupting the hunt. It is true that the protest took the form of impeding the activities of which they disapproved, but the Court considers nonetheless that it constituted an expression of opinion within the meaning

of Article 10 (see, for example, the Steel and Others v. the United Kingdom judgment of 23 September 1998, *Reports* 1998-VII, p. 2742, § 92). The measures taken against the applicants were, therefore, an interference with their right to freedom of expression.

B. Whether the interference was "prescribed by law"

29. The Government submitted that the concepts of breach of the peace and behaviour *contra bonos mores* were sufficiently precise and certain to comply with the requirement under Article 10 § 2 that any limitations on freedom of expression be "prescribed by law". With particular reference to the concept of behaviour *contra bonos mores*, the Government accepted that the power was broadly defined, but claimed that the breadth was necessary to meet the aims of the power, and sufficient to meet the requirements of the Convention. They stated that the power to bind over to be of good behaviour gave magistrates a vital tool in controlling anti-social behaviour which had the potential to escalate into criminal conduct. They also noted that the breadth of the definition facilitated the administration of justice as social standards altered and public perception of acceptable behaviour changed. The Government disagreed with the Commission's conclusion that there was no objective element to help a citizen regulate his conduct: they pointed to the Chorherr case, where an administrative offence of causing "a breach of the peace by conduct likely to cause annoyance" fell within the scope of the concept of "prescribed by law" (Chorherr v. Austria judgment of 25 August 1993, Series A no. 266-B, pp. 35-36, § 25). They also pointed to the test under English law of whether a person had acted "dishonestly" for the purpose of the Theft Acts 1968 and 1978 which was, at least in part, the standard of ordinary reasonable and honest people (*R. v. Ghosh* [1982] Queen's Bench Reports 1053), and to the test for whether a publication was defamatory, namely whether the statement concerned would lower a person in the opinion of right-thinking members of society. Finally, the Government submitted that, on the facts of the case, the applicants should have known that what they had done was *contra bonos mores* and they should have known what they should do to avoid such behaviour in the future: they had acted in a way intended to disrupt the lawful activities of others, and should not have been in any doubt that their behaviour was unlawful and should not be repeated. The Government recalled that the Court was concerned with the case before it, rather than the compatibility of domestic law with the Convention *in abstracto*.

30. The applicants, with reference to the Commission's report and to the report of the Law Commission (see paragraph 19 above), considered that the law on conduct *contra bonos mores* lacked sufficient objective criteria to satisfy the requirements of Article 10 § 2. They further considered that an order not to act *contra bonos mores* could not be prescribed by law as it did not state what it was that the subject of the order might or might not lawfully do, such that it was not "prescribed by law".

31. The Court recalls that one of the requirements flowing from the expression "prescribed by law" is foreseeability. A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. At the same time, whilst certainty in the law is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see generally in this connection, *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III).

32. The Court further recalls that prior restraint on freedom of expression must call for the most careful scrutiny on its part (see, in the context of the necessity for a prior restraint, the *Sunday Times* v. the United Kingdom (no. 2) judgment of 26 November 1991, Series A no. 217, pp. 29-30, § 51).

33. The Court has already considered the issue of "lawfulness" for the purposes of Article 5 of the Convention of orders to be bound over to keep the peace and be of good behaviour in its above-mentioned Steel and Others judgment (pp. 2738-40, §§ 71-77). In that case, the Court found that the elements of breach of the peace were adequately defined by English law (ibid., p. 2739, § 75).

34. The Court also considered whether the binding-over orders in that case were specific enough properly to be described as "lawful order[s] of a court" within the meaning of Article 5 § 1 (b) of the Convention. It noted at paragraph 76 of the judgment that:

> "… the orders were expressed in rather vague and general terms; the expression 'to be of good behaviour' was particularly imprecise and offered little guidance to the person bound over as to the type of conduct which would amount to a breach of the order. However, in each applicant's case the binding-over order was imposed after a finding that she had committed a breach of the peace. Having considered all the circumstances, the Court is satisfied that, given the context, it was sufficiently clear that the applicants were being requested to agree to refrain from causing further, similar, breaches of the peace during the ensuing twelve months."

The Court also noted that the requirement under Article 10 § 2 that an interference with the exercise of freedom of expression be "prescribed by law" is similar to that under Article 5 § 1 that any deprivation of liberty be "lawful" (ibid., p. 2742, § 94).

35. It is a feature of the present case that it concerns an interference with freedom of expression which was not expressed to be a "sanction", or punishment, for behaviour of a certain type, but rather an order, imposed on the applicants, not to breach the peace or behave *contra bonos mores* in the future. The binding-over order in the present case thus had purely prospective effect. It did not require a finding that there had been a breach of the peace. The case is thus different from the case of Steel and Others, in which the proceedings brought against the first and second applicants were

in respect of breaches of the peace which were later found to have been committed.

36. The Court must consider the question of whether behaviour *contra bonos mores* is adequately defined for the purposes of Article 10 § 2 of the Convention.

37. The Court first recalls that in its Steel and Others judgment, it noted that the expression "to be of good behaviour" "was particularly imprecise and offered little guidance to the person bound over as to the type of conduct which would amount to a breach of the order" (ibid., pp. 2739-40, § 76). Those considerations apply equally in the present case, where the applicants were not charged with any criminal offence, and were found not to have breached the peace.

38. The Court next notes that conduct *contra bonos mores* is defined as behaviour which is "wrong rather than right in the judgment of the majority of contemporary fellow citizens" (see paragraph 13 above). It cannot agree with the Government that this definition has the same objective element as conduct "likely to cause annoyance", which was at issue in the Chorherr case (see paragraph 29 above). The Court considers that the question of whether conduct is "likely to cause annoyance" is a question which goes to the very heart of the nature of the conduct proscribed: it is conduct whose likely consequence is the annoyance of others. Similarly, the definition of breach of the peace given in the case of *Percy v. Director of Public Prosecutions* (see paragraph 11 above) – that it includes conduct the natural consequences of which would be to provoke others to violence – also describes behaviour by reference to its effects. Conduct which is "wrong rather than right in the judgment of the majority of contemporary fellow citizens", by contrast, is conduct which is not described at all, but merely expressed to be "wrong" in the opinion of a majority of citizens.

39. Nor can the Court agree that the Government's other examples of behaviour which is defined by reference to the standards expected by the majority of contemporary opinion are similar to conduct *contra bonos mores* as in each case cited by the Government the example given is but one element of a more comprehensive definition of the proscribed behaviour.

40. With specific reference to the facts of the present case, the Court does not accept that it must have been evident to the applicants what they were being ordered not do for the period of their binding over. Whilst in the case of Steel and Others the applicants had been found to have breached the peace, and the Court found that it was apparent that the binding over related to similar behaviour (ibid.), the present applicants did not breach the peace, and given the lack of precision referred to above, it cannot be said that what they were being bound over not to do must have been apparent to them.

41. The Court thus finds that the order by which the applicants were bound over to keep the peace and not to behave *contra bonos mores* did not comply with the requirement of Article 10 § 2 of the Convention that it be "prescribed by law".

42. In these circumstances, the Court is not required to consider the remainder of the issues under Article 10 of the Convention.

43. It follows that there has been a violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Costs and expenses

45. The applicants claimed a total of 6,000 pounds sterling plus value-added tax in respect of costs and expenses in the Strasbourg proceedings, less amounts received by way of legal aid before the Court and Commission. The Government agreed with this figure.

The Court is satisfied that the claim for costs and expenses is reasonable, and should be reimbursed in its entirety.

B. Default interest

46. According to the information available to the Court, the statutory rate of interest applicable in England and Wales at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that it is not necessary to examine the applicants' complaint under Article 11 of the Convention;

2. *Holds* by sixteen votes to one that there has been a violation of Article 10 of the Convention;

3. *Holds* unanimously
   (a) that the respondent State is to pay the applicants, within three months, for costs and expenses, 6,000 (six thousand) pounds sterling, together with any value-added tax that may be chargeable less the sums paid by way of legal aid;
   (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 November 1999.

Luzius WILDHABER
President

Paul MAHONEY
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Baka is annexed to this judgment.

L.W.
P.J.M.

DISSENTING OPINION OF JUDGE BAKA

It is not the task of an international judge to defend a national institution which clearly shows certain shortcomings. The magistrates' power to bind over – as the Law Commission's report on the subject explains – is based on "conduct which … is too vaguely defined; … binding-over orders when made are in terms which are too vague and are therefore potentially oppressive; … the power to imprison someone if he or she refuses to consent to be bound over is anomalous ...". For these and other reasons the Law Commission even recommended abolition of the power to bind over.

On the other hand, it is not easy to destroy old, established institutions which are deeply rooted in a country's legal system and have proved their usefulness over the centuries for protecting the rights of the public, as in the present case. If we look at the concrete circumstances of the case, what the applicants did according to the national courts' finding was "a deliberate attempt to interfere with the Portman Hunt and to take the hounds out of … control ...". They were avowed hunt saboteurs and as such they deliberately tried seriously to disturb other people's lawfully organised pleasure and leisure activity or even make it impossible. Their action, according to the Crown Court's findings, had not resulted in "violence or threats of violence on this occasion, so that it could not be said that any breach of the peace had been committed or threatened". On the other hand, their action, in my opinion, definitely required an adequate and proportionate legal response in order to protect others.

I agree with the Court that this case is different from the case of Steel and Others v. the United Kingdom (judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII), in which the binding-over decision was based on breaches of the peace, while in the present case the findings against the applicants were based on behaviour *contra bonos mores*. In the Steel and Others case the Court was satisfied that binding-over orders had been imposed after a finding that the applicants had committed a breach of the peace, the elements of which – according to the Court's findings – "were adequately defined by English law" (see the Steel and Others judgment, p. 2739, § 75). What I do not agree with is that "the order by which the applicants were bound over to keep the peace and not to behave *contra bonos mores* did not comply with the requirement of Article 10 § 2 of the Convention that it be prescribed by law" (see paragraph 41 of the judgment).

The Court, when analysing the "prescribed by law" requirement of Article 10 § 2, has always reiterated that "the level of precision required of the domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument considered, the field it is designed to cover and the number and status of those to whom it is addressed". It has pointed out also that "it is primarily for the national authorities to interpret and apply domestic law" (see the Chorherr v. Austria judgment of 25 August 1993, Series A no. 266-B, pp. 35-36, § 25).

On the basis of these elements of foreseeability, I am of the opinion that in the concrete circumstances of the case, the applicants should have known what kind of behaviour was *contra bonos mores*. It is true that the requirement is broadly defined, but taking into account the nature of the disturbance and the limited number of offenders, the institution of binding over to be of good behaviour imposed an unmistakable obligation on the applicants, namely to refrain from any offensive and deliberate action which could disturb the lawfully organised activity of others engaged in fox hunting. In my view, the "keep the peace or be of good behaviour" obligation has to be interpreted in the light of the specific anti-social behaviour committed by the applicants. In this context, I think that the binding-over requirement was foreseeable and enabled the applicants to a reasonable extent to behave accordingly.

On this basis, I think that the interference with the applicants' rights under Article 10 § 2 not only served a legitimate aim but was also prescribed by law and necessary in a democratic society. Consequently, I find no breach of Article 10 of the Convention.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF HATTON AND OTHERS v. THE UNITED KINGDOM

(Application no. 36022/97)

JUDGMENT

STRASBOURG

2 October 2001

THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
08/07/2003

In the case of Hatton and Others v. the United Kingdom,

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

Mr J.-P. COSTA, *President*,
Mr L. LOUCAIDES,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Mrs H.S. GREVE, *judges*,
Sir Brian KERR, *ad hoc judge*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 16 May 2000, 4 July 2000 and on 11 September 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 36022/97) against the United Kingdom lodged on 6 May 1997 with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eight United Kingdom nationals, Ruth Hatton, Peter Thake, John Hartley, Philippa Edmunds, John Cavalla, Jeffray Thomas, Richard Bird and Tony Anderson ("the applicants").

2. The applicants were represented by Mr Richard Buxton, a lawyer practising in Cambridge. The Government of the United Kingdom ("the Government") were represented by their Agent, Mr Huw Llewellyn, Foreign and Commonwealth Office.

3. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998, and in accordance with the provisions of Article 5 § 2 thereof, the case falls to be examined by the Court.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court. Sir Nicolas Bratza, the judge elected in respect of the United Kingdom, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Sir Brian Kerr to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. A hearing on admissibility and merits (Rule 54 § 4) took place in public in the Human Rights Building, Strasbourg, on 16 May 2000.

There appeared before the Court:

(a) *for the Government*
Mr H. LLEWELLYN, *Agent*,
Mr J. EADIE, *Counsel*,
Mr P. REARDON, Department of the Environment,
Transport and the Regions, *Adviser*;

(b) *for the applicants*
Mr D. ANDERSON QC, *Counsel*,
Mr R. BUXTON,
Mrs S. RING, *Solicitors*,
Mr C. STANBURY, *Adviser*,
Mrs R. HATTON,
Mr J. THOMAS,
Mr A. ANDERSON, *Applicants*.

The Court heard addresses by Mr James Eadie and Mr David Anderson.

6. By a decision of 16 May 2000, following the hearing, the Chamber declared the application admissible.

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

8. On 30 May 2000, third-party comments were received from British Airways, which had been given leave by the President following the hearing to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

The position of the individual applicants

9. The noise levels experienced by each applicant, and the effect on each of them individually, are as follows:

10. Ruth Hatton was born in 1963 and, until 1997, lived in East Sheen with her husband and two children. From 1993, when the level of night noise increased, Mrs Hatton found the noise levels to be “intolerable” at night. The noise levels were greater when aircraft are landing at Heathrow from the east. When this happened, Mrs Hatton was unable to sleep without ear plugs and her children were frequently woken up before 6 a.m., and

sometimes before 5 a.m. If Mrs Hatton did not wear ear plugs, she would be woken by aircraft activity at around 4 a.m. She was sometimes able to go back to sleep, but found it impossible to go back to sleep once the "early morning bombardment" started which, in the winter of 1996/1997, was between 5 a.m. and 5.30 a.m. When she was woken in this manner, Mrs Hatton tended to suffer from a headache for the rest of the day. When aircraft were landing from the west the noise levels were lower, and Mrs Hatton's children slept much better, generally not waking up until after 6.30 a.m. In the winter of 1993/1994, Mrs Hatton became so run down and depressed by her broken sleep pattern that her doctor prescribed anti-depressants. In October 1997, Mrs Hatton moved with her family to Kingston-upon-Thames in order to get away from the aircraft noise at night.

11. Peter Thake was born in 1965. From 1990 until 1998, he lived in Hounslow with his partner. His home in Hounslow was situated approximately 4 km from Heathrow airport and slightly to the north of the southern flight path. In about 1993, the level of disturbance at night from aircraft noise increased notably, and Mr Thake began to be woken or kept awake at night by aircraft noise. Mr Thake found it particularly difficult to sleep in warmer weather, when open windows increased the disturbance from aircraft noise, and closed windows made it too hot to sleep. Mr Thake found it difficult to go back to sleep after being woken by aircraft noise early in the morning. He was sometimes kept awake by aeroplanes flying until midnight or 1 a.m. and then woken between 4 a.m. and 5 a.m. Mr Thake was also sometimes woken by aeroplanes flying at odd hours in the middle of the night, for example when diverted from another airport. In 1997, Mr Thake became aware that he could complain to the Heathrow Noise Line about aircraft noise if he made a note of the time of the flight. By 30 April 1997, Mr Thake had been sufficiently disturbed to note the time of a flight, and made a complaint to the Heathrow Noise Line on 19 occasions. Mr Thake remained in Hounslow until February 1998 because his family, friends and place of work were in the Heathrow area. Mr Thake moved to Winchester, Hampshire, when a suitable job opportunity arose, even though it meant leaving his family and friends, in order to escape from the aircraft noise, which was "driving [him] barmy".

12. John Hartley was born in 1948 and lives in Richmond with his wife. He has lived at his present address since 1989. His house is about 8 miles (13 km) from Heathrow airport, and is situated almost directly under the approach to the airport's southern runway. The windows of the house are double-glazed. From 1993, Mr Hartley noticed a "huge" increase in the disturbance caused by flights between 6 a.m. and 6.30 a.m. (or 8 a.m. on Sundays). The British Airports Authority did not operate a practice of alternation (using only one runway for landings for half the day, and then switching landings to the other runway) during this period as it did during the day, and the airport regularly had aircraft landing from the east on both

runways. When the wind was blowing from the west and aeroplanes were landing from the east, which was about 70% of the time, aircraft noise would continue until about midnight, so that Mr Hartley was unable to go to sleep earlier than midnight. He would then find it impossible to sleep after 6 a.m. on any day of the week, and was usually disturbed by aircraft noise at about 5 a.m., after which he found he could not go back to sleep. When the aeroplanes were landing from the west, Mr Hartley was able to sleep.

13. Philippa Edmunds was born in 1954 and lives with her husband and two children in East Twickenham. She has lived at her present address since 1992. Ms Edmund's house is approximately one kilometre from the Heathrow flight path. Before 1993, Ms Edmunds was often woken by aircraft noise at around 6 a.m. From 1993, she tended to be woken at around 4 a.m. In 1996, Ms Edmunds and her husband installed double-glazing in their bedroom to try to reduce the noise. Although the double-glazing reduced the noise, Ms Edmunds continued to be woken by aircraft. Ms Edmunds suffered from ear infections in 1996 and 1997 as a result of wearing ear plugs at night, and although she was advised by a doctor to stop using them, she continued to do so in order to be able to sleep. Ms Edmunds was also concerned about the possible long-term effects of using ear plugs, including an increased risk of tinnitus. Ms Edmunds's children both suffered from disturbance by aircraft noise.

14. John Cavalla was born in 1925. From 1970 to 1996, he lived in Isleworth. Mr Cavalla lives with his wife. Mr Cavalla's house in Isleworth was directly under the flight path of the northern runway at Heathrow airport. In the early 1990s, the noise climate deteriorated markedly, partly as a result of a significant increase in traffic, but mainly as a result of aircraft noise in the early morning. Mr Cavalla noticed that air traffic increased dramatically between 6 a.m. and 7 a.m. as a result of the shortening of the night quota period. Mr Cavalla found that, once woken by an aircraft arriving at Heathrow airport in the early morning, he was unable to go back to sleep. In 1996, Mr Cavalla and his wife moved to Sunbury in order to get away from the aircraft noise. After moving house, Mr Cavalla did not live under the approach tracks for landing aircraft, and aircraft used the departure route passing over his new home only very rarely at night. Consequently, Mr Cavalla was only very rarely exposed to any night-time aircraft noise following his move.

15. Jeffray Thomas was born in 1928 and lives in Kew with his wife and two sons, and the wife and son of one of those sons. Mr Thomas has lived at his present address since 1975. His house lies between the north and south Heathrow flight paths. Aircraft pass overhead on seven or eight days out of every ten, when the prevailing wind is from the west. Mr Thomas noticed a sudden increase in night disturbance in 1993. Mr Thomas would find that he was awoken at 4.30 a.m., when three or four large aircraft tended to arrive within minutes of each other. Once he was awake, one large aeroplane

arriving every half an hour was sufficient to keep him awake until 6 a.m. or 6.30 a.m., when the aeroplanes started arriving at frequencies of up to one a minute until about 11 p.m.

16. Richard Bird was born in 1933 and lived in Windsor for 30 years until he retired in December 1998. His house in Windsor was directly under the westerly flight path to Heathrow airport. In recent years, and particularly from 1993, he and his wife suffered from intrusive aircraft noise at night. Although Mr Bird observed that both take-offs and landings continued later and later into the evenings, the main problem was caused by the noise of early morning landings. He stated that on very many occasions he was woken at 4.30 a.m. and 5 a.m. by incoming aircraft, and was then unable to get back to sleep, and felt extremely tired later in the day. Mr Bird retired in December 1998, and he and his wife moved to Wokingham, in Surrey, specifically to get away from the aircraft noise which was "really getting on [his] nerves".

17. Tony Anderson was born in 1932 and lives in Touchen End, which is under the approach to runway 09L at Heathrow airport, and approximately 9 or 10 nautical miles from the runway. Mr Anderson has lived in Touchen End since 1963. By 1994, Mr Anderson began to find that his sleep was being disturbed by aircraft noise at night, and that he was being woken at 4.15 a.m. or even earlier by aircraft coming in from the west to land at Heathrow airport.

The regulatory regime for Heathrow airport

18. Heathrow airport is the busiest airport in Europe, and the busiest international airport in the world. It is used by over 90 airlines, serving over 180 destinations world-wide. It is the United Kingdom's leading port in terms of visible trade.

19. Restrictions on night flights at Heathrow airport were introduced in 1962 and have been reviewed periodically, most recently in 1988, 1993 and 1998.

20. Between 1978 and 1987, a number of reports into aircraft noise and sleep disturbance were published by or on behalf of the Civil Aviation Authority.

21. A Consultation Paper was published by the United Kingdom Government in November 1987 in the context of a review of the night restrictions policy at Heathrow. The Consultation Paper stated that research into the relationship between aircraft noise and sleep suggested that the number of movements at night could be increased by perhaps 25% without worsening disturbance, provided Leq were not increased (dBA Leq metric is a measurement of noise exposure).

22. It indicated that there were two reasons for not considering a ban on night flights: first, that a ban on night flights would deny airlines the ability to plan some scheduled flights in the night period, and to cope with

disruptions and delays; secondly, that a ban on night flights would damage the status of Heathrow airport as a 24-hour international airport (with implications for safety and maintenance and the needs of passengers) and its competitive position in relation to a number of other European airports.

23. From 1988 to 1993, night flying was regulated solely by means of a limitation upon the number of take-offs and landings permitted at night. The hours of restriction were as follows:

Summer	11.30 p.m. to 6 a.m. weekdays
	11.30 p.m. to 6 a.m. Sunday landings
	11.30 p.m. to 8 a.m. Sunday take-offs
Winter	11.30 p.m. to 6.30 a.m. weekdays
	11.30 p.m. to 8 a.m. Sunday take-offs and landings

24. In July 1990, the Department of Transport commenced an internal review of the restrictions on night flights. A new classification of aircraft and the development of a quota count system were the major focus of the review. As part of the review, the Department of Transport asked the Civil Aviation Authority to undertake further objective study of aircraft noise and sleep disturbance.

25. The fieldwork for the study was carried out during the summer of 1991. Measurements of disturbance were obtained from 400 subjects living in the vicinity of Heathrow, Gatwick, Stansted and Manchester airports. The findings were published in December 1992 as the "Report of a Field Study of Aircraft Noise and Sleep Disturbance" ("the 1992 sleep study"). It found that, once asleep, very few people living near airports were at risk of any substantial sleep disturbance due to aircraft noise and that, compared with the overall average of about 18 nightly awakenings without any aircraft noise, even large numbers of noisy night-time aircraft noise movements would cause very little increase in the average person's nightly awakenings. It concluded that the results of the field study provided no evidence to suggest that aircraft noise was likely to cause harmful after effects. It also emphasised, however, that its conclusions were based on average effects, and that some of the subjects of the study (2 to 3%) were over 60% more sensitive than average.

26. In January 1993, the Government published a Consultation Paper regarding a proposed new scheme for regulating night flights at the three main airports serving London: Heathrow, Gatwick and Stansted. In considering the demand for night flights, the Consultation Paper made reference to the fact that if restrictions on night flights were imposed in the United Kingdom, certain flights would not be as convenient or their costs would be higher than competitors abroad could offer, and that passengers would choose alternatives that better suited their requirements.

27. It also stated that various foreign operators were based at airports with no night restrictions, which meant that they could keep prices down by achieving a high utilisation of aircraft, and that this was a crucial factor in attracting business in what was a highly competitive and price sensitive market.

28. Further, the Consultation Paper stated that both scheduled and charter airlines believed that their operations could be substantially improved by being allowed more movements during the night period, especially landings.

It also indicated that charter companies required the ability to operate in the night period, as they operated in a highly competitive, price sensitive market and needed to contain costs as much as possible. The commercial viability of their business depended upon high utilisation of their aircraft, which typically required three rotations a day to nearer destinations, and which could only be fitted in using movements at night.

29. Finally, in reference to the demand for night flights, the Consultation Paper referred to the continuing demand for some all-cargo flights at night carrying mail and other time-sensitive freight such as newspapers and perishable goods, and referred to the fact that all-cargo movements are banned, whether arriving or departing, for much of the day at Heathrow airport.

30. The Consultation Paper referred to the 1992 sleep study stating that the 1992 sleep study found that the number of disturbances caused by aircraft noise was so small that it had a negligible effect on overall normal disturbance rates, and that disturbance rates from all causes were not at a level likely to affect people's health or well-being.

31. The Consultation Paper further stated that, in keeping with the undertaking given in 1988 not to allow a worsening of noise at night, and ideally to improve it, it was proposed that the quota for the next five years based on the new system should be set at a level so as to keep overall noise levels below those in 1988.

32. A considerable number of responses to the Consultation Paper were received from trade and industry associations with an interest in air travel (including the International Air Transport Association ["IATA"], the Confederation of British Industry and the London and Thames Valley Chambers of Commerce) and from airlines, all of which emphasised the economic importance of night flights. Detailed information and figures were provided by the associations and the airlines to support their responses.

33. On 6 July 1993 the Secretary of State for Transport announced his intention to introduce, with effect from October 1993, a quota system of night flying restrictions, the stated aim of which was to reduce noise at the three main London airports, which included Heathrow ("the 1993 Scheme").

34. The 1993 Scheme introduced a noise quota scheme for the night quota period. Under the noise quota scheme each aircraft type was assigned a "quota count" between 0.5 QC (for the quietest) and 16 QC (for the noisiest). Heathrow airport was then allotted a certain number of quota points, and aircraft movements had to be kept within the permitted points total. The effect of this was that, under the 1993 Scheme, rather than a maximum number of individual aircraft movements being specified, aircraft operators could choose within the noise quota whether to operate a greater number of quieter aeroplanes or a lesser number of noisier aeroplanes. The system was designed, according to the 1993 Consultation Paper, to encourage the use of quieter aircraft by making noisier types use more of the quota for each movement.

35. The 1993 Scheme defined "night" as the period between 11 p.m. and 7 a.m., and further defined a "night quota period" from 11.30 p.m. to 6 a.m., seven days a week, throughout the year, when the controls were strict. During the night, operators were not permitted to schedule the noisier types of aircraft to take off (8 QC – quota count – or 16 QC) or to land (16 QC). During the night quota period, aircraft movements were restricted by a movements limit and a noise quota, which were set for each season (summer and winter).

36. The 1993 Consultation Paper had proposed a rating of 0 QC for the quietest aircraft. This would have allowed an unlimited number of these aircraft to fly at night, and the Government took account of objections to this proposal in deciding to rate the quietest aircraft at 0.5 QC. Otherwise, the 1993 Scheme was broadly in accordance with the proposals set out in the 1993 Consultation Paper.

37. The local authorities for the areas around the three main London airports sought judicial review of the Secretary of State's decision to introduce the 1993 Scheme, making four consecutive applications for judicial review and appealing twice to the Court of Appeal (see paragraphs 70-73 below) In consequence of the various judgments delivered by the High Court and Court of Appeal, the Government consulted on revised proposals in October and November 1993; commissioned a study by ANMAC (the Aircraft Noise Monitoring Advisory Committee of the Department of the Environment, Transport and the Regions [formerly the Department of Transport; "the DETR"]) in May 1994 into ground noise at night at Heathrow, Gatwick and Stansted airports; added to the quota count system an overall maximum number of aircraft movements; issued a further Consultation Paper in March 1995, and issued a supplement to the March 1995 Consultation Paper in June 1995.

38. The June 1995 supplement stated that the Secretary of State's policies and the proposals based on them allowed more noise than was experienced from actual aircraft movements in the summer of 1988, and acknowledged that this was contrary to Government policy, as expressed in

the 1993 Consultation Paper. As part of the 1995 review of the 1993 Scheme, the Government reviewed the Civil Aviation Authority reports on aircraft noise and sleep disturbance, including the 1992 sleep study. The DETR prepared a series of papers on night arrival and departure statistics at Heathrow, Gatwick and Stansted airports, scheduling and curfews in relation to night movements, runway capacity between 6 a.m. and 7 a.m., Heathrow night arrivals for four sample weeks in 1994, and Heathrow night departures for four sample weeks in 1994. The DETR also considered a paper prepared by Heathrow Airport Limited on the implications of a prohibition on night flights between 12 a.m. and 5.30 a.m.

39. On 16 August 1995, the Secretary of State for Transport announced that the noise quotas and all other aspects of the night restrictions regime would remain as previously announced. In July 1996, the Court of Appeal decided that the Secretary of State had given adequate reasons and sufficient justification for his conclusion that it was reasonable, on balance, to run the risk of diminishing to some degree local people's ability to sleep at nights because of the other countervailing considerations to which he was, in 1993, willing to give greater weight, and that by June 1995 errors in the consultation papers had been corrected and the new policy could not be said to be irrational. On 12 November 1996, the House of Lords dismissed a petition by the local authorities for leave to appeal against the decision of the Court of Appeal.

40. The movement limits for Heathrow under the 1993 Scheme, introduced as a consequence of the legal challenges in the domestic courts, were set at 2,550 per winter season from 1994/1995 to 1997/1998, and 3,250 per summer season from 1995 to 1998 (the seasons being deemed to change when the clocks change from GMT to BST). The noise quotas for Heathrow up to the summer of 1998 were set at 5,000 for each winter season and 7,000 for each summer season. Flights involving emergencies were excluded from the restrictions. The number of movements permitted during the night quota period (i.e. from 11.30 p.m. to 6 a.m.) remained at about the same level as between 1988 and 1993. At the same time, the number of movements permitted during the night period (i.e. from 11 p.m. to 7 a.m.) increased under the 1993 Scheme due to the reduction in the length of the night quota period.

41. In September 1995, a trial was initiated at Heathrow airport of modified procedures for early morning landings (those between 4 a.m. and 6.00 a.m.). The aim of the trial, which was conducted by National Air Traffic Services Limited on behalf of the DETR, was to help alleviate noise over parts of central London in the early morning. An interim report, entitled "Assessment of Revised Heathrow Early Mornings Approach Procedures Trial", was published in November 1998.

42. In December 1997, a study, commissioned by the DETR and carried out by the National Physical Laboratory gave rise to a report, "Night noise

contours: a feasibility study", which was published in December 1997. The report contained a detailed examination of the causes and consequences of night noise, and identified possible areas of further research. It concluded that there was not enough research evidence to produce "scientifically robust night contours that depict levels of night-time annoyance".

43. In 1998, the Government conducted a two-stage consultation exercise on night restrictions at Heathrow, Gatwick and Stansted airports. In February 1998, a preliminary Consultation Paper on night restrictions at Heathrow, Gatwick and Stansted was published. The Preliminary Consultation Paper stated that most night movements catered primarily for different needs from those that took place during the daytime, and set out reasons for allowing night flights. These were essentially the same as those given in the 1993 Consultation Paper.

44. In addition, the Preliminary Consultation Paper referred to the fact that air transport was one of the fastest growing sectors of the world economy and contained some of the United Kingdom's most successful firms. Air transport facilitated economic growth, world trade, international investment and tourism, and was of particular importance to the United Kingdom because of its open economy and geographical position. The Consultation Paper went on to say that permitting night flights, albeit subject to restrictions, at major airports in the United Kingdom had contributed to this success.

45. The Government set movement limits and noise quotas for winter 1998/99 at the same level as for the previous winter, in order to allow adequate time for consultation.

46. The British Air Transport Association ("BATA") commissioned a report from Coopers & Lybrand into the economic costs of maintaining the restrictions on night flights. The report was published in July 1997 and was entitled "The economic costs of night flying restrictions at the London airports". The report concluded that the economic cost of the then current restrictions being maintained during the period 1997/1998 to 2002/2003 was about £850 million. BATA submitted the report to the Government when it responded to the Preliminary Consultation Paper.

47. On 10 September 1998, the Government announced that the movement limits and noise quotas for summer 1999 would be the same as for summer 1998.

48. In November 1998, the Government published the second stage Consultation Paper on night restrictions at Heathrow, Gatwick and Stansted. The Consultation Paper stated that it had been the view of successive Governments that the policy on night noise should be firmly based on research into the relationship between aircraft noise and interference with sleep and that, in order to preserve the balance between the different interests, this should continue to be the basis for decisions. The Consultation Paper indicated that 'interference with sleep' was intended to cover both

sleep disturbance (an awakening from sleep, however short) and sleep prevention (a delay in first getting to sleep at night, and awakening and then not being able to get back to sleep in the early morning). The Consultation Paper stated that further research into the effect of aircraft noise on sleep had been commissioned, which would include a review of existing research in the United Kingdom and abroad, and a trial to assess methodology and analytical techniques to determine whether to proceed to a full scale study of either sleep prevention or total sleep loss.

49. The Consultation Paper repeated the finding of the 1992 sleep study that for noise events in the range of 90-100 dBA SEL (80-95 dBA Lmax), the likelihood of the average person being awakened by an aircraft noise event was about 1 in 75. It acknowledged that the 1 in 75 related to sleep disturbance, and not to sleep prevention, and that while there was a substantial body of research on sleep disturbance, less was known about sleep prevention or total sleep loss.

50. The Consultation Paper stated that the objectives of the current review were, in relation to Heathrow, to strike a balance between the need to protect local communities from excessive aircraft noise levels at night and to provide for air services to operate at night where they are of benefit to the local, regional and national economy; to ensure that the competitive factors affecting United Kingdom airports and airlines and the wider employment and economic implications were taken into account; to take account of the research into the relationship between aircraft noise and interference with sleep and any health effects; to encourage the use of quieter aircraft at night; to put in place at Heathrow, for the night quota period (11.30 p.m. to 6 a.m.), arrangements which would bring about further improvements in the night noise climate around the airport over time and to update the arrangements as appropriate.

51. The Consultation Paper stated that since the introduction of the 1993 Scheme, there had been an improvement in the noise climate around Heathrow during the night quota period, based on the total of the quota count ratings of aircraft counted against the noise quota, but that there had probably been a deterioration over the full night period between 11 p.m. and 7 a.m. as a result of the growth in traffic between 6 a.m. and 7 a.m.

52. The Consultation Paper found a strong customer preference for overnight long-haul services from the Asia-Pacific region.

53. The Consultation Paper indicated that the Government had not attempted to quantify the aviation and economic benefits of night flights in monetary terms. This was because of the difficulties in obtaining reliable and impartial data on passenger and economic benefits (some of which was commercially sensitive) and modelling these complex interactions. BATA had submitted a copy of the Coopers & Lybrand July 1997 report with its response to the Preliminary Consultation Paper, and the Consultation Paper noted that the report estimated the value of an additional daily long haul

scheduled night flight at Heathrow to be £20m to £30m per year, over half of which was made up of airline profits. The Consultation Paper stated that the financial effects on airlines were understood to derive from estimates made by a leading United Kingdom airline. Other parts of the calculation reflected assumptions about the effects on passengers and knock-on effects on other services, expressed in terms of an assumed percentage of the assumed revenue earned by these services. The Consultation Paper stated that the cost of restricting existing night flights more severely might be different, and that BATA's figures took no account of the wider economic effects which were not captured in the estimated airline and passenger impacts.

54. The Consultation Paper stated that, in formulating their proposals, the Government had taken into account both BATA's figures and the fact that it was not possible for the Government to test the estimates or the assumptions made by BATA. Any value attached to a "marginal" night flight had to be weighed against the environmental disadvantages. These could not be estimated in monetary terms, but it was possible, drawing on the 1992 sleep study, to estimate the numbers of people likely to be awakened. The Consultation Paper concluded that in forming its proposals, the Government must take into account, on the one hand, the important aviation interests involved and the wider economic considerations. It seemed clear that United Kingdom airlines and airports would stand to lose business, including in the daytime, if prevented by unduly severe restrictions from offering limited services at night; that users could also suffer, and that the services offered by United Kingdom airports and airlines would diminish, and with them the appeal of London and the United Kingdom more generally. On the other hand, these considerations had to be weighed against the noise disturbance caused by night flights. The proposals made in the Consultation Paper aimed to strike a balance between the different interests and, in the Government's view, would protect local people from excessive aircraft noise at night.

55. The main proposals in relation to Heathrow were: not to introduce a ban on night flights, or a curfew period; to retain the seasonal noise quotas and movement limits; to review the QC classifications of individual aircraft and, if this produced significant reclassifications, to reconsider the quota limits; to retain the QC system; to review the QC system before the 2002 summer season (when fleet compositions would have changed following completion of the compulsory phase-out in Europe of Chapter 2 civil aircraft, with the exception of Concorde, which began in April 1995), in accordance with the policy of encouraging the use of quieter aircraft; to reduce the summer and winter noise quotas; to maintain the night period as 11 p.m. to 7 a.m. and the night quota period as 11.30 p.m. to 6 a.m.; to extend the restrictions on aircraft classified as QC8 on arrival or departure to match those for QC16 and to ban QC4 aircraft from being scheduled to

land or take off during the night quota period from the start of the 2002 summer season (i.e. after completion of the compulsory Chapter 2 phase out).

56. The Consultation Paper stated that since the introduction of the 1993 scheme, headroom had developed in the quotas, reducing the incentive for operators to use quieter aircraft. The reduction in summer and winter noise quotas to nearer the level of current usage was intended as a first step to restoring the incentive. The winter noise quota level under the 1993 scheme was 5,000 QC points, and the average usage in the last two traffic seasons had been 3,879 QC points. A reduction to 4,000 was proposed. The summer noise quota level had been 7,000 points, and the average usage in the last two seasons was provisionally calculated at 4,472. A reduction to 5,400 was proposed. The new levels would remain in place until the end of the summer 2004 season, subject to the outcome of the QC review.

57. Part 2 of the Consultation Paper invited comments as to whether runway alternation should be introduced at Heathrow at night, and on the preferential use of Heathrow's runways at night.

58. On 10 June 1999, the Government announced that the proposals in the November 1998 Consultation Paper would be implemented with effect from 31 October 1999, with limited modifications. With respect to Heathrow, the only modification was that there was to be a smaller reduction in the noise quotas than proposed. The quotas were set at 4,140 QC points for the winter, and 5,610 QC points for the summer. The effect of this was to set the winter quota at a level below actual usage in winter 1998/99.

59. The 1999 Scheme came into effect on 31 October 1999.

60. On 10 November 1999, a report was published on "The Contribution of the Aviation Industry to the UK Economy". The report was prepared by Oxford Economic Forecasting and was sponsored by a number of airlines, airport operators and BATA, as well as the Government.

61. On 23 November 1999, the Government announced that runway alternation at Heathrow would be extended into the night "at the earliest practicable opportunity", and issued a further consultation paper concerning proposals for changes to the preferential use of Heathrow's runways at night.

62. In December 1999, the DETR and National Air Traffic Services Limited published the final report of the ANMAC Technical Working Group on "Noise from Arriving Aircraft". The purpose of the report was to describe objectively the sources of operational noise for arriving aircraft, to consider possible means of noise amelioration, and to make recommendations to the DETR.

63. In March 2000, DORA published a report, prepared on behalf of the DETR, entitled "Adverse effects of night-time aircraft noise". The report identified a number of issues for possible further research, and was intended

to form the background to any future United Kingdom studies of night-time aircraft noise. The report stated that gaps in knowledge had been identified, and indicated that the DETR was considering whether there was a case for a further full-scale study on the adverse effects of night-time aircraft noise, and had decided to commission two further short research studies to investigate the options. These studies were commissioned in the autumn of 1999, before the publication of the DORA report. One is a trial study to assess research methodology. The other is a social survey the aims of which included an exploration of the difference between objectively measured and publicly received disturbance due to aircraft noise at night. Both studies are being conducted by university researchers.

64. A series of noise mitigation and abatement measures is in place at Heathrow airport, in addition to restrictions on night flights. These include the following: aircraft noise certification to reduce noise at source; the compulsory phasing out of older, noisier jet aircraft; noise preferential routes and minimum climb gradients for aircraft taking off; noise abatement approach procedures (continuous descent and low power/low drag procedures); limitation of air transport movements; noise related airport charges; noise insulation grant schemes and compensation for noise nuisance under the Land Compensation Act 1973.

65. The DETR and the management of Heathrow airport conduct continuous and detailed monitoring of the restrictions on night flights. Reports are provided each quarter to members of the Heathrow Airport Consultative Committee, on which local government bodies responsible for areas within the vicinity of Heathrow airport, and local residents' associations are represented.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Civil Aviation Act 1982 ("the 1982 Act")

66. Section 76 (1) of the 1982 Act provides, so far as relevant:

> "No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case, is reasonable, or the ordinary incidents of such flight, so long as the provisions of any Air Navigation Order ... have been duly complied with ..."

67. Air Navigation Orders made under the 1982 Act provide for Orders in Council to be made for the regulation of aviation. Orders in Council have been made to deal with, amongst other matters, engine emissions, noise certification and compensation for noise nuisance.

68. Section 78 (3) of the 1982 Act provides, so far as relevant:

"If the Secretary of State considers it appropriate for the purpose of avoiding, limiting or mitigating the effect of noise and vibration connected with the taking-off or landing of aircraft at a designated aerodrome, to prohibit aircraft from taking off or landing, or limit the number of occasions on which they may take off or land, at the aerodrome during certain periods, he may by a notice published in the prescribed manner do all or any of the following, that is to say–

(a) prohibit aircraft of descriptions specified in the notice from taking off or landing at the aerodrome (otherwise than in an emergency of a description so specified) during periods so specified;

(b) specify the maximum number of occasions on which aircraft of descriptions so specified may be permitted to take off or land at the aerodrome ... during the periods so specified; ...."

69. Restrictions on night flights at Heathrow airport are imposed by means of notices published by the Secretary of State under section 78 (3) of the 1982 Act.

B. The challenges to the 1993 Scheme

70. The local authorities for the areas around the three main London airports sought judicial review of the Secretary of State's decision to introduce the 1993 Scheme. They made four consecutive applications for judicial review, and appealed twice to the Court of Appeal. The High Court declared that the 1993 Scheme was contrary to the terms of section 78 (3) (b) of the 1982 Act, and therefore invalid, because it did not "specify the maximum number of occasions on which aircraft of descriptions so specified may be permitted to take off or land" but, instead, imposed controls by reference to levels of exposure to noise energy (R. v. Secretary of State for Transport, *ex parte* Richmond upon Thames Borough Council and Others [1994] 1 Weekly Law Reports, p. 74).

71. The Secretary of State decided to retain the quota count system, but with the addition of an overall maximum number of aircraft movements. This decision was held by the High Court to be in accordance with section 78 (3) (b) of the 1982 Act. However, the 1993 Consultation Paper was held to have been "materially misleading" in failing to make clear that the implementation of the proposals for Heathrow airport would permit an increase in noise levels over those experienced in 1988 (R. v. Secretary of State for Transport, *ex parte* Richmond upon Thames Borough Council and Others [1995] Environmental Law Reports, p. 390).

72. Following the publication of a further consultation paper in March 1995, and of a supplement to the March 1995 consultation paper in June 1995, the local authorities brought a further application for judicial review. In July 1996, the Court of Appeal decided that the Secretary of State had given adequate reasons and sufficient justification for his conclusion that it was reasonable, on balance, to run the risk of diminishing to some degree

local people's ability to sleep at night because of the other countervailing considerations to which he was, in 1993, willing to give greater weight, and that by June 1995 errors in the consultation papers had been corrected and the new policy could not be said to be irrational (R. v. Secretary of State for Transport, *ex parte* Richmond LBC [1996] 1 Weekly Law Reports, p. 1460).

73. On 12 November 1996, the House of Lords dismissed a petition by the local authorities for leave to appeal against the decision of the Court of Appeal.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

74. The applicants alleged a violation of Article 8 by virtue of the increase in the level of noise caused at their homes by aircraft using Heathrow airport at night after the introduction of the 1993 scheme.

Article 8 of the Convention provides, so far as relevant, as follows:

> "1. Everyone has the right to respect for his private and family life, his home ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and necessary in a democratic society in the interests of ... the economic well-being of the country ... or for the protection of the rights and freedoms of others."

75. The Government disagreed with the applicants' contention that there had been a violation of Article 8.

A. Arguments of the parties

I. The applicants

76. The applicants submitted that, after the 1993 scheme was introduced, the level of noise caused by aircraft taking off and landing at Heathrow airport between 4 a.m. and 7 a.m. increased significantly. They contended that they found it difficult to sleep after 4 a.m., and impossible after 6 a.m. They submitted that the levels of noise to which they were exposed at night were well in excess of those which were considered, internationally, to be tolerable. They contended that the evidence showed that almost all of them had suffered night noise levels in excess of 80 dB LA max, and in one case as high as 90 dB LA max. They referred to the World Health Organisation's guideline value for avoiding sleep disturbance at night, of a single noise event of 60 dB LA max, and argued that the Government had no adequate

research to support their contention that levels of 80 dB LA max were tolerable. The applicants submitted that, in these circumstances, there had been an interference with their right to respect for their private and family lives and their home, as guaranteed by Article 8 § 1 of the Convention.

77. The applicants contended that the interference was not "necessary in a democratic society". They submitted that there was a great deal of first-hand evidence of the disruption, distress and ill-health caused by night flights. They underlined that the 1992 sleep study dealt only with awakenings from sleep, and reached no conclusions about the incidence or effects of sleep prevention (delay in first getting to sleep at night, and not being able to get back to sleep after being woken in the early morning). The applicants contended that sleep prevention has never been the subject of adequate scientific study. They submitted that basic factual information was needed to support an increase in night flights under the 1993 scheme, and that it was not assembled by the Government.

78. Although they accepted the general importance of Heathrow airport to the United Kingdom economy, the applicants contended that the Government had failed to adduce any evidence of the specific importance of night flights. They referred to the Oxford Economic Forecasting report of November 1999 on "The Contribution of the Aviation Industry to the UK Economy", and noted that the report, which considered the economic importance of Heathrow airport as a whole, did not consider separately the economic importance of night flights. They also submitted a report by Berkeley Hanover Consulting which challenged the validity of the Oxford report and its conclusions. The applicants contended, further, that night flights are of benefit only to the airlines which operate them, and that many other major European airports have greater restrictions on night flights than those in operation at Heathrow.

79. The applicants submitted that, in these circumstances, the reasons for the continuation of night flights adduced by the Government, both in 1993 and subsequently, were not relevant and sufficient, and that it was open to the Court to find a violation of Article 8 on this basis alone.

80. The applicants submitted, further, that the interference with their rights under Article 8 was not "in accordance with the law". They contended that, in order to be "in accordance with the law", there must be protection in domestic law against arbitrary interference with the rights guaranteed by Article 8 § 1 of the Convention; the law must be accessible, and its consequences must be foreseeable. These features were not present when the Government departed from its statement of policy "not to allow a worsening of noise at night, and ideally to improve it" (the 1993 Consultation Paper, paragraph 34), and was held by the High Court to have been "devious" in its attempt to conceal the departure (R. v. London Borough of Richmond and Others (No. 3) [1995] Environmental Law Reports 409).

81. Finally, the applicants contended that Article 8 is capable of conferring upon individuals a right to have essential environmental information communicated to them regarding the extent of an environmental threat to their moral and physical integrity (relying on the judgment of the Court in Guerra v. Italy, 19 February 1998, *Reports of Judgments and Decisions*, 1998-I, § 60), and contended that, *a fortiori*, Article 8 required that such information be assembled by the national authorities. They claimed that the increase in night flights under the 1993 scheme in the absence of proper information constituted in itself a breach of Article 8 of the Convention.

II. The Government

82. The Government acknowledged that the number of movements during the night quota period (11.30 p.m. to 6 a.m.) for the period from winter 1997/98 to summer 1999 was greater than that in 1992/93, and that the increase was greater if the period was taken to 6.30 a.m. They stated that the average QC per movement was significantly lower than the comparable figure prior to the introduction of the 1993 scheme, but that the quota count had increased due to the increased number of movements.

83. The Government's analysis of the current rate of arrivals during half hour slots from 4 a.m. to 6 a.m. was as follows:

	04.00-04.29	04.30-04.59	05.00-05.29	05.30-05.59
Winter	0.57	5.14	7.29	3.43
Summer	0.14	2.29	5.86	4.86

They stated that arrivals before 4 a.m. were so few as to be statistically insignificant, and that average arrivals between 6 a.m. and 6.30 a.m. were 17.86 in the winter and 19.14 in the summer.

84. The Government submitted that the applicants were exposed to lower noise levels than the applicants in the previous cases in which complaints were made concerning aircraft noise at Heathrow airport and which were declared admissible by the Commission (Arrondelle v. the United Kingdom, application no. 7889/97, decision of 15 July 1980, Decision and Reports (DR) 26, p. 5; Baggs v. the United Kingdom, application no. 9310/81, decision of 16 October 1985, DR 44, p. 13; Rayner v. the United Kingdom, application no. 9310/81, decision of 17 July 1986, DR 47, p. 5). With the exception of one of the applicants, Mr Cavalla, at his former address, all the applicants were exposed to the same or lower noise levels than Mr Glass at his former address. Mr Glass's application was declared inadmissible (application no. 28485/95, decision of 3 December 1997). They submitted that, in these circumstances, there had been no

interference with the applicants' rights under Article 8 § 1 of the Convention.

85. The Government submitted, alternatively, that in deciding to introduce the 1993 scheme they struck an appropriate and justified balance between the various interests involved and that, accordingly, any interference with the applicants' rights under Article 8 was justified. They referred to the 1992 sleep study which was in 1993, and remains, the most comprehensive study of its type. They stated that the 1992 sleep study was commissioned in July 1990 in order to inform the 1993 review of restrictions on night flights, but emphasised that it had been preceded by a number of earlier detailed reports into aircraft noise and sleep disturbance, also published by or on behalf of the Civil Aviation Authority. Further, the Government stated that research undertaken in the United States since the results of the 1992 sleep study were published had not cast any doubt on its validity.

86. The Government pointed out that, as they did not own or operate Heathrow airport or the aeroplanes which were causing the noise of which the applicants were complaining, their obligations under Article 8 were properly to be analysed as positive obligations. They submitted that, in these circumstances, they should be permitted a greater degree of leeway than in a case of direct interference by a public authority, although they recognised (referring to the Court's Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, § 41), that the applicable principles were broadly similar whichever analytical approach were to be adopted.

87. The Government referred to the series of noise mitigation and abatement measures which have been implemented at Heathrow airport or have otherwise contributed to the improvement of the noise climate around the airport, in addition to the restrictions on night flights. They provided detailed information in respect of each of these measures.

88. The Government also referred to the responses to the 1993 Consultation Paper received from trade and industry associations with an interest in air travel and from airlines, all of which emphasised the economic importance of night flights and provided detailed information and figures to support their responses. The Government submitted that night flights form an integral part of the global network of air services, and that they have a direct impact on the demand for daytime flights, due to operational constraints (geography, journey length time, number of time zones and direction of flight, turn-around time and efficient aircraft utilisation). A prohibition on night flights would therefore have severe implications for the competitiveness of Heathrow airport and of the airlines based there. These submissions were supported by the written comments received from British Airways.

89. The Government submitted that active and detailed consideration continues to be given to the issue of whether the research undertaken to date needs to be supplemented and, if so, in what areas and on what scientific basis. They pointed to the fact that they are continuing to fund research into sleep disturbance, in the form of further detailed fieldwork and a laboratory trial.

90. They contended that the central issue which they considered before deciding upon the 1993 scheme was the extent to which the economic well-being of the United Kingdom, as represented by the need to meet the requirements of the global market, justified the inconvenience of night noise to local residents. They submitted that before taking the relevant decisions, they had available, and considered, extensive and detailed information regarding the results of research into the effect of night noise on sleep, and regarding the economic importance of night flights at Heathrow airport. They claimed that it was not possible to separate the economic importance of night flights at Heathrow airport from the overall importance of Heathrow to the United Kingdom economy. They contended further that, given the range of interests involved, striking a balance is not a straightforward task, and that it is something which the national authorities are particularly well placed to do. Finally, the Government submitted that the balance which they had struck was a fair and reasonable one.

B. Comments from British Airways plc

91. In written comments, British Airways plc ("BA") addressed the commercial significance of and need to schedule flights which arrive at Heathrow airport at night. BA indicated that its comments were endorsed by BATA. BA stated that in the last two seasons (summer 1999 and winter 1999/2000), BA's night quota flights and those scheduled to operate in the period up to 6.30 a.m., together with their return leg flights, accounted for 16% of BA's total revenue. It stated, further, that the loss of some or all of its night flights would have a serious effect on its ability to compete, and that this effect would be disproportionately great due to both the damage to the network and the scheduling difficulties which it would entail.

92. BA submitted that if its flights which were scheduled to arrive before 7.15 a.m. had not been permitted to operate at Heathrow airport during 1999, it would have lost 49% of its long haul flight output at its main airport base. It would not have been possible to retime night flights into the day due to the lack of spare terminal capacity at Terminals 3 and 4 (the terminals for long haul flights at Heathrow airport) and the fact that no runway slots were available during the morning period. BA would have suffered a very significant loss of revenue, with consequent large-scale redundancies.

93. The report by Berkeley Hanover Consulting submitted by the applicants challenged the validity of the information provided by BA.

C. The Court's assessment

94. The Court considers that it is not possible to make a sensible comparison between the situation of the present applicants and that of the applicants in the previous cases referred to by the Government because, first, the present applicants complain specifically about night noise, whereas the earlier applicants complained generally about aircraft noise and, secondly, the present applicants complain largely about the increase in night noise which they say has occurred since the Government altered the restrictions on night noise in 1993, whereas the previous applications concerned noise levels prior to 1993. The Court concludes, therefore, that the outcome of previous applications is not relevant to the present case.

95. The Court notes that Heathrow airport and the aircraft which use it are not owned, controlled or operated by the Government or by any agency of the Government. The Court considers that, accordingly, the United Kingdom cannot be said to have "interfered" with the applicants' private or family life. Instead, the applicants' complaints fall to be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under Article 8 § 1 of the Convention (see the Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, § 41, and the Guerra v. Italy judgment of 19 February 1998, *Reports* 1998-I, § 58).

96. Whatever analytical approach is adopted – the positive duty or an interference – the applicable principles regarding justification under Article 8 § 2 are broadly similar (the aforementioned Powell and Rayner v. the United Kingdom judgment *loc. cit.*). In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. In both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (see, for example, the Rees v. the United Kingdom judgment of 17 October 1986, Series A no. 106, § 37, as concerns Article 8 § 1, and the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, § 59, as concerns Article 8 § 2). Furthermore, even in relation to the positive obligations flowing from Article 8 § 1, in striking the required balance the aims mentioned in Article 8 § 2 may be of a certain relevance (see the Rees v. the United Kingdom judgment previously cited, loc. cit.; see also the Lopez Ostra v. Spain judgment of 9 December 1994, Series A no. 303-C, p. 54, § 51).

97. The Court would, however, underline that in striking the required balance, States must have regard to the whole range of material considerations. Further, in the particularly sensitive field of environmental

protection, mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others. The Court recalls that in the above-mentioned Lopez Ostra v. Spain case, and notwithstanding the undoubted economic interest for the national economy of the tanneries concerned, the Court looked in considerable detail at "whether the national authorities took the measures necessary for protecting the applicant's right to respect for her home and for her private and family life ..." (judgment of 9 December 1994, p. 55, § 55). It considers that States are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which will, in reality, strike the right balance should precede the relevant project.

98. The Court notes that the Government have acknowledged that, while the average quota count per movement is now lower than the average prior to the introduction of the 1993 scheme, the increased number of movements has led to an increased quota count in comparison with the position in 1992/93. This means that, overall, the level of noise during the quota period (11.30 p.m. to 6 a.m.) has increased under the 1993 scheme. In addition, the Court notes the accounts given by the applicants of the disturbance to their sleep caused by the increase in noise from night flights at Heathrow airport from about 1993.

99. The Court must establish whether, in permitting increased levels of noise over the years since 1993, the Government respected their positive obligation to the applicants.

100. The Court notes that the Government had, when the 1993 scheme was being introduced and in the period whilst it was under judicial challenge, a certain amount of information as to the economic interest in night flights. In particular, they had the responses of industry and commerce to the Consultation Papers of January and November 1993, and of 1995. However, they do not appear to have carried out any research of their own as to the reality or extent of that economic interest.

101. It is true that a measure of further information as to the economic effects of night flights has now been assembled. In particular, BATA commissioned the Coopers & Lybrand report of July 1999 into the economic costs of night flying. This information, however, came too late to be considered in the process leading up to the 1993 Scheme (as reviewed in 1995). The Government acknowledged in the November 1998 Consultation Paper that no attempt was made to quantify the aviation and economic benefits in monetary terms (paragraph 53 above).

102. The Court concludes from the above that whilst it is, at the very least, likely that night flights contribute to a certain extent to the national economy as a whole, the importance of that contribution has never been

assessed critically, whether by the Government directly or by independent research on their behalf.

103. As to the impact of the increased night flights on the applicants, the Court notes from the documents submitted that only limited research had been carried out into the nature of sleep disturbance and prevention when the 1993 Scheme was put in place. In particular, the 1992 sleep study, which was prepared as part of the internal Department of Transport review of the restrictions on night flights, was limited to sleep disturbance, and made no mention of the problem of sleep prevention – that is, the difficulties encountered by those who have been woken in falling asleep again. Further research is now under way, and while the conclusions may be valuable for future Schemes, the results will be too late to have any impact on the increase in night noise caused by the 1993 Scheme.

104. In determining the adequacy of the measures to protect the applicants' Article 8 rights, the Court must also have regard to the specific action which was taken to mitigate night noise nuisance as part of the 1993 Scheme, and to other action which was likely to alleviate the situation.

105. The Court notes that, although the 1993 Scheme did not achieve its stated aim of keeping overall noise levels below those in 1988, it represented an improvement over the proposals made in the 1993 Consultation Paper, in that no aircraft were exempt from the night restrictions (that is, even the quietest aircraft had a rating of 0.5 QC). Further, in the course of the challenges by way of judicial review to the 1993 Scheme, an overall maximum number of aircraft movements was set, and the Government did not accede to calls for large quotas and an earlier end to night quota restrictions.

106. However, the Court does not accept that these modest steps at improving the night noise climate are capable of constituting "the measures necessary" to protect the applicants' position. In particular, in the absence of any serious attempt to evaluate the extent or impact of the interferences with the applicants' sleep patterns, and generally in the absence of a prior specific and complete study with the aim of finding the least onerous solution as regards human rights, it is not possible to agree that in weighing the interferences against the economic interest of the country – which itself had not been quantified – the Government struck the right balance in setting up the 1993 Scheme.

107. Having regard to the foregoing, and despite the margin of appreciation left to the respondent State, the Court considers that in implementing the 1993 scheme the State failed to strike a fair balance between the United Kingdom's economic well-being and the applicants' effective enjoyment of their right to respect for their homes and their private and family lives.

There has accordingly been a violation of Article 8.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

108. The applicants contended that judicial review was not an effective remedy in relation to their rights under Article 8 of the Convention, in breach of Article 13.

Article 13 provides:

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

109. The Government disputed the applicants' contention that there had been a violation of Article 13.

A. Arguments of the parties

I. The applicants

110. The applicants contended that they had no private law rights in relation to excessive night noise, as a consequence of the statutory exclusion of liability in section 76 of the Civil Aviation Act 1982. They submitted that the limits inherent in an application for judicial review meant that it was not an effective remedy. They referred in particular to the fact that the issues arising under Article 8 could not be addressed in an application for judicial review, and that the arguments which had been raised by the local authorities concerning the substance of Article 8 in the four applications for judicial review were rejected on the grounds that they fell outside the scope of the court's power of review. They also referred to the high costs involved in bringing an application for judicial review.

II. The Government

111. The Government submitted that the applicants had no arguable claim of a violation of Article 8 and that, accordingly, no issue of entitlement to a remedy under Article 13 arose. Alternatively, they submitted that as the requirements of Article 13 are less strict than and are absorbed by those of Article 6, and as Article 6 would have applied had it not been for the exclusion of liability in section 76 of the 1982 Act, no separate issue arose under Article 13.

112. The Government contended that, in any event, the remedy of judicial review was available to the applicants. They referred to the wide margin of discretion available to the national authorities in relation to the decision to implement the 1993 scheme. They claimed that judicial review was an effective remedy because, although the English courts could not substitute their view as to where the appropriate balance lay between the competing interests concerned, the courts had power to set aside schemes on

a variety of administrative law grounds (for example, irrationality, unlawfulness or patent unreasonableness). Indeed, the courts had exercised that power in relation to the 1993 scheme.

The Government contended, further, that judicial review would have allowed a challenge to be made on the basis of a failure to take relevant material into account, or the taking into account of irrelevant material. Finally, they observed that Article 8 was considered by the Court of Appeal in R. v. Secretary of State for Transport, *ex parte* Richmond LBC [1996] 1 Weekly Law Reports, p. 1460, at p. 1481E, where it was held that the Secretary of State had given adequate reasons and sufficient justification for his conclusion that it was reasonable, on balance, to run the risk of diminishing to some degree local people's ability to sleep at night because of the other countervailing considerations to which he was, in 1993, willing to give greater weight.

B. The Court's assessment

113. Article 13 has been consistently interpreted by the Court as requiring a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, for example, the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, § 54). In the present case, there has been a finding of a violation of Article 8, and the complaint under Article 13 must therefore be considered.

114. Section 76 of the 1982 Act prevents actions in nuisance in respect of excessive noise caused by aircraft at night. The question which the Court must address is whether the applicants had a remedy at national level to "enforce the substance of the Convention rights ... in whatever form they may happen to be secured in the domestic legal order" (Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, §§ 117 to 127). The scope of the domestic review in the Vilvarajah case, which concerned immigration, was relatively broad because of the importance domestic law attached to the matter of physical integrity. It was on this basis that judicial review was held to comply with the requirements of Article 13. In contrast, however, in its judgment in the case of Smith and Grady v. the United Kingdom of 27 September 1999 (§§ 135 to 139, ECHR 1999-VI [Section 3]), the Court concluded that judicial review was not an effective remedy on the grounds that the domestic courts defined policy issues so broadly that it was not possible for the applicants to make their Convention points regarding their rights under Article 8 of the Convention in the domestic courts.

115. The Court notes that judicial review proceedings were capable of establishing that the 1993 scheme was unlawful because the gap between Government policy and practice was too wide (see R. v. Secretary of State for Transport, *ex parte* Richmond LBC (No. 2) [1995] Environmental Law

Reports p. 390). However, it is clear that the scope of review by the domestic courts was limited to the classic English public law concepts, such as irrationality, unlawfulness and patent unreasonableness, and did not allow consideration of whether the increase in night flights under the 1993 scheme represented a justifiable limitation on their right to respect for the private and family lives or the homes of those who live in the vicinity of Heathrow airport.

116. In these circumstances, the Court considers that the scope of review by the domestic courts in the present case was not sufficient to comply with Article 13.

There has therefore been a violation of Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

117. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damages

118. The applicants submitted that they had each suffered considerable non-pecuniary damage as a result of noise caused by night flights and, in particular, the increase in night flights since 1993. They suggested that an award of 2,000 to 4,000 pounds sterling (GBP) each would be an appropriate starting point for an award of non-pecuniary damage.

119. The Government did not comment on the applicants' submissions.

120. Having regard to the accounts given by the applicants of the impact on each of them of the increase in night flights since 1993, and making its award on an equitable basis, the Court awards the applicants the sum of GBP 4,000 each in respect of non-pecuniary damage.

B. Costs and expenses

121. The applicants submitted a claim for costs and expenses of the proceedings before the Commission and the Court in the sum of GBP 153,867.56, plus GBP 24,929.55 value added tax ("VAT"). They submitted that although their application was almost identical to that made by Mr Glass (the annexes to which were simply reproduced for the purposes of the present application), they should recover the cost of preparation of the application because their representative had represented Mr Glass on a contingency (no-win no-fee) basis, and therefore had not recovered a fee for

the work done on his behalf. They indicated that they had excluded from their claim costs incurred solely in connection with Mr Glass's application, and that they had further reduced the sums claimed by 25% in order to ensure that there was no element of double recovery.

122. The Government expressed some doubt as to whether the applicants were in fact liable for the costs, as the basis for the retention of the applicants' lawyers was not clear. In any event, they considered that the rates and the time charged were excessive, and that the travel expenses were, to a certain extent, not necessary. They put an appropriate figure for costs at GBP 56,739.44 including VAT. They subsequently added that they understood that up to GBP 80,000 had been raised by a pressure group to fund costs.

123. Making its assessment on an equitable basis, the Court awards the applicants by way of costs and expenses the global sum of GBP 70,000, including VAT.

C. Default interest

124. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by five votes to two that there has been a violation of Article 8 of the Convention;

2. *Holds* by six votes to one that there has been a violation of Article 13 of the Convention;

3. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
      (i) in respect of non-pecuniary damage, 4,000 (four thousand) pounds sterling each;
      (ii) for costs and expenses, 70,000 (seventy thousand) pounds sterling, including any value added tax that may be chargeable;
   (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English and notified in writing on 2 October 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ	J.-P. COSTA
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:

(a) separate opinion of Mr Costa;
(b) partly dissenting opinion of Mrs Greve;
(c) dissenting opinion of Sir Brian Kerr.

J.-P.C.
S.D.

SEPARATE OPINION OF JUDGE COSTA

(Translation)

On mature reflection, and not without having hesitated a great deal, I voted in favour of finding that there had been a violation of Article 8 of the Convention. (I concluded more easily that there had been a violation of Article 13, so shall confine my comments to Article 8.)

This case, which gave rise to a public hearing, is far from easy. On the one hand there is the principle, established by the Court as early as the Marckx judgment of 13 June 1979, that the State has positive duties, and that the right to a healthy environment is included in the concept of the right to respect for private and family life (see, for example, the Powell and Rayner against the United Kingdom judgment of 21 February 1990, quoted in the instant judgment (see paragraph 95), which also concerned noise disturbance inflicted on the communities near Heathrow by aircraft noise). On the other hand there is the margin of appreciation which must be left to the States in this sphere, particularly as to the choice of means by which to reduce aircraft noise (see the Powell and Rayner judgment, § 45), and the economic well-being of the country, referred to in Article 8 § 2 of the Convention, which relates to the general interest, a matter towards which I am personally very sensitive. (I refer in this connection to my dissenting opinion in the case of Chassagnou against France: judgment of 29 April 1999.)

There were therefore serious reasons for considering, as did the judges forming the minority, that the inconvenience caused to the applicant as a result of their proximity to Heathrow airport was not disproportionate.

It seems to me, however, that the inconvenience was very substantial and, all in all, excessive. As stated in paragraphs 10 to 17 of the judgment, the eight applicants lived very near the runways, and four of them had to move house. They certainly did not do so merely to satisfy a whim, but because they and their families had been finding it extremely difficult to bear the noise, and, in particular, to sleep. It should not be forgotten that, unlike the cases which were the subject of the Powell and Rayner judgment, and the decisions of the Commission such as Arrondelle (DR 26, p. 5) or Baggs (DR 44, p. 13), what was at issue here were night flights, with aeroplanes landing or taking off between 4 a.m. and 6 a.m. Anyone who has suffered for a long period from noise disturbance such as to disrupt their sleep (or prevent them from getting back to sleep once awake) is well aware that the effects of this on the nerves and on one’s physical and mental well-being are extremely unpleasant and even harmful. Furthermore, again unlike the earlier cases, the applications lodged by Mrs Hatton and the other applicants concern the period subsequent to 1993, and the Government have acknowledged that since 1993 the number of night flights has

substantially increased (see, for example, the admissibility decision of 16 May 2000, p. 13, and the present judgment, paragraph 98).

Moreover, the issues raised by the case do not necessarily boil down to macro economic considerations requiring radical solutions which would compromise the economic well-being of the country (or of the airline companies, the airport authorities, or all three categories at once). In accordance with its positive obligations, could the State not have explored less drastic solutions, such as subsidies (from the State or from the Heathrow management authorities) to soundproof the applicants' homes? The objection may be raised that they are not the only residents suffering from the noise and that, consequently, that solution would have opened the floodgates to multiple requests for subsidies or compensation, whereupon the macro economy would again be in issue and would subsume the individual nature of the applications and violations.

That is certainly true, but it has to be one thing or the other: either the number of potential victims of night flight noise is limited and the "beneficiaries" of those flights can compensate them, or it is too high for the level of compensation to be financially viable for the beneficiaries, whereupon night flights need to be reviewed in their entirety.

It therefore appears to me that, having regard to the Court's case-law on the right to a healthy environment (see, for example, the Lopez Ostra against Spain judgment of 9 December 1994, or the Guerra against Italy judgment of 19 February 1998), maintaining night flights at that level meant that the applicants had to pay too high a price for an economic well-being, of which the real benefit, moreover, is not apparent from the facts of the case. Unless, of course, it is felt that the case-law goes too far and overprotects a person's right to a sound environment. I do not think so. Since the beginning of the 1970s, the world has become increasingly aware of the importance of environmental issues and of their influence on people's lives. Our Court's case-law has, moreover, not been alone in developing along those lines. For example, Article 37 of the Charter of Fundamental Rights of the European Union of 18 December 2000 is devoted to the protection of the environment. I would find it regrettable if the constructive efforts made by our Court were to suffer a setback.

That is why I have finally subscribed, in the main, to the reasoning of the majority of my colleagues, and fully to their conclusion.

PARTLY DISSENTING OPINION OF JUDGE GREVE

In the present case I have not found a violation of Article 8.

In reaching this finding I share essentially the views expressed by Sir Brian Kerr in his dissenting opinion relating to Article 8. I am, however, unlike Sir Brian, prepared to accept the applicants' allegation that the night flights' noise did interfere substantially with their sleep.

In the following I shall limit myself to elaborating on the main points on which I take a different view from that of the majority of my colleagues in this case.

Introductory remark

Article 8 §1 reads:

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

In relation to the notion of "home", the essence of the protection under the provision is to secure the inviolability of one's home, that is to safeguard private individuals against arbitrary interference with their homes. The Convention being a living instrument, the provision has gradually been interpreted to include also environmental rights. There are limits as to the kind of environmental problems – pollution in the widest sense of the word – which people will have to accept before these problems give rise to a violation of Article 8. These environmental rights are nonetheless of a different character from the core right not to have one's home raided without a warrant. Environmental problems may lead to State responsibility under Article 8 as a consequence of the impact of planning decisions, and potentially also when a State refrains from adequately addressing serious environmental problems.

The State's inquiry into night flights

Unlike the majority, I find no major shortcomings in the State's inquiry into night flights' noise and the decision-making process used in this case by the authorities in the United Kingdom. On the contrary, I find that the procedures were reasonable and adequate.

The margin of appreciation

An interference with the right to respect for one's home will infringe Article 8 of the Convention, unless it is "in accordance with the law", pursues one or more legitimate aims under paragraph 2 and is "necessary in a democratic society" to achieve those aims. In the present case, the main issue turns on whether the latter requirement was satisfied.

The majority's understanding of the margin of appreciation left to the national courts is, in my opinion, in conflict with the Court's established case-law.

The standard relied on by the majority requiring States "to minimise, as far as possible, the interference with [Article 8] rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights" (paragraph 97 of the judgment) is, in my opinion, incompatible with the wide margin of appreciation left by the European Court to Contracting States in other planning cases.

The general principles in this respect are laid down in the Buckley v. the United Kingdom judgment (25 September 1996, *Reports of Judgments and Decisions 1996*-IV, pp. 1291-1293, §§ 74-77), and read:

> "As is well established in the Court's case-law, it is for the national authorities to make the initial assessment of the 'necessity' for an interference, as regards both the legislative framework and the particular measure of implementation (see, *inter alia* and *mutatis mutandis*, the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, p. 25, § 59, and the Miailhe v. France (no. 1) judgment of 25 February 1993, Series A no. 256-C, p. 89, § 36). Although a margin of appreciation is thereby left to the national authorities, their decision remains subject to review by the Court for conformity with the requirements of the Convention.
>
> The scope of this margin of appreciation is not identical in each case but will vary according to the context (see, *inter alia* and *mutatis mutandis*, the above-mentioned Leander judgment, ibid.). Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned.
>
> The Court has already had occasion to note that town and country planning schemes involve the exercise of discretionary judgment in the implementation of policies adopted in the interest of the community (in the context of Article 6 § 1, see the Bryan judgment cited above, p. 18, § 47; in the context of Article 1 of Protocol No. 1, see the Sporrong and Lönnroth v. Sweden judgment of 23 September 1982, Series A no. 52, p. 26, § 69; the Erkner and Hofauer v. Austria judgment of 23 April 1987, Series A no. 117, pp. 65-66, §§ 74-75 and 78; the Poiss v. Austria judgment of 23 April 1987, Series A no. 117, p. 108, §§ 64-65, and p. 109, § 68; the Allan Jacobsson v. Sweden judgment of 25 October 1989, Series A no. 163, p. 17, § 57, and p. 19, § 63). It is not for the Court to substitute its own view of what would be the best policy in the planning sphere or the most appropriate individual measure in planning cases (see, *mutatis mutandis*, the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 23, § 49). By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. In so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation."

These principles have most recently been followed by the Court's Grand Chamber in its judgments of 18 January 2001 in the cases of Chapman v. the United Kingdom (application no. 27238/95), Beard v. the United Kingdom (application no. 24882/94), Coster v. the United Kingdom

(application no. 24876/94), Lee v. the United Kingdom (application no. 25289/94) and Jane Smith v. the United Kingdom (application no. 25154/94); and in the inadmissibility decision of 25 May 2000 by the Court (Fourth Section) in the *Noack and Others v. Germany* case (application no. 46346/99). The latter case is of particular interest as it involved no less than the transfer of an entire village – members of the Sorbian minority included. The Court (Fourth Section) described the background to the case as follows:

> "The case concerns the transfer – scheduled to take place at the end of 2002 – of the inhabitants of Horno, a village in the *Land* of Brandenburg fifteen kilometres north of the town of Cottbus, near the Polish border. Horno has a population of 350, approximately a third of whom are from the Sorbian minority, of Slav origin. The first twelve applicants say that they are members of the Sorbian minority. [The other applicants were the Domowina, an association for the protection of Sorbian interests, and the Horno Protestant community.] Approximately 20,000 Sorbs (*Sorben*) live in the *Land* of Brandenburg. They have their own language and culture. They have their own customs (*sorbisches Brauchtum*), which are kept alive by groups performing Sorbian songs or wearing traditional costumes and by drama societies, literary circles and drawing classes. The majority of Sorbs are Protestants.
>
> The inhabitants of Horno are to be transferred to a town some twenty kilometres away because of an expansion of lignite-mining operations (*Braunkohleabbau*) in the area, as the Jänschwalde open-cast lignite mine (*Braunkohletagebau*) is just a few kilometres from Horno."

The Court (Fourth Section) concluded that the impugned interference, though indisputably painful for the inhabitants of Horno, was not disproportionate to the legitimate aim pursued (economic well-being) in view of the margin of appreciation which States are afforded in this area.

The reasons for a wide margin of appreciation in planning and environmental cases are in my opinion no less valid today. In modern society, environmental problems are not discreet and only of concern to those who may invoke Article 8, given their proximity to the source of the given problem. One of the functions of planning is, to the extent possible, to protect people against the negative impact on the environment of, for instance, and as *in casu*, the transport infrastructure; another function is to ensure that no group of people is disproportionately affected by what is considered necessary to meet the needs of modern urban society. The amount and complexity of the factual information needed to strike a fair balance in these respects is more often than not of such a nature that the European Court will be at a marked disadvantage compared to the national authorities in terms of acquiring the necessary level of understanding for appropriate decision-making. Moreover, environmental rights represent a new generation of human rights. How the balance is to be struck will therefore affect the rights not only of those close enough to the source of the environmental problem to invoke Article 8, but also the rights of those

members of the wider public affected by the problem and who must be considered to have a stake in the balancing exercise.

Furthermore, the general principle concerning the assessment of facts argues in favour of a wide margin of appreciation in these cases.

The general principle concerning the assessment of facts

It is normally not within the province of the Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them (see, *inter alia*, the Klaas v. Germany judgment of 22 September 1993, Series A no. 269, p. 17, § 29).

The arguments listed above in favour of a wide margin of appreciation in planning cases also have as a consequence that the Court ought to be reluctant to substitute its own assessment of facts in these cases unless there are relatively clear and substantiated indications that the national authorities have got the facts wrong. In my opinion, there are no such indications in the present case which would make the Court a more competent fact-finder than the national authorities. I consider that the majority moves beyond what appears to me advisable in this respect.

DISSENTING OPINION OF SIR BRIAN KERR

I regret that I am unable to agree with my fellow judges in their conclusion that there have been violations of Articles 8 and Article 13 of the Convention in this case.

Article 8

Article 8 prohibits unjustified State interference with an individual's "right to respect for his private ... life [and] his home". The opportunity for undisturbed sleep is an important aspect of one's private life. The flying of aircraft at night can interfere with the sleep of those who live in its flight path. It scarcely requires to be said, however, that, by allowing night flights, (even those which cause sleep interference) the State is not automatically guilty of an unjustified interference with the right to respect for private life and home. Before that conclusion can be reached, a close examination is required of (i) the nature of the alleged interference, (ii) the State's inquiry into the effects of night flights' noise and (iii) the assessment that the State has made of the consequences of curtailing night flights.

The nature of the interference

The applicants' claims that their sleep has been disturbed have not been subjected to any critical challenge. The account that they have given in documents submitted to the court cannot be accepted without reservation, therefore. Nor can the assumption be made that these accounts are necessarily representative of a general experience of those who live in the same areas as the applicants. In making an assessment of whether the State has been guilty of a failure to have respect for the applicants' private life and home, it must be borne in mind that the extent of the claimed disturbance has not been established to any significant degree.

It may be considered that it is not easy to prove that one's sleep has been disturbed. This difficulty does not alone justify the weight given by the Chamber to an alleged absence of scientific study into the problem. There can be no substitute for a discussion of the facts of the specific case before the Court. This is after all an application under Article 34 of the Convention, and not Article 33.

It is relevant that none of the applicants has been prevented from moving away from the area. None claims that their house became unsaleable or that they lost value to such an extent that equivalent property elsewhere was not affordable. This point does not, of course, deprive the applicants of the status required to claim to be victims of a violation of the Convention within the meaning of Article 34, but it is highly material in determining whether, overall, the government's policy was so wide-ranging and unreasonable as to render it incompatible with Article 8 of the Convention. It is well known

that pressure on property prices around London is so great that they are not seriously affected by aircraft noise. In such circumstances, those who claim sleep disturbance from night flying have a genuine choice as to whether to remain or to move elsewhere.

Modern life is beset with inconveniences. It is an inevitable incident of our changing world that land use plans change and that those changes have an impact on the lives of individuals. From time to time motorways are extended, roads are re-routed or public buildings are erected near private property. Those who are directly affected by such developments are naturally most likely to oppose them. So it is with night flights. But the mere fact that one's private life is interfered with by such developments is not enough to attract the protection of Article 8. It must be demonstrated that, in trying to balance the individual's rights and society's needs and interests, the State has not afforded the rights enshrined in that provision the requisite respect. In addressing that question, the possibility of removing oneself from the source of the inconvenience cannot be ignored.

Having considered all the available evidence, I have concluded that it has not been established that there was a significant interference with the applicants' right to private life.

The State's inquiry into night flights' noise

The majority has concluded that the State did not conduct a sufficient inquiry into the effects of night flying on the sleep of those affected by it (paragraph 106). Since the introduction of the 1993 scheme, however, the Government has taken the following steps, among others, (i) consulted on revised proposals in October and November 1993; (ii) commissioned a study by ANMAC in May 1994; (iii) issued a Consultation paper in March 1995 and a supplement in June 1995; (iv) initiated a trial of modified procedures for early morning landings and published the results in November 1998; (v) commissioned a study to be carried out by the National Physical Laboratory in December 1997; (vi) engaged in a two stage consultation exercise in 1998, publishing the second stage in November of that year; (vii) as a result of the consultation exercise, introduced a new scheme in 1999, and (viii) published a report in March 2000 identifying a number of issues for further possible research.

I cannot subscribe to the view that the Government have been unwarrantably inactive in this area, therefore. On the contrary, the amount of research that has been conducted into the problem of night noise has been substantial, in my opinion. Furthermore, as the judgment records, (paragraph 64) a series of noise mitigation and abatement measures is in place at Heathrow airport, in addition to restrictions on night flights. The DETR and the management of Heathrow airport conduct continuous and detailed monitoring of the restrictions of night flights. These measures

betoken a concern that the right to a private life should not be unduly interfered with rather than a failure to accord that right the requisite respect.

The consequences of curtailing night flights

The majority has concluded that "mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others". I agree. In the present case, however, it is surely misconceived to characterise the case made on behalf of the United Kingdom as a "mere reference" to the economic well being of the country. As the judgment has acknowledged, (paragraph 90) the United Kingdom Government had available to them detailed information regarding the economic importance of night flights at Heathrow. The applicants have challenged the accuracy and validity of that information. In particular, they claim that the Oxford Economic Forecasting report did not consider separately the economic importance of night flights. I am not persuaded, however, that it is possible to segregate the night flights factor in the way suggested by the applicants and I do not consider that it has been shown that the economic effects of curtailing night flights will be other than substantial.

The importance to the national economy of the aircraft industry as a whole, and of Heathrow airport in particular, is self-evident. As to the specific role of night flights at Heathrow, some 3% of air movements take place between 23.30 and 6.30; flights between 6.00 and 6.30 are almost exclusively long haul arrivals. British Airways have informed the Court that this sector of the market is particularly important for them for a number of reasons – customer preference, the need to use aircraft as intensively as possible and the lack of runway and terminal capacity at other times – and there is every reason why the same should apply to other airlines. It is, in my view, beyond plausible dispute that night flights form part of that national economic interest. The preponderance of the evidence available to the Court strongly favours the conclusion that there will be considerable adverse effect to the economy if night flights are curtailed.

Striking the balance

In reaching the conclusion that the economic well-being of the country did not outweigh the rights of the applicants, the majority referred to the Lopez Ostra case in which the Court found State responsibility for nuisances created by a waste-treatment plant. It has been pointed out that, notwithstanding the undoubted economic interest for the national economy of the tanneries concerned in Lopez Ostra, the Court looked in considerable detail at "whether the national authorities took the measures necessary for protecting the applicant's right to respect for her home and for her private and family life..." I would again respectfully agree that this is an entirely appropriate approach. But the fact that the interest for the national economy

of the enterprise concerned did not outweigh the State's obligation to have respect for the applicant's rights under Article 8 in the Lopez Ostra case, does not diminish the potential importance of that factor in other cases in considering whether, if there has been interference with the right to respect for private life and home, that interference may be said to be unjustified. Each case must be considered on its individual merits. In some cases, the economic argument may be pivotal where the interference is not substantial; in others it may be weak, particularly where the interference is considerable. The case of Lopez Ostra does not purport to lay down a general principle that the interest for the national economy is a factor which is to be disregarded or that it must always yield to the need to protect the right to respect for private and home life, especially if the interference with those rights is peripheral or illusory.

Moreover, I would point to a number of significant differences between that case and the present. In Lopez Ostra, the domestic courts accepted that it had been established that the operation of the waste treatment plant created nuisances that "impaired the quality of life of those living in the plant's vicinity" (p. 54, § 50). In the present case, the applicants were not parties in the only court proceedings in the domestic courts. No domestic court has evaluated the actual impact on their lives of the night flights complained of, therefore. Moreover, such proceedings as have been undertaken have concerned procedural aspects of the policy-making process rather than the assessment of any actual nuisance.

By contrast, the waste-treatment plant at issue in Lopez Ostra had started to operate recently (it was built in 1988), was patently illegal in that it was operating without the necessary licences (p. 43, § 8), and the authorities (in re-housing residents, p. 53, § 53) and the courts (p. 44, § 11) accepted that the operation caused actual nuisance. In the present case, Heathrow had been a major international airport long before any of the applicants took up residence at the addresses where they lived when the application was introduced, none of the night flights has been established to be illegal, and the authorities have never taken any measures specific to the applicants.

The majority decision does not address these issues. Rather, it relies on what appears to be a wholly new test for the application of Article 8 in proclaiming that States are required "to minimise, as far as possible, the interference with [Article 8] rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights" (paragraph 97). I am not aware of any other Convention case in which such a test has been applied. Indeed, it is difficult to see how it can be reconciled with the principle that States should have a margin of appreciation in devising measures to strike the proper balance between respect for Article 8 rights and the interests of the community as a whole. This margin of appreciation was expressly acknowledged in the Lopez Ostra case (p. 54, § 51; p. 56, § 58). The test enunciated by the

majority denies to States any discretion as to how they wish to address socio-economic issues, and instead requires that all policy decisions be dictated by a strict "minimum interference with fundamental rights" rule. Such a rule can form part of domestic law, and is not out of place in the case-law of the European Court of Justice, which is itself an essential part of domestic law for the member States of the European Union. It appears to me to be in conflict with the essential subsidiarity of the Convention system[1], however, and cannot therefore be appropriate to the present case.

Looking at the balance that has to be struck between competing interests (the cases are cited at paragraph 96 of the judgment), one evidently must bear in mind all the factors in a case. The Chamber sets against an increase in permitted levels of night noise from 1993 the following factors: an absence of scientific and/or independent information on the economic interest in night flights (paragraphs 100-102); a limited amount of research as to sleep disturbance and prevention (paragraph 103), and specific action taken to mitigate night noise (paragraph 105). Requiring, as the Chamber in effect does, specific research into the extent of the obvious seems to me to be placing a very substantial, and retroactive, burden on the Government.

A further point to be considered in striking the balance between the various interests is that the applicants are challenging not a specific decision which affected them, but a macro-economic policy. It is open to the Court to consider the effect of general policies or laws on individuals, but it must be aware that to make an assessment of a general policy on the basis of a specific case is an exercise that is fraught with difficulty.

Article 8 § 2 includes in the list of justifications for an interference with Article 8 § 1 rights "the rights of others". In a case involving night flights, the rights and freedoms of air carriers and of passengers must be brought into the equation. It is difficult to envisage how the Government may do so in any meaningful way if they are obliged "to minimise, as far as possible, the interference with [Article 8] rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights".

In performing the balancing exercise under Article 8 in this case, one should also consider the consequences of a finding that there has been a violation. The mere fact that a finding of a violation in a particular case might give rise to a large number of applications is not a reason to shirk from that finding. If Convention standards are not met in an individual case, it is the role of the Court to say so, regardless of how many others are in the same position. But when, as here, a substantial proportion of the population of south London is in a similar position to the applicants, the Court must

[1] See, for example, the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, % 48 and Z. and Others v. the United Kingdom [GC], no. 29392/95, § 103, ECHR 2001.

consider whether the proper place for a discussion of the particular policy is in Strasbourg, or whether the issue should not be left to the domestic political sphere.

It will be apparent from the above that I consider that there are so many factors weighing against the applicants, and so few in their favour, that I cannot subscribe to a conclusion that the balance required by Article 8 was not struck in this case.

Article 13

I have concluded that there was no violation under Article 8. As the majority have pointed out, Article 13 has been consistently interpreted by the Court as requiring a remedy in domestic law only in respect of grievances that can be regarded as "arguable" in terms of the Convention. I take the view that the Article 8 claims must so clearly be decided in the Government's favour, that they cannot be considered to be "arguable". Therefore, I must also conclude that there has not been a violation of Article 13.

Had I concluded that the Article 8 claim was arguable, I would still have had doubts as to whether there was a violation of Article 13. The English courts recognise that the intensity of review in a public law case will depend on the subject matter (R (Mahmood) v. Secretary of State for the Home Department [2001] 1 WLR 840, at page 847, approved by Lord Steyn in R v. Secretary of State of the Home Department, *ex parte* Daly [2001] 3 All ER 433 at page 477). While this Chamber in its Smith and Grady judgment found that judicial review did not satisfy the requirements of Article 13, that case involved matters of an intensely personal nature for the applicants which put it clearly within the scope of Article 8, and the national security considerations reduced the scope of the review. The present case is different in that the interference with the applicants' right to respect for their Article 8 rights is, as I have outlined above, difficult to define. In these circumstances, I consider that the possibility of a judicial review of the Minister's policy by way of a challenge to the reasonableness, lawfulness and arbitrariness of the policy is precisely the sort of remedy Article 13 envisages in cases involving not a specific decision, or a decision directly affecting an individual, but a challenge to a general policy on night flights.

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

CASE OF HATTON AND OTHERS v. THE UNITED KINGDOM

(Application no. 36022/97)

GRAND CHAMBER

JUDGMENT

STRASBOURG

8 July 2003

In the case of Hatton and Others v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mr J.-P. COSTA,
Mr G. RESS,
Mr G. BONELLO,
Mrs E. PALM,
Mr I. CABRAL BARRETO,
Mr R. TÜRMEN,
Mrs V. STRÁŽNICKÁ,
Mr V. BUTKEVYCH,
Mr B. ZUPANČIČ,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs E. STEINER,
Mr S. PAVLOVSCHI,
Sir Brian KERR, ad hoc *judge*,

and also of Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 13 November 2002 and 21 May 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 36022/97) against the United Kingdom of Great Britain and Northern Ireland lodged on 6 May 1997 with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eight United Kingdom nationals, Ms Ruth Hatton, Mr Peter Thake, Mr John Hartley, Ms Philippa Edmunds, Mr John Cavalla, Mr Jeffray Thomas, Mr Richard Bird and Mr Tony Anderson ("the applicants"). The applicants are all members of the Heathrow Association for the Control of Aircraft Noise (HACAN, now HACAN-ClearSkies), which itself is a member of the Heathrow Airport Consultative Committee**.**

2. The applicants were represented by Mr R. Buxton, a lawyer practising in Cambridge. The United Kingdom Government ("the Government") were represented by their Agent, Mr H. Llewellyn, of the Foreign and Commonwealth Office.

3. The applicants alleged that government policy on night flights at Heathrow Airport gave rise to a violation of their rights under Article 8 of the Convention and that they were denied an effective domestic remedy for this complaint, contrary to Article 13 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 16 May 2000, following a hearing on admissibility and the merits (Rule 54 § 4, former version), it was declared admissible by a Chamber of that Section, composed of Mr J. P. Costa, President, Mr L. Loucaides, Mr P. Kūris, Mrs F. Tulkens, Mr K. Jungwiert, Mrs H.S. Greve, judges, Sir Brian Kerr, *ad hoc* judge, and Mrs S. Dollé, Section Registrar.

6. On 2 October 2001 the Chamber delivered its judgment in which it held, by five votes to two, that there had been a violation of Article 8 of the Convention and, by six votes to one, that there had been a violation of Article 13. The Chamber also decided, by six votes to one, to award compensation for non-pecuniary damage of 4,000 pounds sterling (GBP) to each applicant, and a global sum of GBP 70,000 in respect of legal costs and expenses. The separate opinions of Mr Costa, Mrs Greve and Sir Brian Kerr were annexed to the judgment.

7. On 19 December 2001 the Government requested, in accordance with Article 43 of the Convention and Rule 73, that the case be referred to the Grand Chamber. A panel of the Grand Chamber accepted this request on 27 March 2002.

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. Mr C.L. Rozakis and Mr P. Lorenzen, who were unable to take part in the final deliberations, were replaced by Mrs E. Steiner and Mr I. Cabral Barreto (Rule 24 § 3).

9. The applicants and the Government each filed written observations on the merits. In addition, third-party comments were received from Friends of the Earth and from British Airways (Article 36 § 2 of the Convention and Rule 61 § 3 of the Rules of Court).

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 13 November 2002 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*
Mr H. LLEWELLYN, Foreign and Commonwealth Office, *Agent,*
Lord GOLDSMITH QC, Attorney General,
Mr P. HAVERS QC,
Mr J. EADIE, *Counsel,*
Mr G. GALLIFORD,
Mr P. REARDON,
Mr G. PENDLEBURY,
Ms M. CROKER, *Advisers*;

(b) *for the applicants*
Mr D. ANDERSON QC,
Ms H. MOUNTFIELD, *Counsel,*
Mr R. BUXTON,
Ms S. RING, *Solicitors,*
Mr C. STANBURY,
Mr M. SHENFIELD, *Advisers*.

The Court heard addresses by Mr Anderson and Lord Goldsmith.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The degree of disturbance caused to each applicant by night flights

11. Ruth Hatton was born in 1963. Between 1991 and 1997 she lived in East Sheen with her husband and two children. According to information supplied by the Government, her house was 11.7 km from the end of the nearest runway at Heathrow and fell within a daytime noise contour where the level of disturbance from aircraft noise was between 57 and 60 dBa Leq. According to the Government, dBA Leq measure the average degree of community annoyance from aircraft noise over a sixteen-hour daytime period and studies have shown that in areas where the daytime noise exposure is below 57 dBA Leq there is no significant community annoyance. The Government state that a daytime noise contour of 57 dBA Leq represents a low level of annoyance; 63 dBA Leq represent a

moderate level of annoyance; 69 dBA Leq correspond to a high level of annoyance; and 72 dBA Leq represent a very high level of annoyance.

12. According to Ms Hatton, in 1993 the level of night noise increased and she began to find noise levels to be "intolerable" at night. She believed that the noise was greater when aircraft were landing at Heathrow from the east. When this happened, Ms Hatton was unable to sleep without ear plugs and her children were frequently woken up before 6 a.m., and sometimes before 5 a.m. If Ms Hatton did not wear ear plugs, she would be woken by aircraft activity at around 4 a.m. She was sometimes able to go back to sleep, but found it impossible to go back to sleep once the "early morning bombardment" started which, in the winter of 1996/1997, was between 5 a.m. and 5.30 a.m. When she was woken in this manner, Ms Hatton tended to suffer from a headache for the rest of the day. When aircraft were landing from the west the noise levels were lower, and Ms Hatton's children slept much better, generally not waking up until after 6.30 a.m. In the winter of 1993/1994, Ms Hatton became so run down and depressed by her broken sleep pattern that her doctor prescribed anti-depressants. In October 1997, she moved with her family to Kingston-upon-Thames in order to get away from the aircraft noise at night.

13. Peter Thake was born in 1965. From 1990 until 1998, he lived in Hounslow with his partner. His home in Hounslow was situated 4.4 km from Heathrow Airport and slightly to the north of the southern flight path, within a daytime noise contour of between 63 and 66 dBA Leq, according to the Government.

14. Mr Thake claims that in about 1993 the level of disturbance at night from aircraft noise increased notably and he began to be woken or kept awake at night by aircraft noise. Mr Thake found it particularly difficult to sleep in warmer weather, when open windows increased the disturbance from aircraft noise, and closed windows made it too hot to sleep, and he found it hard to go back to sleep after being woken by aircraft noise early in the morning. He was sometimes kept awake by aeroplanes flying until midnight or 1 a.m. and then woken between 4 a.m. and 5 a.m. Mr Thake was also sometimes woken by aeroplanes flying at odd hours in the middle of the night, for example when diverted from another airport. In 1997, Mr Thake became aware that he could complain to the Heathrow Noise Line about aircraft noise if he made a note of the time of the flight. By 30 April 1997, Mr Thake had been sufficiently disturbed to note the time of a flight, and made a complaint to the Heathrow Noise Line on nineteen occasions. He remained in Hounslow until February 1998 because his family, friends and place of work were in the Heathrow area, but moved to Winchester, in Hampshire, when a suitable job opportunity arose, even though it meant leaving his family and friends, in order to escape from the aircraft noise, which was "driving [him] barmy".

15. John Hartley was born in 1948 and has lived with his wife at his present address in Richmond since 1989. According to the information provided by the Government, Mr Hartley's house is 9.4 km from the end of the nearest Heathrow runway and, situated almost directly under the southern approach to the airport, within a daytime noise contour area of between 60 and 63 dBA Leq. The windows of the house are double-glazed.

16. From 1993, Mr Hartley claims to have noticed a “huge” increase in the disturbance caused by flights between 6 a.m. and 6.30 a.m. (or 8 a.m. on Sundays). He states that the British Airports Authority did not operate a practice of alternation (using only one runway for landings for half the day, and then switching landings to the other runway) during this period as it did during the day, and the airport regularly had aircraft landing from the east on both runways. When the wind was blowing from the west and aeroplanes were landing from the east, which was about 70% of the time, aircraft noise would continue until about midnight, so that Mr Hartley was unable to go to sleep earlier than then. He would find it impossible to sleep after 6 a.m. on any day of the week, and was usually disturbed by aircraft noise at about 5 a.m., after which he found he could not go back to sleep. When the aeroplanes were landing from the west, Mr Hartley was able to sleep.

17. Philippa Edmunds was born in 1954 and lives with her husband and two children in East Twickenham. She has lived at her present address since 1992. According to information supplied by the Government, Ms Edmund's house is 8.5 km from the end of the nearest Heathrow runway and approximately 1 km from the flight path, within a daytime noise contour area of under 57 dBA Leq.

18. The applicant claims that before 1993 she was often woken by aircraft noise at around 6 a.m. From 1993, she tended to be woken at around 4 a.m. In 1996, Ms Edmunds and her husband installed double-glazing in their bedroom to try to reduce the noise. Although the double-glazing reduced the noise, Ms Edmunds continued to be woken by aircraft. She suffered from ear infections in 1996 and 1997 as a result of wearing ear plugs at night and, although she was advised by a doctor to stop using them, she continued to do so in order to be able to sleep. Ms Edmunds was also concerned about the possible long-term effects of using ear plugs, including an increased risk of tinnitus. Ms Edmunds's children both suffered from disturbance by aircraft noise.

19. John Cavalla was born in 1925. From 1970 to 1996 he lived with his wife in Isleworth, directly under the flight path of the northern runway at Heathrow Airport. According to information supplied by the Government, the applicant's house was 6.3 km from the end of the nearest Heathrow runway, within a daytime noise contour of between 63 and 66 dBA Leq.

20. The applicant claims that in the early 1990s the noise climate deteriorated markedly, partly because of a significant increase in traffic, but mainly as a result of aircraft noise in the early morning. Mr Cavalla

considers that air traffic increased dramatically between 6 a.m. and 7 a.m. as a result of the shortening of the night quota period. He found that, once woken by an aircraft arriving at Heathrow Airport in the early morning, he was unable to go back to sleep.

21. In 1996, Mr Cavalla and his wife moved to Sunbury in order to get away from the aircraft noise. According to the Government, the new house is 9.5 km from Heathrow, within a daytime noise contour area of under 57 dBA Leq. After moving house, Mr Cavalla did not live under the approach tracks for landing aircraft, and aircraft used the departure route passing over his new home only very rarely at night. Consequently, he was only very rarely exposed to any night-time aircraft noise following his move.

22. Jeffray Thomas was born in 1928 and lives in Kew with his wife and two sons, and the wife and son of one of those sons. The family have lived at their present address since 1975, in a house lying between the north and south Heathrow flight paths. According to the Government, it is 10.7 km from Heathrow, within a noise contour area of 57 to 60 dBA Leq. Aircraft pass overhead on seven or eight days out of every ten when the prevailing wind is from the west.

23. Mr Thomas claims to have noticed a sudden increase in night disturbance in 1993. He complains of being woken at 4.30 a.m., when three or four large aircraft tended to arrive within minutes of each other. Once he was awake, one large aeroplane arriving every half hour was sufficient to keep him awake until 6 a.m. or 6.30 a.m., when the aeroplanes started arriving at frequencies of up to one a minute until about 11 p.m.

24. Richard Bird was born in 1933 and lived in Windsor for thirty years until he retired in December 1998. His house in Windsor was directly under the westerly flight path to Heathrow Airport. According to the Government, it was 11.5 km from Heathrow, within a daytime noise contour area of 57 to 60 dBA Leq.

25. The applicant claims that in recent years, and particularly from 1993, he and his wife suffered from intrusive aircraft noise at night. Although Mr Bird observed that both take-offs and landings continued later and later into the evenings, the main problem was caused by the noise of early morning landings. He stated that on very many occasions he was woken at 4.30 a.m. or 5 a.m. by incoming aircraft, and was then unable to get back to sleep, and felt extremely tired later in the day. Mr Bird retired in December 1998 and moved with his wife to Wokingham, in Surrey, specifically to get away from the aircraft noise which was “really getting on [his] nerves”.

26. Tony Anderson was born in 1932 and has lived since 1963 in Touchen End, under the approach to runway 09L at Heathrow Airport and, according to the Government, 17.3 km from the end of the nearest runway, within a daytime noise contour area of under 57 dBA Leq.

According to the applicant, by 1994 he began to find that his sleep was being disturbed by aircraft noise at night, and that he was being woken at 4.15 a.m. or even earlier by aircraft coming in from the west to land at Heathrow Airport.

27. The dBA Leq noise contour figures supplied by the Government and referred to above measure levels of annoyance caused by noise during the course of an average summer day. The Government state that it is not possible to map equivalent contours for night noise disturbance, because there is no widely accepted scale or standard with which to measure night-time annoyance caused by aircraft noise. However, the Government claim that the maximum "average sound exposure" levels, in decibels (dBA), suffered by each applicant as a result of the seven different types of aircraft arriving at Heathrow before 6 a.m. each morning is as follows: Ms Hatton – 88 dBA; Mr Thake – 88.8 dBA; Mr Hartley – 89.9 dBA; Ms Edmunds – 83.4 dBA; Mr Cavalla (at his previous address) – 94.4 dBA; Mr Thomas – 88.7 dBA; Mr Bird – 87.8 dBA; and Mr Anderson – 84.1 dBA.

The Government further claim that the average "peak noise event" levels, that is the maximum noise caused by a single aircraft movement, suffered by each applicant at night are as follows: Mrs Hatton – 76.3 dBA; Mr Thake – 77.1 dBA; Mr Hartley – 78.9 dBA; Ms Edmunds – 70 dBA; Mr Cavalla (at his previous address) – 85 dBA; Mr Thomas – 77.2 dBA; Mr Bird – 76 dBA; Mr Anderson – 71.1 dBA.

The Government claim that research commissioned before the 1993 review of night restrictions indicated that average outdoor sound exposure levels of below 90 dBA, equivalent to peak noise event levels of approximately 80 dBA, were unlikely to cause any measurable increase in overall rates of sleep disturbance experienced during normal sleep. The applicants, however, refer to World Health Organisation "Guidelines for Community Noise", which gave a guideline value for avoiding sleep disturbance at night of a single noise event of 60 dBA[1].

B. The night-time regulatory regime for Heathrow Airport

28. Heathrow Airport is the busiest airport in Europe, and the busiest international airport in the world. It is used by over 90 airlines, serving over

[1] . The Government note that these guidelines were promulgated in 1999, and that they represent a target at which sleep will not be disturbed, rather than an international standard.

180 destinations world-wide. It is the United Kingdom's leading port in terms of visible trade.

29. Restrictions on night flights at Heathrow Airport were introduced in 1962 and have been reviewed periodically, most recently in 1988, 1993 and 1998.

30. Between 1978 and 1987, a number of reports into aircraft noise and sleep disturbance were published by or on behalf of the Civil Aviation Authority.

31. A Consultation Paper was published by the United Kingdom government in November 1987 in the context of a review of the night restrictions policy at Heathrow. The Consultation Paper stated that research into the relationship between aircraft noise and sleep suggested that the number of movements at night could be increased by perhaps 25% without worsening disturbance, provided levels of dBA Leq were not increased.

32. It indicated that there were two reasons for not considering a ban on night flights: firstly, that a ban on night flights would deny airlines the ability to plan some scheduled flights in the night period, and to cope with disruptions and delays; secondly, that a ban on night flights would damage the status of Heathrow Airport as a twenty-four-hour international airport (with implications for safety and maintenance and the needs of passengers) and its competitive position in relation to a number of other European airports.

33. From 1988 to 1993, night flying was regulated solely by means of a limitation on the number of take-offs and landings permitted at night. The hours of restriction were as follows:

Summer 11.30 p.m. to 6 a.m. weekdays,
11.30 p.m. to 6 a.m. Sunday landings,
11.30 p.m. to 8 a.m. Sunday take-offs;

Winter 11.30 p.m. to 6.30 a.m. weekdays,
11.30 p.m. to 8 a.m. Sunday take-offs and landings.

34. In July 1990, the Department of Transport commenced an internal review of the restrictions on night flights. A new classification of aircraft and the development of a quota count system were the major focus of the review. As part of the review, the Department of Transport asked the Civil Aviation Authority to undertake further objective study of aircraft noise and sleep disturbance. The objectives of the review included “to continue to protect local communities from excessive aircraft noise at night” and “to ensure that the competitive influences affecting UK airports and airlines and the wider employment and economic implications are taken into account”.

35. The fieldwork for the study was carried out during the summer of 1991. Measurements of disturbance were obtained from 400 subjects living in the vicinity of Heathrow, Gatwick, Stansted and Manchester Airports. The findings were published in December 1992 as the “Report of a field

study of aircraft noise and sleep disturbance" ("the 1992 sleep study"). It found that, once asleep, very few people living near airports were at risk of any substantial sleep disturbance due to aircraft noise and that, compared with the overall average of about eighteen nightly awakenings without any aircraft noise, even large numbers of noisy night-time aircraft movements would cause very little increase in the average person's nightly awakenings. It concluded that the results of the field study provided no evidence to suggest that aircraft noise was likely to cause harmful after-effects. It also emphasised, however, that its conclusions were based on average effects, and that some of the subjects of the study (2 to 3%) were over 60% more sensitive than average.

36. In January 1993, the government published a Consultation Paper regarding a proposed new scheme for regulating night flights at the three main airports serving London: Heathrow, Gatwick and Stansted. The Consultation Paper set up four objectives of the review being undertaken (so far as Heathrow was concerned): to revise and update the existing arrangements; to introduce a common night flights regime for the three airports; to continue to protect local communities from excessive aircraft noise levels at night; and to ensure that competitive influences and the wider employment and economic implications were taken into account. In a section entitled "Concerns of local people", the Consultation Paper referred to arguments that night flights should be further restricted or banned altogether. In the authors' view, the proposals struck a fair balance between the different interests and did "protect local people from excessive aircraft noise at night". In considering the demand for night flights, the Consultation Paper made reference to the fact that, if restrictions on night flights were imposed in the United Kingdom, certain flights would not be as convenient or their costs would be higher than those that competitors abroad could offer, and that passengers would choose alternatives that better suited their requirements.

37. It also stated that various foreign operators were based at airports with no night restrictions, which meant that they could keep prices down by achieving a high utilisation of aircraft, and that this was a crucial factor in attracting business in what was a highly competitive and price-sensitive market.

38. Further, the Consultation Paper stated that both regular and charter airlines believed that their operations could be substantially improved by being allowed more movements during the night period, especially landings.

It also indicated that charter companies required the ability to operate in the night period, as they operated in a highly competitive, price-sensitive market and needed to contain costs as much as possible. The commercial viability of their business depended on high utilisation of their aircraft, which typically required three rotations a day to nearer destinations, and this could only be fitted in by using movements at night.

39. Finally, as regards night flights, the Consultation Paper referred to the continuing demand for some all-cargo flights at night carrying mail and other time-sensitive freight such as newspapers and perishable goods, and pointed to the fact that all-cargo movements were banned, whether arriving or departing, for much of the day at Heathrow Airport.

40. The Consultation Paper referred to the 1992 sleep study, noting that it had found that the number of disturbances caused by aircraft noise was so small that it had a negligible effect on overall normal disturbance rates, and that disturbance rates from all causes were not at a level likely to affect people's health or well-being.

41. The Consultation Paper further stated that, in keeping with the undertaking given in 1988 not to allow a worsening of noise at night, and ideally to reduce it, it was proposed that the quota for the next five years based on the new system should be set at a level such as to keep overall noise levels below those in 1988.

42. A considerable number of responses to the Consultation Paper were received from trade and industry associations with an interest in air travel (including the International Air Transport Association (IATA), the Confederation of British Industry and the London and Thames Valley Chambers of Commerce) and from airlines, all of which emphasised the economic importance of night flights. Detailed information and figures were provided by the associations and the airlines to support their responses.

43. On 6 July 1993 the Secretary of State for Transport announced his intention to introduce, with effect from October 1993, a quota system of night flying restrictions, the stated aim of which was to reduce noise at the three main London airports, which included Heathrow ("the 1993 Scheme").

44. The 1993 Scheme introduced a noise quota scheme for the night quota period. Under the noise quota scheme each aircraft type was assigned a "quota count" between 0.5 QC (for the quietest) and 16 QC (for the noisiest). Each airport was then allotted a certain number of quota points, and aircraft movements had to be kept within the permitted points total. The effect of this was that, under the 1993 Scheme, rather than a maximum number of individual aircraft movements being specified, aircraft operators could choose within the noise quota whether to operate a greater number of quieter aeroplanes or a lesser number of noisier aeroplanes. The system was designed, according to the 1993 Consultation Paper, to encourage the use of quieter aircraft by making noisier types use more of the quota for each movement.

45. The 1993 Scheme defined "night" as the period between 11 p.m. and 7 a.m., and further defined a "night quota period" from 11.30 p.m. to 6 a.m., seven days a week, throughout the year, when the controls were strict. During the night, operators were not permitted to schedule the noisier types of aircraft to take off (aircraft with a quota count of 8 QC or 16 QC) or to

land (aircraft with a quota count of 16 QC). During the night quota period, aircraft movements were restricted by a movements limit and a noise quota, which were set for each season (summer and winter).

46. The 1993 Consultation Paper had proposed a rating of 0 QC for the quietest aircraft. This would have allowed an unlimited number of these aircraft to fly at night, and the government took account of objections to this proposal in deciding to rate the quietest aircraft at 0.5 QC. Otherwise, the 1993 Scheme was broadly in accordance with the proposals set out in the 1993 Consultation Paper.

47. The local authorities for the areas around the three main London airports sought judicial review of the Secretary of State's decision to introduce the 1993 Scheme, making four consecutive applications for judicial review and appealing twice to the Court of Appeal (see paragraphs 80-83 below). As a result of the various judgments delivered by the High Court and Court of Appeal, the government consulted on revised proposals in October and November 1993; commissioned a study by ANMAC (the Aircraft Noise Monitoring Advisory Committee of the Department of the Environment, Transport and the Regions (DETR) formerly the Department of Transport) in May 1994 into ground noise at night at Heathrow, Gatwick and Stansted Airports; added to the quota count system an overall maximum number of aircraft movements; issued a further Consultation Paper in March 1995 and issued a supplement to the March 1995 Consultation Paper in June 1995.

48. The June 1995 supplement stated that the Secretary of State's policies and the proposals based on them allowed more noise than was experienced from actual aircraft movements in the summer of 1988, and acknowledged that this was contrary to government policy, as expressed in the 1993 Consultation Paper. As part of the 1995 review of the 1993 Scheme, the government reviewed the Civil Aviation Authority reports on aircraft noise and sleep disturbance, including the 1992 sleep study. The DETR prepared a series of papers on night arrival and departure statistics at Heathrow, Gatwick and Stansted Airports, scheduling and curfews in relation to night movements, runway capacity between 6 a.m. and 7 a.m., Heathrow night arrivals for four sample weeks in 1994, and Heathrow night departures for four sample weeks in 1994. The DETR also considered a paper prepared by Heathrow Airport Limited on the implications of a prohibition on night flights between 12 midnight and 5.30 a.m.

49. On 16 August 1995 the Secretary of State for Transport announced that the noise quotas and all other aspects of the night restrictions regime would remain as previously announced. In July 1996, the Court of Appeal confirmed the lawfulness of the 1993 Scheme, as it had been amended (see paragraphs 82-83 below).

50. The movement limits for Heathrow under the 1993 Scheme, introduced as a consequence of the legal challenges in the domestic courts,

were set at 2,550 per winter season from 1994/1995 to 1997/1998, and 3,250 per summer season from 1995 to 1998 (the seasons being deemed to change when the clocks changed from Greenwich Mean Time (GMT) to British Summer Time (BST)). The noise quotas for Heathrow up to the summer of 1998 were set at 5,000 for each winter season and 7,000 for each summer season. Flights involving emergencies were excluded from the restrictions. The number of movements permitted during the night quota period (i.e. from 11.30 p.m. to 6 a.m.) remained at about the same level as between 1988 and 1993. At the same time, the number of movements permitted during the night period (i.e. from 11 p.m. to 7 a.m.) increased under the 1993 Scheme due to the reduction in the length of the night quota period.

51. In September 1995, a trial was initiated at Heathrow Airport of modified procedures for early morning landings (those between 4 a.m. and 6 a.m.). The aim of the trial, which was conducted by National Air Traffic Services Limited on behalf of the DETR, was to help alleviate noise over parts of central London in the early morning. An interim report, entitled "Assessment of revised Heathrow early mornings approach procedures trial", was published in November 1998.

52. In December 1997, a study, commissioned by the DETR and carried out by the National Physical Laboratory gave rise to a report, "Night noise contours: a feasibility study", which was published the same month. The report contained a detailed examination of the causes and consequences of night noise, and identified possible areas of further research. It concluded that there was not enough research evidence to produce "scientifically robust night contours that depict levels of night-time annoyance".

53. In 1998, the government conducted a two-stage consultation exercise on night restrictions at Heathrow, Gatwick and Stansted Airports. In February 1998, a Preliminary Consultation Paper on night restrictions at Heathrow, Gatwick and Stansted was published. The Preliminary Consultation Paper stated that most night movements catered primarily for different needs from those that took place during the daytime, and set out reasons for allowing night flights. These were essentially the same as those given in the 1993 Consultation Paper.

54. In addition, the Preliminary Consultation Paper referred to the fact that air transport was one of the fastest growing sectors of the world economy and contained some of the United Kingdom's most successful firms. Air transport facilitated economic growth, world trade, international investment and tourism, and was of particular importance to the United Kingdom because of its open economy and geographical position. The Consultation Paper went on to say that permitting night flights, albeit subject to restrictions, at major airports in the United Kingdom had contributed to this success.

55. The government set movement limits and noise quotas for winter 1998/99 at the same level as for the previous winter, in order to allow adequate time for consultation.

56. The British Air Transport Association (BATA) commissioned a report from Coopers & Lybrand into the economic costs of maintaining the restrictions on night flights. The report was published in July 1997 and was entitled "The economic costs of night flying restrictions at the London airports". The report concluded that the economic cost of the then current restrictions being maintained during the period 1997/1998 to 2002/2003 was about 850 million pounds sterling (GBP). BATA submitted the report to the government when it responded to the Preliminary Consultation Paper.

57. On 10 September 1998 the Government announced that the movement limits and noise quotas for summer 1999 would be the same as for summer 1998.

58. In November 1998, the government published the second stage Consultation Paper on night restrictions at Heathrow, Gatwick and Stansted. The Consultation Paper stated that it had been the view of successive governments that the policy on night noise should be firmly based on research into the relationship between aircraft noise and interference with sleep and that, in order to preserve the balance between the different interests, this should continue to be the basis for decisions. The Consultation Paper indicated that "interference with sleep" was intended to cover both sleep disturbance (an awakening from sleep, however short) and sleep prevention (a delay in first getting to sleep at night, and awakening and then not being able to get back to sleep in the early morning). The Consultation Paper stated that further research into the effect of aircraft noise on sleep had been commissioned, which would include a review of existing research in the United Kingdom and abroad, and a trial to assess methodology and analytical techniques to determine whether to proceed to a full-scale study of either sleep prevention or total sleep loss.

59. The Consultation Paper repeated the finding of the 1992 sleep study that for noise events in the range of 90-100 dBA SEL (80-95 dBA Lmax), the likelihood of the average person being awakened by an aircraft noise event was about 1 in 75. It acknowledged that the 1 in 75 related to sleep disturbance, and not to sleep prevention, and that while there was a substantial body of research on sleep disturbance, less was known about sleep prevention or total sleep loss.

60. The Consultation Paper stated that the objectives of the current review were, in relation to Heathrow, to strike a balance between the need to protect local communities from excessive aircraft noise levels at night and to provide for air services to operate at night where they were of benefit to the local, regional and national economy; to ensure that the competitive factors affecting United Kingdom airports and airlines and the wider employment and economic implications were taken into account; to take

account of the research into the relationship between aircraft noise and interference with sleep and any health effects; to encourage the use of quieter aircraft at night; and to put in place at Heathrow, for the night quota period (11.30 p.m. to 6 a.m.), arrangements which would bring about further improvements in the night noise climate around the airport over time and update the arrangements as appropriate.

61. The Consultation Paper stated that since the introduction of the 1993 Scheme, there had been an improvement in the noise climate around Heathrow during the night quota period, based on the total of the quota count ratings of aircraft counted against the noise quota, but that there had probably been a deterioration over the full night period between 11 p.m. and 7 a.m. as a result of the growth in traffic between 6 a.m. and 7 a.m.

62. The Consultation Paper found a strong customer preference for overnight long-haul services from the Asia-Pacific region.

63. The Consultation Paper indicated that the government had not attempted to quantify the aviation and economic benefits of night flights in financial terms. This was because of the difficulties in obtaining reliable and impartial data on passenger and economic benefits (some of which were commercially sensitive) and modelling these complex interactions. BATA had submitted a copy of the Coopers & Lybrand July 1997 report with its response to the Preliminary Consultation Paper, and the Consultation Paper noted that the report estimated the value of an additional daily long-haul scheduled night flight at Heathrow to be GBP 20 million to GBP 30 million per year, over half of which was made up of airline profits. The Consultation Paper stated that the financial effects on airlines were understood to derive from estimates made by a leading United Kingdom airline. Other parts of the calculation reflected assumptions about the effects on passengers and knock-on effects on other services, expressed in terms of an assumed percentage of the assumed revenue earned by these services. The Consultation Paper stated that the cost of restricting existing night flights more severely might be different, and that BATA's figures took no account of the wider economic effects which were not captured in the estimated airline and passenger impacts.

64. The Consultation Paper stated that, in formulating its proposals, the government had taken into account both BATA's figures and the fact that it was not possible for the government to test the estimates or the assumptions made by BATA. Any value attached to a “marginal” night flight had to be weighed against the environmental disadvantages. These could not be estimated in financial terms, but it was possible, drawing on the 1992 sleep study, to estimate the number of people likely to be awakened. The Consultation Paper concluded that, in forming its proposals, the government must take into account, on the one hand, the important aviation interests involved and the wider economic considerations. It seemed clear that United Kingdom airlines and airports would stand to lose business, including in the

daytime, if prevented by unduly severe restrictions from offering limited services at night, that users could also suffer, and that the services offered by United Kingdom airports and airlines would diminish, and with them the appeal of London and the United Kingdom more generally. On the other hand, these considerations had to be weighed against the noise disturbance caused by night flights. The proposals made in the Consultation Paper aimed to strike a balance between the different interests and, in the government's view, would protect local people from excessive aircraft noise at night.

65. The main proposals in relation to Heathrow were: not to introduce a ban on night flights, or a curfew period; to retain the seasonal noise quotas and movement limits; to review the QC classifications of individual aircraft and, if this produced significant re-classifications, to reconsider the quota limits; to retain the QC system; to review the QC system before the 2002 summer season (when fleet compositions would have changed following completion of the compulsory phase-out in Europe of "Chapter 2" civil aircraft, with the exception of Concorde, which began in April 1995), in accordance with the policy of encouraging the use of quieter aircraft; to reduce the summer and winter noise quotas; to maintain the night period as 11 p.m. to 7 a.m. and the night quota period as 11.30 p.m. to 6 a.m.; to extend the restrictions on aircraft classified as QC8 on arrival or departure to match those for QC16; and to ban QC4 aircraft from being scheduled to land or take off during the night quota period from the start of the 2002 summer season (that is, after completion of the compulsory Chapter 2 phase-out).

66. The Consultation Paper stated that since the introduction of the 1993 Scheme, headroom had developed in the quotas, reducing the incentive for operators to use quieter aircraft. The reduction in summer and winter noise quotas to nearer the level of current usage was intended as a first step to restoring the incentive. The winter noise quota level under the 1993 Scheme was 5,000 QC points, and the average usage in the last two traffic seasons had been 3,879 QC points. A reduction to 4,000 was proposed. The summer noise quota level had been 7,000 points, and the average usage in the last two seasons was provisionally calculated at 4,472. A reduction to 5,400 was proposed. The new levels would remain in place until the end of the summer 2004 season, subject to the outcome of the QC review.

67. Part 2 of the Consultation Paper invited comments as to whether runway alternation should be introduced at Heathrow at night, and on the preferential use of Heathrow's runways at night.

68. On 10 June 1999 the government announced that the proposals in the November 1998 Consultation Paper would be implemented with effect from 31 October 1999, with limited modifications. With respect to Heathrow, the only modification was that there was to be a smaller reduction in the noise quotas than proposed. The quotas were set at 4,140 QC points for the

winter, and 5,610 QC points for the summer. The effect of this was to set the winter quota at a level below actual usage in winter 1998/99.

69. The 1999 Scheme came into effect on 31 October 1999.

70. On 10 November 1999, a report was published on "The contribution of the aviation industry to the UK economy". The report was prepared by Oxford Economic Forecasting and was sponsored by a number of airlines, airport operators and BATA, as well as the government.

71. On 23 November 1999 the government announced that runway alternation at Heathrow would be extended into the night "at the earliest practicable opportunity", and issued a further Consultation Paper concerning proposals for changes to the preferential use of Heathrow's runways at night.

72. In December 1999, the DETR and National Air Traffic Services Limited published the final report of the ANMAC Technical Working Group on "Noise from Arriving Aircraft". The purpose of the report was to describe objectively the sources of operational noise for arriving aircraft, to consider possible means of noise amelioration, and to make recommendations to the DETR.

73. In March 2000, the Department of Operational Research and Analysis (DORA) published a report, prepared on behalf of the DETR, entitled "Adverse effects of night-time aircraft noise". The report identified a number of issues for possible further research, and was intended to form the background to any future United Kingdom studies of night-time aircraft noise. The report stated that gaps in knowledge had been identified, and indicated that the DETR was considering whether there was a case for a further full-scale study on the adverse effects of night-time aircraft noise, and had decided to commission two further short research studies to investigate the options. These studies were commissioned in the autumn of 1999, before the publication of the DORA report. One is a trial study to assess research methodology. The other is a social survey the aims of which included an exploration of the difference between objectively measured and publicly received disturbance due to aircraft noise at night. Both studies are being conducted by university researchers.

74. A series of noise mitigation and abatement measures is in place at Heathrow Airport, in addition to restrictions on night flights. These include the following: aircraft noise certification to reduce noise at source; the compulsory phasing out of older, noisier jet aircraft; noise preferential routes and minimum climb gradients for aircraft taking off; noise abatement approach procedures (continuous descent and low power/low drag procedures); limitation of air transport movements; noise-related airport charges; noise insulation grant schemes; and compensation for noise nuisance under the Land Compensation Act 1973.

75. The DETR and the management of Heathrow Airport conduct continuous and detailed monitoring of the restrictions on night flights.

Reports are provided each quarter to members of the Heathrow Airport Consultative Committee, on which local government bodies responsible for areas in the vicinity of Heathrow Airport and local residents' associations are represented.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Civil Aviation Act 1982 ("the 1982 Act")

76. Section 76(1) of the 1982 Act provides, in its relevant part:

> "No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case, is reasonable, or the ordinary incidents of such flight, so long as the provisions of any Air Navigation Order ... have been duly complied with ..."

77. Air Navigation Orders made under the 1982 Act provide for Orders in Council to be made for the regulation of aviation. Orders in Council have been made to deal with, amongst other matters, engine emissions, noise certification and compensation for noise nuisance.

78. Section 78(3) of the 1982 Act provides, in its relevant part:

> "If the Secretary of State considers it appropriate for the purpose of avoiding, limiting or mitigating the effect of noise and vibration connected with the taking-off or landing of aircraft at a designated aerodrome, to prohibit aircraft from taking off or landing, or limit the number of occasions on which they may take off or land, at the aerodrome during certain periods, he may by a notice published in the prescribed manner do all or any of the following, that is to say –
>
> (a) prohibit aircraft of descriptions specified in the notice from taking off or landing at the aerodrome (otherwise than in an emergency of a description so specified) during periods so specified;
>
> (b) specify the maximum number of occasions on which aircraft of descriptions so specified may be permitted to take off or land at the aerodrome ... during the periods so specified;
>
> ..."

79. Restrictions on night flights at Heathrow Airport are imposed by means of notices published by the Secretary of State under section 78(3) of the 1982 Act.

B. The challenges to the 1993 Scheme

80. The local authorities for the areas around the three main London airports sought judicial review of the Secretary of State's decision to introduce the 1993 Scheme. They made four consecutive applications for judicial review, and appealed twice to the Court of Appeal. The High Court declared that the 1993 Scheme was contrary to the terms of section 78(3)(b) of the 1982 Act, and therefore invalid, because it did not "specify the maximum number of occasions on which aircraft of descriptions so specified may be permitted to take off or land" but, instead, imposed controls by reference to levels of exposure to noise energy (see *R. v. Secretary of State for Transport, ex parte Richmond upon Thames Borough Council and Others* [1994] 1 Weekly Law Reports 74).

81. The Secretary of State decided to retain the quota count system, but with the addition of an overall maximum number of aircraft movements. This decision was held by the High Court to be in accordance with section 78(3)(b) of the 1982 Act. However, the 1993 Consultation Paper was held to have been "materially misleading" in failing to make clear that the implementation of the proposals for Heathrow Airport would permit an increase in noise levels over those experienced in 1988 (see *R. v. Secretary of State for Transport, ex parte Richmond upon Thames Borough Council and Others* [1995] Environmental Law Reports 390).

82. Following the publication of a further Consultation Paper in March 1995, and of a supplement to the March 1995 Consultation Paper in June 1995, the local authorities brought a further application for judicial review. In July 1996, the Court of Appeal decided that the Secretary of State had given adequate reasons and sufficient justification for his conclusion that it was reasonable, on balance, to run the risk of diminishing to some degree local people's ability to sleep at night because of the other countervailing considerations to which he was, in 1993, willing to give greater weight, and that by June 1995 errors in the consultation papers had been corrected and the new policy could not be said to be irrational (see *R. v. Secretary of State for Transport, ex parte Richmond LBC* [1996] 1 Weekly Law Reports 1460).

83. On 12 November 1996 the House of Lords dismissed a petition by the local authorities for leave to appeal against the decision of the Court of Appeal.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

84. The applicants complained that the government policy on night flights at Heathrow introduced in 1993 violated their rights under Article 8 of the Convention, which provides:

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

The Government denied that there had been any violation of the Convention in this case.

A. The general principles

1. The Chamber's judgment

85. In its judgment of 2 October 2001, the Chamber held that because Heathrow Airport and the aircraft which used it were not owned, controlled or operated by the government or its agents, the United Kingdom could not be said to have "interfered" with the applicants' private or family lives. Instead, the Chamber analysed the applicants' complaints in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under Article 8 § 1 (see paragraph 95 of the Chamber's judgment).

86. The Chamber further held that, whatever analytical approach was adopted, regard must be had to the fair balance that had to be struck between the competing interests of the individual and the community as a whole. In both contexts, the State enjoyed a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (see paragraph 96 of the Chamber's judgment). However, the Chamber underlined that in striking the required balance States must have regard to the whole range of material considerations. Further, in the particularly sensitive field of environmental protection, mere reference to the economic well-being of the country was not sufficient to outweigh the rights of others. The Chamber considered that States were required to minimise, as far as possible, interference with Article 8 rights, by trying to find alternative solutions and by generally seeking to achieve their aims in

the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study, with the aim of finding the best possible solution which would, in reality, strike the right balance, should precede the relevant project (see paragraph 97 of the Chamber's judgment).

2. The parties' submissions

(a) The Government

87. In their letter requesting that the case be referred to the Grand Chamber, and in their written and oral observations to the Grand Chamber, the Government strongly objected to the "minimum interference" approach outlined by the Chamber in paragraph 97 of its judgment.

The Government argued that this test in the context of the present type of case was at odds with a consistent line of Convention jurisprudence and was unwarranted in principle. They submitted that the test reduced to vanishing-point the margin of appreciation afforded to States in an area involving difficult and complex balancing of a variety of competing interests and factors.

88. Not merely was there clear authority in favour of a wide margin, it was appropriate and right in principle that the State should be allowed such a margin in a context such as the present, since it involved the balancing of a number of competing rights and interests, the importance and sensitivity of some of which might be difficult accurately to evaluate. There was no single correct policy to be applied as regards the regulation of night flights; States could and did adopt a variety of different approaches. The Government reasoned that the present context was similar to the field of planning policy, where the Court had consistently recognised that by reason of their direct and continuous contact with the vital forces of their countries and because of the range of discretionary issues involved, the national authorities were in principle better placed than an international court to evaluate local conditions and needs.

89. They accepted that inherent in the striking of a fair balance was a need to be sufficiently informed in relation to the relevant issues, in order to avoid making or appearing to make an arbitrary decision. However, the decision-making process was primarily for the national authorities, in this case, the government, subject to judicial review by the domestic courts. The European Court's powers in this context were supervisory: in the absence of any indication of an arbitrary or clearly inadequate investigation, a detailed and minute critique of the information which the government should take into account was neither necessary nor appropriate.

(b) The applicants

90. The applicants argued that it was well established from previous case-law that aircraft noise was capable of infringing the Article 8 rights of those sufficiently affected by it and that national authorities owed a positive duty to take steps to ensure the effective protection of these rights. Relying on earlier environmental cases and also child-care and other cases under Article 8, they submitted that the duty could be breached in circumstances where, having regard to the margin of appreciation, the Court considered that the State had struck the wrong substantive balance between the interest it pursued and the individual's effective enjoyment of the Article 8 right, or where there had been a procedural failing, such as the failure to disclose information to an individual affected by environmental nuisance or a failure to base a decision-making process on the relevant considerations or to give relevant and sufficient reasons for an interference with a fundamental right.

91. The applicants accepted that any informed assessment of whether an interference with Article 8 rights was "necessary in a democratic society" would be accorded a margin of appreciation, the width of that margin depending on the context. However, they submitted that in the present case the margin should be narrow, because deprivation of sleep by exposure to excessive noise, like the infliction of inhuman or degrading treatment, was a matter which could and should be judged by similar standards in similar Contracting States.

92. Moreover, where a case – such as the present – could be decided on the basis of a procedural breach, namely the government's failure properly to assemble the evidence necessary for the decision-making process, the doctrine of the margin of appreciation had no role to play, since the international judge was well placed to assess the adequacy of the procedural safeguards applied by the State.

93. For the applicants, the approach of the Chamber – that the violation of Article 8 was based on the government's failure to assemble the evidence that would have been necessary for the decision to be made on the basis of the relevant considerations – was but one way of dealing with the case. A violation of Article 8 could also be established on the basis that the necessary steps to ensure protection of Article 8 rights were not taken, that "relevant and sufficient reasons" had not been given for the interference, or that the substantive balance of interests had not been properly struck.

3. The third parties

94. Friends of the Earth submitted that the Chamber's judgment in the present case was consistent with developments in national and international law concerning the relationship between human rights and the environment. In particular, it was consistent with requirements under general international law requiring decision-makers to satisfy themselves by means of proper, complete, and prior investigation as to the factors which should be taken

into account in order to achieve an appropriate balance between individual rights and the State's economic interests.

95. British Airways did not comment on the general principles to be applied by the Court.

4. The Court's assessment

96. Article 8 protects the individual's right to respect for his or her private and family life, home and correspondence. There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8. Thus, in *Powell and Rayner v. the United Kingdom* (judgment of 21 February 1990, Series A no. 172, p. 18, § 40), where the applicants had complained about disturbance from daytime aircraft noise, the Court held that Article 8 was relevant, since "the quality of [each] applicant's private life and the scope for enjoying the amenities of his home [had] been adversely affected by the noise generated by aircraft using Heathrow Airport". Similarly, in *López Ostra v. Spain* (judgment of 9 December 1994, Series A no. 303-C, pp. 54-55, § 51) the Court held that Article 8 could include a right to protection from severe environmental pollution, since such a problem might "affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health". In *Guerra and Others v. Italy* (judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I), which, like *López Ostra*, concerned environmental pollution, the Court observed that "[the] direct effect of the toxic emissions on the applicants' right to respect for their private and family life means that Article 8 is applicable" (p. 227, § 57).

97. At the same time, the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (see, for example, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 22, § 48). In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 32, § 46, where the Court found it natural that the margin of appreciation "available to the legislature in implementing social and economic policies should be a wide one").

98. Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly. Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 or in

terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance (see *Powell and Rayner*, p. 18, § 41, and *López Ostra* pp. 54-55, § 51, both cited above).

99. The Court considers that in a case such as the present one, involving State decisions affecting environmental issues, there are two aspects to the inquiry which may be carried out by the Court. First, the Court may assess the substantive merits of the government's decision, to ensure that it is compatible with Article 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual.

100. In relation to the substantive aspect, the Court has held that the State must be allowed a wide margin of appreciation. In *Powell and Rayner*, for example, it asserted that it was "certainly not for the Commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere", namely the regulation of excessive aircraft noise and the means of redress to be provided to the individual within the domestic legal system. The Court continued that "this is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation" (p. 19, § 44).

101. In other cases involving environmental issues, for example planning cases, the Court has also held that the State must be allowed a wide margin of appreciation. The Court explained the reasons for this approach in *Buckley v. the United Kingdom*, where the applicant complained that she had been denied planning permission to install a residential caravan on land that she owned (judgment of 25 September 1996, *Reports* 1996-IV, pp. 1291-93, §§ 74-77):

> "74. As is well established in the Court's case-law, it is for the national authorities to make the initial assessment of the 'necessity' for an interference, as regards both the legislative framework and the particular measure of implementation ... Although a margin of appreciation is thereby left to the national authorities, their decision remains subject to review by the Court for conformity with the requirements of the Convention.
>
> The scope of this margin of appreciation is not identical in each case but will vary according to the context ... Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned.

> 75. The Court has already had occasion to note that town and country planning schemes involve the exercise of discretionary judgment in the implementation of policies adopted in the interest of the community ... It is not for the Court to substitute its own view of what would be the best policy in the planning sphere or the most appropriate individual measure in planning cases ... By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. In so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation.
>
> 76. The Court cannot ignore, however, that in the instant case the interests of the community are to be balanced against the applicant's right to respect for her 'home', a right which is pertinent to her and her children's personal security and well-being ... The importance of that right for the applicant and her family must also be taken into account in determining the scope of the margin of appreciation allowed to the respondent State.
>
> Whenever discretion capable of interfering with the enjoyment of a Convention right such as the one in issue in the present case is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. Indeed it is settled case-law that, whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 ...
>
> 77. The Court's task is to determine, on the basis of the above principles, whether the reasons relied on to justify the interference in question are relevant and sufficient under Article 8 § 2."

102. The Court has recognised that, where government policy in the form of criminal laws interferes with a particularly intimate aspect of an individual's private life, the margin of appreciation left to the State will be reduced in scope (see *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, p. 21, § 52).

103. The Court is thus faced with conflicting views as to the margin of appreciation to be applied: on the one hand, the Government claim a wide margin on the ground that the case concerns matters of general policy, and, on the other hand, the applicants' claim that where the ability to sleep is affected, the margin is narrow because of the "intimate" nature of the right protected. This conflict of views on the margin of appreciation can be resolved only by reference to the context of a particular case.

104. In connection with the procedural element of the Court's review of cases involving environmental issues, the Court is required to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals (including the applicants) were taken into account throughout the decision-making procedure, and the procedural safeguards available.

B. Appraisal of the facts of the case in the light of the general principles

1. The Chamber's judgment

105. The Chamber found that, overall, the level of noise during the hours 11.30 p.m. to 6 a.m. had increased under the 1993 Scheme. It considered that, in permitting increased levels of noise from 1993 onwards, the government had failed to respect their positive obligation to the applicants, through omitting, either directly or through the commissioning of independent research, to assess critically the importance of the contribution of night flights to the United Kingdom economy. The Chamber further criticised the government for carrying out only limited research into the effects of night flights on local residents prior to the introduction of the 1993 Scheme, noting that the 1992 sleep study was limited to sleep disturbance and made no mention of the problem of sleep prevention. The Chamber did not accept that the "modest" steps taken to mitigate night noise under the 1993 Scheme were capable of constituting "the measures necessary" to protect the applicants. It concluded that "in the absence of any serious attempt to evaluate the extent or impact of the interferences with the applicants' sleep patterns, and generally in the absence of a prior specific and complete study with the aim of finding the least onerous solution as regards human rights, it is not possible to agree that in weighing the interferences against the economic interest of the country – which itself had not been quantified – the government struck the right balance in setting up the 1993 Scheme".

2. The parties' submissions

(a) The Government

106. The Government recognised that night-time noise from aircraft had the capacity to disturb or prevent sleep, but urged the Court to assess critically the applicants' claims that each suffered from a high level of disturbance. In this connection they pointed out that there was a considerable variety in the geographical positions of the applicants and in the levels of night noise to which they were exposed. Furthermore, it was noteworthy that hundreds of thousands of residents of London and the home counties were in a similar position, that the property market in the affected areas was thriving and that the applicants had not claimed that they were unable to sell their houses and move.

107. The Government stressed that all other principal European hub airports had less severe restrictions on night flights than those imposed at the three London airports. Paris-Charles de Gaulle and Amsterdam-Schiphol

had no restrictions at all on the total number of "Chapter 3" aircraft which could operate at night, while Frankfurt had restrictions on landings by Chapter 3 aircraft between 1 a.m. and 4 a.m. If restrictions on night flights at Heathrow were made more stringent, UK airlines would be placed at a significant competitive disadvantage. Since 1988 they had used the scarce night slots permitted at Heathrow for two purposes: a small number were late evening departures on flights which had been delayed but the majority, typically thirteen to sixteen flights a night, were early morning arrivals between 4 a.m. and 6 a.m. of long-haul scheduled flights, mainly from South-East Asia, North America and southern Africa. In recent years the airlines concerned had taken steps to ensure that these arrivals did not land before 4.30 a.m.

The Government submitted that these flights formed an integral part of the network of connecting air services. If they were forced to operate during the day they could provide fewer viable connections with regional services at both ends, making London a less attractive place in which to do business. In any event, daytime capacity at all of London's airports was close to full, and it would be impracticable to re-schedule flights out of the night period.

108. The Government asserted that before 1993 detailed reviews were conducted into a number of aspects of the night restrictions regime. Thus, in July 1990 the Department of Transport commenced an internal review into the restrictions then applying and, in January, October and November 1993, and also in March and June 1995, published Consultation Papers to seek the views of the public and the industries concerned on the need for and effects of night flights and on various proposed modifications to the regime.

The respondents from the airline industry stressed the economic importance of night flights, as set out above. They provided information showing that, in 1993, a typical daily night flight would generate an annual revenue of between GBP 70 and 175 million and an annual profit of up to GBP 15 million. The loss of this revenue and profit would impact severely on the ability of airlines to operate and the cost of air travel by day and night. The Government submitted that the basic components of the economic justification for night flights have never been substantially challenged, either by other respondents to the Consultation Papers or since. Despite accepting the force of the economic justification, the authorities did not go as far as they were invited to by the industry; for example, they did not grant the repeated requests for much larger night noise quotas or a night quota period ending at 5 a.m. Instead, they struck a genuine balance between the interests of the industry and of local residents.

109. The Government stressed that they had also had available, in December 1992, the results of research commissioned in July 1990 into aircraft noise disturbance amongst people living near to Gatwick, Heathrow, Stansted and Manchester Airports ("the 1992 sleep study" – see paragraph 35 above). This study was, and remained, the most

comprehensive of its type, and had been preceded by a number of other reports into aircraft noise and sleep disturbance, including detailed interviews with some 1,636 people living near the airports ("the social survey"). The purpose of all this research, culminating in the 1992 sleep study, was to provide information, on as reliable a scientific basis as possible, as to the effects of night-time aircraft noise on sleep. The sleep study showed that external noise levels below 80 dBA were very unlikely to cause any increase in the normal rate of disturbance of someone's sleep; that with external noise levels between 80 and 95 dBA the likelihood of an average person being awakened was about 1 in 75; and that the number of disturbances caused by aircraft noise was so small that it had a negligible effect on overall disturbance rates, although it was possible that the 2 to 3% of the population who were more sensitive to noise disturbance were twice as likely to be woken. According to the social survey, approximately 80% of those living in the Heathrow area had said that they were never or only sometimes woken up for any cause. Of those that were woken, 17% gave aircraft noise as the cause, 16% blamed a partner or a child and another 28.5% gave a variety of different reasons. Approximately 35% of those living near Heathrow said that if woken, for any reason, they found it difficult to get back to sleep.

110. The Government submitted that the changes to the hours of restriction, the extension of the quota restrictions to place limits on many previously exempt types of aircraft and the restrictions on the scheduling for landing or taking off of the noisiest categories of aircraft over a longer night period made an exact comparison between the regimes before and after 1993 impossible.

They recognised that there had been an increase in the number of movements between 6 a.m. and 6.30 a.m. in winter, since this time slot had been subject to restriction before 1993 and now fell outside the quota period. However, the Government contended that, during the core quota period of 11.30 p.m. to 6 a.m., there had been an improvement in the noise environment because of the measures taken, notably the introduction of the quota count system, to encourage the use of quieter aircraft at night.

(b) The applicants

111. The applicants, who accepted the Chamber's judgment as one way of applying the Convention to the facts of the case, underlined that only a very small percentage of flights take place between 11.30 p.m. and 6 a.m., and that there are hardly any flights before 4 a.m. at all, with an average of four aircraft landing between 4 a.m. and 4.59 a.m. in 2000, and eleven between 5 a.m. and 5.59 a.m.. They maintained that the disturbance caused by these flights was extensive because the applicants and large numbers of others were affected, and it is the nature of sleep disturbance that once people are awake even a few flights will keep them awake.

112. The applicants also pointed out that the night noise they are subjected to is frequently in excess of international standards: the World Health Organisation sets as a guideline value for avoiding sleep disturbance at night a single noise event level of 60 dBA Lmax; almost all the applicants have suffered night noise events in excess of 80 dBA Lmax, and in one case as high as 90 dBA Lmax. Because of the logarithmic nature of the decibel scale, noise energy at 80 dBA Lmax is one hundred times the noise energy at 60 dBA Lmax, and in terms of subjective loudness is four times as loud.

113. The applicants contended that the 1993 Scheme was bound to, and did, result in an increase in night flights and deterioration in the night noise climate, regardless of whether the position was measured by reference to the official night period from 11 p.m. to 7 a.m. or the night quota period from 11.30 a.m. to 6 a.m..

114. The applicants pointed to the absence of any research into sleep prevention before the 1993 Scheme, and added that post-1993 studies and proposals did not amount to an assessment of the effect of night noise on sleep prevention. They further noted the absence of any government-commissioned research into the economic benefits claimed for night flights, seeing this omission as particularly serious given that many of the world's leading business centres (for example, Berlin, Zürich, Munich, Hamburg and Tokyo) have full night-time passenger curfews of between seven and eight hours.

3. The third parties

115. British Airways, whose submissions were supported by the British Air Transport Association (BATA) and the International Air Transport Association (IATA), submitted that night flights at Heathrow play a vital role in the United Kingdom's transport infrastructure, and contribute significantly to the productivity of the United Kingdom economy and the living standards of United Kingdom citizens. They contended that a ban on, or reduction in, night flights would cause major and disproportionate damage to British Airways' business, and would reduce consumer choice. The loss of night flights would cause significant damage to the United Kingdom economy.

4. The Court's assessment

116. The case concerns the way in which the applicants were affected by the implementation in 1993 of the new scheme for regulating night flights at Heathrow. The 1993 Scheme was latest in the series of restrictions on night flights which began at Heathrow in 1962 and replaced the previous five-year 1988 Scheme. Its aims included, according to the 1993 Consultation Paper (see paragraph 36 above), both protection of local communities from excessive night noise, and taking account of the wider economic

implications. The undertaking given by the government in 1988 “not to allow a worsening of noise at night, and ideally to improve it” was maintained (see paragraphs 41 and 43 above). Specifically, the scheme replaced the earlier system of movement limitations with a regime which gave aircraft operators a choice, through the quota count, as to whether to fly fewer noisier aircraft, or more less noisy types (for details, see paragraphs 44-46 above). Although modified in some respects following various judicial review proceedings (see paragraphs 47-50 and 80-83 above) and as a result of further studies and consultations (see paragraphs 51-69 above), the quota count system introduced in 1993 has remained in place to the present day, the authorities continuing to monitor the situation with a view to possible improvements (see paragraphs 70-75 above).

117. The 1993 Scheme accepted the conclusions of the 1992 sleep study (see paragraph 35 above) that for the large majority of people living near airports there was no risk of substantial sleep disturbance due to aircraft noise and that only a small percentage of individuals (some 2 to 3%) were more sensitive than others. On this basis, disturbances caused by aircraft noise were regarded as negligible in relation to overall normal disturbance rates (see paragraph 40 above). The 1992 sleep study continued to be relied upon by the government in their 1998/99 review of the regulations for night flights, when it was acknowledged that further research was necessary, in particular as regards sleep prevention, and a number of further studies on the subject were commissioned (see paragraphs 58-59 and 73 above).

118. The Court has no doubt that the implementation of the 1993 Scheme was susceptible of adversely affecting the quality of the applicants' private life and the scope for their enjoying the amenities of their respective homes, and thus their rights protected by Article 8 of the Convention. Each of the applicants has described the way in which he or she was affected by the changes brought about by the 1993 Scheme at the relevant time (see paragraphs 11-26 above), and the Court sees no reason to doubt the sincerity of their submissions in this respect. It is true that the applicants have not submitted any evidence in support of the degree of discomfort suffered, in particular they have not disproved the Government's indications as to the “objective” daytime noise contour measured at each applicant's home (ibid.). However, as the Government themselves admit, and as is evident from the 1992 sleep study on which they rely, sensitivity to noise includes a subjective element, a small minority of people being more likely than others to be woken or otherwise disturbed in their sleep by aircraft noise at night. The discomfort caused to the individuals concerned will therefore depend not only on the geographical location of their respective homes in relation to the various flight paths, but also on their individual disposition to be disturbed by noise. In the present case the degree of disturbance may vary somewhat from one applicant to the other, but the Court cannot follow the

Government when they seem to suggest that the applicants were not, or not considerably, affected by the scheme at issue.

119. It is clear that in the present case the noise disturbances complained of were not caused by the State or by State organs, but that they emanated from the activities of private operators. It may be argued that the changes brought about by the 1993 Scheme are to be seen as a direct interference by the State with the Article 8 rights of the persons concerned. On the other hand, the State's responsibility in environmental cases may also arise from a failure to regulate private industry in a manner securing proper respect for the rights enshrined in Article 8 of the Convention. As noted above (see paragraph 98), broadly similar principles apply whether a case is analysed in terms of a positive duty on the State or in terms of an interference by a public authority with Article 8 rights to be justified in accordance with paragraph 2 of this provision. The Court is not therefore required to decide whether the present case falls into the one category or the other. The question is whether, in the implementation of the 1993 policy on night flights at Heathrow Airport, a fair balance was struck between the competing interests of the individuals affected by the night noise and the community as a whole.

120. The Court notes at the outset that in previous cases in which environmental questions gave rise to violations of the Convention, the violation was predicated on a failure by the national authorities to comply with some aspect of the domestic regime. Thus, in *López Ostra*, the waste-treatment plant at issue was illegal in that it operated without the necessary licence, and was eventually closed down (*López Ostra*, cited above, pp. 46-47, §§ 16-22). In *Guerra and Others*, the violation was also founded on an irregular position at the domestic level, as the applicants had been unable to obtain information that the State was under a statutory obligation to provide (*Guerra and Others*, cited above, p. 219, §§ 25-27).

This element of domestic irregularity is wholly absent in the present case. The policy on night flights which was set up in 1993 was challenged by the local authorities, and was found, after a certain amount of amendment, to be compatible with domestic law. The applicants do not suggest that the policy (as amended) was in any way unlawful at a domestic level, and indeed they have not exhausted domestic remedies in respect of any such claim. Further, they do not claim that any of the night flights which disturbed their sleep violated the relevant regulations, and again any such claim could have been pursued in the domestic courts under section 76(1) of the Civil Aviation Act 1982.

121. In order to justify the night flight scheme in the form in which it has operated since 1993, the Government refer not only to the economic interests of the operators of airlines and other enterprises as well as their clients, but also, and above all, to the economic interests of the country as a whole. In their submission these considerations make it necessary to

impinge, at least to a certain extent, on the Article 8 rights of the persons affected by the scheme. The Court observes that according to the second paragraph of Article 8 restrictions are permitted, *inter alia*, in the interests of the economic well-being of the country and for the protection of the rights and freedoms of others. It is therefore legitimate for the State to have taken the above economic interests into consideration in the shaping of its policy.

122. The Court must consider whether the State can be said to have struck a fair balance between those interests and the conflicting interests of the persons affected by noise disturbances, including the applicants. Environmental protection should be taken into consideration by States in acting within their margin of appreciation and by the Court in its review of that margin, but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights. In this context the Court must revert to the question of the scope of the margin of appreciation available to the State when taking policy decisions of the kind at issue (see paragraph 103 above).

123. The Court notes that the introduction of the 1993 Scheme for night flights was a general measure not specifically addressed to the applicants in this case, although it had obvious consequences for them and other persons in a similar situation. However, the sleep disturbances relied on by the applicants did not intrude into an aspect of private life in a manner comparable to that of the criminal measures considered in *Dudgeon* to call for an especially narrow scope for the State's margin of appreciation (see *Dudgeon*, cited above, p. 21, § 52, and paragraph 102 above). Rather, the normal rule applicable to general policy decisions (see paragraph 97 above) would seem to be pertinent here, the more so as this rule can be invoked even in relation to individually addressed measures taken in the framework of a general policy, such as in *Buckley*, cited above (see paragraph 101). Whilst the State is required to give due consideration to the particular interests, the respect for which it is obliged to secure by virtue of Article 8, it must in principle be left a choice between different ways and means of meeting this obligation. The Court's supervisory function being of a subsidiary nature, it is limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance.

124. In the present case the Court first notes the difficulties in establishing whether the 1993 Scheme actually led to a deterioration of the night noise climate. The applicants contend that it did; the Government disagree. Statements in the 1998 Consultation Paper suggest that, generally, the noise climate around Heathrow may have improved during the night quota period, but probably deteriorated over the full night period (see paragraph 61 above). The Court is not able to make any firm findings on this point. It notes the dispute between the parties as to whether aircraft movements or quota counts should be employed as the appropriate yardstick

for measuring night noise. However, it finds no indication that the authorities' decision to introduce a regime based on the quota count system was as such incompatible with Article 8.

125. Whether in the implementation of that regime the right balance has been struck in substance between the Article 8 rights affected by the regime and other conflicting community interests depends on the relative weight given to each of them. The Court accepts that in this context the authorities were entitled, having regard to the general nature of the measures taken, to rely on statistical data based on average perception of noise disturbance. It notes the conclusion of the 1993 Consultation Paper that due to their small number sleep disturbances caused by aircraft noise could be treated as negligible in comparison to overall normal disturbance rates (see paragraph 40 above). However, this does not mean that the concerns of the people affected were totally disregarded. The very purpose of maintaining a scheme of night flight restrictions was to keep noise disturbance at an acceptable level for the local population living in the area near the airport. Moreover, there was a realisation that in view of changing conditions (increase of air transport, technological advances in noise prevention, development of social attitudes, etc.) the relevant measures had to be kept under constant review.

126. As to the economic interests which conflict with the desirability of limiting or halting night flights in pursuance of the above aims, the Court considers it reasonable to assume that those flights contribute at least to a certain extent to the general economy. The Government have produced to the Court reports on the results of a series of inquiries on the economic value of night flights, carried out both before and after the 1993 Scheme. Even though there are no specific indications about the economic cost of eliminating specific night flights, it is possible to infer from those studies that there is a link between flight connections in general and night flights. In particular, the Government claim that some flights from Far-East destinations to London could arrive only by departing very late at night, giving rise to serious passenger discomfort and a consequent loss of competitiveness. One can readily accept that there is an economic interest in maintaining a full service to London from distant airports, and it is difficult, if not impossible, to draw a clear line between the interests of the aviation industry and the economic interests of the country as a whole. However, airlines are not permitted to operate at will, as substantial limitations are put on their freedom to operate, including the night restrictions which apply at Heathrow. The Court would note here that the 1993 Scheme which was eventually put in place was stricter than that envisaged in the 1993 Consultation Paper, as even the quietest aircraft were included in the quota count system. The Government have in addition resisted calls for a shorter night quota period, or for the lifting of night restrictions. The Court also notes subsequent modifications to the system involving further limitations

for the operators, including, *inter alia*, the addition of an overall maximum number of permitted aircraft movements (see paragraph 50 above) and reduction of the available quota count points (see paragraph 66 above).

127. A further relevant factor in assessing whether the right balance has been struck is the availability of measures to mitigate the effects of aircraft noise generally, including night noise. A number of measures are referred to above (see paragraph 74). The Court also notes that the applicants do not contest the substance of the Government's claim that house prices in the areas in which they live have not been adversely affected by the night noise. The Court considers it reasonable, in determining the impact of a general policy on individuals in a particular area, to take into account the individuals' ability to leave the area. Where a limited number of people in an area (2 to 3% of the affected population, according to the 1992 sleep study) are particularly affected by a general measure, the fact that they can, if they choose, move elsewhere without financial loss must be significant to the overall reasonableness of the general measure.

128. On the procedural aspect of the case, the Court notes that a governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake. However, this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided. In this respect it is relevant that the authorities have consistently monitored the situation, and that the 1993 Scheme was the latest in a series of restrictions on night flights which stretched back to 1962. The position concerning research into sleep disturbance and night flights is far from static, and it was the government's policy to announce restrictions on night flights for a maximum of five years at a time, each new scheme taking into account the research and other developments of the previous period. The 1993 Scheme had thus been preceded by a series of investigations and studies carried out over a long period of time. The particular new measures introduced by that scheme were announced to the public by way of a Consultation Paper which referred to the results of a study carried out for the Department of Transport, and which included a study of aircraft noise and sleep disturbance. It stated that the quota was to be set so as not to allow a worsening of noise at night, and ideally to improve the situation. This paper was published in January 1993 and sent to bodies representing the aviation industry and people living near airports. The applicants and persons in a similar situation thus had access to the Consultation Paper, and it would have been open to them to make any representations they felt appropriate. Had any representations not been taken into account, they could have challenged subsequent decisions, or the scheme itself, in the courts. Moreover, the applicants are, or have

been, members of HACAN (see paragraph 1 above), and were thus particularly well-placed to make representations**.**

129. In these circumstances the Court does not find that, in substance, the authorities overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home and the conflicting interests of others and of the community as a whole, nor does it find that there have been fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights.

130. There has accordingly been no violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

131. The applicants contended that judicial review was not an effective remedy in relation to their rights under Article 8 of the Convention, in breach of Article 13.

Article 13 provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

132. The Government disputed the applicants' contention that there had been a violation of Article 13.

A. The Chamber's judgment

133. In its judgment of 2 October 2001, the Chamber held that the scope of review by the domestic courts did not allow consideration of whether the increase in night flights under the 1993 Scheme represented a justifiable limitation on the Article 8 rights of those who live in the vicinity of Heathrow Airport (see paragraphs 115 and 116 above).

B. The parties' submissions

1. The Government

134. In their letter requesting that the case be referred to the Grand Chamber, the Government made no reference to Article 13 of the Convention. In subsequent communications they referred back to the pleadings before the Commission and the Chamber, summarised at paragraphs 112 and 113 of the Chamber's judgment, in which they contended that Article 13 was not applicable or, in the alternative, that the scope of judicial review was sufficient to satisfy the requirements of that

provision. At the hearing of 13 November 2002 the Government underlined that the present case concerned positive rather than negative obligations, and pointed to similarities between the judicial review proceedings in the United Kingdom and the Convention approach.

2. The applicants

135. The applicants contended, as they had before the Chamber, that they had no private-law rights in relation to excessive night noise, as a consequence of the statutory exclusion of liability in section 76 of the Civil Aviation Act 1982. They submitted that the limits inherent in an application for judicial review meant that it was not an effective remedy. They added that in *R. (Daly) v. Secretary of State for the Home Department* ([2001] 2 Appeal Cases 532), the House of Lords had confirmed the inadequacy of the approach in *R. v. Minister of Defence, ex parte Smith* ([1996] Queen's Bench Reports 517).

C. The third parties

136. The third parties did not comment on the Article 13 issues.

D. The Court's assessment

137. As the Chamber observed, Article 13 has been consistently interpreted by the Court as requiring a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, for example, *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, pp. 23-24, § 54). In the present case, it has not found a violation of Article 8, but the Court considers that confronted with a finding by the Chamber that the Article 8 issues were admissible and indeed that there was a violation of that provision, it must accept that the claim under Article 8 was arguable. The complaint under Article 13 must therefore be considered.

138. The Court would first reiterate that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws to be challenged before a national authority on the ground of being contrary to the Convention (see *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, p. 62, § 40). Similarly, it does not allow a challenge to a general policy as such. Where an applicant has an arguable claim to a violation of a Convention right, however, the domestic regime must afford an effective remedy (ibid., p. 62, § 39).

139. As the Chamber found, section 76 of the 1982 Act prevents actions in nuisance in respect of excessive noise caused by aircraft at night. The applicants complain about the flights which were permitted by the 1993

Scheme, and which were in accordance with the relevant regulations. No action therefore lay in trespass or nuisance in respect of lawful night flights.

140. The question which the Court must address is whether the applicants had a remedy at national level to "enforce the substance of the Convention rights ... in whatever form they may happen to be secured in the domestic legal order" (see *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, pp. 38-40, §§ 117-27). The scope of the domestic review in *Vilvarajah*, which concerned immigration, was relatively broad because of the importance domestic law attached to the matter of physical integrity. It was on this basis that judicial review was held to comply with the requirements of Article 13. In contrast, in *Smith and Grady v. the United Kingdom* (nos. 33985/96 and 33986/96, §§ 135-39, ECHR 1999-VI), the Court concluded that judicial review was not an effective remedy on the ground that the domestic courts defined policy issues so broadly that it was not possible for the applicants to make their Convention points regarding their rights under Article 8 in the domestic courts.

141. The Court observes that judicial review proceedings were capable of establishing that the 1993 Scheme was unlawful because the gap between government policy and practice was too wide (see *R. v. Secretary of State for Transport, ex parte Richmond LBC (no. 2)* [1995] Environmental Law Reports 390). However, it is clear, as noted by the Chamber, that the scope of review by the domestic courts was limited to the classic English public-law concepts, such as irrationality, unlawfulness and patent unreasonableness, and did not at the time (that is, prior to the entry into force of the Human Rights Act 1998) allow consideration of whether the claimed increase in night flights under the 1993 Scheme represented a justifiable limitation on the right to respect for the private and family lives or the homes of those who live in the vicinity of Heathrow Airport.

142. In these circumstances, the Court considers that the scope of review by the domestic courts in the present case was not sufficient to comply with Article 13.

There has therefore been a violation of Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

143. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

144. The applicants, referring to the Chamber's judgment, considered that a modest award should be made in relation to non-pecuniary damage.

145. The Government took the view that a finding of a violation would constitute in itself sufficient just satisfaction in respect of a violation of either Article 8 or Article 13.

146. The Chamber awarded the applicants the sum of 4,000 pounds sterling (GBP) each for non-pecuniary damage in respect of the violations it found of Articles 8 and 13.

147. The Court has found a violation of the procedural right to an effective domestic remedy under Article 13 of the Convention in respect of the applicants' complaints under Article 8, but no violation of the substantive right to respect for private life, family life, home and correspondence under Article 8 itself.

148. The Court notes that in *Camenzind v. Switzerland* (judgment of 16 December 1997, *Reports* 1997-VIII, pp. 2897-98, § 57) the Court found a violation of Article 13 in relation to the applicant's claim under Article 8, but no substantive violation of the Convention. In that case the Court considered that the judgment constituted in itself sufficient just satisfaction for the alleged non-pecuniary damage.

Furthermore, in the present case, the violation of Article 13 derived, not from the applicants' lack of any access to the British courts to challenge the impact on them of the State's policy on night flights at Heathrow Airport, but rather from the overly narrow scope of judicial review at the time, which meant that the remedy available under British law was not an "effective" one enabling them to ventilate fully the substance of their complaint under Article 8 of the Convention (see paragraphs 140-42 above).

This being so, the Court considers that, having regard to the nature of the violation found, the finding of a violation constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage.

B. Costs and expenses

149. The applicants claimed a total of GBP 153,867.56 plus GBP 24,929.55 value-added tax (VAT) in respect of the costs before the

Chamber, and an additional GBP 154,941.48 plus GBP 23,976.82 VAT (totalling GBP 178,918.30) before the Grand Chamber.

150. The Government made a number of comments on the costs and expenses before the Grand Chamber. They challenged the rates charged by the solicitors involved, and considered that the time billed by the solicitors was excessive. They also considered that the fees charged by counsel and the applicants' experts were excessive. Overall, they suggested GBP 109,000 as an appropriate figure for the Grand Chamber costs and expenses.

151. The Chamber reduced the costs and expenses claimed by the applicants in the proceedings up to then from GBP 153,867.56 to GBP 70,000.

152. Costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred and are also reasonable as to quantum (see The Sunday Times *v. the United Kingdom (no. 1)* (Article 50), judgment of 6 November 1980, Series A no. 38, p. 13, § 23). Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002).

153**.** The Court notes that whilst the Chamber found a violation of both Articles 8 and 13 of the Convention, the Grand Chamber has found solely a violation of Article 13 in relation to the applicants' claim under Article 8. Whilst this difference between the findings should be reflected in the award of costs, the Grand Chamber should not lose sight of the fact that Article 13 cannot stand alone. Without an "arguable claim" in respect of the substantive issues, the Court would have been unable to consider Article 13 (see, for example, *Boyle and Rice*, cited above, pp. 23-24, §§ 52 and 54). The award of costs should therefore reflect the work undertaken by the applicants' representatives on the Article 8 issues to a certain extent, even if not to the same extent as if a violation of Article 8 had also been found.

154**.** The Court awards the applicants the sum of 50,000 euros, including VAT, in respect of costs and expenses.

C. Default interest

155. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by twelve votes to five that there has been no violation of Article 8 of the Convention;

2. *Holds* by sixteen votes to one that there has been a violation of Article 13 of the Convention;

3. *Holds* by fifteen votes to two that the finding of a violation of Article 13 of the Convention constitutes in itself sufficient just satisfaction for any damage sustained by the applicants;

4. *Holds* unanimously
   (a) that the respondent State is to pay the applicants, within three months, EUR 50,000 (fifty thousand euros) in respect of costs and expenses, to be converted into pounds sterling at the rate applicable on the date of settlement, including any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* by thirteen votes to four the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 2003.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinions are annexed to this judgment:

(a) joint dissenting opinion of Mr Costa, Mr Ress, Mr Türmen, Mr Zupančič and Mrs Steiner;

(b) dissenting opinion of Sir Brian Kerr.

L.W.
P.J.M.

JOINT DISSENTING OPINION OF JUDGES COSTA, RESS, TÜRMEN, ZUPANČIČ AND STEINER

I. Introduction

We regret that we cannot adhere to the majority's view that there has been no violation of Article 8 of the European Convention on Human Rights in this case. We have reached our joint dissenting standpoint primarily from our reading of the current stage of development of the pertinent case-law. In addition, the close connection between human rights protection and the urgent need for a decontamination of the environment leads us to perceive health as the most basic human need and as pre-eminent. After all, as in this case, what do human rights pertaining to the privacy of the home mean if, day and night, constantly or intermittently, it reverberates with the roar of aircraft engines?

1. It is true that the original text of the Convention does not yet disclose an awareness of the need for the protection of environmental human rights[1]. In the 1950s, the universal need for environmental protection was not yet apparent. Historically, however, environmental considerations are by no means unknown to our unbroken and common legal tradition[2] whilst, thirty-one years ago, the Declaration of the United Nations Conference on the Human Environment stated as its first principle:

> "... Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being ..."[3]

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[1] . The idiom "environmental protection" appears in fifty-seven of our cases. The phrase "environmental human rights" appears for the first time in the majority judgment.

[2] . For example, the extraordinarily sensitive doctrine concerning environmental nuisances goes back to Roman law. Roman law classified these nuisances as *immissiones in alienum*. Dig.8.5.8.5 Ulpianus 17 ad ed.; see http://www.thelatinlibrary.com/justinian/digest8.shtml

[3] . *Declaration of the United Nations Conference on the Human Environment*, 1972; see http://www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503. It is interesting that from the very beginning environmental protection has been linked to personal well-being (health). See note 3, p. 45.

The European Union's Charter of Fundamental Rights (even though it does not at present have binding legal force) provides an interesting illustration of the point. Article 37 of the Charter provides:

> "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

These recommendations show clearly that the member States of the European Union want a high level of protection and better protection, and expect the Union to develop policies aimed at those objectives. On a broader plane the Kyoto Protocol makes it patent that the question of environmental pollution is a supra-national one, as it knows no respect for the boundaries of national sovereignty[1]. This makes it an issue *par excellence* for international law – and a fortiori for international jurisdiction. In the meanwhile, many supreme and constitutional courts have invoked constitutional vindication of various aspects of environmental protection – on these precise grounds[2]. We believe that this concern for environmental protection shares common ground with the general concern for human rights.

II. Development of the case-law

2. As the Court has often underlined: "The Convention is a living instrument, to be interpreted in the light of present-day conditions" (see, among many other authorities, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 14-16, § 26, and *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, pp. 26-27, § 71). This "evolutive" interpretation by the Commission and the Court of various Convention requirements has generally been "progressive", in the sense that they have gradually extended and raised the level of protection afforded to the rights and freedoms guaranteed by the Convention to develop the "European public order". In the field of environmental human rights, which was practically unknown in 1950, the Commission and the Court have increasingly taken the view that Article 8 embraces the right to a healthy environment, and therefore to protection against pollution and nuisances caused by harmful chemicals, offensive smells, agents which precipitate respiratory ailments, noise and so on.

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1. . Kyoto Protocol to the United Nations Framework Convention on Climate Change, see "the Convention and Kyoto Protocol" at http://unfccc.int/resource/convkp.html.

2. . See, for example, *Compendium of summaries of judicial decisions in environment related cases* (SACEP/UNEP/NORAD Publication Series on Environmental Law and Policy no. 3), Compendium of summaries at http://www.unescap.org/drpad/vc/document/compendium/index.htm; EPA search results at http://oaspub.epa.gov/webi/meta_first_new2.try_these_first.

3. In previous cases concerning protection against aircraft noise the Commission did not hesitate to rule that Article 8 was applicable and declared complaints of a violation of that provision admissible – in *Arrondelle* and *Baggs*, for example. In *Arrondelle v. the United Kingdom* (no. 7889/77, Commission decision of 15 July 1980, Decisions and Reports (DR) 19, p. 186) the applicant's house was just over one and a half kilometres from the end of the runway at Gatwick Airport. In *Baggs v. the United Kingdom* (no. 9310/81, Commission decision of 16 October 1985, DR 44, p. 13) the applicant's property was 400 metres away from the south runway of Heathrow Airport. These two applications, which were declared admissible, ended with friendly settlements. While that does not mean that there was a violation of the Convention, it does show that the respondent Government accepted at that time that there was a real problem. And it was for purely technical reasons that the Court itself, in *Powell and Rayner v. the United Kingdom* (judgment of 21 February 1990, Series A no. 172), which also concerned flights in and out of Heathrow, refused to look into the Article 8 issue.

4. The Court has given clear confirmation that Article 8 of the Convention guarantees the right to a healthy environment: it found violations of Article 8, on both occasions unanimously, in *López Ostra v. Spain* (judgment of 9 December 1994, Series A no. 303-C) and *Guerra and Others v. Italy* (judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I). The first of those cases concerned nuisances (smells, noise and fumes) caused by a waste-water treatment plant close to the applicant's home which had affected her daughter's health. The other concerned harmful emissions from a chemical works which presented serious risks to the applicants, who lived in a nearby municipality.

5. The Grand Chamber's judgment in the present case, in so far as it concludes, contrary to the Chamber's judgment of 2 October 2001, that there was no violation of Article 8, seems to us to deviate from the above developments in the case-law and even to take a step backwards. It gives precedence to economic considerations over basic health conditions in qualifying the applicants' "sensitivity to noise" as that of a small minority of people (see paragraph 118 of the judgment). The trend of playing down such sensitivity – and more specifically concerns about noise and disturbed sleep – runs counter to the growing concern over environmental issues all over Europe and the world. A simple comparison of the above-mentioned cases (*Arrondelle*, *Baggs* and *Powell and Rayner*) with the present judgment seems to show that the Court is turning against the current.

III. The positive obligation of the State

6. The Convention protects the individual against direct abuses of power by the State authorities. Typically, the environmental aspect of the

individual's human rights is not threatened by direct government action. Indirectly, however, the question is often whether the State has taken the necessary measures to protect health and privacy. Even assuming it has, direct State action may take the form of permitting, as here, the operation of an airport under certain conditions. The extent of permissible direct State interference and of the State's positive obligations is not easy to determine in such situations, but these difficulties should not undermine the overall protection which the States have to ensure under Article 8.

7. Thus, under domestic law, the regulatory power of the State is involved in protecting the individual against the macroeconomic and commercial interests that cause pollution. The misleading variation in this indirect juxtaposition of the individual and the State therefore derives from the fact that the State is under an obligation to act and omits to do so (or does so in violation of the principle of proportionality). In this respect, we have come a long way from the situation considered by this Court in *Powell and Rayner* (cited above, pp. 9-10, § 15), in which the Noise Abatement Act specifically exempted aircraft noise from its protection. The issue in the context of domestic law is, therefore, whether the State has done anything or enough.

8. At least since *Powell and Rayner* (p. 18, § 41), the key issue has been the positive obligation of the State.

9. The majority tries to distinguish the present case from *Dudgeon v. the United Kingdom* (judgment of 22 October 1981, Series A no. 45), which dealt with the sexual intimacy aspect of the applicant's private life. In *Dudgeon* (p. 21, § 52) it is said: “The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8.” The majority judgment differentiates this case from *Dudgeon* by saying: “the sleep disturbances relied on by the applicants did not intrude into an aspect of private life in a manner comparable to that of the criminal measures considered in *Dudgeon* to call for an especially narrow scope for the State's margin of appreciation” (see paragraph 123 of the judgment).

10. It is logical that there be an inverse relationship between the importance of the right to privacy in question on the one hand and the permissible intensity of the State's interference on the other hand. It is also true that sexual intimacy epitomises the innermost concentric circle of private life where the individual should be left in peace unless he interferes with the rights of others. However, it is not logical to infer from this that the proportionality doctrine of inverse relationship between the importance of the right to privacy and the permissible interference should be limited to sexual intimacy. Other aspects of privacy, such as health, may be just as “intimate”, albeit much more vital.

11. Privacy is a heterogeneous prerogative. The specific contours of privacy can be clearly distinguished and perceived only when it is being defended against different kinds of encroachments. Moreover, privacy is an aspect of the person's general well-being and not necessarily only an end in itself. The intensity of the State's permissible interference with the privacy of the individual and his or her family should therefore be seen as being in inverse relationship with the damage the interference is likely to cause to his or her mental and physical health. The point, in other words, is not that the sexual life of the couple whose home reverberates with the noise of aircraft engines may be seriously affected. The thrust of our argument is that "health as a state of complete physical, mental and social well-being" is, in the specific circumstances of this case, a precondition to any meaningful privacy, intimacy, etc., and cannot be unnaturally separated from it[1]. To maintain otherwise amounts to a wholly artificial severance of privacy and of general personal well-being. Of course, each case must be decided on its own merits and by taking into account the totality of its specific circumstances. In this case, however, it is clear that the circles of the protection of health and of the safeguarding of privacy do intersect and do overlap.

12. We do not agree with the majority's position taken in paragraph 123 of the Grand Chamber judgment and especially not with the key language *in fine* where the majority considers: "Whilst the State is required to give due consideration to the particular interests the respect for which it is obliged to secure by virtue of Article 8, it must in principle be left a choice between different ways and means of meeting this obligation. The Court's supervisory function being of a subsidiary nature, it is limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance." When it comes to such intimate personal situations as the constant disturbance of sleep at night by aircraft noise there is a positive duty on the State to ensure as far as possible that ordinary people enjoy normal sleeping conditions. It has not been demonstrated that the applicants are capricious, and even if their "sensitivity to noise" and "disposition to be disturbed by noise" may be called "subjective", the Court agreed that they were affected in their ability to sleep "considerably ... by the scheme at issue" (see paragraph 118 of the judgment).

13. It is significant in this respect that under Article 3 sleep deprivation may be considered as an element of inhuman and degrading treatment or even torture[2]. Already, in the inter-State case of *Ireland v. the United*

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1 . WHO definition of health, see http://www.who.int/about/definition/en/.

2 . In *Selmouni v France*, judgment of 28 July 1999, § 97, we decided to adhere to the definition of torture given in Article 1 of the United Nations Convention against Torture. It therefore makes sense to take into account that excessive noise may in fact amount to "severe pain or suffering, whether physical or mental". See, for example, paragraph 257 referring to "sounding of loud music for prolonged periods, sleep

Kingdom (judgment of 18 January 1978, Series A no. 25, p. 41, § 96), the Court held, *inter alia*, that "... holding the detainees in a room where there was a continuous loud and hissing noise ..." constituted a practice of inhuman and degrading treatment[1]. In the light of the subsequent development of our case-law in *Selmouni v. France* ([GC], no. 25803/94, § 97, ECHR 1999-V), the same treatment would now most probably be considered as torture. The present case does not involve torture or inhuman and degrading treatment, and we do not suggest that the complaint could possibly be reclassified under Article 3 of the Convention. Nevertheless, we think that the problem of noise, when it seriously disturbs sleep, does interfere with the right to respect for private and, under specific circumstances, family life, as guaranteed by Article 8, and may therefore constitute a violation of said Article, depending in particular on its intensity and duration.

14. We also find it inconsistent that the judgment (in paragraph 126) should take into account "serious passenger discomfort" whereas it downgrades (see paragraph 118) the discomfort of all the residents, who are exposed to aircraft noise to a "subjective element [of] a small minority of people being more likely than others to be woken or otherwise disturbed in their sleep ...". We do not find it persuasive to engage in the balancing exercise employing the proportionality doctrine in order to show that the abstract majority's interest outweighs the concrete "subjective element of a small minority of people". According to the World Health Organisation (WHO) Guidelines[2], measurable effects of noise on sleep start at noise levels of about 30 dBLA. These criteria are objective. They show that this susceptibility to noise is not "subjective" in the sense of being due to over-sensitivity or capriciousness[3]. Indeed, one of the important functions of human rights protection is to protect "small minorities" whose "subjective element" makes them different from the majority.

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deprivation for prolonged periods" in "Concluding observations of the Committee against Torture: Israel. 09.05.97. A/52/44, paras. 253-260. (Concluding Observations/Comments) at http://www.unhchr.ch/tbs/doc.nsf/9c663e9ef8a0d080c12565a9004db9f7/69b6685c93d9f25180256498005063da?OpenDocument.

1. Similar considerations played a role in *Kalashnikov v. Russia*, no. 47095/99, ECHR 2002-VI.

2. Guidelines for Community Noise – Chapter 4 at http://www.who.int/environmental _information/Noise/Commnoise4.htm; see also Environmental Protection Agency of Ireland at http://www.epa.ie/Noise/default.htm.

3. The guidelines are based on a combination of values of 30 dBLA and 45 dBLA maximum. To protect sensitive persons, a still lower guideline value would be preferred when the background level is low. In the case before the Court, however, almost all the applicants have suffered from night noise events in excess of 80 dBLA and in one case as high as 90 dBLA max. It is noteworthy that the judgment in its assessment did not take into account these international standards concerning the effects noise has on sleep, although the relevant data were available in the file.

15. According to the Consultation Paper published by the government in November 1998, "any value attached to a marginal night flight had to be weighed against the environmental disadvantages. These could not be estimated in monetary terms, but it was possible, drawing on a 1992 sleep study, to estimate the numbers of people likely to be awakened". The 1992 sleep study was limited to sleep disturbances and did not even take into account the problems of those who had been unable to get to sleep in the first place. It is noteworthy that the government's claims in respect of the country's economic well-being are based on reports prepared by the aviation industry. The government did not make any serious attempt to assess the impact of aircraft noise on the applicants' sleep. When the 1993 Scheme was introduced, only very limited research existed on the nature of sleep disturbance and prevention. In this respect, we agree with the findings in the Chamber's judgment (paragraphs 103-06). Nor has the government really shown that it has explored all the alternatives, such as using more distant airports.

16. In principle, the general reference to the economic well-being of the country is not sufficient to justify the failure of the State to safeguard an applicant's rights under Article 8. In *Berrehab v. Netherlands* (judgment of 21 June 1988, Series A no. 138), for example, the Court found that the actions of the authorities could not be justified by the alleged economic well-being of the Netherlands. In *López Ostra* (cited above), too, the Court held, after examining the Government's argument, that "... the State did not succeed in striking a fair balance between the interests of the town's economic well-being ...and the applicant's effective enjoyment of her right to respect for her home and her private and family life" (p. 56, § 58).

17. Although we might agree with the judgment when it states: "the Court must consider whether the State can be said to have struck a fair balance between those interests [namely, the economic interests of the country] and the conflicting interests of the persons affected by noise disturbances" (see paragraph 122 of the judgment), the fair balance between the rights of the applicants and the interests of the broader community must be maintained. The margin of appreciation of the State is narrowed because of the fundamental nature of the right to sleep, which may be outweighed only by the real, pressing (if not urgent) needs of the State. Incidentally, the Court's own subsidiary role, reflected in the use of the "margin of appreciation", is itself becoming more and more marginal when it comes to such constellations as the relationship between the protection of the right to sleep as an aspect of privacy and health on the one hand and the very general economic interest on the other hand.

18. As stated above, reasons based on economic arguments referring to "the country as a whole" without any "specific indications of the economic cost of eliminating specific night flights" (see paragraph 126 of the judgment) are not sufficient. Moreover, it has not been demonstrated by the

respondent State how and to what extent the economic situation would in fact deteriorate if a more drastic scheme – aimed at limiting night flights, halving their number or even halting them – were implemented.

IV. Realistic assessment under Article 41

19. Finally, and in view of the powers of the Court under Article 41 and the alleged importance of the macroeconomic interests at stake, indemnification of the "small minority" should be less of a problem rather than more. The applicants' rights could have been treated much more realistically than they were by the majority. In other words, the issue could have been circumscribed to the "small minority's" entitlement to just satisfaction for the real pecuniary and non-pecuniary damage incurred. Since we do not believe that the "subjective element" referred to in paragraph 118 of the judgment is simply a euphemism for "capricious hyper-sensitivity", the applicants in our opinion ought to have been awarded just satisfaction.

DISSENTING OPINION OF JUDGE Sir Brian KERR

In *Christine Goodwin v. the United Kingdom* ([GC], no. 28957/95, § 113, ECHR 2002-VI), the Grand Chamber held that "Article 13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention". That ruling relates to the "state of domestic law", and seems to me to go beyond the traditional view that Article 13 does not guarantee a remedy against "legislation" (as in, for example, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 47, § 85). It corresponds closely to the ideas I expressed on Article 13 in my dissenting opinion to the Chamber's judgment of 2 October 2001.

I would here wish simply to record that it is my view, given the nature of the applicants' complaints, the state of domestic law at the time and the role of Article 13 in the Convention structure, that there has been no violation of Article 13 in this case.

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

COURT (CHAMBER)

CASE OF HOKKANEN v. FINLAND

(Application no. 19823/92)

JUDGMENT

STRASBOURG

23 September 1994

In the case of Hokkanen v. Finland[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, President,
Mr Thór VILHJÁLMSSON,
Mr C. RUSSO,
Mr J. DE MEYER,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr J.M. MORENILLA,
Mr J. MAKARCZYK,
Mr K. JUNGWIERT,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 25 March and on 24 August 1994,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 December 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 19823/92) against the Republic of Finland lodged with the Commission under Article 25 (art. 25) by Mr Teuvo Hokkanen, a Finnish national, on his own behalf and on that of his daughter, Ms Sini Hokkanen, also a Finnish national, on 10 April 1992. The application was however declared inadmissible in respect of Sini (see paragraph 50 below).

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Finland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46)[**]. The object of the request was to obtain a decision as to whether the facts of the case disclosed a

[*] The case is numbered 50/1993/445/524. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] Note by the Registrar. The declaration dates from 10 May 1990, which is also the date of ratification by Finland of the Convention.

breach by the respondent State of its obligations under Articles 6 para. 1, 8 and 13 (art. 6-1, art. 8, art. 13) of the Convention as well as Article 5 of Protocol No. 7 (P7-5).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr R. Pekkanen, the elected judge of Finnish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 7 January 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr C. Russo, Mr J. De Meyer, Mr I. Foighel, Mr J.M. Morenilla, Mr J. Makarczyk and Mr K. Jungwiert (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Finnish Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence on 26 January 1994, the Registrar received the applicant's and the Government's memorials on 21 February 1994. On 18 March the Secretary to the Commission indicated that the Delegate did not wish to file a memorial in reply.

5. On 22 February 1994, following a request from Sini Hokkanen and her maternal grandparents, Mr Reino and Mrs Sinikka Nick, the President, having consulted the Chamber on the same date, granted Mr and Mrs Nick, but not Sini Hokkanen, leave to submit written observations (Rule 37 para. 2) on any facts which they considered had been dealt with inaccurately in the Commission's report of 22 October 1993. On 8 March the Registrar received their observations.

6. On various dates between 17 February and 16 March 1994 the Commission produced a number of documents, which the Registrar had requested from it on the President's instructions.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 March 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr T. GRÖNBERG, Ambassador,
Director General for Legal Affairs, Ministry for Foreign Affairs, *Agent*,
Mr A. KOSONEN, Legal Adviser,
Ministry for Foreign Affairs, *Co-Agent*,
Mr M. HELIN, Adviser on Legislation,

Ministry of Justice, *Adviser*;
- for the Commission
Mrs J. LIDDY, *Delegate*;
- for the applicant
Mr H. SALO, Lawyer, *Counsel*,
Mr J. KORTTEINEN, Lawyer,
Mr A. ROSAS, Law Professor
at Åbo Akademi, *Advisers*.

The Court heard addresses by Mrs Liddy, Mr Salo, Mr Rosas and Mr Grönberg, and also replies to its questions.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Events leading to the first set of custody proceedings

8. Mr Hokkanen, a Finnish citizen, was born in 1953. He lives at Tuusula.

He has a daughter, Sini, who was born in September 1983. Following the death in April 1985 of Mrs Tuula Hokkanen (the child's mother, to whom the applicant had been married since 11 June 1983), Sini was looked after by her maternal grandparents, Mr Reino and Mrs Sinikka Nick (hereinafter referred to as "the grandparents"). According to the applicant, he had agreed to this as a provisional arrangement so that he could deal with various problems caused by his wife's death, including the reorganisation of his farming activities.

In late 1985 the grandparents informed the applicant that they did not intend to restore Sini to him. Efforts, involving the Social Welfare Board (sosiaalilautakunta, socialnämnden) of Tuusula, were made to achieve reconciliation between the applicant and the grandparents, but to no avail.

9. On 2 May 1986 the County Administrative Board (lääninhallitus, länsstyrelsen) of Uusimaa as the competent Chief Bailiff (ulosotonhaltija, överexekutor; see paragraph 44 below) rejected a request by the applicant to have Sini returned in accordance with section 8(2) of the 1975 Act on the Enforcement of Decisions concerning Custody of and the Right of Access to Children (laki 523/75 lapsen huollosta ja tapaamisoikeudesta annetun päätöksen täytäntöönpanosta, lag 523/75 om verkställighet av beslut som gäller vårdnad om barn och umgängesrätt - "the 1975 Act"). It observed that the applicant had consented to the arrangement leaving Sini in the care of

the grandparents. In view of the time which had elapsed since she had moved to them and of the little contact Sini had had with the applicant, returning her could be contrary to her own interests; both parties should therefore institute custody proceedings before the District Court (kihlakunnanoikeus, häradsrätten) of Tuusula. They did so.

B. First set of custody proceedings

1. Proceedings before the District Court

10. Following a hearing on 16 July 1986, the District Court ordered provisionally that Sini should remain with her grandparents; at the same time it granted the applicant access rights, according to which Sini was to stay with him every fourth weekend and, from 8 August 1986, every fourth week.

11. On 30 September 1986 the County Administrative Board ordered the grandparents to respect the applicant's visiting rights on pain of an administrative fine (uhkasakko, vite) of 2,000 Finnish marks each. However, they did not comply.

12. On 31 October 1986 the District Court held a further hearing. It adjourned the case and again provisionally granted the applicant access rights: as from 5 November he could visit his daughter at her grandparents' home for two hours every Wednesday and six hours every Sunday and, as from 1 December, she was to visit him at the same times and for the same periods at his home. The grandparents refused to comply with these arrangements.

13. On 21 January 1987 the County Administrative Board rejected a request from the applicant asking it to enforce the right of access granted to him by the District Court on 16 July 1986. It observed that the District Court, in its decision of 31 October 1986, had varied his right of access. The County Administrative Board was therefore of the view that its decision of 30 September 1986 that the grandparents would be liable to pay fines should they fail to comply with the access order (see paragraph 11 above) no longer applied.

14. By judgment of 26 January 1987, the District Court confirmed the applicant's custody and ordered that Sini be handed over to him. It took into account, among other things, a report of 22 January 1987 by the Child Guidance Centre (kasvatusneuvola, uppfostrings- rådgivningen - "the Centre") of Central Uusimaa.

15. On 10 March 1987 the County Administrative Board ordered the grandparents to comply with the District Court's judgment of 26 January on pain of a fine of 8,000 marks each should they fail to do so. The grandparents persisted in not complying.

2. Appeal by the grandparents to the Court of Appeal and measures taken by the County Administrative Board

16. On 6 May 1987, on an appeal by the grandparents, the Court of Appeal (hovioikeus, hovrätten) of Helsinki upheld the District Court's judgment of 26 January. On 23 June it dismissed their appeal against the County Administrative Board's decision of 10 March.

17. On 7 May 1987 the County Administrative Board had again ordered the grandparents to return Sini to the applicant within a week and to pay 2,000 marks each of the fines imposed on them previously. The Board further ordered that, in the event of the grandparents' failure to return her, the Bailiff should use coercion to ensure that she was so returned.

3. Appeal by the grandparents to the Supreme Court

18. On 30 July 1987 the Supreme Court (korkein oikeus, högsta domstolen) granted the grandparents leave to appeal against the Court of Appeal's judgments of 6 May and 23 June 1987. It ordered a stay, or alternatively suspension, of both judgments (see paragraph 16 above).

The Supreme Court, in two separate judgments of 17 May 1988, dismissed the appeal and lifted the two decisions staying execution.

19. The grandparents asked the local Social Welfare Board to investigate whether execution of the Supreme Court's judgments would be in Sini's interests. The Board referred the matter to the National Social Welfare Board (sosiaalihallitus, socialstyrelsen).

At the same time, the grandparents requested the Supreme Court to stay the execution of, and annul, its judgments of 17 May 1988, which it refused to do on 13 September.

C. Requests by the applicant to the police and complaint to the Chancellor of Justice

20. In the meantime, on 13 and 18 May 1987, the applicant had asked the District Chief of Police of Järvenpää to execute the County Administrative Board's decision of 7 May (see paragraph 17 above). On 28 May the authorities discovered that the grandparents had moved Sini and that her whereabouts were unknown. The Järvenpää police then contacted their counterpart in Mäntyharju, where the grandparents had a summer home. Subsequently Sini was found to be with her grandparents at their summer home. On 10 June the applicant requested the Chief of Police of Mäntyharju to return her, but the latter official refused to do so, finding it contrary to the child's interests to interrupt her summer vacation.

21. On 29 May 1987 the applicant complained to the Chancellor of Justice (oikeuskansleri, justitiekanslern), alleging that the authorities had failed to take sufficient action to find and return Sini. The Chancellor

replied on 6 July 1988 that he did not consider that any measures were called for in view of, firstly, the steps taken to execute the County Administrative Board's decision of 7 May 1987; secondly, the Supreme Court's subsequent decision to stay the execution of the Court of Appeal's judgments of 6 May and 23 June 1987 (see paragraphs 16 and 18 above) and, thirdly, the grandparents' request for a stay and annulment in respect of the Supreme Court's judgments of 17 May 1988 (see paragraph 19 above).

D. Second set of custody proceedings

1. Administrative proceedings

22. On 30 May 1990 the National Social Welfare Board recommended that the Social Welfare Board in Tuusula take steps to have custody of Sini transferred from Mr Hokkanen to the grandparents, to obtain access for the applicant and to have a person other than him appointed Sini's guardian.

On 25 July 1990, at the Social Welfare Board's request, the Guardianship Board (holhouslautakunta, förmyndarenämnden) of Tuusula submitted an opinion on the above matter, stating that the applicant had performed his duties as a guardian in a satisfactory manner. It did not consider the transfer of custody and guardianship advisable and concluded that he should continue as Sini's custodian and guardian.

2. Proceedings before the District Court and applicant's requests for enforcement of his right of access

23. On 13 August 1990 the Social Welfare Board of Tuusula asked the District Court to transfer custody to the grandparents. The Board noted that the applicant was a fit person to bring Sini up and was able to offer her a good home environment. The Board placed emphasis on the fact that since 1985 she had been living with the grandparents, with whom she had close relations. In view of the fact that Sini had not met her father for many years it was necessary for their meetings in the autumn of 1990 to be well prepared and that they should take place in a neutral environment. It also recommended that the applicant remain Sini's guardian.

24. On 19 September 1990 the District Court held a hearing but adjourned the case until 14 November after deciding to obtain an opinion from the Guardianship Board. The Board submitted a report on 31 October, recommending that the applicant cease to be the child's guardian.

At the hearing scheduled for 14 November 1990 the District Court again adjourned the case, this time until 8 May 1991, pending an opinion from the Child Guidance Centre of Central Uusimaa. On 7 May 1991 the Child and Family Guidance Centre (perhe- ja kasvatusneuvola, familje - och uppfostringsrådgivningen) of Tuusula, which had taken over the former's

functions, confirmed the views expressed by that Centre in its opinion of 22 January 1987 (see paragraph 14 above). It observed that the grandparents had refused to allow Sini to be subjected to an examination (requested by the National Board of Social Welfare) and to participate in related interviews. It also referred to a statement of 13 December 1989 by a working group of the Lastenlinna Children's Hospital that, although Sini related to the grandparents as her psychological parents, there were no psychological obstacles as far as she was concerned to her meeting the applicant; on the contrary, such meetings were in her interests.

25. During the proceedings before it the District Court had, on 14 November 1990, provisionally ordered that Sini remain with the grandparents and granted the applicant certain rights of access: in December 1990 and January 1991 he was to be permitted to meet his daughter for six hours on the first Sunday of the month at a place chosen by the Board and in the presence of one of its officials; as from January they were in addition to meet from Saturday noon to Sunday noon on the third weekend of the month and, as from February, also the first weekend.

However, the grandparents would not allow the applicant to meet the child outside their home. On 20 December 1990 he asked the County Administrative Board to take enforcement measures. He renewed this request on 31 January 1991.

26. On 28 March 1991 the Board ordered the grandparents to comply with the District Court's provisional order of 14 November 1990 and decided that failure to do so would make them liable to pay an administrative fine of 5,000 marks each. The grandparents persisted in their refusal to comply. The applicant did not request the enforcement of the fines, such a request being a legal condition for their imposition.

27. The District Court, by judgment of 8 May 1991, rejected the Social Welfare Board's request to transfer custody and guardianship. It moreover noted that its provisional access order of 14 November 1990 no longer applied.

3. Appeals to the Court of Appeal and refusal of leave to appeal by the Supreme Court

28. On 24 July 1991, on separate appeals by the grandparents and the Social Welfare Board, the Court of Appeal ordered a stay of execution of the District Court's judgment of 8 May 1991 (see paragraph 24 above).

29. By judgment of 25 September 1991 the Court of Appeal, by a majority, held that the applicant should remain Sini's guardian but transferred custody to the grandparents, finding that the fact that she had lived with them since 30 April 1985 militated strongly in favour of her remaining in their care. It referred to the above-mentioned opinion of 13 December 1989 by the Children's Hospital (see paragraph 24 above), according to which she had strong ties of security, confidence and affection

with her grandparents and perceived their home as her own. No substantial changes should be made to this situation. She should be able to meet the applicant and develop a normal relationship with him. In view of her low age (eight at the time) and the fact that she had not been in a position to form her views independently, the Court of Appeal considered that no significant importance could be attached to Sini's own wish not to see the applicant, mentioned in the Child and Family Guidance Centre's opinion of 7 May 1991 (see paragraph 24 above).

The judgment prescribed the following access arrangements: during the first three months the applicant and his daughter were to meet for four hours one Saturday each month, at a place chosen by the Tuusula Social Welfare Office, in the presence of one of its officers and, after that, every other weekend between Saturday noon and Sunday noon. She was to spend Christmas with her grandparents and two weeks of the following summer with the applicant; subsequently her stays during holidays should alternate between the applicant and the grandparents.

30. On 19 December 1991 the Court of Appeal quashed the County Administrative Board's order of 28 March 1991 requiring the grandparents to comply with the District Court's provisional order of 14 November 1990 regarding access (see paragraph 25 above). The Court of Appeal had regard to the lower court's decision of 8 May 1991 (see paragraph 27 above), which in effect revoked its decision of 14 November 1990.

31. On 21 January 1992 the Supreme Court refused the applicant leave to appeal.

E. Further proceedings regarding access

1. Request for enforcement to the local Social Welfare Board

32. On 25 June 1992 the Social Welfare Board of Järvenpää replied to an enforcement request by the applicant. It observed that the Child and Family Guidance Centre of Järvenpää had offered the grandparents "an opportunity to obtain assistance and to discuss the matter concerning visiting rights" but they had refused to contact the Centre. The latter had, in a letter to the Board of 16 June 1992, stated that in those circumstances "nothing else could be done by the Centre".

2. Request for enforcement to the County Administrative Board and the ensuing court proceedings

33. In the meantime, on 22 June 1992 the applicant asked the County Administrative Board to take steps to execute the Court of Appeal's judgment of 25 September 1991 (see paragraph 29 above). He referred to the fact that in 1991 all three meetings planned between him and Sini had

failed to take place, as the grandparents had refused to bring her. They had moreover declined to respond to attempts to arrange further meetings.

34. On 23 June 1992 the County Administrative Board gave an interim decision ordering the applicant to communicate the documents in the case to the grandparents in order to enable them to comment on his request to the Board. This they did on 21 July. The decision further indicated that the case would be struck off the list if the applicant did not renew his enforcement request within a year.

On 10 November 1992 the applicant renewed his request of 22 June to the County Administrative Board. Following this, the Board, as required by the relevant legislation, referred the matter to the conciliator for mediation (see paragraph 45 below). The latter submitted a report to the Board on 2 December and the applicant filed his comments on 7 December.

35. On 31 December 1992 the County Administrative Board ordered the grandparents to comply with the Court of Appeal's decision of 25 September 1991, on pain of having to pay an administrative fine of 5,000 marks.

On the other hand, the Board dismissed a request by the applicant for Sini to be transferred to him; such a measure could only be taken in enforcement of a custody order. However, it noted that the grandparents had totally refused to co-operate in attempts to arrange for the applicant to meet his daughter. Bearing in mind her age and the grandparents' strong influence over her, she could not be considered sufficiently mature for her views to be taken into account.

The County Administrative Board had regard also to the conciliator's above-mentioned report (see paragraph 34 above), submitted by the Social Welfare Board of Järvenpää. According to that report the grandparents had agreed to allow the applicant to see Sini in their own home, whilst the applicant had categorically refused to have anything to do with them. The conciliator in question had met Sini only in the grandparents' presence in their home on 27 November 1992. On being questioned about her father she had been very reserved but had said that she objected to seeing him. The conciliator was of the view that Sini's wishes in this regard should be taken into consideration.

36. The grandparents refused to bring Sini to a meeting with the applicant which the Social Welfare Board of Järvenpää had arranged to take place on 3 April 1993.

37. By judgment of 21 October 1993 the Court of Appeal, referring to section 6 of the 1975 Act (see paragraph 47 below), upheld an appeal lodged by the grandparents against the County Administrative Board's decision of 31 December 1992 (see paragraph 35 above). The Court of Appeal noted that, according to a medical report of 8 September 1992 by Dr Arajärvi, Sini was physically and mentally healthy and a psychological test had shown that she was clearly of above average intelligence for a twelve-

year-old; she should not therefore be forced to meet the applicant but be allowed to decide for herself. Moreover, the conciliator's report (see paragraphs 34 and 35 above) stated that she had clearly and consistently refused to meet the applicant and was sufficiently mature for her wishes to be taken into account. The judgment concluded that in view of the child's maturity, access could not be enforced against her wishes and lifted the fines imposed on the grandparents.

On 4 February 1994 the Supreme Court refused the applicant leave to appeal.

F. Contacts between the applicant and Sini

38. The applicant visited Sini in the grandparents' home on a few occasions until 1986. The last time he met her was on 14 January 1987.

II. RELEVANT DOMESTIC LAW

A. Custody and access

39. Custody of children is governed by the 1983 Act on Custody and Access Rights with regard to Children (laki 361/83 lapsen huollosta ja tapaamisoikeudesta, lag 361/83 ang. vårdnad om barn och umgängesrätt - "the 1983 Act"). Section 1 provides that the aim of such custody is to ensure the child's balanced development and well-being, regard being had to the latter's special needs and wishes, as well as to encourage a close relationship between the child and the parents. The custodian represents the child in his or her personal matters, unless the law provides otherwise (section 4).

40. The parents, or any other person to whom care of the child has been entrusted, are his or her custodians (section 3). Parents who are married to each other at the time of the child's birth are the latter's custodians (section 6).

41. The District Court may order that custody of a child be entrusted to one or more persons together with, or instead of, the parents (section 9 para. 1). It may transfer custody from the parents to other persons only if, from the child's point of view, there are particularly strong reasons for doing so (section 9 para. 2).

The District Court is moreover empowered to decide on access (section 9). The aim of access is to secure a child's right to maintain contacts with a parent with whom he or she is not living (section 2).

In deciding on matters of custody and access the competent court must take into account the wishes and interests of the child in accordance with the following considerations: primary emphasis must be placed on the interests

of the child and particular regard should be had to the most effective means of implementing custody and access rights in the future (section 9 para. 4 and section 10 para. 1); the child's views and wishes must, if possible and depending on its age and maturity, be obtained if the parents are unable to agree on the matter or if the child is being cared for by a person other than its custodian or if it is otherwise deemed necessary in the latter's interests; the consultation must be carried out in a tactful manner, taking into account the child's maturity and without causing harm to its relations with the parents (section 11).

42. Pending court decisions on matters of custody and access, the competent court may issue an interim order as to where the child should live, access arrangements and, in special circumstances, custody (section 17 paras. 1 and 2).

43. A decision on custody, access or a child's place of residence is, unless it states otherwise, immediately enforceable (section 19).

B. Enforcement of custody and access rights

44. According to section 1 of the 1975 Act (for references, see paragraph 9 above), the Act applies to the enforcement of a court decision, including an interim order, regarding custody and access. It may also apply to the enforcement of an order that a child should live with a particular person or that it should be handed over to its custodian.

A request for enforcement may be submitted to the Chief Bailiff in the area where the child lives (section 2), which authority is vested in the County Administrative Board (section 1 of the 1895 Act on Enforcement - ulosotto laki 1895/37, utsökningslagen 1895/37).

45. Pursuant to section 4, as amended by Act no. 366/83, before ordering enforcement the Chief Bailiff must assign as a conciliator a person appointed by the Social Welfare Board or another suitable person to mediate between the parties with a view to enforcing the decision. Such mediation is aimed at persuading the person taking care of the child to comply voluntarily with his obligations under the relevant decision.

Conciliation may not be ordered if it is evident from previous attempts that it would be unsuccessful or, in the case of a custody decision, if immediate enforcement is in the child's interests and dictated by strong reasons.

46. The Chief Bailiff may impose an administrative fine in connection with an enforcement decision or, when the matter relates to the custody of a child or the handing over of a child to its custodian, he may order the Bailiff to transfer the child (section 5).

A fine as mentioned above must be fixed on the basis of the means of the person concerned (chapter 2, section 4 (b) para. 2, of the 1889 Penal Code).

If the fine cannot be collected, it must be converted into a prison sentence (section 5 para. 1, as amended by Act no. 650/86).

47. Enforcement must not take place against a child's own wishes if he or she is twelve years of age or is sufficiently mature for her wishes to be taken into account (section 6 of the 1975 Act, as amended by Act no. 366/83).

48. A decision by the Chief Bailiff under the 1975 Act may, unless otherwise stated therein, be enforced immediately (section 13 para. 1).

PROCEEDINGS BEFORE THE COMMISSION

49. In his application (no. 19823/92) of 10 April 1992 to the Commission, Mr Teuvo Hokkanen, on his own and Sini's behalf, complained that, in breach of Article 8 (art. 8) of the Convention, the public authorities had failed to take appropriate measures to facilitate their speedy reunion. In this regard he also relied on Article 5 of Protocol No. 7 (P7-5) (right to equality of spouses in their relations with their children). He further complained that, contrary to Article 6 para. 1 (art. 6-1) of the Convention, he had not been given a fair and oral hearing before the Court of Appeal and the Supreme Court in 1991 to 1992. In addition he alleged a breach of this provision in that the custody proceedings had not been concluded within a reasonable time and that the Supreme Court had failed to give reasons for its refusal of 21 January 1992 to grant leave to appeal. Finally, he complained that he had not been afforded an effective remedy as required under Article 13 (art. 13), in respect of the failure to take measures to facilitate reunion, the excessive length of the proceedings and the ineffectiveness of the administrative fines imposed upon the grandparents in view of their financial circumstances.

50. By decision of 9 February 1993, the Commission declared admissible the complaints made by Mr Hokkanen on his own behalf under Article 8 (art. 8) of the Convention, Article 5 of Protocol No. 7 (P7-5) and, in so far as they concerned the length of the second set of custody proceedings, those relating to Article 6 para. 1 and Article 13 (art. 6-1, art. 13) of the Convention. It declared inadmissible the complaints lodged on Sini's behalf on the ground that Mr Hokkanen could not file an application for her as he was no longer her custodian at that time.

In its report of 22 October 1993 (Article 31) (art. 31), the Commission expressed the following opinion:

(a) by nineteen votes to two that there had been a violation of Article 8 (art. 8);

(b) unanimously that no separate issue arose under Article 5 of Protocol No. 7 (P7-5);

(c) by sixteen votes to five that there had been no violation of Article 6 para. 1 (art. 6-1);

(d) by twenty votes to one that it was not necessary to examine the complaints under Article 13 (art. 13).

The full text of the Commission's opinion and of the concurring and dissenting opinions contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS MADE BY THE GOVERNMENT TO THE COURT

51. At the hearing on 21 March 1994 the Government confirmed the final submission in their memorial inviting "the Court to hold that there have been no violations of the Convention in the present case".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8) OF THE CONVENTION

52. The applicant submitted that the Finnish authorities had failed to promote his speedy reunion with his daughter. They had allowed the grandparents to keep Sini in their care and prevent his access to her in defiance of court decisions and had transferred custody to them. He alleged a violation of Article 8 (art. 8) of the Convention, which reads:

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

The Government disputed this contention. The Commission upheld it in so far as it concerned the alleged non-enforcement of parental rights but did not state any opinion on the transfer of custody.

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* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 299-A of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

53. The Court notes from the outset that since the Convention entered into force with respect to Finland on 10 May 1990, it will, like the Commission, limit its examination to whether the facts occurring after that date disclosed a breach of the Convention (see, for instance, the Moreira de Azevedo v. Portugal judgment of 23 October 1990, Series A no. 189, pp. 17-18, para. 70; the Stamoulakatos v. Greece judgment of 26 October 1993, Series A no. 271, pp. 13-14, paras. 32-33). Events prior to 10 May 1990 will be taken into account merely as a background to the issues before the Court, in particular the large number of administrative and judicial actions taken by the applicant, the fact that all the decisions in his favour had been effectively resisted by the grandparents and that the embittered relationship between them and the applicant did not favour a co-operative approach to resolving the dispute.

A. Applicability of Article 8 (art. 8)

54. Sini was the child of a marriage and was thus ipso jure part of that "family" unit from the moment of birth and by the very fact of it. She lived with the applicant and her mother from her birth in September 1983, until she was handed over to her maternal grandparents after her mother's death in April 1985. After that the applicant met her on some occasions until January 1987. He was her custodian until September 1991 and remains her legal guardian. Since 1985 he has continuously sought to have access to her and to have her returned to him.

These links are undoubtedly sufficient to establish "family life" within the meaning of Article 8 (art. 8), which is thus applicable. Indeed applicability was not disputed before the Court.

B. Compliance with Article 8 (art. 8)

55. The essential object of Article 8 (art. 8) is to protect the individual against arbitrary interference by the public authorities. There may in addition be positive obligations inherent in an effective "respect" for family life. Whilst the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition, the applicable principles are similar. In particular, in both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in both contexts the State is recognised as enjoying a certain margin of appreciation (see the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, p. 19, para. 49).

The Court's role is not to substitute itself for the competent Finnish authorities in regulating custody and access issues in Finland, but rather to review under the Convention the decisions that those authorities have taken

in the exercise of their power of appreciation (see, mutatis mutandis, the Handyside v, the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 23, para. 50). In so doing, it must determine whether the reasons purporting to justify the actual measures adopted with regard to the applicant's enjoyment of his right to respect for family life are relevant and sufficient under Article 8 (art. 8).

In previous cases dealing with issues relating to the compulsory taking of children into public care and the implementation of care measures, the Court has consistently held that Article 8 (art. 8) includes a right for the parent to have measures taken with a view to his or her being reunited with the child and an obligation for the national authorities to take such action (see, for instance, the Eriksson v. Sweden judgment of 22 June 1989, Series A no. 156, p. 26, para. 71; the Margareta and Roger Andersson v. Sweden judgment of 25 February 1992, Series A no. 226-A, p. 30, para. 91; and the Olsson v. Sweden (no. 2) judgment of 27 November 1992, Series A no. 250, pp. 35-36, para. 90). In the opinion of the Court, this principle must be taken as also applying to cases such as the present where the origin of the provisional transfer of care is a private agreement.

56. The applicant and the Commission reasoned that a positive obligation for the Contracting State to take coercive measures was more called for where a child is in de facto care in defiance of the law and of court orders than after the termination of de jure care. The non-enforcement of the applicant's custody rights, as from 10 May 1990 until the transfer of the custody of Sini on 25 September 1991, as well as the non-enforcement of his visiting rights constituted a lack of "respect" for his "family life" in violation of Article 8 (art. 8). Notwithstanding the reasonable steps he had taken to have his parental rights enforced there was a striking lack of effective response. This fact, together with the length of the enforcement proceedings, had created a situation where his reunification with Sini had become difficult.

In addition, as regards the transfer of custody, the applicant contended that the Court of Appeal's judgment of 25 September 1991 conferred legitimacy on the illegal de facto care assumed by the grandparents. Although the grandparents had retained the child unlawfully, the length of time they had kept her was perceived by that court as an important justification for transferring custody. The measure further weakened the protection of his parental rights, notably as regards access to his daughter.

57. In the Government's submission a distinction should be drawn between, on the one hand, a parent's custody and visiting rights in respect of a child and, on the other hand, the enforcement of such rights. Although there may be plausible reasons for a parent to have custody and access rights, it does not necessarily follow that these should be enforced, especially if it would be incompatible with the interests and welfare of the child. That was the position under Finnish law, which viewed a parent's

custody of a child as a right first and foremost in the interest of the well-being and balanced development of the child and not primarily for the benefit of the parent. They referred also to Article 3 of the 1989 United Nations Convention on the Rights of the Child, Article 19 para. 1 (b) of the 1980 European Convention on the Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (European Treaty Series no. 105) and Articles 1 and 12 para. 3 of the 1980 Convention on the Civil Aspects of International Child Abduction (done at the Hague on 25 October 1980). The Government therefore disagreed with the contention of the applicant and the Commission that forcible measures should be more readily resorted to in the situation facing the applicant. At any rate, it would not have been appropriate to use coercion to implement his parental rights.

Whilst conceding that the applicant had not been able to exercise his access rights in the way specified in the relevant court decisions, the Government emphasised that this was due to the non-compliance by the grandparents with those decisions. The latter being private persons, the State was not directly responsible under international law for their acts or omissions.

In any event, the applicant's own conduct was open to criticism: he had not availed himself of the possibility of visiting Sini in the grandparents' home; he had failed to finalise the enforcement proceedings relating to the District Court's decision on access of 14 November 1990, by not requesting imposition of the fines indicated by the County Administrative Board on 28 March 1991; and for several months he had omitted to renew his request for enforcement of the access rights granted to him by the Court of Appeal on 25 September 1991 (see paragraphs 26 and 34 above).

The Government concluded that, in view of the difficult circumstances of the case, the national authorities had done everything that could reasonably be expected of them to facilitate reunion.

58. The Court recalls that the obligation of the national authorities to take measures to facilitate reunion is not absolute, since the reunion of a parent with a child who has lived for some time with other persons may not be able to take place immediately and may require preparatory measures being taken to this effect. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and co-operation of all concerned will always be an important ingredient. Whilst national authorities must do their utmost to facilitate such co-operation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 (art. 8) of the Convention. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them (see the above-mentioned Olsson (no. 2) judgment, pp. 35-36, para. 90).

What is decisive is whether the national authorities have taken all necessary steps to facilitate reunion as can reasonably be demanded in the special circumstances of each case (ibid.). The Court does not deem it necessary to deal with the applicant's and the Commission's general argument on an obligation under Article 8 (art. 8) to take forcible measures (see paragraph 56 above).

59. Turning to the particular facts the Court will deal first with the alleged non-enforcement of the applicant's access rights and then with the alleged non-enforcement of his custody rights and the transfer of custody to the grandparents.

1. Non-enforcement of access

60. As regards the alleged non-enforcement of access the Court notes that during the period under consideration the prevailing view of the Finnish authorities was, until the Court of Appeal's judgment of 21 October 1993, that it was in the child's best interest to develop contacts with the applicant, even if she might not wish to meet him. What is more, at least from the Supreme Court's judgments of 17 May 1988 until the Court of Appeal's judgment of 25 September 1991, the Finnish courts considered not only that the applicant was best suited as custodian but also that the child should return to live with him (see paragraphs 14, 16, 18 and 27 above). Arrangements for his access to the child were specified in the District Court's interim decision of 14 November 1990 and in the Court of Appeal's judgment of 25 September 1991 (see paragraphs 25 and 29 above). Since the grandparents failed to comply with the access arrangements set out in these decisions, the County Administrative Board, at the applicant's requests, ordered their enforcement subject to administrative fines being imposed upon them (see paragraphs 26 and 35 above); but these measures proved to be of no avail in face of the grandparents' persistent refusal to comply.

Against a background of ineffective court decisions and enforcement orders, the actions of the social welfare authorities consisted mainly of planning three meetings in 1991, taking steps to conciliate the applicant and the grandparents in late 1992; and arranging for one further meeting in the spring of 1993; none of which materialised (see paragraphs 33-36 above).

The difficulties in arranging access were admittedly in large measure due to the animosity between the grandparents and the applicant. Nonetheless the Court does not accept that responsibility for the failure of the relevant decisions or measures in actually bringing about contacts can be attributed to the applicant. Both the District Court's and the Court of Appeal's decisions regarding access had recognised the need to arrange meetings at a neutral place outside the grandparents' home (see paragraphs 23, 25 and 29 above). Whilst the grandparents consistently refused to comply with these decisions, the applicant actively sought their enforcement. The suggestion

by the Government that the situation would have been any different had he requested the imposition of the administrative fines or not omitted for some time to renew his enforcement request is highly improbable (see paragraphs 26 and 34 above).

61. From the foregoing it cannot be said that, bearing in mind the interests involved, the competent authorities, prior to the Court of Appeal's judgment of 21 October 1993, made reasonable efforts to facilitate reunion. On the contrary, the inaction of the authorities placed the burden on the applicant to have constant recourse to a succession of time-consuming and ultimately ineffectual remedies to enforce his rights.

On the other hand, in the judgment of 21 October 1993 the Court of Appeal came to the conclusion that the child had become sufficiently mature for her views to be taken into account and that access should therefore not be accorded against her own wishes (see paragraph 37 above). The Court sees no reason to call this finding into question.

62. Accordingly, the Court concludes that, notwithstanding the margin of appreciation enjoyed by the competent authorities, the non-enforcement of the applicant's right of access from 10 May 1990 until 21 October 1993 constituted a breach of his right to respect for his family life under Article 8 (art. 8). However, there has been no such violation in respect of the period thereafter.

2. Non-enforcement of custody rights and transfer of custody

63. It remains to be determined whether there was also a violation with respect to the non-enforcement of the applicant's custody rights and the subsequent transfer of the custody to the grandparents.

The Court observes that as of 10 May 1990, the child, who had been placed with her grandparents when she was one and a half years old, had been living with them for approximately five years. During this period she had very few contacts with her father, the applicant, and had not met him since early 1987 (see paragraph 38 above). On 30 May 1990, steps to have the custody transferred to the grandparents were recommended by the National Social Welfare Board (see paragraph 22 above) and, on 13 August 1990, the local Social Welfare Board instituted proceedings to this effect before the District Court. The Board's request was dismissed by it on 8 May 1991 but upheld by the Court of Appeal on 25 September 1991; leave to appeal was refused by the Supreme Court on 21 January 1992 (see paragraphs 23, 27, 29 and 31 above).

The Court is of the view that in such circumstances there were sufficient grounds to justify non-enforcement of the applicant's custody right pending the outcome of the custody proceedings.

64. Furthermore, as to the outcome of these proceedings, it is undisputed that the transfer of custody constituted an interference with the applicant's right to respect for family life under paragraph 1 of Article 8

(art. 8-1), that this interference was "in accordance with the law" and pursued the legitimate aim of protecting "the rights" of the child within the meaning of paragraph 2 (art. 8-2). The Court sees no reason to doubt that the transfer of custody was "necessary in a democratic society". The Court of Appeal's judgment, which was based on expert opinion, had regard to the length of the girl's stay with the grandparents, her strong attachment to them and her feeling that their home was her own (see paragraphs 29 and 31 above). These reasons were not only relevant but also sufficient for the purposes of paragraph 2 of Article 8 (art. 8-2). The competent national authorities, which were in principle better placed than the international judge in evaluating the evidence before them (see, amongst many authorities, the above-mentioned Olsson v. Sweden (no. 2) judgment, pp. 35-36, para. 90), did not overstep their margin of appreciation in arriving at the decisions they did. Even taking into account the failure of the authorities to secure the applicant access to his child, the measure cannot be regarded as disproportionate to the legitimate aim of protecting her interests.

65. These aspects of the applicant's complaint do not therefore give rise to a separate breach of Article 8 (art. 8).

II. ALLEGED VIOLATION OF ARTICLE 5 OF PROTOCOL No. 7 (P7-5)

66. Before the Commission the applicant maintained that the same facts as constituted the alleged violation of Article 8 (art. 8) of the Convention also gave rise to a breach of Article 5 of Protocol No. 7 (P7-5) (right to equality of spouses in their relations with their children). The Commission concluded that no separate issue arose under the latter provision.

The applicant did not pursue this complaint before the Court, which does not find it necessary to deal with the matter of its own motion.

III. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 OF THE CONVENTION (art. 6-1)

A. Scope of the issues before the Court

67. The applicant complained under Article 6 para. 1 (art. 6-1) of the Convention that the second set of custody proceedings, in the first place, and, secondly, the ensuing enforcement proceedings exceeded a reasonable time. Thirdly, in the latter proceedings, he did not have a fair and impartial hearing before the Court of Appeal.

However, only the facts of the first complaint were declared admissible by the Commission. The Court will, in accordance with its established case-law, limit its examination to that complaint (see, for instance, the Helmers

v. Sweden judgment of 29 October 1991, Series A no. 212-A, p. 13, para. 25; and the above-mentioned Olsson (no. 2) judgment, pp. 29-30, para. 75).

B. Reasonableness of the length of the second set of custody proceedings

68. The applicant alleged a violation of Article 6 para. 1 (art. 6-1) of the Convention, according to which:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] tribunal ..."

Both the Government and the Commission disagreed with this contention.

69. The reasonableness of the length of proceedings is to be considered in the light of the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and that of the relevant authorities. On the latter point, the importance of what is at stake for the applicant in the litigation has to be taken into account (see the Vallée v. France judgment of 26 April 1994, Series A no. 289-A, p.17, para. 34).

70. The applicant maintained that the proceedings had been unduly delayed by the fact that the District Court had twice suspended them for no pressing reasons, the second time for a period of six months. The extensive investigations requested by the District Court were unnecessary as they were based exclusively on material already available to it (see paragraphs 14 and 24 above). The authorities thus did not satisfy the requirement of exceptional diligence to be observed in such cases.

71. The Court finds that the relevant period to be taken into consideration started on 13 August 1990, when the Social Welfare Board made a request to the District Court for transfer of custody, and ended on 21 January 1992, when the Supreme Court refused leave to appeal (see paragraphs 23 and 31 above).

72. Although it is essential that custody cases be dealt with speedily, the Court sees no reason to criticise the District Court for having suspended the proceedings twice in order to obtain expert opinions on the issue before it.

As regards the six months' delay the difficulties which the social welfare authorities encountered as a result of the grandparents' refusal to allow Sini to be subjected to investigation and to take part in related interviews must not be overlooked (see paragraph 24 above). Irrespective of whether there were sufficient reasons for suspending the hearing for as long as six months, it has to be noted that the overall length of the proceedings was approximately eighteen months. In itself this is not excessive for proceedings comprising three judicial levels.

Having regard to the particular circumstances of the case, the Court, like the Commission, finds that the length of the second custody proceedings did

not exceed a "reasonable time" and that there was thus no violation of Article 6 para. 1 (art. 6-1) of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 (art. 13) OF THE CONVENTION

73. The applicant complained that the non-enforcement of his custody and access rights and the length of the proceedings violated Article 13 (art. 13), which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

74. This complaint amounts in substance to the same as those made under Articles 6 and 8 (art. 6, art. 8). The Court, having regard to its findings above, shares the Commission's view that it is not necessary to examine this grievance.

V. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

75. Article 50 (art. 50) of the Convention reads:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

76. The applicant sought 200,000 Finnish marks in compensation for non-pecuniary damage, attributable to the anxiety and distress he had felt as a result of the lack of enforcement of his parental rights and the transfer of custody.

The Government considered the amount excessive, whereas the Commission's Delegate did not comment.

77. The Court sees no reason to doubt that the applicant suffered distress as a result of the non-enforcement of his access rights and that sufficient just satisfaction would not be provided solely by the finding of a violation. Deciding on an equitable basis, as is required by Article 50 (art. 50), it awards him 100,000 marks for non-pecuniary damage. This figure is to be increased by any value-added tax that may be chargeable (see, for instance, the Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, p. 38, para. 84).

B. Costs and expenses

78. The applicant further claimed reimbursement of costs and expenses, totalling 229,906.47 marks and 2,770 French francs, in respect of the following items:

(a) 37,751.47 marks for legal fees and expenses in the domestic proceedings, of which 31,692.20 marks related to the period after the entry into force of the Convention in respect of Finland; in addition at least 15,000 marks which he would normally have been billed if invoices had not been reduced to meet his modest resources after the cessation of an insurance policy;

(b) 161,600 marks for 202 hours' work (at 800 marks per hour) by his lawyers in connection with the Strasbourg proceedings;

(c) 15,555 marks and 2,770 francs to cover expenses incurred by the appearance of three lawyers at the Court's hearing on 21 March 1994.

The applicant further asked the Court to add to any award made with regard to the above "all possible value-added taxes".

79. The Government maintained that only costs and expenses which had been necessarily incurred after 10 May 1990 (date of ratification of the Convention by Finland) should be taken into consideration and they objected to 15,000 marks being added to the domestic costs, the amount being based merely on hypothetical calculations. In their view the number of working hours and the hourly rate were excessive and representation of the applicant by one lawyer alone would have been sufficient. They also disagreed with the applicant's approach to including value-added taxes.

The Delegate of the Commission did not comment.

80. As to item (a), the Court recalls that an award may be made only in so far as the costs were actually and necessarily incurred in order to avoid or obtain redress for the non-enforcement of his right of access from 10 May 1990 until 21 October 1993. This does not include costs in connection with the proceedings before the Court of Appeal leading to its decision of the latter date. It does not appear that the applicant had a legal obligation to pay the additional 15,000 marks claimed. As these costs were not actually incurred, this part of the claim must also be rejected. In the light of the above, the Court awards him 15,000 marks for domestic costs together with any relevant value-added tax.

As regards item (b), the Court, deciding on an equitable basis, awards the applicant 120,000 marks, also to be increased by any relevant value-added tax, from which must be deducted the 8,070 French francs already received for legal fees from the Council of Europe by way of legal aid.

The applicant has moreover received 13,654.43 French francs in respect of item (c) and the Court does not find it necessary to make any further award under this head.

FOR THESE REASONS, THE COURT

1. Holds unanimously that the non-enforcement of the applicant's right of access from 10 May 1990 until 21 October 1993 constituted a violation of Article 8 (art. 8) of the Convention;

2. Holds by six votes to three that there was no such violation thereafter;

3. Holds by six votes to three that the non-enforcement after 10 May 1990 of his right of custody and the subsequent transfer of the custody to the grandparents did not constitute a violation of Article 8 (art. 8) of the Convention;

4. Holds unanimously that it is not necessary to examine the applicant's complaint under Article 5 of Protocol No. 7 (P7-5);

5. Holds unanimously that the Court's examination under Article 6 para. 1 (art. 6-1) of the Convention is limited to the complaint concerning the length of the second set of custody proceedings and that there has been no violation of this provision;

6. Holds unanimously that it is not necessary to examine the applicant's allegations under Article 13 (art. 13) of the Convention;

7. Holds unanimously that Finland is to pay to the applicant, within three months and together with any value-added tax that may be chargeable, 100,000 (hundred thousand) Finnish marks for non-pecuniary damage, and, for legal fees and expenses, 135,000 (one hundred and thirty-five thousand) marks less 8,070 (eight thousand and seventy) French francs to be converted into Finnish marks at the rate applicable on the date of delivery of the present judgment;

8. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 September 1994.

Rolv RYSSDAL
President

Herbert PETZOLD
Acting Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the partly dissenting opinion of Mr De Meyer, joined by Mr Russo and Mr Jungwiert, is annexed to this judgment.

R.R.
H.P.

PARTLY DISSENTING OPINION OF JUDGE DE MEYER, JOINED BY JUDGES RUSSO AND JUNGWIERT

(Translation)

In our opinion, there has been a breach of the applicant's right to respect for his family life both as regards custody and as regards access, and in respect of the latter since 21 October 1993 as well as before then.

Over many years the Finnish authorities were faced with and tolerated the prolongation of a situation which they had on many occasions noted to be unlawful and which they were accordingly under a duty to bring to an end[*]. On each occasion they yielded in the face of the grandparents' persistent obstination and thus enabled them to create a fait accompli which the authorities eventually resigned themselves to endorsing as regards both custody and access.

Having thus brought upon themselves this capitulation on both fronts, they may well have thought that matters had got to such a point that it was no longer in the child's interests to go on trying to remedy the situation.

The fact remains nevertheless that ultimately the authorities deprived the applicant of the exercise of rights which naturally vested in him as father, although they had previously recognised on numerous occasions that he should not be denied them[**].

Far from stopping the infringement of these rights, they thus permanently put a seal on it.

[*] No distinction needs to be made between the various authorities which intervened in the case; they all engage the respondent State's responsibility.

[**] See, in particular, as regards access, paragraphs 10, 12, 25 and 29, and as regards custody, paragraphs 14, 16, 18, 22, 24 and 27 of this judgment.

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

COURT (CHAMBER)

CASE OF HUVIG v. FRANCE

(Application no. 11105/84)

JUDGMENT

STRASBOURG

24 April 1990

In the Huvig case[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 October 1989 and 27 March 1990,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 16 March 1989, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11105/84) against the French Republic lodged with the Commission under Article 25 (art. 25) by two nationals of that State, Mr Jacques Huvig and his wife Mrs Janine Huvig-Sylvestre, on 9 August 1984.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 (art. 8).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

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[*] Note by the Registrar: The case is numbered 4/1989/164/220. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

3. On 30 March 1989 the President of the Court decided, under Rule 21 § 6 and in the interests of sound administration of justice, that a single Chamber should be constituted to consider both the instant case and the Kruslin case[*].

The Chamber thus constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On the same day, 30 March 1989, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mrs D. Bindschedler-Robert, Mr F. Gölcüklü, Mr F. Matscher, Mr B. Walsh and Sir Vincent Evans (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted the Agent of the French Government ("the Government"), the Delegate of the Commission and the lawyer for the applicants on the need for a written procedure (Rule 37 § 1). In accordance with his orders and instructions, the Registrar received the Government's memorial on 18 August 1989; the applicants' representative and the Delegate of the Commission informed the Registrar on 11 July and 19 October respectively that they would not be filing memorials.

On 13 September and 10 October 1989 the Commission provided the Registrar with various documents he had asked for on the President's instructions.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President had directed on 21 June 1989 that the oral proceedings should open on 24 October 1989 (Rule 38).

6. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mr J.-P. PUISSOCHET, Head
of the Department of Legal Affairs, Ministry of Foreign Affairs, *Agent*,

Mrs I. CHAUSSADE, magistrat,
on secondment to the Department of Legal Affairs, Ministry of Foreign Affairs,

Miss M. PICARD, magistrat,
on secondment to the Department of Legal Affairs, Ministry of Foreign Affairs,

Mr M. DOBKINE, magistrat, Department of Criminal Affairs and Pardons, Ministry of Justice,

[*] Note by the Registrar: Case no. 7/1989/167/223.

Mr F. LE GUNEHEC, magistrat,
Department of Criminal Affairs and Pardons, Ministry of Justice, *Counsel*;

- for the Commission
Mr S. TRECHSEL, *Delegate*.

By letter of 11 July 1989 counsel for the applicant had informed the Registrar that he would not be attending the hearing.

The Court heard addresses by Mr Puissochet for the Government and by Mr Trechsel for the Commission, as well as their answers to a question it put.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. Mr Jacques Huvig and his wife Janine, née Sylvestre, currently live at Grau-du-Roi (Gard). Before he retired, Mr Huvig, with his wife's assistance, ran a wholesale fruit-and-vegetable business at Varennes-sur-Amance and Montigny-le-Roi (Haute-Marne).

8. On 20 December 1973 the Director of the Haute-Marne Tax Office lodged a complaint against the applicant and two other persons alleging tax evasion, failure to make entries in accounts and false accounting.

A judicial investigation was begun on 26 December by an investigating judge at Chaumont, assigned by the President of the Chaumont tribunal de grande instance.

Mr and Mrs Huvig's home was searched as were their business premises, pursuant to a warrant issued on 14 March 1974 by the investigating judge. The latter also issued a warrant to the gendarmerie at Langres (Haute-Marne) on 4 April requiring them to monitor and transcribe all Mr and Mrs Huvig's telephone calls - both business and private ones - on that day and the next day.

The telephone tapping took place from about 8 p.m. on 4 April 1974 until midnight on 5 April; on 6 April the second in command of the gendarmerie unit at Langres made a "summary report" on the tapping, which was subsequently brought to the knowledge of the applicants.

9. Mr Huvig was charged with tax evasion, forgery of private and business documents, failure to keep proper accounts, aiding and abetting misuse of company property and receiving funds derived from misuse of company property, and on 9 April he appeared before the investigating judge, who remanded him in custody; he was released on 11 June 1974.

Mrs Huvig, who from 20 March 1974 onwards was questioned several times as a witness, was charged on 13 May 1976 with aiding and abetting tax evasion and forgery of business documents.

10. On 23 December 1976 the investigating judge committed them for trial - with the other two persons mentioned above - at the Chaumont tribunal de grande instance, in Mr Huvig's case on charges of forgery, uttering, aiding and abetting misuse of company property, aiding and abetting tax evasion, aiding and abetting fraud, receiving funds derived from misuse of company property, and false or incomplete accounting, and in Mrs Huvig's case on charges of aiding and abetting forgery, aiding and abetting tax evasion and aiding and abetting improper keeping of accounts.

They raised as a preliminary issue several pleas of nullity, one of which related to the telephone tapping carried out on 4 and 5 April 1974. On 26 January 1982 the court ordered that these pleas should be heard as part of the main trial, and on 30 March 1982 it rejected them. Of the telephone tapping it said:

> "This investigative measure, even if it must remain an exceptional one, is within the investigating judge's powers as part of his inquiries during an investigation;
>
> No infringement of the rights of the defence has been substantiated, especially as in the instant case the results were unusable and did not serve as a basis for the prosecution ..."

In the same judgment it was held that the various offences with which the applicants were charged had been made out, except that of aiding and abetting fraud in Mr Huvig's case; in consequence, Mr Huvig was sentenced to eight months' imprisonment, six months of which were suspended, and Mrs Huvig to two months suspended.

11. The defendants, the civil party seeking damages and the prosecution appealed to the Dijon Court of Appeal.

The defence again raised the pleas of nullity that had been put forward unsuccessfully at the original trial. The Court of Appeal rejected all of them on 17 March 1983. As regards the impugned telephone tapping, it gave the following reasons for its decision:

> "[According to Mr Huvig, the investigating judge] infringed the rights of the defence and the guarantees afforded by law to all accused persons, seeing that, even though he had not yet had his first interview with the investigating judge (which took place on 9 April 1974 ...), he nonetheless had to be regarded as having already been charged, since the public prosecutor's application of 20 December 1973 was directed against him among others;
>
> But, as the trial court rightly pointed out, this investigative measure, while it must remain an exceptional one, is one of the prerogatives of an investigating judge carrying out inquiries as part of an investigation he is conducting;
>
> The Court has been able to check and satisfy itself that this operation, which to be effective must be carried out without the knowledge of the person suspected - or even

charged -, was carried out on the investigating judge's authority and under his supervision, without any subterfuge or ruse being employed;

The operation, moreover, lasted only 28 hours ..., did not yield anything usable and did not serve as a basis for the prosecution;

Nothing enables it to be established that the procedure thus followed had the result of jeopardising the exercise of the rights of the defence, since it must be borne in mind that Mr Huvig had not at that stage been officially charged by the investigating judge and that Article 81 of the Code of Criminal Procedure empowers the latter to take all investigative measures he deems useful for establishing the truth ...;

..."

At the same time the Dijon Court of Appeal upheld the judgment under appeal as to the finding that the defendants were guilty but increased the sentences passed on them by the trial court, sentencing the applicant to two years' imprisonment, twenty-two months of which were suspended, and to a fine of 10,000 French francs, and his wife to six months suspended.

12. The applicants appealed to the Court of Cassation on points of law. In the first of their grounds of appeal the Court of Appeal's judgment was criticised for its failure to quash the investigating judge's warrant of 4 April 1974:

"Firstly, investigating judges are not empowered by Article 81 of the Code of Criminal Procedure to tap the telephone of anybody - whether it be a person charged with a criminal offence, a third party or a witness - and such a procedure is contrary to the law, since the Code of Criminal Procedure has regulated searches, the seizing of property and the taking of evidence from witnesses and has not conferred on investigating judges the power to tap the telephones of persons against whom there is substantial, consistent evidence of guilt, such a procedure being prohibited both by Articles 6 and 8 (art. 6, art. 8) of the Convention ... and by Article 9 of the Civil Code, Articles L. 41 and L. 42 of the Post and Telecommunications Code and Article 368 of the Criminal Code;

Secondly, an individual who has been personally proceeded against by the civil party seeking damages and in respect of whom ... the public prosecutor has requested that an investigation be commenced is a party to the proceedings and must consequently be regarded as a person charged with a criminal offence within the meaning of Article 114 of the Code of Criminal Procedure; such a person must, therefore, before any statement is taken by the investigating judge, be informed of the charges against him, of his right not to make any statement and of his right to the assistance of a lawyer; the investigating judge accordingly cannot, without infringing the rights of the defence, record such a person's telephone conversations without the person's knowledge;

Lastly, since what is at issue is a nullity that is absolute as a matter of public policy - unlawful telephone tapping being a criminal offence -, it is of little importance that the conversations recorded were not used as the basis for the prosecution."

On pages 6 and 7 of the supplementary pleadings there were references to the Klass and Others judgment of the European Court of Human Rights (6 September 1978, Series A no. 28).

The Criminal Division of the Court of Cassation dismissed the appeal on 24 April 1984. It rejected the foregoing ground in the following terms:

> "In the judgment [of the Dijon Court of Appeal] the plea that the investigation proceedings were null and void because of the nullity of the warrant issued by the investigating judge on 4 April 1974 ordering that Huvig's telephone conversations should be monitored was rejected on the grounds that this measure was within the contemplation of Article 81 of the Code of Criminal Procedure and that as, moreover, it had not served as a basis for the prosecution, it had not had the effect of jeopardising the exercise of the rights of the defence;
>
> As these reasons stand and seeing, furthermore, that it has not been found - nor even alleged by the appellants - that the investigative measure in question, which was carried out under the supervision of the investigating judge, entailed any subterfuges or ruses, the Court of Appeal did, without laying itself open to the objection raised in the ground of appeal, provide a legal basis for its decision;
>
> ..." (Recueil Dalloz Sirey (DS) 1986, jurisprudence, pp. 125-128)

II. THE RELEVANT LEGISLATION AND CASE-LAW

13. French criminal law adopts the principle that any kind of evidence is admissible: "unless otherwise provided by statute, any type of evidence shall be admissible to substantiate a criminal charge ..." (Article 427 of the Code of Criminal Procedure).

There is no statutory provision which expressly empowers investigating judges to carry out or order telephone tapping, or indeed to carry out or order various measures which are nonetheless in common use, such as the taking of photographs or fingerprints, shadowing, surveillance, requisitions, confrontations of witnesses and reconstructions of crimes. On the other hand, the Code of Criminal Procedure does expressly confer power on them to take several other measures, which it regulates in detail, such as pre-trial detention, seizure of property and searches.

14. Under the old Code of Criminal Procedure the Court of Cassation had condemned the use of telephone tapping by investigating judges, at least in circumstances which it regarded as disclosing, on the part of a judge or the police, a lack of "fairness" incompatible with the rules of criminal procedure and the safeguards essential to the rights of the defence (combined divisions, 31 January 1888, ministère public c. Vigneau, Dalloz 1888, jurisprudence, pp. 72-74; Criminal Division, 12 June 1952, Imbert, Bull. no. 153, pp. 258-260; Civil Division, second section, 18 March 1955, époux Jolivot c. époux Lubrano et autres, DS 1955, jurisprudence, pp. 573-574, and Gazette du Palais (GP) 1955, jurisprudence, p. 249). Some trial

courts and courts of appeal which had to deal with the issue, on the other hand, showed some willingness to hold that such telephone tapping was lawful if there had been neither "entrapment" nor "provocation"; this view was based on Article 90 of the former Code (Seine Criminal Court, Tenth Division, 13 February 1957, ministère public contre X, GP 1957, jurisprudence, pp. 309-310).

15. Since the 1958 Code of Criminal Procedure came into force, the courts have had regard in this respect to, among others, Articles 81, 151 and 152, which provide:

Article 81

(first, fourth and fifth paragraphs)

"The investigating judge shall, in accordance with the law, take all the investigative measures which he deems useful for establishing the truth.

...

If the investigating judge is unable to take all the investigative measures himself, he may issue warrants to senior police officers (officiers de police judiciaire) in order to have them carry out all the necessary investigative measures on the conditions and subject to the reservations provided for in Articles 151 and 152.

The investigating judge must verify the information thus gathered.

..."

Article 151

(as worded at the material time)

"An investigating judge may issue a warrant requiring any judge of his court, any district-court judge within the territorial jurisdiction of that court, any senior police officer (officier de police judiciaire) with authority in that jurisdiction or any investigating judge to undertake any investigative measures he considers necessary in places coming under their respective jurisdictions.

The warrant shall indicate the nature of the offence to which the proceedings relate. It shall be dated and signed by the issuing judge and shall bear his seal.

It may only order investigative measures directly connected with the prosecution of the offence to which the proceedings relate.

..."

Article 152

"The judges or senior police officers instructed to act shall exercise, within the limits of the warrant, all the powers of the investigating judge.

..."

16. An Act of 17 July 1970 added to the Civil Code an Article 9 guaranteeing to everyone "the right to respect for his private life". It also added to the Criminal Code an Article 368, whereby:

"Anyone who wilfully intrudes on the privacy of others:

1. By listening to, recording or transmitting by means of any device, words spoken by a person in a private place, without that person's consent;

2. ...

shall be liable to imprisonment for not less than two months and not more than one year and a fine ... or to only one of these two penalties."

During the preparatory work, one of the vice-chairmen of the National Assembly's Statutes Committee, Mr Zimmermann, sought "certain assurances" that this enactment "[would] not prevent the investigating judge from issuing strictly within the limits of the law warrants to have telephones tapped, obviously without making use of any form of inducement and in compliance with all the legal procedures" (Journal officiel, National Assembly, 1970 proceedings, p. 2074). The Minister of Justice, Mr René Pleven, replied: "... there is no question of interfering with the powers of investigating judges, who are indeed empowered, in the circumstances laid down by law, to order tapping"; he added a little later: "when an official taps a telephone, he can only do so lawfully if he has a warrant from a judicial authority or is acting on the instructions of a minister" (ibid., p. 2075). Both Houses of Parliament thereupon passed the Bill without amending it on this point.

17. Article 41 of the Post and Telecommunications Code provides that any public servant or anyone authorised to assist with the performance of relevant official duties who breaches the secrecy of correspondence entrusted to the telecommunications service shall be liable to the penalties provided for in Article 187 of the Criminal Code - a fine, imprisonment and temporary disqualification from any public office or employment. Article 42 provides that anyone who, without permission from the sender or the addressee, divulges, publishes or uses the content of correspondence transmitted over the air or by telephone shall be liable to the penalties provided for in Article 378 of the Criminal Code (on professional confidentiality) - a fine or imprisonment.

General Instruction no. 500-78 on the telephone service - intended for Post and Telecommunications Authority officials - contains the following

provisions, however, given here in the amended version of 1964 (Article 24 of Part III):

> "Postmasters and sub-postmasters are required to comply with any requests that ... calls to or from a specified telephone should be monitored by the relevant authority, made by:
>
> 1. An investigating judge (Arts. 81, 92 and 94 of the Code of Criminal Procedure) or any judge or senior police officer (officier de police judiciaire) to whom a judicial warrant has been issued (Art. 152);
>
> ..."

The General Instruction was published in the official bulletin of the Ministry of Post and Telecommunications and was described by the Government as an "implementing regulation".

18. The striking development of various forms of serious crime - large-scale thefts and robberies, terrorism, drug-trafficking - appears in France to have led to a marked increase in the frequency with which investigating judges resort to telephone tapping. The courts have as a result given many more decisions on the subject than formerly; telephone tapping has not been held to be unlawful in itself, although the courts have occasionally shown some distaste for it (Paris Court of Appeal, Ninth Criminal Division, 28 March 1960, Cany et Rozenbaum, GP 1960, jurisprudence, pp. 253-254).

The vast majority of the decisions cited to the Court by the Government and the Commission, or of which the Court has had cognisance by its own means, are of later date than the facts of the instant case (April 1974) and have gradually provided a number of clarifications. These do not all stem from judgments of the Court of Cassation, and do not for the time being constitute a uniform body of case-law, because the decisions or reasons given in some of the cases have remained unique. They may be summarised as follows.

(a) Articles 81 and 151 of the Code of Criminal Procedure (see paragraph 15 above) empower investigating judges - and them alone, as far as judicial investigations are concerned - to carry out telephone tapping or, much more commonly in practice, to issue a warrant to that effect to a senior police officer (officier de police judiciaire) within the meaning of Article 16 (see, in particular, Court of Cassation, Criminal Division, 9 October 1980, Tournet, Bull. no. 255, pp. 662-664; 24 April 1984 - see paragraph 12 above; 23 July 1985, Kruslin, Bull. no. 275, pp. 713-715; 4 November 1987, Croce, Antoine et Kruslin, DS 1988, sommaires, p. 195; 15 February 1988, Schroeder, and 15 March 1988, Arfi, Bull. no. 128, pp. 327-335). Telephone tapping is an "investigative measure" which may sometimes be "useful for establishing the truth". It is comparable to the seizure of letters or telegrams (see, among other authorities, Poitiers Court of Appeal, Criminal Division, 7 January 1960, Manchet, Juris-Classeur périodique (JCP) 1960, jurisprudence, no. 11599, and Paris Court of Indictment Division, 27 June

1984, F. et autre, DS 1985, jurisprudence, pp. 93-96) and it similarly does not offend the provisions of Article 368 of the Criminal Code, having regard to the legislative history and to the principle that any kind of evidence is admissible (see paragraphs 13 and 16 above and Strasbourg tribunal de grande instance, 15 February 1983, S. et autres, unreported; Colmar Court of Appeal, 9 March 1984, Chalvignac et autre, unreported; Paris Court of Appeal, Indictment Division, judgment of 27 June 1984 previously cited and judgment of 31 October 1984, Li Siu Lung et autres, GP 1985, sommaires, pp. 94-95).

(b) The investigating judge can only issue such a warrant "where there is a presumption that a specific offence has been committed which has given rise to the investigation" which he is responsible for conducting and not in respect of a whole category of offences "on the off chance"; this is clear not only from Articles 81 and 151 (second and third paragraphs) of the Code of Criminal Procedure but also "from the general principles of criminal procedure" (see, among other authorities, Court of Cassation, Criminal Division, judgments of 23 July 1985, 4 November 1987 and 15 March 1988 previously cited).

The French courts do not seem ever to have held that telephone tapping is lawful only where the offences being investigated are of some seriousness or if the investigating judge has specified a maximum duration for it.

(c) "Within the limits of the warrant" that has been issued to him - if need be by fax (Limoges Court of Appeal, Criminal Division, 18 November 1988, Lecesne et autres, DS 1989, sommaires, p. 394) - the senior police officer exercises "all the powers of the investigating judge" (Article 152 of the Code of Criminal Procedure). He exercises these under the supervision of the investigating judge, who by the fifth paragraph of Article 81 is bound to "verify the information ... gathered" (see, among other authorities, Court of Cassation, Criminal Division, judgments of 9 October 1980, 24 April 1984, 23 July 1985, 4 November 1987 and 15 March 1988 previously cited).

The warrant apparently sometimes takes the form of a general delegation of powers, including - without its being expressly mentioned - the power to tap telephones (Court of Cassation, Civil Division, second section, judgment of 18 March previously cited, and Paris Court of Appeal, judgment of 28 March 1960 previously cited).

(d) In no case may a police officer tap telephones on his own initiative without a warrant, for example during the preliminary investigation preceding the opening of the judicial investigation (see, among other authorities, Court of Cassation, Criminal Division, 13 June 1989, Derrien, and 19 June 1989, Grayo, Bull. no. 254, pp. 635-637, and no. 261, pp. 648-651; full court, 24 November 1989, Derrien, DS 1990, p. 34, and JCP 1990, jurisprudence, no. 21418, with the submissions of Mr Advocate-General Emile Robert).

(e) Telephone tapping must not be accompanied by "any subterfuge or ruse" (see, among other authorities, Court of Cassation, Criminal Division, judgment of 9 October 1980, 24 April 1984, 23 July 1985, 4 November 1987, 15 February 1988 and 15 March 1988 previously cited) failing which the information gathered by means of it must be either deleted or removed from the case file (Court of Cassation, Criminal Division, judgments of 13 and 19 June 1989 previously cited).

(f) The telephone tapping must also be carried out "in such a way that the exercise of the rights of the defence cannot be jeopardised" (see, among other authorities, Court of Cassation, Criminal Division, judgments of 9 October 1980, 24 April 1984, 23 July 1985, 4 November 1987, 15 February 1988, 15 March 1988 and 19 June 1989 previously cited). In particular, the confidentiality of the relations between suspect or person accused and lawyer must be respected, as must, more generally, a lawyer's duty of professional confidentiality, at least when he is not acting in any other capacity (Aix-en-Provence Court of Appeal, Indictment Division, 16 June 1982 and 2 February 1983, Sadji Hamou et autres, GP 1982, jurisprudence, pp. 645-649, and GP 1983, jurisprudence, pp. 313-315; Paris Court of Appeal, Indictment Division, judgment of 27 June 1984 previously cited).

(g) With this reservation, it is permissible to tap telephone calls to or from a charged person (Court of Cassation, Criminal Division, judgments of 9 October 1980 and 24 April 1984 previously cited) or a mere suspect (judgments of the Strasbourg tribunal de grande instance, 15 February 1983, the Colmar Court of Appeal, 9 March 1984, and the Indictment Division of the Paris Court of Appeal, 27 June 1984, previously cited) or even a third party, such as a witness, whom there is reason to believe to be in possession of information about the perpetrators or circumstances of the offence (see, among other authorities, Aix-en-Provence Court of Appeal, judgment of 16 June 1982 previously cited).

(h) A public telephone-box may be tapped (Seine Criminal Court, Tenth Division, 30 October 1964, Trésor public et Société de courses c. L. et autres, DS 1965, jurisprudence, pp. 423-424) just like a private line, irrespective of whether current is diverted to a listening station (Court of Cassation, Criminal Division, 13 June 1989, and full court, 24 November 1989, previously cited).

(i) The senior police officer supervises the tape or cassette recording of the conversations and their transcription, where he does not carry out these operations himself; when it comes to choosing extracts to submit "for examination by the court", it is for him to determine "what words may render the speaker liable to criminal proceedings". He performs these duties "on his own responsibility and under the supervision of the investigating judge" (Strasbourg tribunal de grande instance, judgment of 15 February 1983 previously cited, upheld by the Colmar Court of Appeal on 9 March 1984; Paris Court of Appeal, judgment of 27 June 1984 previously cited).

(j) The original tapes are "exhibits", not "investigation documents", but have only the weight of circumstantial evidence; their contents are transcribed in reports in order to give them a physical form so that they can be inspected (Court of Cassation, Criminal Division, 28 April 1987, Allieis, Bull. no. 173, pp. 462-467).

(k) If transcription raises a problem of translation into French, Articles 156 et seq. of the Code of Criminal Procedure, which deal with expert opinions, do not apply to the appointment and work of the translator (Court of Cassation, Criminal Division, 6 September 1988, Fekari, Bull. no. 317, pp. 861-862 (extracts), and 18 December 1989, M. et autres, not yet reported).

(l) There is no statutory provision prohibiting the inclusion in the file on a criminal case of evidence from other proceedings, such as tapes and reports containing transcriptions, if they may "assist the judges and help to establish the truth", provided that such evidence is added under an adversarial procedure (Court of Cassation, Criminal Division, judgments of 23 July 1985 and 6 September 1988 previously cited).

(m) The defence must be able to inspect the reports containing transcriptions, to hear the original tape recordings, to challenge their authenticity during the judicial investigation and subsequent trial and to apply for any necessary investigative measures - such as an expert opinion - relating to their contents and the circumstances in which they were made (see, among other authorities, Court of Cassation, Criminal Division, 23 July 1985, previously cited; 16 July 1986, Illouz, unreported; and 28 April 1987, Allieis, previously cited).

(n) Just as the investigating judge supervises the senior police officer, he is himself supervised by the Indictment Division, to which he - exactly like the public prosecutor - may apply under Article 171 of the Code of Criminal Procedure.

Trial courts, courts of appeal and the Court of Cassation may have to deal with objections or grounds of appeal as the case may be - particularly by defendants but also, on occasion, by the prosecution (Court of Cassation, judgments of 19 June and 24 November 1989 previously cited) - based on a failure to comply with the requirements summarised above or with other rules which the parties concerned claim are applicable. A failure of this kind, however, would not automatically nullify the proceedings such that a court of appeal could be held to have erred if it had not dealt with them of its own motion; they affect only defence rights (Court of Cassation, Criminal Division, 11 December 1989, Takrouni, not yet reported).

19. Since at least 1981, parties have increasingly often relied on Article 8 (art. 8) of the Convention - and, much less frequently, on Article 6 (art. 6) (Court of Cassation, Criminal Division, 23 April 1981, Pellegrin et autres, Bull. no. 117, pp. 328-335, and 21 November 1988, S. et autres) - in support of their complaints about telephone tapping; they have sometimes as in the

instant case (see paragraph 12 above) - cited the case-law of the European Court of Human Rights.

Hitherto only telephone tapping carried out without a warrant, during the police investigation (see, among other authorities, Court of Cassation, judgments of 13 June and 24 November 1989 previously cited), or in unexplained circumstances (see, among other authorities, Court of Cassation, judgment of 19 June 1989 previously cited) or in violation of defence rights (Paris Court of Appeal, Indictment Division, judgment of 31 October 1984 previously cited) has been held by the French courts to be contrary to Article 8 § 2 (art. 8-2) ("in accordance with the law") or to domestic law in the strict sense. In all other cases the courts have either found no violation (Court of Cassation, Criminal Division, judgments of 24 April 1984, 23 July 1985, 16 July 1986, 28 April 1987, 4 November 1987, 15 February 1988, 15 March 1988, 6 September 1988 and 18 December 1989 previously cited, and 16 November 1988, S. et autre, unreported, and the judgments of 15 February 1983 (Strasbourg), 9 March 1984 (Colmar) and 27 June 1984 (Paris) previously cited) or else ruled the plea inadmissible for various reasons (Court of Cassation, Criminal Division, judgments of 23 April 1981, 21 November 1988 and 11 December 1989 previously cited and the unreported judgments of 24 May 1983, S. et autres; 23 May 1985, Y. H. W.; 17 February 1986, H.; 4 November 1986, J.; and 5 February 1990, B. et autres).

20. While academic opinion is divided as to the compatibility of telephone tapping as carried out in France - on the orders of investigating judges or others - with the national and international legal rules in force in the country, there seems to be unanimous agreement that it is desirable and even necessary for Parliament to try to solve the problem by following the example set by many foreign States (see in particular Gaëtan di Marino, comments on the Tournet judgment of 9 October 1980 (Court of Cassation), JCP 1981, jurisprudence, no. 19578; Albert Chavanne, ‘Les résultats de l’audio-surveillance comme preuve pénale’, Revue internationale de droit comparé, 1986, pp. 752-753 and 755; Gérard Cohen-Jonathan, ‘Les écoutes téléphoniques’, Studies in honour of Gérard J. Wiarda, 1988, p. 104; Jean Pradel, ‘Écoutes téléphoniques et Convention européenne des Droits de l’Homme’, DS 1990, chronique, pp. 17-20). In July 1981 the Government set up a study group chaired by Mr Robert Schmelck, who was then President of the Court of Cassation, and consisting of senators and MPs of various political persuasions, judges, university professors, senior civil servants, judges and a barrister. The group submitted a report on 25 June 1982, but this has remained confidential and has not yet led to a bill being tabled.

PROCEEDINGS BEFORE THE COMMISSION

21. The applicants applied to the Commission on 9 August 1984 (application no. 11105/84). Mr Huvig relied on Article 6 § 1 (art. 6-1) of the Convention and complained of the investigating judge's refusal to grant his application for an expert opinion on technical and financial matters; he ascribed this refusal to evidence improperly taken from a witness. He and his wife also complained under Article 6 § 3 (a) (art. 6-3-a) of the delay in charging them. Lastly, both alleged that the telephone tapping carried out on 4 and 5 April 1974 had contravened Article 8 (art. 8).

22. On 15 October 1987 the Commission declared the first complaint inadmissible as being manifestly ill-founded (under Article 27 § 2) (art. 27-2) and the second complaint inadmissible for failure to exhaust domestic remedies (under Articles 26 and 27 § 3) (art. 26, art. 27-3). The third and final complaint, however, it declared admissible, on 6 July 1988.

In its report of 14 December 1988 (made under Article 31) (art. 31) the Commission expressed the opinion by ten votes to two that there had been a breach of Article 8 (art. 8). The full text of the Commission's opinion and of the separate opinion contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS TO THE COURT

23. At the hearing the Court was requested:

(a) by the Agent of the Government to "hold that in the instant case there ha[d] been no conduct disclosing a breach of Article 8 (art. 8) of the Convention"; and

(b) by the Delegate of the Commission to "find that there ha[d] been a violation of Article 8 (art. 8)".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

24. Mr and Mrs Huvig claimed that in the instant case there had been a breach of Article 8 (art. 8), which provides:

[*] Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 176-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

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

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

The Government disputed that submission, while the Commission agreed with it in substance.

25. The telephone tapping complained of amounted without any doubt to an "interference by a public authority" with the exercise of the applicants' right to respect for their "correspondence" and their "private life" (see the Klass and Others judgment of 8 September 1978, Series A no. 28, p. 21, § 41, and the Malone judgment of 2 August 1984, Series A no. 82, p. 30, § 64). The Government did not dispute this.

Such an interference contravenes Article 8 (art. 8) unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 (art. 8-2) and furthermore is "necessary in a democratic society" in order to achieve them.

A. "In accordance with the law"

26. The expression "in accordance with the law", within the meaning of Article 8 § 2 (art. 8-2), requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law.

1. Whether there was a legal basis in French law

27. It was a matter of dispute before the Commission and the Court whether the first condition was satisfied in the instant case.

The applicants said it was not. They submitted that there was no law in France governing the matter. France being a country of written law, case-law was a source only of law in general (droit), not of law in the statutory sense (loi). Furthermore, the courts had left the question of tapping private telephones to the unfettered discretion of investigating judges.

In the Government's submission, there was no contradiction between Article 368 of the Criminal Code and Article 81 of the Code of Criminal Procedure, at least not if regard was had to the drafting history of the former (see paragraph 16 above). The Code of Criminal Procedure, they argued, did not give an exhaustive list of the investigative means available to the investigating judge - measures as common as the taking of photographs or

fingerprints, shadowing, surveillance, requisitions, confrontations between witnesses, and reconstructions of crimes, for example, were not mentioned in it either (see paragraph 13 above). The provisions added to Article 81 by Articles 151 and 152 were supplemented in national case-law (see paragraphs 15 and 18-19 above). By "law" as referred to in Article 8 § 2 (art. 8-2) of the Convention was meant the law in force in a given legal system, in this instance a combination of the written law - essentially Articles 81, 151 and 152 of the Code of Criminal Procedure - and the case-law interpreting it.

The Delegate of the Commission considered that in the case of the Continental countries, including France, only a substantive enactment of general application - whether or not passed by Parliament - could amount to a "law" for the purposes of Article 8 § 2 (art. 8-2) of the Convention. Admittedly the Court had held that "the word ‘law’ in the expression ‘prescribed by law’ cover[ed] not only statute but also unwritten law" (see the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 30, § 47, the Dudgeon judgment of 22 October 1981, Series A no. 45, p. 19, § 44, and the Chappell judgment of 30 March 1989, Series A no. 152, p. 22, § 52), but in those instances the Court was, so the Delegate maintained, thinking only of the common-law system. That system, however, was radically different from, in particular, the French system. In the latter, case-law was undoubtedly a very important source of law, but a secondary one, whereas by "law" the Convention meant a primary source.

28. Like the Government and the Delegate, the Court points out, firstly, that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among many other authorities, the Malone judgment previously cited, Series A no. 82, p. 36, § 79, and the Eriksson judgment of 22 June 1989, Series A no. 156, p. 25, § 62). It is therefore not for the Court to express an opinion contrary to theirs on whether telephone tapping ordered by investigating judges is compatible with Article 368 of the Criminal Code. For many years now, the courts - and in particular the Court of Cassation - have regarded Articles 81, 151 and 152 of the Code of Criminal Procedure as providing a legal basis for telephone tapping carried out by a senior police officer (officier de police judiciaire) under a warrant issued by an investigating judge.

Settled case-law of this kind cannot be disregarded. In relation to paragraph 2 of Article 8 (art. 8-2) of the Convention and other similar clauses, the Court has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both enactments of lower rank than statutes (see, in particular, the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 45, § 93) and unwritten law. The Sunday Times, Dudgeon and Chappell judgments admittedly concerned the United Kingdom, but it would be wrong to exaggerate the distinction between common-law countries and Continental countries, as the

Government rightly pointed out. Statute law is, of course, also of importance in common-law countries. Conversely, case-law has traditionally played a major role in Continental countries, to such an extent that whole branches of positive law are largely the outcome of decisions by the courts. The Court has indeed taken account of case-law in such countries on more than one occasion (see, in particular, the Müller and Others judgment of 24 May 1988, Series A no. 133, p. 20, § 29, the Salabiaku judgment of 7 October 1988, Series A no. 141, pp. 16-17, § 29, and the Markt Intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989, Series A no. 165, pp. 18-19, § 30). Were it to overlook case-law, the Court would undermine the legal system of the Continental States almost as much as the Sunday Times judgment of 26 April 1979 would have "struck at the very roots" of the United Kingdom's legal system if it had excluded the common law from the concept of "law" (Series A no. 30, p. 30, § 47). In a sphere covered by the written law, the "law" is the enactment in force as the competent courts have interpreted it in the light, if necessary, of any new practical developments.

In sum, the interference complained of had a legal basis in French law.

2. "Quality of the law"

29. The second requirement which emerges from the phrase "in accordance with the law" - the accessibility of the law - does not raise any problem in the instant case.

The same is not true of the third requirement, the law's "foreseeability" as to the meaning and nature of the applicable measures. As the Court pointed out in the Malone judgment of 2 August 1984, Article 8 § 2 (art. 8-2) of the Convention "does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law". It

> "thus implies ... that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 (art. 8-1) ... Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident ... Undoubtedly ..., the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations"

- or judicial investigations -

> "as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.

> ... [In its judgment of 25 March 1983 in the case of Silver and Others the Court] held that 'a law which confers a discretion must indicate the scope of that discretion', although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law (Series A no. 61, pp. 33-34, §§ 88-89). The degree of precision required of the 'law' in this connection will depend upon the particular subject-matter ... Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive"

- or to a judge -

> "to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity ... to give the individual adequate protection against arbitrary interference." (Series A no. 82, pp. 32-33, §§ 67-68)

30. The Government submitted that the Court must be careful not to rule on whether French legislation conformed to the Convention in the abstract and not to give a decision based on legislative policy. The Court was therefore not concerned, they said, with matters irrelevant to Mr and Mrs Huvig's case, such as the fact that there was no requirement that an individual whose telephone had been monitored should be so informed after the event where proceedings had not in the end been taken against him. Such matters were in reality connected with the condition of "necessity in a democratic society", fulfilment of which had to be reviewed in concrete terms, in the light of the particular circumstances of each case.

31. The Court is not persuaded by this argument. Since it must ascertain whether the interference complained of was "in accordance with the law", it must inevitably assess the relevant French "law" in force at the time in relation to the requirements of the fundamental principle of the rule of law. Such a review necessarily entails some degree of abstraction. It is none the less concerned with the "quality" of the national legal rules applicable to Mr and Mrs Huvig in the instant case.

32. Tapping and other forms of interception of telephone conversations represent a serious interference with private life and correspondence and must accordingly be based on a "law" that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated.

Before the Commission (supplementary observations of 17 October 1988, pages 4-7, summarised in paragraph 31 of the report) and, in a slightly different form, before the Court, the Government listed seventeen safeguards which they said were provided for in French law (droit). These related either to the carrying out of telephone tapping or to the use made of the results or to the means of having any irregularities righted, and the Government claimed that the applicants had not been deprived of any of them.

33. The Court does not in any way minimise the value of several of the safeguards, in particular the need for a decision by an investigating judge, who is an independent judicial authority; the latter's supervision of senior police officers and the possible supervision of the judge himself by the Indictment Division (chambre d'accusation) of the Court of Appeal, by trial courts and courts of appeal and, if need be, by the Court of Cassation; the exclusion of any "subterfuge" or "ruse" consisting not merely in the use of telephone tapping but in an actual trick, trap or provocation; and the duty to respect the confidentiality of relations between suspect or accused and lawyer.

It has to be noted, however, that only some of these safeguards are expressly provided for in Articles 81, 151 and 152 of the Code of Criminal Procedure. Others have been laid down piecemeal in judgments given over the years, practically all of them after the interception complained of by the applicants (April 1974). Some have not yet been expressly laid down in the case-law at all, at least according to the information gathered by the Court; the Government appear to infer them either from general enactments or principles or else from an analogical interpretation of legislative provisions - or court decisions - concerning investigative measures different from telephone tapping, notably searches and seizure of property. Although logical in itself, such "extrapolation" does not provide sufficient legal certainty in the present context.

34. Above all, the system does not for the time being afford adequate safeguards against various possible abuses. For example, the categories of people liable to have their telephones tapped by judicial order and the nature of the offences which may give rise to such an order are nowhere defined. Nothing obliges a judge to set a limit on the duration of telephone tapping. Similarly unspecified are the procedure for drawing up the summary reports containing intercepted conversations; the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge (who can hardly verify the number and length of the original tapes on the spot) and by the defence; and the circumstances in which recordings may or must be erased or the tapes be destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court. The information provided by the Government on these various points shows at best the existence of a practice, but a practice lacking the necessary regulatory control in the absence of legislation or case-law.

35. In short, French law, written and unwritten, does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. This was truer still at the material time, so that Mr and Mrs Huvig did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society (see the Malone judgment previously cited, Series A no.

82, p. 36, § 79). Admittedly they suffered little or no harm from this, as the results of the impugned telephone tapping did not "serve as a basis for the prosecution" (see paragraphs 10-12 above), but the Court has consistently held that a violation is conceivable even in the absence of any detriment; the latter is relevant only to the application of Article 50 (art. 50) (see, inter alia, the Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 21, § 42).

There has therefore been a breach of Article 8 (art. 8) of the Convention.

B. Purpose and necessity of the interference

36. Having regard to the foregoing conclusion, the Court, like the Commission (see paragraph 67 of the report), does not consider it necessary to review compliance with the other requirements of paragraph 2 of Article 8 (art. 8-2) in this case.

II. APPLICATION OF ARTICLE 50 (art. 50)

37. By Article 50 (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

In their written observations of February and September 1988 the applicants asked the Commission to "award them just compensation", but before the Court they did not seek either compensation or reimbursement of costs and expenses.

38. As these are not matters which the Court has to examine of its own motion (see, as the most recent authority, the Kostovski judgment of 20 November 1989, Series A no. 166, p. 18, § 46), it finds that it is unnecessary to apply Article 50 (art. 50) in this case.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a breach of Article 8 (art. 8);

2. Holds that it is unnecessary to apply Article 50 (art. 50).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 April 1990.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

COURT (CHAMBER)

CASE OF JACUBOWSKI v. GERMANY

(Application no. 15088/89)

JUDGMENT

STRASBOURG

23 June 1994

In the case of Jacubowski v. Germany[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr R. BERNHARDT,
Mr B. WALSH,
Mr R. MACDONALD,
Mr R. PEKKANEN,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr G. MIFSUD BONNICI,
Mr D. GOTCHEV,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 24 November 1993 and 26 May 1994,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the Government of the Federal Republic of Germany ("the Government") and by the European Commission of Human Rights ("the Commission") on 19 February and 12 March 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 15088/89) against Germany lodged with the Commission under Article 25 (art. 25) by a German national, Mr Manfred Jacubowski, on 11 April 1989.

The Government's application referred to Articles 32 and 48 (art. 32, art. 48); the Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the application and of the request was to obtain a decision as to whether the facts of the

[*] Note by the Registrar. The case is numbered 7/1993/402/480. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). The lawyer was given leave by the President to use the German language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 February 1993, in the presence of the Registrar, Mr Bernhardt, the Vice-President, drew by lot the names of the other seven members, namely Mr B. Walsh, Mr R. Macdonald, Mr R. Pekkanen, Mr M.A. Lopes Rocha, Mr L. Wildhaber, Mr G. Mifsud Bonnici and Mr D. Gotchev (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Deputy Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 16 July 1993 and the applicant's memorial on 19 July. On 30 July the Deputy Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 14 September 1993 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the decision of the President, who had also given the Government's representatives leave to address the Court in German (Rule 27 para. 2), the hearing took place in public in the Human Rights Building, Strasbourg, on 22 November 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr J. MEYER-LADEWIG, Ministerialdirigent,
Federal Ministry of Justice, *Agent*,
Mr A. VON MÜHLENDAHL, Ministerialrat,
Federal Ministry of Justice, *Adviser*;

- for the Commission

Mr J.A. FROWEIN, *Delegate*;

- for the applicant

Mr W. MEILICKE, Rechtsanwalt, *Counsel*,
Mr T. HEIDEL, Rechtsanwalt, *Adviser*.

The Court heard addresses by Mr Meyer-Ladewig, Mr von Mühlendahl, Mr Frowein and Mr Meilicke, and also replies to its questions.

AS TO THE FACTS

7. Mr Manfred Jacubowski lives in Bonn and is a journalist by profession. At the material time he was working as editor-in-chief of a news agency run by a commercial company, the Deutsche Depeschendienst GmbH, of which he was a founder member and manager. This company filed a petition in bankruptcy (Eröffnung des Konkursverfahrens) on 31 March 1983. A new company, the Deutsche Depeschendienst AG ("the ddp"), was created subsequently, and Mr Jacubowski became its sole director (Vorstand) and editor-in-chief on 3 May 1983.

8. Shortly afterwards, he instituted two different sets of proceedings. In the first (A) he sought to challenge his dismissal and in the second (B) he claimed the right to reply to a press release issued by his employer. At almost the same time, he became involved in a third set of proceedings (C) brought against him under the Unfair Competition Act of 7 June 1909 (Gesetz gegen den unlauteren Wettbewerb - "the 1909 Act").

A. The applicant's dismissal

9. For reasons connected with the applicant's financial management, the ddp's supervisory board (Aufsichtsrat) dismissed him without notice from all his duties on 17 July 1984. On 25 August it sent him another letter of dismissal on the ground that he had allegedly communicated inside information to third persons. Mr Jacubowski challenged the validity of the latter dismissal, which was renewed on 12 October. A further dismissal letter was sent to him on 28 October, after he had distributed a circular letter and newspaper cuttings among fellow professionals on 25 September (see paragraph 14 below). A final dismissal notice, based on new grounds, was sent to him on 12 February 1985.

10. At the end of legal proceedings instituted by the applicant, the Cologne Court of Appeal (Oberlandesgericht) held on 11 October 1988 that he had been validly dismissed on 28 October 1984.

According to the court, the distribution of the circular and cuttings was to be regarded as such a serious breach of Mr Jacubowski's duty of loyalty that it was not possible for the employer to continue his contract, nor could it reasonably be expected. By sending press articles to a large number of influential professionals and endorsing in the circular their objectively unfavourable statements about the ddp's competence and business situation, Mr Jacubowski had knowingly run the risk of causing the company considerable prejudice; such behaviour on the part of a leading employee was unacceptable and therefore not covered by the constitutional right to freedom of expression.

Furthermore, it could not be inferred from the circular that its main aim was to defend the applicant's reputation and honour; it contained neither

any reference to the ddp's allegations nor any arguments in Mr Jacubowski's defence. The circular's last paragraph clearly showed that the sole purpose of the mailing had been to disseminate adverse comments on the applicant's former employer and to establish contact with the addressees.

11. Mr Jacubowski challenged this judgment in the Federal Court of Justice (Bundesgerichtshof) and the Federal Constitutional Court (Bundesverfassungsgericht), but on 26 June and 25 October 1989 respectively those courts declined to accept for adjudication his applications on the ground that they had no prospects of success.

B. The applicant's reply to his employer's press release

12. In the meantime, on 16 August 1984, the agency had published a press release concerning its own reorganisation. In this it also criticised the applicant's management in the following terms:

> "... after the private limited company ... had filed a petition in bankruptcy on 31 March 1983, the public limited company D. - again under the management of Manfred Jacubowski - started up on 20 April 1983 with a capital of one million DM. Jacubowski's unchanged business methods and his inappropriate behaviour to clients, together with the lack of any efficient, reliable editorial management meant that no advantage was taken of the opportunity to make a fresh start, and indeed they led to a loss of clients. Until this spring Jacubowski misled the supervisory board about vital aspects of the developments. In particular, liabilities incurred in the private company's period of existence were transferred to the public company, and this put the D. agency into financial difficulties again. Only the timely intervention of the former finance and accounting director, K., the current director, prevented more serious harm being done, so that today D. is once again on a sound financial footing. On 17 July - the date of the general meeting - Jacubowski was dismissed without notice on account of his business incompetence ... K. was appointed sole director."

13. On 29 August and 4 September 1984 the applicant requested the ddp to publish his reply (Gegendarstellung) to the press release, but without success. He then sought an interim injunction (einstweilige Verfügung) from the Bonn Regional Court (Landgericht), but this was refused on 17 September 1984, on the ground that the proposed reply was not limited to answering the allegations of fact in the press release (gegenteilige Tatsachenbehauptung) but gave a completely new version of the sequence of events (Auflistung), which had not been an issue in the ddp's press release.

On 11 October the Cologne Court of Appeal reversed the Regional Court's judgment and ordered the agency to accede to Mr Jacubowski's request, which it did a month later. In the reply then published the applicant answered in detail all the main accusations contained in the ddp's press release.

C. The proceedings under the Unfair Competition Act

14. In the meantime, on 25 September 1984, Mr Jacubowski had sent thirteen articles from newspapers with large circulations to forty newspaper publishers and newspaper, radio and television journalists who, as clients of the ddp, had received the press release of 16 August (see paragraph 12 above). These articles gave critical accounts of his dismissal, the circumstances surrounding it and the ddp's activities in general. They reported in particular that the ddp's financial position had worsened again since the bankruptcy in April 1983 (see paragraph 7 above) and that some of its clients were preparing to dispense with its services, mainly because of their poor standard and the lack of certain technical facilities.

He had appended a circular letter that read as follows:

> "The enclosed selection - which is inevitably incomplete - of articles on the Jacubowski v. D. case will undoubtedly throw light on certain matters that are still obscure, even though you may already be familiar with one or other of the accounts of the facts. Some of the facts are admittedly reported inaccurately, but they scarcely alter the picture as a whole. The pending court proceedings that members of D.'s staff affected by current developments at the agency and I have brought will ensure that all the details finally become clear.
>
> I should be glad to be able to meet you in person before too long, in order to discuss not only the past but also future developments in the German 'news market'. I will ask for an appointment in due course."

15. Shortly afterwards, on 11 March 1985, the applicant set up a "public-relations" agency.

16. In the meantime the E. company, which had acquired 25% of the ddp's capital, had applied for a restraining injunction (Unterlassung) against Mr Jacubowski. On 29 January 1986 the Düsseldorf Regional Court refused the application on the ground that E. had no legal interest (rechtliches Interesse).

17. On 11 December 1986, on an appeal by E., joined (Eintritt in den Rechtsstreit) by the agency, the Düsseldorf Court of Appeal refused to grant an injunction prohibiting the applicant from systematically criticising the ddp but ordered that he should desist from any further such mailings, on pain of a fine; it went on to hold that he would have to "compensate the [E. company] for all the damage that the acts [in question] ha[d] caused and [would] cause the [ddp]". The judgment was based on section 1 of the 1909 Act, which provides: "Any person who, in the course of business commits, for purposes of competition, acts contrary to accepted moral standards may be enjoined from further engaging in those acts and held liable for damages."

The court held that in his circular the respondent had repeated in his own name the allegations made in the attached articles. Admittedly, he had sought to correct assertions made about him in the press release that were

possibly false but he had acted above all for purposes of competition in the course of business.

The court said, inter alia:

> "... the respondent sent his circular of 25 September 1984 for purposes of competition in the course of business.
>
> An action is said to be for purposes of competition where it is on the face of it apt to promote one person's sales to the detriment of another's and where it is carried out with a corresponding intention, although that intention need not be the only or the essential motive for the action (settled case-law, see Federal Court of Justice in GRUR 1952, p. 410 - Constanze I; Baumbach-Hefermehl, Wettbewerbsrecht, 14th edition, intro. to Unfair Competition Act, marginal notes 209 et seq., with further references).
>
> Remarks which, according to the witness Leisner, the respondent made several times show that even before sending out the circular the latter had planned to set up his own news agency after he left the employ of the [ddp]. The distribution of the circular referring to the enclosed adverse newspaper reports on, inter alia, the [ddp]'s activities as a news agency to current clients of the [ddp] and/or potential clients of both the [ddp] and the news agency that the respondent proposed to set up was apt to enhance the competitive position of the respondent's company and impair that of the [ddp]. Admittedly, the respondent's company did not then exist. However, for it to be held that there is a competitive relationship, it is sufficient that traders have, or at least will in the future have, the same potential clientele. This was the case as regards the respondent's company and the [ddp] ...
>
> Behind the respondent's conduct there was furthermore a ... competitive intention.
>
> Experience shows that the fact that activities are objectively apt to enhance one's own competitive position at the expense of another's is not the only basis for presuming a competitive intention ...
>
> In the present case such an intention is also apparent from the other facts that emerged during the proceedings. According to what he told the witness Leisner, the respondent had already been planning for a long time to set up his own agency in the event of his leaving the [ddp]'s service. In the middle of July 1984 the [ddp] had removed him from the post of director and in the middle of August [it] had terminated his contract of employment. The circular and newspaper cuttings were sent out about a month later to selected addressees, including - and this is not disputed - important clients of the [ddp]. A few months later the respondent's new agency was set up. This chronological sequence of events is a further indication of the respondent's intention to lower the [ddp] in the esteem of potential clients of both parties and thereby make it easier for his own agency to gain a foothold in the market in preparation for competition with the [ddp].
>
> The last paragraph of the circular likewise makes the competitive intention clear. It shows that the respondent intended to provoke discussion not only with a view to correcting assertions concerning himself that were possibly false, but also, at the very least, in order to promote his future activities as a competitor of the [ddp]. It is not apparent what else the respondent could have meant when he wrote that he wished to discuss 'not only the past but also future developments in the German "news market"'. By taking up these unfavourable comments on the [ddp] and distributing them anew as his own statements and assessments, he unnecessarily handicapped the [ddp] as a

> competitor. In this connection it does not matter whether the unfavourable factual statements concerning the [ddp]'s activities were accurate and whether they justified the unfavourable assessments accompanying them. This is because even true statements may only be used to disparage a competitor where the person making them has sufficient reason to link his own competitive position with disparagement of the competitor and provided that the criticism does not in nature or degree exceed what is necessary (Federal Court of Justice in GRUR 1968, pp. 262 and 265 - Fälschung). It does not appear that there was any such reason to disparage the [ddp] by taking up the unfavourable comments on its activities in the Horizont article."

In short, Mr Jacubowski had needlessly handicapped (behinderte unnötig) a competitor and accordingly infringed section 1 of the 1909 Act.

18. On 26 November 1987 the Federal Court of Justice declined to accept for adjudication an appeal on points of law (Revision) by the applicant on the ground that it had no prospects of success.

19. Thereupon Mr Jacubowski applied to the Federal Constitutional Court, complaining in particular of an infringement of freedom of expression (Article 5 para. 1, first sentence, of the Basic Law). On 4 October 1988 the Federal Constitutional Court declined to accept the complaint for adjudication on the ground that it was unfounded.

It noted, firstly, that the prohibition in issue related solely to the applicant's chosen method of circulating his information. The information was, moreover, of a business nature, but this did not mean that it ceased to be an opinion whose expression was protected by Article 5 para. 1, first sentence, of the Basic Law. This provision therefore had to be weighed against section 1 of the 1909 Act, on which the prohibition had been founded.

The court went on:

> "In order for it to be determined how [freedom of expression and fair competition] are to be related to each other in the case of damaging comment by a competitor, the following points are decisive, having regard to earlier decisions of the Constitutional Court in cases involving a call for a boycott (see Constitutional Court Decisions [vol.] 62, 230 at 244 et seq., with further references).
>
> In the first place, the motives of the person concerned and, linked to them, the aim and purpose of the comment are crucial. If the comment is motivated not by personal interests of an economic nature, but by concern for the political, economic, social or cultural interests of the community, if it serves to influence public opinion, the appeal will probably qualify for the protection of Article 5 para. 1 of the Basic Law, even if private and, more particularly, economic interests are adversely affected as a result. Conversely, the importance of protecting the latter interests is the greater, the less the comment is a contribution to public debate on a major issue of public concern and the more it is immediately directed against those interests in the course of business and in pursuit of a self-serving goal (see Constitutional Court Decisions [vol.] 66, 116 at 139) such as improving one's own competitive position ...
>
> ...

> In the light of these facts, the distribution of the applicant's circular can hardly be regarded as an attempt to influence public opinion. Rather it was designed almost exclusively to promote his private business interests and to secure or improve his competitive position in the news market.
>
> It follows ... that the prejudice caused to the complainants by the distribution of the circular was disproportionate to the applicant's aim, stated in it, of clarifying his relationship with the ddp and 'current developments at the agency'. In principle, freedom of expression takes precedence over rights (Rechtsgüter) protected by ordinary laws in so far as the statement is part of the ongoing discussion of questions of public importance which is absolutely fundamental to a free democratic system. This condition is not satisfied where the statement is made to ensure that certain business interests prevail over others in the context of business competition. The fact that an interest is made to prevail by means which are in principle protected under Article 5 para. 1 of the Basic Law cannot therefore justify subordinating to it the other interest, which is in turn entitled to the protection of an ordinary law that places restrictions on freedom of expression, in this case section 1 of the Unfair Competition Act (see Constitutional Court Decisions [vol.] 62, 230 at 247 et seq.). It follows that the finding by the Court of Appeal that the applicant's distribution of the circular was contrary to accepted moral standards is not incompatible with Article 5 para. 1 of the Basic Law."

The Constitutional Court added that the fact that the impugned circular followed a press release directed against him which had been issued by the ddp (see paragraph 12 above) did not invalidate this conclusion, since in order to claim the protection of the Constitution, his response would have had to be intended to influence public opinion, which it was not.

20. On 30 November 1988 the Düsseldorf Regional Court dismissed a claim for damages brought by the ddp in reliance on the Court of Appeal's judgment of 11 December 1986 (see paragraph 17 above). It held that the ddp had insufficiently substantiated its claim and had failed to prove any causal link between the alleged damage and the distribution of Mr Jacubowski's circular.

PROCEEDINGS BEFORE THE COMMISSION

21. Mr Jacubowski applied to the Commission on 11 April 1989. Relying on Article 10 (art. 10) of the Convention, he complained of a breach of his right to freedom of expression.

22. The Commission declared the application (no. 15088/89) admissible on 3 December 1991. In its report of 7 January 1993 (made under Article 31) (art. 31), it expressed the unanimous opinion that there had been a

violation of Article 10 (art. 10). The full text of the Commission's opinion is reproduced as an annex to this judgment[*].

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

23. The applicant complained of the court order of 11 December 1986, later confirmed on 26 November 1987 by the Federal Court of Justice, prohibiting him from continuing to distribute his circular of 25 September 1984 (see paragraphs 17-18 above). He alleged a violation of Article 10 (art. 10), which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The order of 11 December 1986 had, he said, prevented further distribution of his reply of 25 September 1984 to a press release in which his former employer had openly put his professional abilities in question. He had tried unsuccessfully to have his reply published by the ddp itself, by applying firstly to the agency and then to the Bonn Regional Court (see paragraphs 12-13 above). These attempts having failed, he had had to resort to other means, without awaiting the judgment of the Cologne Court of Appeal, since his reputation was at stake. In any case, there had been nothing extreme about the circular in issue, which had merely approved in a few lines the substance of the attached articles from newspapers that had already been widely distributed.

The Commission shared this view for the most part.

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[*] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 291-A of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

24. The Government challenged it. In issuing an injunction consequent upon an act of unfair competition, the Düsseldorf Court of Appeal had done no more than exercise a discretion in commercial matters, as it was empowered to do under the doctrine of the margin of appreciation. Although it could not be regarded as the only possible one, its decision appeared at the very least defensible in the light of the wording of the circular of 25 September 1984, in which Mr Jacubowski had first of all broadly endorsed the criticisms of the ddp in the press cuttings he reproduced and then, in the last paragraph, expressed the intention, thinly disguised, of establishing business relations between the recipients of the circular and the new agency he was preparing to set up. Rather than defend himself, he had therefore clearly denigrated a competitor the better to be able to poach clients, and this was, moreover, shown by the appreciable difference in content between the circular and the reply eventually published after the judgment of 11 October 1984 (see paragraph 13 above).

In addition, the national courts had shown moderation in going no further than prohibiting any redistribution of the circular of 25 September 1984; the applicant still had complete freedom to voice his opinions in any other way.

25. The Court notes that the impugned measure was, without a doubt, an interference with Mr Jacubowski’s exercise of his freedom of expression. The fact that, in a given case, that freedom is exercised other than in the discussion of matters of public interest does not deprive it of the protection of Article 10 (art. 10) (see, mutatis mutandis, the Casado Coca v. Spain judgment of 24 February 1994, Series A no. 285-A, p. 16, para. 35).

The interference was "prescribed by law" and pursued a legitimate aim under the Convention, namely "the protection of the reputation or rights of others" (see, mutatis mutandis, the Barthold v. Germany judgment of 25 March 1985, Series A no. 90, pp. 21-23, paras. 44-51, and the markt intern Verlag GmbH and Klaus Beermann v. Germany judgment of 20 November 1989, Series A no. 165, pp. 17-19, paras. 27-31). It consequently remains to be ascertained whether the interference can be regarded as having been "necessary in a democratic society".

26. The Court has consistently held that a certain margin of appreciation is to be left to the Contracting States in assessing whether and to what extent an interference is necessary, but this margin goes hand in hand with European supervision covering both the legislation and the decisions applying it, even those given by an independent court.

Such a margin of appreciation appears essential in commercial matters, in particular in an area as complex and fluctuating as that of unfair competition. The Court must confine its review to the question whether the measures taken at national level are justifiable in principle and proportionate (see the markt intern Verlag GmbH and Klaus Beermann judgment previously cited, pp. 19-20, para. 33).

27. In the instant case the requirements of protecting the reputation and rights of others must be weighed against the applicant's freedom to distribute his circular and the newspaper cuttings.

All three of the national courts that considered the merits of Mr Jacubowski's course of action were unanimous in regarding it as an act of unfair competition in breach of "accepted moral standards", as in their view it had been mainly designed to draw the ddp's clients away to the new press agency that he set up shortly afterwards. Their judgments were based principally on the circular's wording, especially its last paragraph, in which, so they held, the sender clearly expressed his wish to establish personal business contacts with the addressees. The domestic courts further relied on testimony that, even before sending his circular, the applicant had planned to found his own news agency (see paragraphs 10, 15, 17 and 19 above). The evidence put before the Court does not undermine that conclusion.

28. All three domestic courts took into account the fact that Mr Jacubowski had been personally attacked in a press release issued by his former employer. However, in view of the aforementioned circumstances, they attached less importance to it than to what they regarded as the cardinal feature, namely the essentially competitive purpose of the exercise. In the reply he eventually published Mr Jacubowski responded in detail to the main accusations contained in the ddp's press release; but the content of his reply was substantially different from that of his circular (see paragraph 13 above).

29. Lastly, it should be emphasised that the impugned court order went no further than to prohibit distribution of the circular; the Düsseldorf Court of Appeal refused the ddp's application for an injunction prohibiting Mr Jacubowski from systematically criticising the ddp (see paragraph 17 above). He thus retained the right to voice his opinions and to defend himself by any other means. The interference complained of therefore cannot be regarded as disproportionate.

30. Accordingly, it cannot be said that the German courts overstepped the margin of appreciation left to national authorities and no breach of Article 10 (art. 10) has been made out.

FOR THESE REASONS, THE COURT

Holds by six votes to three that there has been no breach of Article 10 (art. 10).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 June 1994.

Rolv RYSSDAL
President

Herbert PETZOLD
Acting Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the joint dissenting opinion of Mr Walsh, Mr Macdonald and Mr Wildhaber is annexed to this judgment.

R.R.
H.P.

DISSENTING OPINION OF JUDGES WALSH, MACDONALD AND WILDHABER

This is an important case in which admittedly the requirements of protecting the reputation and rights of others (of potential commercial competitors) must be weighed against the applicant's freedom to distribute his circular of 25 September 1984 along with the appended thirteen newspaper articles.

In our opinion, the majority judgment makes it appear as though this case involves simply a choice between two conflicting principles of equal weight. It relies too heavily on the findings of fact by the national courts. In so doing, it gives an excessive significance to the doctrine of the margin of appreciation.

In our view, freedom of expression is the guiding principle in the instant case. Exceptions to this fundamental principle must be interpreted narrowly (see, mutatis mutandis, the Sunday Times v. the United Kingdom (no. 1) judgment of 26 April 1979, Series A no. 30, p. 41, para. 65). The findings of fact by the national courts must be assessed with the proper respect due to them, but without excessive deference. It is crucial that the margin of appreciation which is left to national legislatures and courts must remain subject to an effective European supervision.

In the instant case, the applicant had been harshly attacked by his employer in a press release in which his professional abilities had been seriously questioned and he himself had been held responsible for the collapse of the Deutsche Depeschendienst GmbH. Shortly afterwards his dispute with the ddp culminated in his being dismissed without notice from all his duties. He accordingly had an obvious and pressing interest in trying to protect his impugned reputation without delay, especially as he was seeking a new job in the same sector and had to wait almost two months for his right to reply to be recognised and another month for his reply to be published (see paragraphs 12-13 of the judgment). There was a parallel public interest to learn whether the applicant would defend himself against his former employer.

In this situation, the applicant sent his circular of 25 September 1984. At the time he sent it, some six weeks had already elapsed since the ddp had issued its press release of 16 August 1984 (see paragraphs 12 and 14 of the judgment). He still did not know whether the courts would eventually grant him a right of reply. Given this situation, there was nothing extreme or improper in the circular at issue. On the contrary, he merely approved in a few lines the substance of thirteen articles from newspapers with a large circulation, which were already in the public domain. Subsequently, the Düsseldorf Court of Appeal ruled that the applicant should desist from any further such mailings, on pain of a fine, and that he would have to pay compensation for all actual or potential damage suffered by the ddp as a

consequence of his action (see paragraph 17 of the judgment). In effect, the German Unfair Competition Act was interpreted so as to make unlawful the distribution of widely circulated newspaper articles, at a time when the applicant had no way to re-establish his impugned reputation and did not know whether any such way would be available to him in the foreseeable future. Thus the Düsseldorf Court of Appeal accepted that he had acted, among other reasons, in order to correct assertions about him that were "possibly false" (see paragraph 17 of the judgment).

Admittedly, in the eyes of the national courts, the injunction in issue was founded on the fact that in addition to defending himself the applicant had above all sought to "disparage" his former employer - "as a competitor" - to the recipients of the circular (see paragraph 17 of the judgment). The recipients of the circular, however, were among those who had also received the ddp's press release of 16 August 1984, in which the applicant had been attacked and to which he had finally secured the right to reply on 11 October 1984 (see paragraphs 12-13 of the judgment). The motives which prompted the applicant's action - protecting his reputation and securing his future career - appear both legitimate and intertwined. They are so intertwined, in fact, that he could not be expected to justify himself without making reference to both his past and his future professional career. Moreover, as we have stressed, he did not do so in an extreme or improper fashion, since he confined himself to sending out newspaper cuttings, to which he added only a few comments. To put it succinctly, he distributed newspaper articles which were already in the public domain, and added that they gave, on the whole, a fair picture.

We fail to see how it could have been proportionate to prevent him from doing this. The competitive element cannot be regarded as having played a preponderant role in the particular circumstances of the case. To accept in this case a preponderance of the competitive element amounts to reducing the principle of freedom of expression to the level of an exception and to elevating the Unfair Competition Act to the status of a rule. We cannot agree that this constitutes the proper way of exercising a European supervision.

In the case of Johansen v. Norway (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B (2), as a Chamber composed of the following judges:

Mr R. Bernhardt, President,
Mr R. Ryssdal,
Mr R. Macdonald,
Mr I. Foighel,
Mr R. Pekkanen,
Mr A.N. Loizou,
Mr J.M. Morenilla,
Mr P. Kuris,
Mr U. Lohmus,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 26 January and 27 June 1996,

Delivers the following judgment, which was adopted on the last-mentioned date:

_____
Notes by the Registrar

1. The case is numbered 24/1995/530/616. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9).

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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Kingdom of Norway ("the Government") on 1 March and 3 April 1995 respectively, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 17383/90) against Norway lodged with the Commission under Article 25 (art. 25) by a Norwegian citizen, Ms Adele Johansen, on 10 October 1990.

The Commission's request and the Government's application referred to Articles 44 and 48 (art. 44, art. 48); the request also referred to the declaration whereby Norway recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6, 8 and 13 of the Convention (art. 6, art. 8, art. 13).

2. In response to the enquiry made in accordance with Rule 35 para. 3 (d) of Rules of Court B, the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 31).

3. The Chamber to be constituted included ex officio Mr R. Ryssdal, the elected judge of Norwegian nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 5 May 1995, in the presence of the Registrar, Mr Bernhardt drew by lot the names of the other seven members, namely Mr R. Macdonald, Mr I. Foighel, Mr R. Pekkanen, Mr A.N. Loizou, Mr J.M. Morenilla, Mr P. Kuris and Mr U. Lohmus (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the orders made in consequence on 6 June and 13 November 1995, the Registrar received the applicant's and the Government's memorials on 13 and 20 November 1995. On 20 December 1995 the Secretary to the Commission indicated that the Delegate did not wish to reply in writing.

5. On various dates between 10 January and 19 June 1996 the Registrar received a number of documents from the Government and the applicant, including particulars on the latter's Article 50 (art. 50) claims.

6. On 10 and 12 January 1996, the Registrar received from the Government a request that the memorials and appendices thereto not be made accessible to the public and that the hearing on 23 January be held in camera. The applicant and the Delegate of the Commission submitted their comments on 16 and 17 January. On 19 and 22 January the Government and the applicant accepted that the hearing be held in public subject, inter alia, to the non-disclosure of the identity of certain persons, including the applicant's daughter.

7. In accordance with the President's decisions, the hearing took place in the Human Rights Building, Strasbourg, on 23 January 1996, in public, in accordance with the terms indicated above. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr T. Stabell, Assistant Attorney-General
(Civil Matters), Agent,
Mr F. Elgesem, Attorney, Attorney-General's Office
(Civil Matters),
Ms T. Smith, Assistant Director-General, The Royal
Ministry of Child and Family Affairs,
Ms K. Ofstad, Adviser, The Royal Ministry of
Child and Family Affairs, Advisers;

(b) for the Commission

Mrs G.H. Thune, Delegate;

(c) for the applicant

Mrs S. Moland, advokat, Counsel,
Mrs K. Næss, advokat, Adviser,
Mr A. Salomonsen, Assistant.

The Court heard addresses by Mrs Thune, Mrs Moland, Mrs Næss and Mr Stabell.

8. On 26 June 1996 the President decided that the Government's and the applicant's memorials, subject to changes to the former, be made accessible to the public but that those appendices thereto which related to the domestic proceedings not be made so accessible (see paragraph 6 above).

On the same date, he also decided to authorise the filing of the applicant's letters of 16 and 22 January 1996, with their enclosures, but to refuse that of the letter and enclosures received on 19 January (Rule 39 para. 1, third sub-paragraph, of Rules of Court B).

AS TO THE FACTS

I. Particular circumstances of the case

A. Background

9. The applicant, who was born at Laksevåg near Bergen, left home when she was 16. In 1977, when she was 17 years old, she gave birth to her son C. and they became dependent on assistance from the social welfare authorities. From 1980 onwards the applicant cohabited with a man who mistreated her and C. He was convicted of drug offences in 1983 and spent two years in prison. On many occasions the social welfare authorities assisted the applicant in the upbringing of C., but considerable problems as well as friction arose between those authorities and the applicant. In August 1988 C. began to receive treatment at the Child Psychiatric Department of Haukeland Hospital in Bergen. In January 1989 he was admitted to a special school adapted to his needs.

10. On 14 November 1989 C., who was then 12 years old, was provisionally taken into care under section 11 of the Child Welfare Act (Barnevernsloven) no. 14 of 17 July 1953 ("the 1953 Act"; see paragraph 33 below), as the circumstances of the case disclosed a danger to his health and development. The police assisted the child welfare authorities in enforcing the decision. After spending the period from November 1989 to early January 1990 at the Child Psychiatric Department of Haukeland Hospital, C. was placed in a children's home.

According to a statement of 10 January 1990 by the Chief Physician, Ms Guri Rogge, and the Deputy Chief Physician, Mr Arne Hæggernes, the applicant's and C.'s situation had been "rather chaotic" throughout the period during which they had been in contact with the hospital. When faced with difficulties, the applicant had broken off her contact with the system which had been set up to assist her. Her way of life had had a detrimental effect on C. and the fact that he had changed schools had created much insecurity.

11. In mid-November 1989 the applicant, who was pregnant, left

Bergen for Oslo. On 23 November she was given accommodation at the Oslo Crisis Centre, an institution for women who had been victims of domestic ill-treatment.

On the following day she went for an antenatal check-up at Markveien Medical Centre in Oslo. She stated to the doctor concerned that she had been taking valium, vival and paralgin during her pregnancy and that she had hardly eaten during the last fortnight. Because of her pregnancy and her state of health she was subsequently referred to Ullevål Hospital in Oslo. The doctors there considered her physical and mental state of health to be very poor, but refrained from contacting the child welfare authorities, fearing that she might injure herself if they did so.

B. Public-care measures in respect of the applicant's second child

12. On 7 December 1989 the applicant gave birth to her daughter S. In view of the applicant's difficult situation and the problems with regard to the upbringing of C., the child welfare authorities (barnevernet) at Røa in Oslo were contacted. At a meeting on 8 December 1989 between the applicant and her lawyer and the child welfare authorities the applicant's and S.'s situation was discussed.

On 13 December 1989 the Chairperson of the Client and Patient Committee of Røa, district 24 (klient- og pasientutvalget i bydel 24, Røa - "the Committee"), decided to take S. provisionally into care under section 11 of the Child Welfare Act (see paragraph 33 below) on the grounds that the applicant, because of her physical and mental state of health, was considered incapable of taking care of her daughter. The Chairperson considered that the child would be put at risk if the decision were not implemented immediately.

In reaching the above decision, the Chairperson had regard to the decision by the social welfare authorities in Bergen to take the applicant's son provisionally into care and their intention of doing so on a permanent basis, as well as their concern for the situation of the baby whom they considered taking into care immediately after birth. The Chairperson also took into account information provided by Markveien Medical Centre, by Ullevål Hospital and by those who had attended the meeting on 8 December 1989.

The applicant did not lodge any appeal against this provisional care decision.

13. On 19 December 1989, in accordance with the above decision, S. was placed in a short-term foster home linked to the Aline Child Care Centre. The applicant was allowed to visit her twice a week at the Centre. She did not challenge this access arrangement, which was not based on any formal decision.

14. The question of public care was brought before the Committee on 29 December 1989. The Committee obtained an expert opinion dated 13 February 1990 from Mr Knut Rønbeck, psychologist, which contained the following conclusion on the applicant's ability to take care of S.:

> "... On the surface, she appears to be a well-organised, friendly and charming young woman. On meeting her, it may therefore initially be difficult to understand that the child welfare authorities and mental health authorities have had

such serious problems in achieving cooperation with her for the benefit of her son. If one approaches her more closely, however, a clear picture emerges of a woman with major unsolved mental problems which strongly affect her social functioning and her ability to care [for a child]. The problems are expressed in the form of anxiety and depression. Since her early youth, she has functioned fairly marginally from a social point of view. For many years, she lived with a man who she herself believes abused both her and her son, but without being able to break out of this relationship.

...

... Having regard to [the applicant's] history in respect of taking care of her child and due to her lack of knowledge of/denial of her own faults vis-à-vis her own and [C.'s] problems I regret that, as the expert in this case, I am not hopeful about her future ability to take care of her children, although she undoubtedly loves them and is attached to them. In addition to these points [I] must add that [the applicant] now realises that what the future holds in store is the prospect of being a mother on her own in Oslo where she lacks support from a social environment.

...

The child in this case [S.] is in a period of her life where the attachment to preferably stable persons ought to develop. It is of decisive importance for her personal development that she now gets the opportunity to attach herself to persons whom she may regard during her adolescence as stable and secure parents."

15. The applicant requested the appointment of a second expert. Since the child welfare authorities refused her request, the applicant herself engaged a psychologist, Mrs Lise Valla, who submitted her opinion on 17 April 1990. This concluded:

"... I cannot find that there are sufficient reasons for depriving [the applicant] of the care of her children [C.] and [S.].

In my view [the applicant] shows responsibility when it comes to considering the children's adolescence - and she is also a person who may learn from the mistakes she has made.

It is clear, however, that [the applicant] will need some practical assistance in the future. It is desirable that both she and [C.] receive therapy in order to manage the emotional gaps from the bad years - and I would consider it reasonable that the public authorities should provide this. Furthermore, [the applicant] ought to receive support so that she can improve her level of education."

The above opinion was based on available documents and meetings with the applicant and her son.

16. In the meantime the child welfare authorities at Røa continued their examination of the case. Their report to the Committee of 30 March 1990, based on, among other material, talks with the

applicant, Mr Rønbeck's opinion and the case files of the child welfare authorities in Bergen and Oslo, stated that if S. were to be reunited with her mother, the child's mental health would be subjected to harm or serious danger and she would live under such conditions as described in section 16 (a) of the Child Welfare Act (see paragraph 32 below). The report recommended that S. be taken into compulsory care pursuant to section 19 of the Act, such measures being necessary in view of the applicant's inability to provide satisfactory care for her daughter and of the fact that the preventive care measures taken under section 18 of the Act in respect of her son C. had not been effective (see paragraphs 33-34 below). The report further recommended that S. be placed in a foster home with a view to adoption. Scientific experience in recent years had shown that remaining a long-term foster child instead of being adopted was disadvantageous for the child: the foster parents could at any time cancel the agreement or the parents might institute proceedings in order to be reunited with the child. Adoption had the advantage of clarifying the situation and of creating security and stability for the child and the adoptive parents. Moreover, the report stated that, in order to secure the child's development and its relationship with the persons who would permanently assume the care, it would be appropriate for the authorities to deprive the applicant of all her parental responsibilities (foreldreansvaret) pursuant to section 20 of the Act (see paragraph 35 below).

As regards the question of access, the report added:

"While the girl has been at the Child Care Centre [the applicant] has had access to her twice a week for one hour. Following transfer of the girl to an approved foster home with a view to adoption it is recommended that access be refused and the address kept secret.

[The applicant] has previously tried to disappear with her son in order to avoid the social welfare authorities and she did not inform the social welfare office/authorities when her son ran away from the children's home at Bergen in February 1990 in order to stay with her. Therefore, it is considered not unlikely that she would intervene in a disturbing manner in the foster home, and perhaps also try to take the girl with her.

It is considered important for this child to have quiet and stability in the new environment where she is placed. The social welfare authorities will accordingly recommend that [the applicant] be refused contact with the child and that the child's new address be kept secret.

Today the girl has no relationship with her mother and, therefore, it will not be necessary to phase out the access arrangement before the girl is transferred to the foster home."

17. On 2 May 1990 the Committee, chaired by a Mrs Justice Inger Kristine Moksnes of the Oslo City Court (byrett), examined the case. The applicant, assisted by a lawyer, called three witnesses and the child welfare authorities called one witness. Mr Rønbeck, the appointed expert, was heard, but not Mrs Valla, the expert engaged by the applicant herself. As the costs in respect of Mrs Valla's appearance were not covered by the State, she was not able to attend the hearing.

A request by the applicant's counsel to be assisted by Mr Reidar Larssen, a psychiatrist, as a representative was rejected by the Committee on the ground that the applicant was already represented. He was, however, allowed to appear as a witness and to attend the hearing thereafter with no right to address the Committee.

The opinions of Mr Rønbeck and Mrs Valla and the child welfare authorities' report of 30 March 1990 were available to the Committee.

On the basis of the information and evidence submitted to it the Committee decided on 3 May 1990, by four votes to two, to take S. into care; to deprive the applicant of her parental responsibilities (which as a result were transferred to the child welfare authorities); to place S. in a foster home with a view to adoption; to refuse the mother access as from the moment of the child's placement in the foster home and to keep the latter's address secret. In its decision the Committee stated:

> "With reference to the reports which have been submitted and the submissions made during this meeting, the Committee's majority, Mrs Ryberg, Mr Clausen, Mr Aasland and Mrs Moksnes, finds that [the applicant] has very little chance of acting satisfactorily in taking care of her daughter. The majority stresses that [the applicant] has had sole responsibility for the maintenance and care of her son, born in 1977. This task she has not managed and the social welfare authorities have taken this child into care. The [applicant] has received special assistance since 1977 and has lived off social security benefits since her son was 10 years old. She has only worked for short periods. She has not lived with the fathers of her two children but had for several years a cohabitant who ill-treated her and her son, both physically and mentally. He was part of the drugs scene in Bergen, as she was at one time. He is now in prison, serving a sentence for drug dealing. She has herself used drugs and alcohol and has had intoxication problems. It is unclear how big a problem this has been, but the Committee assumes that she has no intoxication problems at present. It is not quite clear, however, whether the problem has been solved also for the future.
>
> [The applicant] now maintains that she has broken with her former friend and her previous life. She has moved to Oslo and now appears to have a different lifestyle than the one in Bergen. She has made a few social contacts but these are dependent on circumstances and cannot be of decisive importance. She has vague plans for the future, although she expresses a wish to train as a nursing auxiliary.
>
> However, the majority is of the opinion that the decisive factor in this case must be that, according to the appointed expert, [the applicant] has serious unsolved mental problems which impair her social skills and her ability to take care [of children]. Although her son has had considerable mental problems she has not been able to cooperate with the authorities and has not understood the necessity of giving his needs priority over her own. She has not been able to understand that the boy needed help and has not been willing to accept assistance either. The majority fears that this

attitude may lead to her daughter's needs not being met either if she remains with [the applicant]. The majority finds that the daughter will live in such conditions that the requirements of section 16 (a) of the Child Welfare Act are fulfilled.

In connection with taking her son into care a number of measures have been tried, and the majority therefore finds that measures under section 18 would be ineffective. The requirements for care under section 19 are accordingly fulfilled. The majority also finds that the requirements pursuant to section 20 of the Child Welfare Act are fulfilled. [The applicant] is not particularly motivated to accept treatment and there is little prospect of change in this respect. The majority accordingly finds that it would be in the interest of the child to be placed in a foster home with a view to adoption. The next few years will be crucial for the child and it is preferable that she should feel certain that she will not be moved. It is of decisive importance for the girl that she can now be attached to stable persons whom she may regard as stable and secure parents in her adolescence.

This is of decisive importance for the development of her personality. Therefore she ought not to be exposed to a foster-home agreement which may be revoked. She also ought to form close relationships with a small number of people and

therefore ought to remain at a secret address pursuant to section 19 of the Child Welfare Act, so that [the applicant] no longer has access to her daughter when she is placed with foster parents."

18. The minority of the Committee found that the applicant's situation in life had improved since her removal from Bergen to Oslo and that she should thus be given the opportunity to take charge of the care of her daughter while staying at a special institution for that purpose.

19. After her daughter's birth the applicant moved to a flat in Oslo. During the spring of 1990, her son C. twice ran away from the children's home in Bergen to join her in Oslo and, on the second occasion, she indicated that she would not comply with the care decision. As C. did not want to return to Bergen and as the applicant considered that the social welfare authorities there did not do enough to help him, she decided to let C. stay in Oslo. She managed to get him admitted to a school there and she contacted a psychiatrist for support.

20. On 24 April 1990 it was decided to take C. permanently into care but on 19 June that care decision was lifted, notwithstanding the fact that his care situation was still considered to be detrimental to his physical and psychological development, a matter which continued to be of great concern to the authorities. The conflict between the authorities, on the one hand, and the applicant and her son, on the other, had made it impossible to implement the care decision without it being even more detrimental to the boy. The decision of 19 June was subsequently confirmed by the Hordaland County Governor (Fylkesmannen) on 13 March 1991. C. has lived with the applicant since May 1990.

C. Applicant's appeals against the care measures in respect of S.

21. On 25 May 1990 the applicant's lawyer received the minutes of the Committee's meeting of 2 May 1990 leading to its decision of 3 May 1990. As regards the taking into public care and the deprivation of her parental responsibilities, the applicant lodged an appeal on 28 May 1990 against the decision of 3 May with the County Governor for Oslo and Akershus. As far as the restrictions on access were concerned, she requested the County Governor to give the appeal suspensive effect (oppsettende virkning). She submitted that continuing access was decisive for maintaining contact between her and the child pending the appeal. The applicant also sent a copy of her appeal to the Committee, which on 28 June 1990 decided to uphold the decision of 3 May 1990 and to refer the case to the County Governor.

22. On 31 July 1990 the County Governor, referring to section 42 of the Public Administration Act (Forvaltningsloven) of 10 February 1967 decided not to give the appeal suspensive effect on the grounds that it would be in the girl's best interests if the decision of 3 May 1990 to terminate access were implemented as from the moment the child was placed in the foster home.

S. was placed with foster parents on 30 May 1990. The applicant has not had access to or seen her daughter since.

23. The applicant pursued her appeal against the care decision and the deprivation of parental responsibilities. As she was informed that her appeal to the County Governor of 28 May 1990 would remain pending for four to five months, she instituted proceedings in the Oslo City Court. She asked the court to set aside the Committee's decision of 3 May 1990, maintaining inter alia that it was crucial that her case be examined speedily, given that she had been refused access to her daughter. On 24 October 1990 the City Court dismissed (avviste) the application as such actions could only be instituted subsequent to a decision in the matter by the County Governor. On 17 January 1991 the High Court (Lagmannsretten) rejected an appeal by the applicant on the ground that the County Governor had in the meantime decided the case (see paragraph 24 below) and there was therefore no reason to deal with the appeal. A further appeal to the Supreme Court (Høyesterett) was rejected on 7 March 1991.

24. On 9 November 1990, after a meeting with the applicant and her lawyer, the County Governor for Oslo and Akershus upheld the Committee's decision concerning care and parental responsibilities.

25. On 13 November 1990 the applicant instituted proceedings against the Ministry of Child and Family Affairs (Barne- og familiedepartementet) in the Oslo City Court under Chapter 33 of the Code of Civil Procedure (tvistemålsloven, Law no. 6 of 13 August 1915 -see paragraph 38 below), asking for the care decision to be lifted and to be reunited with her daughter. In the alternative she requested that her parental responsibilities be restored.

On 20 December 1990 the defendant Ministry submitted observations in reply.

26. After consulting the parties, the City Court appointed two experts on 1 February 1991 to evaluate the applicant's ability to take care of her daughter and the consequences of revoking the care decision

and/or restoring the applicant's parental responsibilities. The experts were requested to submit their opinions by 15 March 1991, which they did.

On 8 February 1991 the parties were informed that the case had been set down for 2 April 1991.

27. The City Court, sitting with one specially appointed judge, Mr Idar E. Pettersen, heard the case between 2 and 5 April 1991. Having heard the applicant, represented by counsel, a representative of the defendant Ministry, eleven witnesses and the two appointed experts, the City Court, in a judgment of 16 April 1991, upheld the taking into care and the deprivation of parental responsibilities. It gave the following reasons:

> "According to the Child Welfare Act the starting-point is that a child should grow up with his or her natural parents. The interests of the child may, however, warrant exceptions being made to this general rule as it cannot be interpreted so as to allow the child to be subjected to considerable harm.
>
> In reviewing a compulsory measure imposed under the Child Welfare Act the courts must as a starting-point rely on the circumstances obtaining at the time of passing judgment. The possible negative effects on the child of being returned from the foster parents to the natural parents must be taken into consideration. Regard must also be had to the fact that the Child Welfare Committee [barnevernsnemnda] and the County Governor may lawfully maintain a decision to take the child into care even if the circumstances on which the decision was based have later changed to such an extent that the conditions for intervention pursuant to the Child Welfare Act are no longer fulfilled.
>
> After hearing the evidence the Court finds that such material conditions [ytre betingelser] obtain as would allow the applicant today to give her daughter, born on 7 December 1989, an acceptable upbringing. In this respect there has been an improvement in the situation since the child welfare authorities took over the care of the daughter. [The applicant] now appears to be permanently settled in Oslo together with the father of her oldest child who also lives with her. It appears quite clear that the applicant has great concern for the child who has been taken from her. There can hardly be any doubt that it is her intention to arrange things as far as possible in order to assume the care of the child, if she were to be returned to the mother, to the best of her abilities. These being the facts in the present case, the Court must examine whether returning the child from the foster parents to her natural mother would entail a real danger of harm to the child.
>
> We have before us a case where the mother had the care taken away from her shortly after birth. The mother has since had very little contact with the child and is now a stranger to her.
>
> The experts appointed by the City Court are both in agreement that the child would be in a critical situation if returned. On this point, Mrs Seltzer, psychologist, states in her expert

opinion:

> 'She is today in the middle of a phase of development of her personal autonomy which, in order for her to develop without complications, depends on secure conditions and stable emotional continuity. In the short term there can be no doubt that the child would react with sorrow and emotion if she were now to be removed from her foster home. In the long run it is likely that if she were removed at this stage of her development she would carry with her into her future life an experience of insecurity vis-à-vis other people, including those who represent close and dear relations.'

The experts stress that a return in these circumstances would entail a particular risk. This is so because [the child] has twice already in her short life experienced a removal from her natural mother, first shortly after birth and then at the age of seven months when she was moved from the [Child Care Centre] to her present foster parents. She would therefore be particularly sensitive to further changes.

The child now lives under secure and stimulating conditions with her foster family and, as the situation appears to the Court, it is considered that the foster parents can give her a safer upbringing than she would receive from her natural mother. Furthermore, in the Court's view there is a real danger that the mother will not be able to deal adequately ... with the return of her child in a crisis. The mother's history and previous contact with the public-support system indicate that when, in such a pressing and threatening situation, she needs help from that system, she will defend herself with fear and aggression. It was in particular Mr Reigstad, psychologist, who emphasised this. During his oral explanations to the Court he has maintained the views which he expressed in his written opinion but has also in his oral explanations submitted further details concerning the mother's personality. He is of the opinion that the mother makes a projective identification. This means that she has divided her world into two parts, one with friends and another with enemies. Towards those whom she recognises as friends she shows a secure and nice side of herself, whilst to those whom she considers to be against her she reacts with deep suspicion, fear and aggression. In Mr Reigstad's opinion, in such a situation the mother will consider the public-support system to be against her and will meet it with a correspondingly negative attitude. This will place an additional burden on the child and harm her permanently in the form of a split character.

The expert witnesses called by the mother have all had a very good impression of her. This goes for Mr Terje Torgersen, doctor, Mrs Lise Valla, psychologist, and Mr Reidar Larsen, psychiatrist. A common element for these persons is, however, that none of them have had a patient-doctor relationship with [the applicant]. Those who have been appointed by the child welfare authorities and the Court, Mr Knut Rønbeck, psychologist, Mrs Wenche Seltzer, psychologist and Mr Ståle Reigstad, psychologist, have all found the mother to be more complex. The Court considers that the appointed

experts, on the basis of their terms of reference and their contacts with [the applicant] and others, have had the best opportunity to evaluate her as a person. The Court has therefore considerable hesitations about departing from [their assessment]. The Court has examined the [assessment] in the light of the other submissions in the case and, not least, the basic principles of the Act on the lifting of a care decision.

In the Court's view the experts have done a very thorough job. The conclusions are clear and appear well-founded. Their statements confirm and elaborate the overall impression which the Court has formed of the case. The Court, therefore, considering the case as a whole, will base its decision on the experts' assessment. In the Court's opinion, there is nothing in the case to suggest that it should depart from their assessment.

In the light of the above the Court finds that, because of the likely reactions of the child to changes to her environment, it would be a particularly demanding task for the mother to assume the care of her. In view of what is known about the mother's present situation and her history it is unlikely that she will be able to cooperate with the social assistance provided by society without friction. Accordingly, having regard to the concrete circumstances of the case as a whole, the Court reaches the conclusion that the County Governor's, and thus also the social welfare authorities', decision to take the child into care should be upheld.

The next question is whether the decision should be limited to the taking into care or should also cover parental responsibilities pursuant to section 20 of the Child Welfare Act. In this respect the Court points out that it is clear that section 20 has been applied with a view to adoption. The foster parents wish to adopt [the child] and in view of the information available to it the Court assumes that, unless the present decision is limited to taking into care, adoption will be the end result.

The Court considers that for it to apply ... section 20, it must be satisfied that this is necessary in order to secure proper care for the child. What is required will depend on the purpose of depriving the parents of their parental responsibilities and the situation in general. If the aim is to free the child for adoption, very weighty reasons are required. Section 20 may be applied with a view to adoption only in very special circumstances. It must be a condition that the parents will be unable to give the child appropriate care and that this would be a permanent situation. When parental responsibilities are taken away with a view to adoption the question arises whether the child and the natural parents should be permanently deprived of contact with each other, with the consequences for reunification which that entails.

In the Court's opinion a condition for the transfer of parental responsibilities with a view to adoption is that it is obvious that the child cannot in the foreseeable future be reunited with the parents. In the present case, both appointed experts have recommended to the Court that the

child's placement in the foster home be made permanent. One of [them], [Mr] Reigstad, states in this respect:

> `Assessment of the question of parental responsibilities and adoption
>
> When considering this question in the present case we find, in addition to the general consideration that in such cases adoption is always an advantage for the child, concrete and real reasons militating in favour of adoption.
>
> The applicant's problems are in my view long-standing and well established in her overall character. They can be documented back to 1977 and have been almost constantly present during her entire adult life. It follows that she is unlikely to solve them in the foreseeable future and that the situation therefore has a certain permanent character.
>
> In addition, were the applicant to be given access to the foster home she would in all likelihood destroy the home's security and make it unsuitable as a foster home for the child. This must be seen in the light of the crusade the applicant has led over the last years against the child care authorities and of the fact that she has clearly stated that her aim is to get her daughter back. In addition, the fact that she earlier hid her son from the child care authorities in Bergen and was supported in this by her lawyers in Oslo on the whole gives very little reason for optimism in respect of her future cooperation with the foster home.
>
> I have therefore reached the conclusion that it would be in the interest of the daughter to remain in the foster home and that permission be granted to adopt her so that [the foster parents] also acquire the parental responsibilities.
>
> Having regard to my terms of reference, my conclusion is accordingly:
>
> Conclusion
>
> A. If the daughter were to be reunited with her natural mother there is a considerable danger that she would not recover from her separation crisis, which would cause her permanent harm. There are also objective grounds for doubting that the mother would be capable of ensuring that the daughter receives such necessary medical and psychological assistance as she needs. For these reasons I cannot recommend to the Court that the child and her natural mother be reunited.
>
> B. I assume that the aim of letting a natural mother keep her parental responsibilities in respect of a child placed in a foster home is to allow her access to the home and to participate in, or take, important decisions regarding the child. In the circumstances, access to the foster home or even lifting of the secrecy of the home's address would

destroy the security of the foster parents and make the home unsuitable as a foster home. In both the short and the long run this would be detrimental to the child.

C. In my view the best solution from the child's point of view would be to deprive the mother of her parental responsibilities and to allow the foster family to adopt the child. This would secure the child a stable and appropriate upbringing and would bind the child to its new family without reservation.'

In this regard, the other expert, [Mrs] Seltzer, states:

`If the child remains in the foster home and the foster parents continue to act as the [child's] foster parents, I consider that it would be impractical and possibly complicating if a person other than the foster parents were to assume parental responsibilities. I consider also that it would be in the best interests of the child for her to belong, fully, formally and uninterruptedly to one place. In addition one cannot disregard the fact that an arrangement dividing the care and the parental responsibilities may create insecurity and represent a potential source of conflict between the adults, with the child in between. In certain circumstances it can also be difficult to manage the daily care in a satisfactory manner if the parental responsibilities are assumed by another party. If the Court nevertheless decides to split the daily care and parental responsibilities, this requires good cooperation between the parties, something which at present cannot be taken for granted having regard to the fact that the foster parents and the natural mother have not met each other. I recommend that the daily care and the parental responsibilities be entrusted to those who have the daily care of the child.'

Both experts, in their oral submissions to the Court, have stated that their views have been strengthened by the submissions made during the examination of the case.

As regards the question whether the mother would be able to give the child proper care on a permanent basis, [Mr] Reigstad states that the mother lacks today and will lack in the foreseeable future the necessary ability to do so. [Mr] Rønbeck was of the same opinion when he submitted his report in connection with the case. [Mrs] Seltzer for her part is of the opinion that today the mother is probably capable, in favourable and clear circumstances, of taking care of the child but the mother's situation is uncertain. She suggests therefore that it would be in the child's interests to stay where she is.

As the Court understands the expert evidence, it is obvious that the mother could not properly take care of the child on a permanent basis. Also as regards the question of parental responsibilities, the Court attaches decisive weight to the experts' assessment. The Court further agrees with the experts that allowing the [applicant] access to the foster home would entail a real danger of conflict between the

foster parents and the natural mother. The Court refers in this connection to what has been said about the mother's ways of reacting. It follows that there are strong and real factors militating in favour of adoption. The special interests which might weigh against adoption in the present case cannot in the opinion of the Court be decisive. The Court here points out that the natural mother is a stranger to the child, who, as far as the Court has been informed, has not had any particular contact with the mother. After a general, concrete evaluation the Court has accordingly reached the conclusion that the decision concerning the transfer of parental responsibilities shall also be maintained."

28. On 28 May 1991 the applicant lodged an appeal with the Supreme Court. The defendant Ministry filed a reply on 19 June 1991. On 23 August 1991 the applicant was requested to submit further observations by 6 September 1991, which she did on 5 September 1991. On 19 September 1991 the Appeals Committee of the Supreme Court (Høyesteretts Kjæremålsutvalg) refused leave to appeal.

D. Subsequent developments

29. In the spring of 1991 the applicant moved to Nørreballe, Denmark. She now lives there with C.'s father. C. now lives near Copenhagen where he works. The applicant gave birth to a second daughter on 14 December 1991. According to the Danish authorities this child has developed well. A second son was born in 1993. The applicant's daughter S. is still living with her foster parents. No decision concerning her adoption has yet been taken.

A report of 30 January 1994 by Mrs An-Magritt Aanonsen, psychologist, which is favourable both to the applicant and to the foster parents, concluded:

"1. Both mother and child today seem to be doing well. The mother is cohabiting in a steady relationship with the father of three of her four children. She seems to give satisfactory care to her children and copes well with her everyday situation and has managed to handle problems which have arisen without any special help.

The child has formed a strong primary attachment to her foster parents who provide her with good conditions for growing up and who appear genuinely fond of her and very committed.

2. In the previous section, I discussed the consequences of establishing a right of contact. Given the child's situation today it is not desirable to establish a right of access at present unless there is some change in the conditions of care placement. It is desirable for the child to have the greatest possible continuity and stability, something that is best achieved by permanent placement with her present carers.

3. I have also discussed above the consequences of establishing a right of access with respect to the child's care position and the importance this will have for her development. I have indicated a type of arrangement that it would be possible to introduce without any consequences for

the care situation.

In conclusion, I would stress that one thing we know today is that it is important for a child's development for him or her to have stability, continuity and carers who take responsibility for and are fond of it and help it affirm itself as a person. It is in the child's interest that the carers should be confident that it is they who take decisions about important events in the child's life. This must be taken into account if a right of access or visit is established."

II. Relevant domestic law

A. The 1953 Child Welfare Act

1. Compulsory care measures

30. The public-care measures at issue in the present case were based on provisions set out in the Child Welfare Act of 17 July 1953 ("the 1953 Act"), which was replaced by new legislation on 1 January 1993 (see paragraphs 41-45 below).

31. The principle underlying the 1953 Act, which was applicable in this case, was that, generally speaking, it was in the best interests of a child for it to be cared for by its natural parents. If the child had been taken into care, the best solution would in principle be for the natural parents to remain in contact with it and retain parental responsibilities.

32. Under section 16 (a) of the 1953 Act, protective measures could be taken if a child lived in such conditions that its physical and mental health was likely to be impaired or was seriously endangered. It was established case-law (see the Supreme Court's judgment of 6 November 1986, Norsk Retstidende ("NRt") 1986, p. 1189, and judgment of 21 January 1987, NRt 1987, p. 52) that such a measure could be taken not only where such harm had materialised but also where there was a clear risk of harm. Consequently, under this provision, a child could be taken into care immediately after birth.

33. Section 18 of the Act provided for several preventive measures (forebyggende tiltak), such as placing the child's home under supervision, furnishing financial assistance, ensuring placement in a kindergarten or a school, or providing care and treatment.

If such preventive measures were considered to be ineffective or had proved to be of no avail and leaving the child in its current situation pending care proceedings would entail a risk of harm to the child, section 11 of the Act empowered the Health and Social Board (helse- og sosialstyret), hereinafter "the Board", or if necessary its chairperson, to take a child into care on a provisional basis. Where such an interim measure had been taken, the case had to be brought before the Board, often represented by its Client and Patient Committee. Provided that the requirements of section 16 were fulfilled, the Board or the Committee could decide to take the child into public care (overta omsorgen) pursuant to section 19 of the Act. In practice the child was usually transferred to a suitable child care centre or a foster family.

34. The 1953 Act did not contain any provision expressly empowering

the authorities to restrict the parents' access to their child where the child had been taken into public care. However, according to an authoritative interpretation of section 19 by the Ministry of Justice, Department of Legislation (Justisdepartementets lovavdeling), the Board or the Committee could also determine the extent of the parents' right of access and whether or not the address of the foster family should be kept secret (see the Department's statements of 28 October 1964 and 14 March 1966).

35. Where the Board or the Committee had decided to take a child into care in accordance with the above rules they could also decide, pursuant to section 20 of the Act, to deprive the natural parents of their parental responsibilities. Section 20 did not set out the circumstances in which such a measure could be taken but, according to the Supreme Court's case-law, it should be supported by weighty reasons. A decision to deprive the natural parents of their parental responsibilities could not be taken unless the long-term consequences of alternative arrangements were considered (see the Supreme Court's judgments of 20 December 1990, NRt 1990, p. 1274, and of 23 May 1991, NRt 1991, p. 557). Measures under section 20 were often taken with a view to adoption by the foster parents. Adoption represented a final break in the legal relations between the child and its natural parents.

The notion of parental responsibilities, which is defined in Chapter 5 of the Child Act (Barnelova) no. 7 of 7 April 1981, comprises two elements: firstly a duty of care (omsut og omtanke), and secondly a duty and a right to decide, within certain limits, for the child in its personal matters (personlege tilhøve) (sections 30 to 33). The latter include decisions on the child's place of residence, general education, religious and civic education, medical and dental treatment, consent to marriage, adoption and employment (Lucy Smith and Peter Lødrup in Barn og Foreldre, 4th edition, Oslo 1993, pp. 67 and 71). In the present judgment the right of the parent to decide on the child's personal matters is referred to as "parental rights".

36. Compulsory care measures under the 1953 Act were to be lifted when the child was 21 years of age or when there were no longer any reasons to maintain the measures (section 48).

2. Administrative and judicial remedies against compulsory care measures

37. A decision by the Board or the Committee to take a child into care, to deprive the parents of their parental responsibilities or to restrict access under the 1953 Act could be appealed against to the County Governor by any person affected by the measure (sections 52 and 54 of the Act). Orders on access could in addition be appealed against to the Ministry of Child and Family Affairs (section 53 (2) of the 1953 Act).

38. Decisions by the County Governor under the 1953 Act regarding care decisions and the deprivation of parental responsibilities, but not access, could form the subject of an appeal to the City or District Court under a special procedure provided for in Chapter 33 of the Code of Civil Procedure. The court had jurisdiction to review all aspects of the case (Article 482).

An appeal against a judgment by the City or District Court lay directly to the Supreme Court (Article 485). This was to give priority to the kind of cases to which Chapter 33 of the Code applied, as is

illustrated by Article 478 of the Code which provided that the proceedings must be dealt with speedily.

39. On the other hand, appeals to the courts against decisions by the County Governor restricting access were governed by the ordinary procedure laid down in Chapter 30 of the Code of Civil Procedure and the general principles of judicial review of administrative decisions. Such review covered not only questions of fact and of law but also to some extent the exercise of administrative discretion (for a more detailed description, see the E. v. Norway judgment of 29 August 1990, Series A no. 181-A, pp. 18-19, paras. 40-42).

40. If an appeal by the natural parents to have the care terminated had been rejected, they were not entitled to apply for fresh review proceedings until one year after the prior decisions had become final (section 54 of the 1953 Act). However, no such right to review applied if the child had been adopted in the meantime, as adoption meant a definite break between the child and its natural parents.

B. The Child Welfare Services Act 1992

41. On 1 January 1993 the 1953 Act was replaced by the Child Welfare Services Act no. 100 of 17 July 1992 ("the 1992 Act"). Among other reforms the 1992 Act introduced a new adjudicating body in the child welfare administration, namely the County Social Welfare Board ("the County Board"), which was established in accordance with the Social Services Act (sosialtjenesteloven) no. 81 of 13 December 1991. The major reason for this change was to reinforce the legal protection of the parents and the child.

Like the 1953 Act, the 1992 Act stresses that "crucial importance shall be attached to framing measures which are in the child's best interest" (section 4-1).

42. Although the 1992 Act contains more detailed provisions, the conditions for compulsory care measures and deprivation of parental responsibilities are essentially the same as those that applied under the 1953 Act. The Supreme Court's case-law predating the 1992 Act remains applicable.

43. Under the 1992 Act the question of adoption of a child who has been taken into care is a separate issue. If the parents object to adoption, such a measure cannot be taken unless the County Board gives its consent. Under the more detailed provisions of the 1992 Act (section 4-20 (2) and (3)), the County Board may only give its consent if the parents will be permanently unable to provide the child with reasonable care, or if removing the child may lead to serious problems for him or her because of his or her attachment to the persons and the environment where he or she is living. In addition, an adoption must be in the child's best interest and the prospective adoptive parents must have been the child's foster parents and have shown themselves fit to bring up the child as their own. According to the preparatory works this implies that consent to adoption should not be given unless the child has lived in the foster home for some time.

44. Unlike the 1953 Act, the 1992 Act contains in section 4-19 (1) a provision to the effect that both the child and the parent have a right of access unless the County Board decides otherwise in the child's interests. The preparatory works of the new Act emphasise the importance of contact between the child and its parents.

45. The decisions of the County Board may be contested before the courts under the special provisions of Chapter 33 of the Code of Civil Procedure (section 9-10 of the Social Services Act). The system of judicial review of public-care decisions is amended on two major points.

Firstly, whereas judicial review of care decisions and deprivation of parental responsibilities under the 1953 Act presupposed a prior decision by the County Governor, an appeal against such decisions taken by the County Board under the 1992 Act lies directly to the City Court.

Secondly, whilst the special Chapter 33 review did not apply to access restrictions under the 1953 Act, it now does when such restrictions have been imposed under the 1992 Act (section 7-1).

PROCEEDINGS BEFORE THE COMMISSION

46. In her application to the Commission of 10 October 1990 (no. 17383/90), Ms Johansen complained that there had been a violation of her right to respect for family life as guaranteed by Article 8 of the Convention (art. 8) on account of the order to take her daughter into public care, the deprivation of her parental rights, the termination of her access to her daughter, the excessive length of the proceedings and their lack of fairness. She also invoked Article 6 of the Convention (art. 6) (right to a fair hearing within a reasonable time). In addition, she complained that, contrary to Article 13 (art. 13), she had not been afforded an effective remedy in respect of her complaint under Article 8 of the Convention (art. 8).

47. On 13 October 1993 the Commission declared the application admissible. In its report of 17 January 1995 (Article 31) (art. 31), the Commission expressed the opinion that there had been no violation of Article 8 of the Convention (art. 8) with regard to the taking of her daughter into care and the maintenance in force of the care decision concerned (unanimously); that there had been a violation of Article 8 (art. 8) as regards the decision depriving the applicant of her parental rights and access (by eleven votes to two); that no separate issue arose either under Article 6 (art. 6) (by twelve votes to one) or Article 13 (art. 13) (unanimously). The full text of the Commission's opinion and of the two partly dissenting opinions contained in the report is reproduced as an annex to this judgment (1).

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Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-III), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS MADE TO THE COURT

48. At the hearing on 23 January 1996 the Government, as they had done in their memorial, invited the Court to hold that there had been no violation of Article 6 or 8 of the Convention (art. 6, art. 8).

49. On the same occasion the applicant reiterated her request to the Court stated in her memorial to find that there had been a breach

of Articles 6 and 8 (art. 6, art. 8).

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION (art. 8)

50. The applicant alleged that the taking into care of her daughter S., the refusal to terminate the care and the deprivation of her parental rights and access gave rise to violations of Article 8 of the Convention (art. 8), which provides:

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

51. The Government disputed the above contention. The Commission considered that there had been no violation with regard to the taking into public care and the refusal to terminate the care, but that there had been a violation with regard to the deprivation of the applicant's parental rights and access.

A. Was there an interference with the applicant's right to respect for family life?

52. The Court recalls that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 (art. 8) (see, amongst others, the McMichael v. the United Kingdom judgment of 24 February 1995, Series A no. 307-B, p. 55, para. 86). The impugned measures, as was not disputed, evidently amounted to interferences with the applicant's right to respect for her family life as guaranteed by paragraph 1 of Article 8 of the Convention (art. 8-1). Such interference constitutes a violation of this Article (art. 8) unless it is "in accordance with the law", pursues an aim or aims that are legitimate under paragraph 2 of Article 8 (art. 8-2) and can be regarded as "necessary in a democratic society".

B. Were the interferences justified?

1. "In accordance with the law"

53. It was undisputed before the Commission and, with one exception, before the Court that the impugned measures had a basis in national law and, to that extent, the Court is satisfied that such was the case.

54. The exception was an allegation by the applicant - in her written pleadings dealing with the necessity of the interference - to the effect that the provisional taking into care of her daughter had failed to fulfil the condition as to risk of harm in section 11 of the Child Welfare Act 1953 (see paragraphs 12 and 33 above).

55. The Government maintained that the measure was in accordance with Norwegian law.

56. The Court sees no reason to doubt that the provisional taking into care of the daughter had a basis in Norwegian law; it observes that the applicant, although she could have done so, did not appeal against that measure but only challenged the subsequent decision to take into care on a permanent basis, which measure was upheld by the City Court as being lawful.

57. Before the Commission the applicant had argued that as the relevant law (see paragraphs 32-35 above) was framed in vague terms its effects were unforeseeable and it thus failed to satisfy one of the quality requirements implied by the expression "in accordance with the law" (see, for instance, the Margareta and Roger Andersson v. Sweden judgment of 25 February 1992, Series A no. 226-A, p. 25, para. 75).

58. The Commission and the Government disagreed. They considered that the law in question was rather broad in its terms but that it was impossible to formulate legal rules with absolute precision in this field. Also, since the imposition of measures under that law was to a large extent subject to judicial review, there were important safeguards against arbitrariness.

59. Before the Court the applicant did not pursue her submission that the relevant domestic law was not foreseeable for the purposes of paragraph 2 of Article 8 (art. 8-2).

2. Legitimate aim

60. Those who appeared before the Court agreed that the relevant domestic law was clearly intended to protect the interests of children and that there was nothing to suggest that it was applied for any other purpose.

61. The Court is satisfied that the contested measures were aimed at protecting the "health" and "rights and freedoms" of the applicant's daughter and thus pursued legitimate aims within the meaning of paragraph 2 of Article 8 (art. 8-2).

3. "Necessary in a democratic society"

62. The applicant disputed that the interference with her right to respect for family life had been "necessary". In this connection she challenged a number of aspects of the domestic decisions, namely (1) the decision-making process before the Committee (see paragraphs 14-17 above); (2) the merits of the taking into care of her daughter S. and the maintenance in force of the care decision; (3) the merits of the deprivation of her parental rights and access; and (4) the length of the entire proceedings.

63. The Government contested the applicant's allegations. The Commission disagreed on the first and second points but shared the applicant's view as regards the third point, taking into account the argument concerning the length of the proceedings.

64. In determining whether the impugned measures were "necessary in a democratic society", the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient for the purposes of paragraph 2 of Article 8

(art. 8-2) (see, inter alia, the Olsson v. Sweden (no. 1) judgment of 24 March 1988, Series A no. 130, p. 32, para. 68).

In so doing, the Court will have regard to the fact that perceptions as to the appropriateness of intervention by public authorities in the care of children vary from one Contracting State to another, depending on such factors as traditions relating to the role of the family and to State intervention in family affairs and the availability of resources for public measures in this particular area. However, consideration of what is in the best interest of the child is in any event of crucial importance. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned (see the Olsson v. Sweden (no. 2) judgment of 27 November 1992, Series A no. 250, pp. 35-36, para. 90), often at the very stage when care measures are being envisaged or immediately after their implementation. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities for the regulation of the public care of children and the rights of parents whose children have been taken into care, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see, for instance, the Hokkanen v. Finland judgment of 23 September 1994, Series A no. 299-A, p. 20, para. 55).

The margin of appreciation so to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake (see the Sunday Times v. the United Kingdom (no. 1) judgment of 26 April 1979, Series A no. 30, pp. 35-37, para. 59). Thus, the Court recognises that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care. However, a stricter scrutiny is called for both of any further limitations, such as restrictions placed by those authorities on parental rights and access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed.

It is against this background that the Court will examine whether the measures constituting the interferences with the applicant's exercise of her right to family life were "necessary".

(a) The decision-making process

65. The applicant complained that the hearing before the Committee had been inadequate. Not only had the authorities been over-represented, but their expert, Mr Rønbeck, had had a more favourable position at the hearing than the psychologists whom the applicant had wanted to be present: Mrs Valla had not been summoned and Mr Larssen had not been allowed to address the Committee (see paragraph 17 above). In addition, the fact that the hearing had continued until late at night had adversely affected the applicant's possibility of presenting her views in a fully satisfactory manner.

66. The Court notes that the Committee took its decision of 3 May 1990 after hearing the views of the applicant and her counsel. Mr Rønbeck had moreover been appointed with the applicant's agreement and it was only after he had presented his opinion that she requested the appointment of another psychologist, Mrs Valla. Although the

latter was not heard directly by the Committee, her report was submitted to it (see paragraph 17 above).

In the circumstances, there is nothing to suggest that the decision-making process leading to the adoption of the impugned measures by the Committee was unfair or failed to involve the applicant to a degree sufficient to provide her with the requisite protection of her interests (cf. the W. v. the United Kingdom judgment of 8 July 1987, Series A no. 121, pp. 28-29, paras. 64-65; and the above-mentioned McMichael judgment, pp. 55 and 57, paras. 87 and 92). In addition, it is to be noted that, before deciding the applicant's appeals, the County Governor and the City Court heard the applicant and her counsel (see paragraphs 24 and 27 above). The Court therefore agrees with the Government and the Commission that the procedure did not give rise to a breach of Article 8 (art. 8).

(b) The merits of the impugned measures

(i) The taking into care and the refusal to terminate the care

67. As to the taking into care, the applicant maintained that the Committee's majority had wrongly relied on Mr Rønbeck's assessment (see paragraphs 14 and 17 above). In concluding that she was incapable of assuming the care of her daughter, he had over-emphasised the importance of her difficult past in Bergen. The minority had correctly based its opinion on the assessment by the psychologist Mrs Valla, who, in the light of the improvements in the applicant's situation after she moved to Oslo, had considered her suitable as a carer, as was confirmed by the subsequent opinions of two other psychologists, Mrs Seltzer and Mrs Aanonsen (see paragraphs 18, 27 and 29 above). Indeed, even the City Court had found her suitable when adjudicating the case (see paragraph 27 above).

According to the applicant, any uncertainty as to her ability to care for her daughter could have been reduced by resorting to preventive care measures. For instance, the authorities could have acceded to the applicant's request for a place in a mother-and-child unit, which would have enabled her to prove she was capable of assuming care while under the supervision of the child welfare authorities. Any lack of cooperation between her and the child welfare authorities in Bergen had stemmed from her extremely difficult situation while living there and did not mean that she would not cooperate with the authorities in Oslo; on the contrary she had declared her willingness to do so.

68. Also the County Governor, in rejecting the applicant's appeal against the care decision, had in her view attached excessive weight to her past in Bergen and too little to the improvements in her ability to provide care after her move to Oslo.

69. She further maintained that the City Court's ruling had the undesirable consequence that a new-born baby placed in a foster home could never be reunited with his or her natural parent even though the latter, as here, was deemed capable of assuming care. Since care measures were in principle to be temporary in character, the authorities should instead have sought gradually to return the child to the applicant.

70. The Government and the Commission were of the view that both the taking into care and the maintenance in force of the care decision

were "necessary" within the meaning of paragraph 2 of Article 8 of the Convention (art. 8-2).

71. The Court observes that the Committee Chairperson's decision of 13 December 1989 to take the applicant's daughter S. provisionally into care was taken on the grounds that the applicant, in view of her physical and mental state at the time, was deemed unable to provide satisfactory care for her daughter, who would thus be at risk if she were to remain with the applicant. The Chairperson had regard not only to statements by medical officers in Oslo but also to those of the child welfare authorities in Bergen, which, after several years' concern for the applicant's son C., had provisionally taken him into care and had contemplated such a measure also with regard to the daughter S. immediately after her birth (see paragraph 12 above).

Furthermore, in deciding to take S. into care on a permanent basis, the Committee attached decisive weight to Mr Rønbeck's assessment that the applicant suffered from serious unsolved mental problems impairing her social skills and her ability to take care of children. It considered that, if S. were to remain with the applicant, it was likely that the child would live under such conditions as would damage her physical and mental health. Having failed to understand her son C.'s need for care, the applicant had opposed attempts by the authorities to assist her in this matter. The fact that preventive care measures in respect of her son had been ineffective suggested that this kind of measure would also be unsuccessful with regard to her daughter. There was little reason to believe that the applicant would be motivated to accept treatment. The child was at a stage of her development where it was crucial that she should become attached to stable and secure persons without fearing that she would be moved. In these circumstances, the Committee considered, it was in her best interests to be taken into care (see paragraphs 14 and 17 above).

Moreover, the County Governor's decision of 9 November 1990 upholding the Committee's decision to take S. into care was based essentially on the same reasons (see paragraph 24 above).

72. In its decision of 16 April 1991 the City Court found that the material conditions (ytre betingelser) had improved to a point where the applicant was able to provide S. with a satisfactory upbringing but held nevertheless that the measure should remain in force. It considered that, since S. had been taken into care shortly after birth, had had very little contact with her mother and had already been moved twice, returning her to the mother would entail a particular risk to her development. As the child was in the middle of a phase of development of personal autonomy, it was crucial that she live under secure and emotionally stable conditions, such as obtained in the foster home. Moreover, at this critical stage of her upbringing, there was a real danger that the applicant would be unable to deal adequately with the child's reactions to the change of environment (see paragraph 27 above).

73. In the light of the foregoing, the Court is satisfied that the taking of the applicant's daughter S. into care and the maintenance in force of the care decision concerned were based on reasons which were not only relevant but also sufficient for the purposes of paragraph 2 of Article 8 (art. 8-2). The measures were supported by painstaking and detailed assessments by the experts appointed by the Committee and the City Court. The finding of fact being primarily a matter for the national authorities, the Court will not substitute its views for

theirs as to the relative weight to be given to the expert evidence adduced by each party (see paragraph 64 above). It considers that in taking the above care measures the national authorities acted within the margin of appreciation afforded to them in such matters. Accordingly, these measures did not constitute a violation of Article 8 (art. 8).

(ii) The deprivation of parental rights and access

74. In the applicant's and the Commission's opinion, taking into care should in principle be a temporary measure to be discontinued as soon as circumstances permit. The deprivation of the applicant's parental rights and access had a permanent character and could only be considered "necessary" within the meaning of Article 8 para. 2 (art. 8-2) if supported by particularly strong reasons. However, the applicant's state of health had not been such that she would have been permanently unable to care for her daughter. The argument that the applicant might disturb the calm and stable foster-home environment could not be decisive as access arrangements could have been implemented outside the foster home. Having regard to the improvements in the applicant's situation and the irreversible effects which the deprivation of the applicant's parental rights and access had on her enjoyment of family life with her daughter, the measures could not be said to be justified.

75. In addition, the applicant disputed that the deprivation of her parental rights and access were in her daughter's interest. On the contrary, the mother's contact with her child during the period preceding her placement with the foster parents had been positive and such contact could have contributed to a stable development of the child's identity had it been allowed to continue. The applicant further stressed that the measures had not been based on proper and repeated reviews of the specific circumstances of her case but on a general and prevailing view that adoption offered better prospects for the child's welfare than long-term fostering. Having been taken primarily to facilitate adoption, the measures had seriously and permanently prejudiced the applicant's interests by depriving her of any prospects of being reunited with her daughter.

76. The Government argued that in cases such as the present one the necessity test to be applied under Article 8 of the Convention (art. 8), rather than attempting to strike a "fair balance" between the interests of the natural parent and those of the child, should attach paramount importance to the best interests of the child, a principle which was firmly rooted not only in the laws of the Council of Europe member States but also in the Organisation's own policies (see Council of Europe: Committee of Ministers Resolution (77) 33 on placement of children, adopted on 3 November 1977; 16th Conference of European Ministers of Justice, Lisbon, 21-22 June 1988, Conclusions and resolutions of the conference, pp. 5-6). In this connection the Government referred also to the preamble to the 1996 European Convention on the Exercise of Children's Rights and to Articles 3, 9 paras. 1 and 3, and 21 of the 1989 United Nations Convention on the Rights of the Child. In any event, so the Government submitted, Article 8 of the Convention (art. 8) should not be interpreted so as to protect family life to the detriment of the child's health and development.

77. In the instant case, they maintained, the reasons mentioned above for the taking into care and for maintaining the care decision

concerned in force all suggested that it was necessary to place the child permanently in a foster home. There was strong scientific evidence indicating that the placement was more likely to be successful if the child was adopted by the foster parents.

Reuniting the applicant with her daughter would have required extensive preparation presupposing good cooperation between all the parties involved. However, the applicant had shown an extremely hostile attitude towards the child welfare authorities in Bergen and had actively obstructed their implementation of the care decision in respect of her son by attempting to take him with her to Oslo. The competent authorities had therefore considered that there was a danger that she might disturb the daughter's development in the foster home and try to abduct her if given access. In these circumstances, having regard to their margin of appreciation, the relevant authorities were entitled to think that it was necessary for the protection of the child's best interests to deprive the applicant of her parental rights and access.

78. The Court considers that taking a child into care should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit and that any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and the child (see, in particular, the above-mentioned Olsson (no. 1) judgment, p. 36, para. 81). In this regard, a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child (see, for instance, the above-mentioned Olsson (no. 2) judgment, pp. 35-36, para. 90; and the above-mentioned Hokkanen judgment, p. 20, para. 55). In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent. In particular, as suggested by the Government, the parent cannot be entitled under Article 8 of the Convention (art. 8) to have such measures taken as would harm the child's health and development.

In the present case the applicant had been deprived of her parental rights and access in the context of a permanent placement of her daughter in a foster home with a view to adoption by the foster parents (see paragraphs 17 and 22 above). These measures were particularly far-reaching in that they totally deprived the applicant of her family life with the child and were inconsistent with the aim of reuniting them. Such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests (see, mutatis mutandis, the Margareta and Roger Andersson judgment cited above, p. 31, para. 95).

79. The question whether the deprivation of the applicant's parental rights and access was justified must be assessed in the light of the circumstances obtaining at the time when the decisions were taken and not with the benefit of hindsight. That question must moreover be considered in the light of the reasons mentioned in paragraphs 71 to 73 above for taking the daughter into care and for maintaining the care decision in force.

80. It is also relevant that it was in the child's interest to ensure that the process of establishing bonds with her foster parents was not disrupted. As already mentioned, the girl, who had been taken

into care shortly after birth and had already spent half a year with temporary carers before being placed in a long-term foster home, was at a stage of her development when it was crucial that she live under secure and emotionally stable conditions. The Court sees no reason to doubt that the care in the foster home had better prospects of success if the placement was made with a view to adoption (see paragraphs 17 and 27 above). Furthermore, regard must be had to the fact that the child welfare authorities found that the applicant was not "particularly motivated to accept treatment" (see paragraph 17 above) and even feared that she might take her daughter away; for instance, she had on one occasion tried to disappear with her son and on another occasion she had failed to inform the authorities that he had run away from the children's home to join her (see paragraph 16 above).

81. In the Court's opinion, the above considerations were all relevant to the issue of necessity under paragraph 2 of Article 8 (art. 8-2). It remains to be examined whether they were also sufficient to justify the Committee's decision of 3 May 1990 to cut off the contact between the mother and the child (see paragraphs 17 and 22 above).

82. In the first place, it must be observed that during the period between the birth of the applicant's daughter on 7 December 1989 and the Committee's decision of 3 May 1990, the applicant had had access to her child twice a week in a manner which does not appear to be open to criticism (see paragraph 16 above).

83. Secondly, as indicated in the Committee's decision of 3 May 1990, the applicant's lifestyle had by then already somewhat changed for the better (see paragraph 17 above).

It was rather the difficulties experienced in the implementation of the care decision concerning her son which provided the reason for the authorities' view that the applicant was unlikely to cooperate and that there was a risk of her disturbing the daughter's care if given access to the foster home (see paragraphs 16 and 17 above).

However, it cannot be said that those difficulties and that risk were of such a nature and degree as to dispense the authorities altogether from their normal obligation under Article 8 of the Convention (art. 8) to take measures with a view to reuniting them if the mother were to become able to provide the daughter with a satisfactory upbringing.

84. Against this background, the Court does not consider that the decision of 3 May 1990, in so far as it deprived the applicant of her access and parental rights in respect of her daughter, was sufficiently justified for the purposes of Article 8 para. 2 (art. 8-2), it not having been shown that the measure corresponded to any overriding requirement in the child's best interests (see paragraph 78 above).

Therefore the Court reaches the conclusion that the national authorities overstepped their margin of appreciation, thereby violating the applicant's rights under Article 8 of the Convention (art. 8).

In this connection it should be noted that less than a year after 3 May 1990 the City Court found that the applicant's material conditions had improved to the point where she would have been able to provide her daughter with a satisfactory upbringing. An important

consideration for the City Court in refusing to terminate care was the lack of contact between the applicant and her daughter pending the proceedings, which state of affairs resulted directly from the decision of 3 May 1990 to deprive the applicant of her access (see paragraph 27 above).

85. In view of the reasons set out in paragraphs 82 to 84 above, the Court does not consider that the applicant's allegation that the length of the care proceedings was excessive (see paragraph 62 above) gives rise to any issue under Article 8 (art. 8).

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 OF THE CONVENTION (art. 6-1)

86. The applicant also complained about the length of the proceedings under Article 6 para. 1 of the Convention (art. 6-1), which, in so far as relevant, reads:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

87. The Government disagreed with the applicant, whereas the Commission, having taken the length of the proceedings into account under Article 8 (art. 8) (see paragraph 63 above), concluded that no separate issue arose under Article 6 (art. 6).

88. The Court observes that the proceedings leading to the deprivation of parental rights and access commenced before the Committee on 13 December 1989 and ended when the Supreme Court refused leave to appeal on 19 September 1991 (see paragraphs 12 and 28 above). They thus lasted altogether one year and nine months.

The Court shares the applicant's and the Commission's opinion that, in view of what was at stake for the applicant and the irreversible and definitive character of the measures concerned, the competent national authorities were required by Article 6 para. 1 (art. 6-1) to act with exceptional diligence in ensuring the progress of the proceedings. However, it does not find that they failed to discharge their obligations in this respect.

In the Court's opinion the issues to be determined by the relevant administrative and judicial authorities were of a certain complexity. The proceedings comprised a thorough examination of the merits of the impugned care measures by the Committee's Chairperson, the Committee itself, the County Governor and the City Court and then a summary examination by the Supreme Court which refused leave to appeal (see paragraphs 12, 17, 24, 27 and 28 above). Thus three administrative and two judicial levels were involved and there is nothing to suggest, as was also conceded by the Commission, that any of these separately failed to act with the diligence required in the particular circumstances. Nor does it appear, having regard to the complexity of the case, that the duration of the proceedings as a whole exceeded a reasonable time.

89. Accordingly, the Court finds no breach of Article 6 of the Convention (art. 6) on account of the length of the proceedings.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION (art. 13)

90. Before the Commission the applicant alleged that there had been a breach of Article 13 of the Convention (art. 13), which reads:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

91. This complaint, which in the Commission's opinion gave rise to no issue separate from that under Article 8 (art. 8), was not pursued by the applicant before the Court, which does not consider it necessary to examine it of its own motion.

IV. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

92. Ms Adele Johansen sought just satisfaction under Article 50 of the Convention (art. 50), which reads:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

93. The applicant sought no compensation for damage but claimed the reimbursement of costs and expenses incurred in the proceedings before the Court. By letter of 17 June 1996, she stated that she waived her Article 50 (art. 50) claim, the costs and expenses in question having been reimbursed by way of legal aid from the Norwegian authorities.

FOR THESE REASONS, THE COURT

1. Holds unanimously that the taking into care of the applicant's daughter and the maintenance in force of the relevant care decision did not give rise to a breach of Article 8 of the Convention (art. 8);

2. Holds by eight votes to one that the decision of 3 May 1990, in so far as it deprived the applicant of her access and parental rights in respect of her daughter, constituted a violation of Article 8 (art. 8);

3. Holds unanimously that there has been no violation of Article 6 para. 1 of the Convention (art. 6-1);

4. Holds unanimously that it is not necessary to examine whether there was a breach of Article 13 of the Convention (art. 13);

5. Holds unanimously that it is not necessary to make an award for costs and expenses.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 August 1996.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 55 para. 2 of Rules of Court B, the partly dissenting opinion of Mr Morenilla is annexed to this judgment.

Initialled: R.B.

Initialled: H.P.

PARTLY DISSENTING OPINION OF JUDGE MORENILLA

1. I agree with the majority that the taking into care of the applicant's daughter and the maintenance in force of the care decision were "necessary in a democratic society" within the meaning of paragraph 2 of Article 8 of the Convention (art. 8-2). However, unlike the majority, I find that the Norwegian administrative and judicial authorities were entitled to think that it was "necessary" also to deprive the applicant of her parental rights and access in respect of the daughter.

2. When judging the necessity of these measures, the Court should, as rightly pointed out by the majority (see paragraph 64 of the judgment), examine whether the reasons adduced by the domestic authorities were "relevant and sufficient" in the light of the case as a whole. Moreover, regard should be had to the margin of appreciation to be accorded to them in this area, which, in addition to those reasons mentioned in paragraph 64 of the judgment, may be justified by the changing structure of family life in many member States of the Council of Europe (see Gomien, Harris and Zwaak, Law and Practice of the European Convention on Human Rights and the European Social Charter, Strasbourg 1996, pp. 242, 243).

I share the majority's view that the authorities' discretion in assessing the necessity of taking a child into care should be a wide one but, unlike the majority, I see no valid justification for the Court to exercise a stricter scrutiny of restrictions on parental rights and access. In my view, in respect of the latter kind of measure too, the Court should avoid playing the role of a court of appeal and should limit itself to reviewing whether the applicant's interests were duly protected in the decision-making process and whether the justifications adduced by the national authorities could reasonably be made on the basis of the facts established by them.

3. In the instant case, the decision-making process leading to the decisions depriving the applicant of her parental rights and access was, as also observed by the majority, beyond reproach.

However, unlike the majority, I consider that the difficulties which the child welfare authorities experienced with the applicant and the risk of her disturbing the foster-home environment were such as to exempt them from their normal duty under Article 8 (art. 8) to take measures with a view to reuniting her and the daughter. In serious circumstances such as those which obtained in the instant case, where the life, health and development of the child were at risk, society must be able to intervene by taking such measures as are required in order to protect the best interests of the child, even though it may have the ultimate effect of disrupting in an irreversible manner the natural bonds between the mother and the daughter. Such interests were

paramount not only under the relevant domestic law (see paragraphs 30-40 of the judgment) but also under Article 8 of the Convention (art. 8) (see, for instance, the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, pp. 20-21, para. 55; and the Olsson v. Sweden (no. 2) judgment of 27 November 1992, Series A no. 250, pp. 35-36, para. 90), which should be interpreted in the light of Resolution (77) 33 on placement of children adopted by the Committee of Ministers of the Council of Europe on 3 November 1977.

Although I am aware of the serious consequences of the measures for the applicant's family life, I consider that in the circumstances the authorities were, having regard to their margin of appreciation, entitled to think that it was necessary to deprive the applicant of her parental rights and access in the context of a permanent placement of the child in a foster home with a view to adoption. In my opinion, in reaching the contrary conclusion, the majority has based itself on reasoning (see paragraphs 82-84 of the judgment) which amounts to a reassessment of the evidence established by the Committee (see paragraph 17) and the County Governor (see paragraph 22).

4. For these reasons, I cannot follow the majority in finding that the national authorities, by depriving the applicant of her parental rights and access, "overstepped their margin of appreciation, thereby violating the applicant's rights under Article 8 of the Convention (art. 8)".

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

COURT (PLENARY)

CASE OF KLASS AND OTHERS v. GERMANY

(Application no. 5029/71)

JUDGMENT

STRASBOURG

6 September 1978

In the case of Klass and others,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

Mr. G. BALLADORE PALLIERI, *President*,
Mr. G. WIARDA,
Mr. H. MOSLER,
Mr. M. ZEKIA,
Mr. J. CREMONA,
Mr. P. O'DONOGHUE,
Mr. Thór VILHJÁLMSSON,
Mr. W. GANSHOF VAN DER MEERSCH,
Sir Gerald FITZMAURICE,
Mrs D. BINDSCHEDLER-ROBERT,
Mr. P.-H. TEITGEN,
Mr. G. LAGERGREN,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,

and also Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 11, 13 and 14 March, and then on 30 June, 1, 3 and 4 July 1978,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case of Klass and others was referred to the Court by the European Commission of Human Rights (hereinafter called "the Commission"). The case originated in an application against the Federal Republic of Germany lodged with the Commission on 11 June 1971 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter called "the Convention") by five German citizens, namely Gerhard Klass, Peter Lubberger, Jürgen Nussbruch, Hans-Jürgen Pohl and Dieter Selb.

2. The Commission's request, which referred to Articles 44 and 48, paragraph (a) (art. 44, art. 48-a), and to which was attached the report provided for in Article 31 (art. 31), was lodged with the registry of the Court on 15 July 1977, within the period of three months laid down in Articles 32 para. 1 and 47 (art. 32-1, art. 47). The purpose of the request is

to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Articles 6 para. 1, 8 and 13 (art. 6-1, art. 8, art. 13) of the Convention.

3. On 28 July, the President of the Court drew by lot, in the presence of the Registrar, the names of five of the seven judges called upon to sit as members of the Chamber; Mr. H. Mosler, the elected judge of German nationality, and Mr. G. Balladore Pallieri, the President of the Court, were ex officio members under Article 43 (art. 43) of the Convention and Rule 21 para. 3 (b) of the Rules of Court respectively. The five judges thus designated were Mr. J. Cremona, Mr. W. Ganshof van der Meersch, Mr. D. Evrigenis, Mr. G. Lagergren and Mr. F. Gölcüklü (Article 43 in fine of the Convention and Rule 21 para. 4 of the Rules of Court) (art. 43) .

Mr. Balladore Pallieri assumed the office of president of the Chamber in accordance with Rule 21 para. 5.

4. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Government and the Delegates of the Commission regarding the procedure to be followed. By an Order of 12 August, the President decided that the Government should file a memorial within a time-limit expiring on 28 November and that the Delegates of the Commission should be entitled to file a memorial in reply within two months of receipt of the Government’s memorial.

5. At a meeting held in private on 18 November in Strasbourg, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court, on the ground "that the case raise(d) serious questions affecting the interpretation of the Convention".

6. The Government filed their memorial on 28 November. On 27 January 1978, a memorial by the Principal Delegate of the Commission was received at the registry; at the same time, the Secretary to the Commission advised the Registrar that the Delegates would reply to the Government’s memorial during the oral hearings.

7. After consulting, through the Registrar, the Agent of the Government and the Delegates of the Commission, the President directed by an Order of 24 February 1978 that the oral hearings should open on 10 March.

8. The Court held a preparatory meeting on 10 March, immediately before the opening of the hearings. At that meeting the Court, granting a request presented by the Government, decided that their Agent and counsel would be authorised to address the Court in German at the hearings, the Government undertaking, inter alia, responsibility for the interpretation into French or English of their oral arguments or statements (Rule 27 para. 2). In addition, the Court took note of the intention of the Commission’s Delegates to be assisted during the oral proceedings by one of the applicants, namely Mr. Pohl; the Court also authorised Mr. Pohl to speak in German (Rules 29 para. 1 in fine and 27 para. 3).

9. The oral hearings took place in public at the Human Rights Building, Strasbourg, on 10 March.

There appeared before the Court:

- for the Government:
  Mrs. I. MAIER, Ministerialdirigentin
  at the Federal Ministry of Justice, *Agent*,
  Mr. H. G. MERK, Ministerialrat
  at the Federal Ministry of the Interior,
  Mr. H. STÖCKER, Regierungsdirektor
  at the Federal Ministry of Justice,
  Mrs. H. SEIBERT, Regierungsdirektorin
  at the Federal Ministry of Justice, *Advisers*;
- for the Commission:
  Mr. G. SPERDUTI, *Principal Delegate*,
  Mr. C. A. NØRGAARD, *Delegate*,
  Mr. H.-J. POHL, Applicant, assisting the Delegates
  under Rule 29 para. 1, second sentence.

The Court heard addresses by Mrs. Maier for the Government and by Mr. Sperduti, Mr. Nørgaard and Mr. Pohl for the Commission, as well as their replies to questions put by several members of the Court.

AS TO THE FACTS

10. The applicants, who are German nationals, are Gerhard Klass, an Oberstaatsanwalt, Peter Lubberger, a lawyer, Jürgen Nussbruch, a judge, Hans-Jürgen Pohl and Dieter Selb, lawyers. Mr. Nussbruch lives in Heidelberg, the others in Mannheim.

All five applicants claim that Article 10 para. 2 of the Basic Law (Grundgesetz) and a statute enacted in pursuance of that provision, namely the Act of 13 August 1968 on Restrictions on the Secrecy of the Mail, Post and Telecommunications (Gesetz zur Beschränkung des Brief-, Post- under Fernmeldegeheimnisses, hereinafter referred to as "the G 10"), are contrary to the Convention. They do not dispute that the State has the right to have recourse to the surveillance measures contemplated by the legislation; they challenge this legislation in that it permits those measures without obliging the authorities in every case to notify the persons concerned after the event, and in that it excludes any remedy before the courts against the ordering and execution of such measures. Their application is directed against the legislation as modified and interpreted by the Federal Constitutional Court (Bundesverfassungsgericht).

11. Before lodging their application with the Commission, the applicants had in fact appealed to the Federal Constitutional Court. By judgment of 15

December 1970, that Court held that Article 1 para. 5, sub-paragraph 5 of the G 10 was void, being incompatible with the second sentence of Article 10 para. 2 of the Basic Law, in so far as it excluded notification of the person concerned about the measures of surveillance even when such notification could be given without jeopardising the purpose of the restriction. The Constitutional Court dismissed the remaining claims (Collected Decisions of the Constitutional Court, Vol. 30, pp. 1 et seq.).

Since the operative provisions of the aforementioned judgment have the force of law, the competent authorities are bound to apply the G 10 in the form and subject to the interpretation decided by the Constitutional Court. Furthermore, the Government of the Federal Republic of Germany were prompted by this judgment to propose amendments to the G 10, but the parliamentary proceedings have not yet been completed.

12. As regards the applicants' right to apply to the Constitutional Court, that Court held, inter alia:

> "In order to be able to enter a constitutional application against an Act, the applicant must claim that the Act itself, and not merely an implementary measure, constitutes a direct and immediate violation of one of his fundamental rights ... These conditions are not fulfilled since, according to the applicants' own submissions, it is only by an act on the part of the executive that their fundamental rights would be violated. However, because they are not apprised of the interference with their rights, the persons concerned cannot challenge any implementary measure. In such cases, they must be entitled to make a constitutional application against the Act itself, as in cases where a constitutional application against an implementary measure is impossible for other reasons ..." (ibid, pp. 16-17).

13. Although, as a precautionary measure, the applicants claimed before both the Constitutional Court and the Commission that they were being subjected to surveillance measures, they did not know whether the G 10 had actually been applied to them.

On this point, the Agent of the Government made the following declaration before the Court:

> "To remove all uncertainty as to the facts of the case and to give the Court a clear basis for its decision, the Federal Minister of the Interior, who has competence in the matter, has, with the G 10 Commission's approval, authorised me to make the following statement:
>
> At no time have surveillance measures provided for by the Act enacted in pursuance of Article 10 of the Basic Law been ordered or implemented against the applicants. Neither as persons suspected of one or more of the offences specified in the Act nor as third parties within the meaning of Article 1, paragraph 2, sub-paragraph 2, of the G 10 have the applicants been subjected to such measures. There is also no question of the applicants' having been indirectly involved in a surveillance measure directed against another person - at least, not in any fashion which would have permitted their identification. Finally, there is no question of the applicants' having been subjected to surveillance by mistake - for example through confusion over a telephone number -, since in such cases the person concerned is notified of the surveillance measure."

The contested legislation

14. After the end of the Second World War, the surveillance of mail, post and telecommunications in Germany was dealt with by the occupying powers. As regards the Federal Republic, neither the entry into force on 24 May 1949 of the Basic Law nor the foundation of the State of the Federal Republic on 20 September 1949 altered this situation which continued even after the termination of the occupation régime in 1955. Article 5 para. 2 of the Convention of 26 May 1952 on Relations between the Three Powers (France, the United States and the United Kingdom) and the Federal Republic - as amended by the Paris Protocol of 23 October 1954 - specified in fact that the Three Powers temporarily retained "the rights ... heretofore held or exercised by them, which relate to the protection of the security of armed forces stationed in the Federal Republic". Under the same provision, these rights were to lapse "when the appropriate German authorities (had) obtained similar powers under German legislation enabling them to take effective action to protect the security of those forces, including the ability to deal with a serious disturbance of public security and order".

15. The Government wished to substitute the domestic law for the rights exercised by the Three Powers and to place under legal control interferences with the right, guaranteed by Article 10 of the Basic Law, to respect for correspondence. Furthermore, the restrictions to which this right could be subject appeared to the Government to be inadequate for the effective protection of the constitutional order of the State. Thus, on 13 June 1967, the Government introduced two Bills as part of the Emergency Legislation. The first sought primarily to amend Article 10 para. 2 of the Basic Law; the second - based on Article 10 para. 2 so amended - was designed to limit the right to secrecy of the mail, post and telecommunications. The two Acts, having been adopted by the federal legislative assemblies, were enacted on 24 June and 13 August 1968 respectively.

The Three Powers had come to the view on 27 May that these two texts met the requirements of Article 5 para. 2 of the above-mentioned Convention. Their statements declared:

> "The rights of the Three Powers heretofore held or exercised by them which relate to the protection of the security of armed forces stationed in the Federal Republic and which are temporarily retained pursuant to that provision will accordingly lapse as each of the above-mentioned texts, as laws, becomes effective."

16. In its initial version, Article 10 of the Basic Law guaranteed the secrecy of mail, post and telecommunications with a proviso that restrictions could be ordered only pursuant to a statute. As amended by the Act of 24 June 1968, it now provides:

> "(1) Secrecy of the mail, post and telecommunications shall be inviolable.
>
> (2) Restrictions may be ordered only pursuant to a statute. Where such restrictions are intended to protect the free democratic constitutional order or the existence or

security of the Federation or of a Land, the statute may provide that the person concerned shall not be notified of the restriction and that legal remedy through the courts shall be replaced by a system of scrutiny by agencies and auxiliary agencies appointed by the people's elected representatives."

17. The G 10, adopting the solution contemplated by the second sentence of paragraph 2 of the above-quoted Article 10, specifies (in Article 1 para. 1) the cases in which the competent authorities may impose the restrictions provided for in that paragraph, that is to say, may open and inspect mail and post, read telegraphic messages, listen to and record telephone conversations. Thus, Article 1 para. 1 empowers those authorities so to act in order to protect against "imminent dangers" threatening the "free democratic constitutional order", "the existence or the security of the Federation or of a Land", "the security of the (allied) armed forces" stationed on the territory of the Republic and the security of "the troops of one of the Three Powers stationed in the Land of Berlin". According to Article 1 para. 2, these measures may be taken only where there are factual indications (tatsächliche Anhaltspunkte) for suspecting a person of planning, committing or having committed certain criminal acts punishable under the Criminal Code, such as offences against the peace or security of the State (sub-paragraph 1, no. 1), the democratic order (sub-paragraph 1, no. 2), external security (sub-paragraph 1, no. 3) and the security of the allied armed forces (sub-paragraph 1, no. 5).

Paragraph 2 of Article 1 further states that the surveillance provided for in paragraph 1 is permissible only if the establishment of the facts by another method is without prospects of success or considerably more difficult (aussichtslos oder wesentlich erschwert). The surveillance may cover only "the suspect or such other persons who are, on the basis of clear facts (bestimmter Tatsachen), to be presumed to receive or forward communications intended for the suspect or emanating from him or whose telephone the suspect is to be presumed to use" (sub-paragraph 2).

18. Article 1 para. 4 of the Act provides that an application for surveillance measures may be made only by the head, or his substitute, of one of the following services: the Agencies for the Protection of the Constitution of the Federation and the Länder (Bundesamt für Verfassungsschutz; Verfassungsschutzbehörden der Länder), the Army Security Office (Amt für Sicherheit der Bundeswehr) and the Federal Intelligence Service (Bundesnachrichtendienst).

The measures are ordered, on written application giving reasons, either by the supreme Land authority in cases falling within its jurisdiction or by a Federal Minister empowered for the purpose by the Chancellor. The Chancellor has entrusted these functions to the Ministers of the Interior and of Defence each of whom, in the sphere falling within his competence, must personally take the decision as to the application of the measures (Article 1 para. 5, sub-paragraphs 1 and 2).

Measures ordered must be immediately discontinued once the required conditions have ceased to exist or the measures themselves are no longer necessary (Article 1 para. 7, sub-paragraph 2). The measures remain in force for a maximum of three months and may be renewed only on fresh application (Article 1 para. 5, sub-paragraph 3).

19. Under the terms of Article 1 para. 5, sub-paragraph 5, the person concerned is not to be notified of the restrictions affecting him. However, since the Federal Constitutional Court's judgment of 15 December 1970 (see paragraph 11 above), the competent authority has to inform the person concerned as soon as notification can be made without jeopardising the purpose of the restriction. To this end, the Minister concerned considers ex officio, immediately the measures have been discontinued or, if need be, at regular intervals thereafter, whether the person concerned should be notified. The Minister submits his decision for approval to the Commission set up under the G 10 for the purpose of supervising its application (hereinafter called "the G 10 Commission"). The G 10 Commission may direct the Minister to inform the person concerned that he has been subjected to surveillance measures.

20. Implementation of the measures ordered is supervised by an official qualified for judicial office (Article 1 para. 7, sub-paragraph 1). This official examines the information obtained in order to decide whether its use would be compatible with the Act and whether it is relevant to the purpose of the measure. He transmits to the competent authorities only information satisfying these conditions and destroys any other intelligence that may have been gathered.

The information and documents so obtained may not be used for other ends and documents must be destroyed as soon as they are no longer needed to achieve the required purpose (Article 1 para. 7 sub-paragraphs 3 and 4).

21. The competent Minister must, at least once every six months, report to a Board consisting of five Members of Parliament on the application of the G 10; the Members of Parliament are appointed by the Bundestag in proportion to the parliamentary groupings, the opposition being represented on the Board (Article 1 para. 9, sub-paragraph 1, of the G 10 and Rule 12 of the Rules of Procedure of the Bundestag). In addition, the Minister is bound every month to provide the G 10 Commission with an account of the measures he has ordered (Article 1 para. 9). In practice and except in urgent cases, the Minister seeks the prior consent of this Commission. The Government, moreover, intend proposing to Parliament to amend the G 10 so as to make such prior consent obligatory.

The G 10 Commission decides, ex officio or on application by a person believing himself to be under surveillance, on both the legality of and the necessity for the measures; if it declares any measures to be illegal or unnecessary, the Minister must terminate them immediately (Article 1 para. 9, sub-paragraph 2). Although not required by the Constitutional Court's

judgment of 15 December 1970, the Commission has, since that judgment, also been called upon when decisions are taken on whether the person concerned should be notified of the measures affecting him (see paragraph 19 above).

The G 10 Commission consists of three members, namely, a Chairman, who must be qualified to hold judicial office, and two assessors. The Commission members are appointed for the current term of the Bundestag by the above-mentioned Board of five Members of Parliament after consultation with the Government; they are completely independent in the exercise of their functions and cannot be subject to instructions.

The G 10 Commission draws up its own rules of procedure which must be approved by the Board; before taking this decision, the Board consults the Government.

For the Länder, their legislatures lay down the parliamentary supervision to which the supreme authorities are subject in the matter. In fact, the Länder Parliaments have set up supervisory bodies which correspond to the federal bodies from the point of view of organisation and operation.

22. According to Article 1 para. 9, sub-paragraph 5, of the G 10:

> "... there shall be no legal remedy before the courts in respect of the ordering and implementation of restrictive measures."

The official statement of reasons accompanying the Bill contains the following passage in this connection:

> "The surveillance of the post and telecommunications of a certain person can serve a useful purpose only if the person concerned does not become aware of it. For this reason, notification to this person is out of the question. For the same reason, it must be avoided that a person who intends to commit, or who has committed, the offences enumerated in the Act can, by using a legal remedy, inform himself whether he is under surveillance. Consequently, a legal remedy to impugn the ordering of restrictive measures had to be denied ...
>
> The Bill presented during the 4th legislative session ... provided for the ordering (of such measures) by an independent judge. The Federal Government abandoned this solution in the Bill amending Article 10 of the Basic Law, introduced as part of the Emergency Legislation, mainly because the Executive, which is responsible before the Bundestag, should retain the responsibility for such decisions in order to observe a clear separation of powers. The present Bill therefore grants the power of decision to a Federal Minister or the supreme authority of the Land. For the (above-)mentioned reasons ..., the person concerned is deprived of the opportunity of having the restrictive measures ordered examined by a court; on the other hand, the constitutional principle of government under the rule of law demands an independent control of interference by the Executive with the rights of citizens. Thus, the Bill, in pursuance of the Bill amending Article 10 of the Basic Law ..., prescribes the regular reporting to a Parliamentary Board and the supervision of the ordering of the restrictive measures by a Control Commission appointed by the Board ..." (Bundestag document V/1880 of 13 June 1967, p. 8).

23. Although access to the courts to challenge the ordering and implementation of surveillance measures is excluded in this way, it is still open to a person believing himself to be under surveillance pursuant to the G 10 to seek a constitutional remedy: according to the information supplied by the Government, a person who has applied to the G 10 Commission without success retains the right to apply to the Constitutional Court. The latter may reject the application on the ground that the applicant is unable to adduce proof to substantiate a complaint, but it may also request the Government concerned to supply it with information or to produce documents to enable it to verify for itself the individual's allegations. The authorities are bound to reply to such a request even if the information asked for is secret. It is then for the Constitutional Court to decide whether the information and documents so obtained can be used; it may decide by a two-thirds majority that their use is incompatible with State security and dismiss the application on that ground (Article 26 para. 2 of the Constitutional Court Act).

The Agent of the Government admitted that this remedy might be employed only on rare occasions.

24. If the person concerned is notified, after the measures have been discontinued, that he has been subject to surveillance, several legal remedies against the interference with his rights become available to him. According to the information supplied by the Government, the individual may: in an action for a declaration, have reviewed by an administrative court declaration, the legality of the application to him of the G 10 and the conformity with the law of the surveillance measures ordered; bring an action for damages in a civil court if he has been prejudiced; bring an action for the destruction or, if appropriate, restitution of documents; finally, if none of these remedies is successful, apply to the Federal Constitutional Court for a ruling as to whether there has been a breach of the Basic Law.

25. Article 2 of the G 10 has also amended the Code of Criminal Procedure by inserting therein two Articles which authorise measures of surveillance of telephone and telegraphic communications.

Under Article 100 (a), these measures may be taken under certain conditions, in particular, when there are clear facts on which to suspect someone of having committed or attempted to commit certain serious offences listed in that Article. Under Article 100 (b), such measures may be ordered only by a court and for a maximum of three months; they may be renewed. In urgent cases, the decision may be taken by the public prosecutor's department but to remain in effect it must be confirmed by a court within three days. The persons concerned are informed of the measures taken in their respect as soon as notification can be made without jeopardising the purpose of the investigation (Article 101 para. 1 of the Code of Criminal Procedure).

These provisions are not, however, in issue in the present case.

PROCEEDINGS BEFORE THE COMMISSION

26. In their application lodged with the Commission on 11 June 1971, the applicants alleged that Article 10 para. 2 of the Basic Law and the G 10 - to the extent that these provisions, firstly, empower the authorities to monitor their correspondence and telephone communications without obliging the authorities to inform them subsequently of the measures taken against them and, secondly, exclude the possibility of challenging such measures before the ordinary courts - violate Articles 6, 8 and 13 (art. 6, art. 8, art. 13) of the Convention.

On 18 December 1974, the Commission declared the application admissible. It found, as regards Article 25 (art. 25) of the Convention:

> "... only the victim of an alleged violation may bring an application. The applicants, however, state that they may be or may have been subject to secret surveillance, for example, in course of legal representation of clients who were themselves subject to surveillance, and that persons having been the subject of secret surveillance are not always subsequently informed of the measures taken against them. In view of this particularity of the case the applicants have to be considered as victims for the purpose of Article 25 (art. 25)."

27. Having been invited by the Government to consider the application inadmissible under Article 29 in conjunction with Articles 25 and 27 para. 2 (art. 29+25, art. 29+27-2) of the Convention, the Commission declared in its report of 9 March 1977 that it saw no reason to accede to this request. In this connection, the report stated:

> "The Commission is ... still of the opinion ... that the applicants must be considered as if they were victims. Some of the applicants are barristers and it is theoretically excluded that they are in fact subject to secret surveillance in consequence of contacts they may have with clients who are suspected of anti-constitutional activities.
>
> As it is the particularity of this case that persons subject to secret supervision by the authorities are not always subsequently informed of such measures taken against them, it is impossible for the applicants to show that any of their rights have been interfered with. In these circumstances the applicants must be considered to be entitled to lodge an application even if they cannot show that they are victims."

The Commission then expressed the opinion:

- by eleven votes to one with two abstentions, that the present case did not disclose any breach of Article 6 para. 1 (art. 6-1) of the Convention insofar as the applicants relied on the notion "civil rights";

- unanimously, that the present case did not disclose any breach of Article 6 para. 1 (art. 6-1) in so far as the applicants relied on the notion "criminal charge";

- by twelve votes in favour with one abstention, that the present case did not disclose any breach of Article 8 (art. 8) or of Article 13 (art. 13).

The report contains various separate opinions.

28. In her memorial of 28 November 1977, the Agent of the Government submitted in conclusion:

> "I ... invite the Court
>
> to find that the application was inadmissible;
>
> in the alternative, to find that the Federal Republic of Germany has not violated the Convention."

She repeated these concluding submissions at the hearing on 10 March 1978.

29. For their part, the Delegates of the Commission made the following concluding submissions to the Court:

> "May it please the Court to say and judge
>
> 1. Whether, having regard to the circumstances of the case, the applicants could claim to be 'victims' of a violation of their rights guaranteed by the Convention by reason of the system of surveillance established by the so-called G 10 Act;
>
> 2. And, if so, whether the applicants are actually victims of a violation of their rights set forth in the Convention by the very existence of that Act, considering that it gives no guarantee to persons whose communications have been subjected to secret surveillance that they will be notified subsequently of the measures taken concerning them."

AS TO THE LAW

I. ON ARTICLE 25 PARA. 1 (art. 25-1)

30. Both in their written memorial and in their oral submissions, the Government formally invited the Court to find that the application lodged with the Commission was "inadmissible". They argued that the applicants could not be considered as "victims" within the meaning of Article 25 para. 1 (art. 25-1) which provides as follows:

> "The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions ..."

In the Government's submission, the applicants were not claiming to have established an individual violation, even potential, of their own rights but rather, on the basis of the purely hypothetical possibility of being

subject to surveillance, were seeking a general and abstract review of the contested legislation in the light of the Convention.

31. According to the reply given by the Delegates at the hearing, the Commission agreed with the Government that the Court is competent to determine whether the applicants can claim to be "victims" within the meaning of Article 25 para. 1 (art. 25-1). However, the Commission disagreed with the Government in so far as the latter's proposal might imply the suggestion that the Commission's decision on the admissibility of the application should as such be reviewed by the Court.

The Delegates considered that the Government were requiring too rigid a standard for the notion of a "victim" of an alleged breach of Article 8 (art. 8) of the Convention. They submitted that, in order to be able to claim to be the victim of an interference with the exercise of the right conferred on him by Article 8 para. 1 (art. 8-1), it should suffice that a person is in a situation where there is a reasonable risk of his being subjected to secret surveillance. In the Delegates' view, the applicants are not only to be considered as constructive victims, as the Commission had in effect stated: they can claim to be direct victims of a violation of their rights under Article 8 (art. 8) in that under the terms of the contested legislation everyone in the Federal Republic of Germany who could be presumed to have contact with people involved in subversive activity really runs the risk of being subject to secret surveillance, the sole existence of this risk being in itself a restriction on free communication.

The Principal Delegate, for another reason, regarded the application as rightly declared admissible. In his view, the alleged violation related to a single right which, although not expressly enounced in the Convention, was to be derived by necessary implication; this implied right was the right of every individual to be informed within a reasonable time of any secret measure taken in his respect by the public authorities and amounting to an interference with his rights and freedoms under the Convention.

32. The Court confirms the well-established principle of its own case-law that, once a case is duly referred to it, the Court is endowed with full jurisdiction and may take cognisance of all questions of fact or of law arising in the course of the proceedings, including questions which may have been raised before the Commission under the head of admissibility. This conclusion is in no way invalidated by the powers conferred on the Commission under Article 27 (art. 27) of the Convention as regards the admissibility of applications. The task which this Article assigns to the Commission is one of sifting; the Commission either does or does not accept the applications. Its decision to reject applications which it considers to be inadmissible are without appeal as are, moreover, also those by which applications are accepted; they are taken in complete independence (see the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 29 and 30, paras. 47-54; see also the judgment of 9 February 1967 on

the preliminary objection in the "Belgian Linguistic" case, Series A no. 5, p. 18; the Handyside judgment of 7 December 1976, Series A no. 24, p. 20, para. 41; and the judgment of 18 January 1978 in the case of Ireland v. the United Kingdom, Series A no. 25, p. 63, para. 157).

The present case concerns, inter alia, the interpretation of the notion of "victim" within the meaning of Article 25 (art. 25) of the Convention, this being a matter already raised before the Commission. The Court therefore affirms its jurisdiction to examine the issue arising under that Article (art. 25).

33. While Article 24 (art. 24) allows each Contracting State to refer to the Commission "any alleged breach" of the Convention by another Contracting State, a person, non-governmental organisation or group of individuals must, in order to be able to lodge a petition in pursuance of Article 25 (art. 25), claim "to be the victim of a violation ... of the rights set forth in (the) Convention". Thus, in contrast to the position under Article 24 (art. 24) - where, subject to the other conditions laid down, the general interest attaching to the observance of the Convention renders admissible an inter-State application - Article 25 (art. 25) requires that an individual applicant should claim to have been actually affected by the violation he alleges (see the judgment of 18 January 1978 in the case of Ireland v. the United Kingdom, Series A no. 25, pp. 90-91, paras. 239 and 240). Article 25 (art. 25) does not institute for individuals a kind of actio popularis for the interpretation of the Convention; it does not permit individuals to complain against a law in abstracto simply because they feel that it contravenes the Convention. In principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been applied to his detriment. Nevertheless, as both the Government and the Commission pointed out, a law may by itself violate the rights of an individual if the individual is directly affected by the law in the absence of any specific measure of implementation. In this connection, the Court recalls that, in two previous cases originating in applications lodged in pursuance of Article 25 (art. 25), it has itself been faced with legislation having such an effect: in the "Belgian Linguistic" case and the case of Kjeldsen, Busk Madsen and Pedersen, the Court was called on to examine the compatibility with the Convention and Protocol No. 1 of certain legislation relating to education (see the judgment of 23 July 1968, Series A no. 6, and the judgment of 7 December 1976, Series A no. 23, especially pp. 22-23, para. 48).

34. Article 25 (art. 25), which governs the access by individuals to the Commission, is one of the keystones in the machinery for the enforcement of the rights and freedoms set forth in the Convention. This machinery involves, for an individual who considers himself to have been prejudiced by some action claimed to be in breach of the Convention, the possibility of bringing the alleged violation before the Commission provided the other

admissibility requirements are satisfied. The question arises in the present proceedings whether an individual is to be deprived of the opportunity of lodging an application with the Commission because, owing to the secrecy of the measures objected to, he cannot point to any concrete measure specifically affecting him. In the Court's view, the effectiveness (l'effet utile) of the Convention implies in such circumstances some possibility of having access to the Commission. If this were not so, the efficiency of the Convention's enforcement machinery would be materially weakened. The procedural provisions of the Convention must, in view of the fact that the Convention and its institutions were set up to protect the individual, be applied in a manner which serves to make the system of individual applications efficacious.

The Court therefore accepts that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him. The relevant conditions are to be determined in each case according to the Convention right or rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures.

35. In the light of these considerations, it has now to be ascertained whether, by reason of the particular legislation being challenged, the applicants can claim to be victims, in the sense of Article 25 (art. 25), of a violation of Article 8 (art. 8) of the Convention - Article 8 (art. 8) being the provision giving rise to the central issue in the present case.

36. The Court points out that where a State institutes secret surveillance the existence of which remains unknown to the persons being controlled, with the effect that the surveillance remains unchallengeable, Article 8 (art. 8) could to a large extent be reduced to a nullity. It is possible in such a situation for an individual to be treated in a manner contrary to Article 8 (art. 8), or even to be deprived of the right granted by that Article (art. 8), without his being aware of it and therefore without being able to obtain a remedy either at the national level or before the Convention institutions.

In this connection, it should be recalled that the Federal Constitutional Court in its judgment of 15 December 1970 (see paragraphs 11 and 12 above) adopted the following reasoning:

> "In order to be able to enter a constitutional application against an Act, the applicant must claim that the Act itself, and not merely an implementary measure, constitutes a direct and immediate violation of one of his fundamental rights ... These conditions are not fulfilled since, according to the applicants' own submissions, it is only by an act on the part of the executive that their fundamental rights would be violated. However, because they are not apprised of the interference with their rights, the persons concerned cannot challenge any implementary measure. In such cases, they must be entitled to make a constitutional application against the Act itself, as in cases

where a constitutional application against an implementary measure is impossible for other reasons ..."

This reasoning, in spite of the possible differences existing between appeals to the Federal Constitutional Court under German law and the enforcement machinery set up by the Convention, is valid, mutatis mutandis, for applications lodged under Article 25 (art. 25).

The Court finds it unacceptable that the assurance of the enjoyment of a right guaranteed by the Convention could be thus removed by the simple fact that the person concerned is kept unaware of its violation. A right of recourse to the Commission for persons potentially affected by secret surveillance is to be derived from Article 25 (art. 25), since otherwise Article 8 (art. 8) runs the risk of being nullified.

37. As to the facts of the particular case, the Court observes that the contested legislation institutes a system of surveillance under which all persons in the Federal Republic of Germany can potentially have their mail, post and telecommunications monitored, without their ever knowing this unless there has been either some indiscretion or subsequent notification in the circumstances laid down in the Federal Constitutional Court's judgment (see paragraph 11 above). To that extent, the disputed legislation directly affects all users or potential users of the postal and telecommunication services in the Federal Republic of Germany. Furthermore, as the Delegates rightly pointed out, this menace of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users or potential users a direct interference with the right guaranteed by Article 8 (art. 8).

At the hearing, the Agent of the Government informed the Court that at no time had surveillance measures under the G 10 been ordered or implemented in respect of the applicants (see paragraph 13 above). The Court takes note of the Agent's statement. However, in the light of its conclusions as to the effect of the contested legislation the Court does not consider that this retrospective clarification bears on the appreciation of the applicants' status as "victims".

38. Having regard to the specific circumstances of the present case, the Court concludes that each of the applicants is entitled to "(claim) to be the victim of a violation" of the Convention, even though he is not able to allege in support of his application that he has been subject to a concrete measure of surveillance. The question whether the applicants were actually the victims of any violation of the Convention involves determining whether the contested legislation is in itself compatible with the Convention's provisions.

Accordingly, the Court does not find it necessary to decide whether the Convention implies a right to be informed in the circumstances mentioned by the Principal Delegate.

II. ON THE ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

39. The applicants claim that the contested legislation, notably because the person concerned is not informed of the surveillance measures and cannot have recourse to the courts when such measures are terminated, violates Article 8 (art. 8) of the Convention which provides as follows:

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

40. According to Article 10 para. 2 of the Basic Law, restrictions upon the secrecy of the mail, post and telecommunications may be ordered but only pursuant to a statute. Article 1 para. 1 of the G 10 allows certain authorities to open and inspect mail and post, to read telegraphic messages and to monitor and record telephone conversations (see paragraph 17 above). The Court's examination under Article 8 (art. 8) is thus limited to the authorisation of such measures alone and does not extend, for instance, to the secret surveillance effect in pursuance of the Code of Criminal Procedure (see paragraph 25 above).

41. The first matter to be decided is whether and, if so, in what respect the contested legislation, in permitting the above-mentioned measures of surveillance, constitutes an interference with the exercise of the right guaranteed to the applicants under Article 8 para. 1 (art. 8-1).

Although telephone conversations are not expressly mentioned in paragraph 1 of Article 8 (art. 8-1), the Court considers, as did the Commission, that such conversations are covered by the notions of "private life" and "correspondence" referred to by this provision.

In its report, the Commission expressed the opinion that the secret surveillance provided for under the German legislation amounted to an interference with the exercise of the right set forth in Article 8 para. 1 (art. 8-1). Neither before the Commission nor before the Court did the Government contest this issue. Clearly, any of the permitted surveillance measures, once applied to a given individual, would result in an interference by a public authority with the exercise of that individual's right to respect for his private and family life and his correspondence. Furthermore, in the mere existence of the legislation itself there is involved, for all those to whom the legislation could be applied, a menance of surveillance; this menace necessarily strikes at freedom of communication between users of the postal and telecommunication services and thereby constitutes an "interference by a public authority" with the exercise of the applicants' right to respect for private and family life and for correspondence.

The Court does not exclude that the contested legislation, and therefore the measures permitted thereunder, could also involve an interference with the exercise of a person's right to respect for his home. However, the Court does not deem it necessary in the present proceedings to decide this point.

42. The cardinal issue arising under Article 8 (art. 8) in the present case is whether the interference so found is justified by the terms of paragraph 2 of the Article (art. 8-2). This paragraph, since it provides for an exception to a right guaranteed by the Convention, is to be narrowly interpreted. Powers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions.

43. In order for the "interference" established above not to infringe Article 8 (art. 8), it must, according to paragraph 2 (art. 8-2), first of all have been "in accordance with the law". This requirement is fulfilled in the present case since the "interference" results from Acts passed by Parliament, including one Act which was modified by the Federal Constitutional Court, in the exercise of its jurisdiction, by its judgment of 15 December 1970 (see paragraph 11 above). In addition, the Court observes that, as both the Government and the Commission pointed out, any individual measure of surveillance has to comply with the strict conditions and procedures laid down in the legislation itself.

44. It remains to be determined whether the other requisites laid down in paragraph 2 of Article 8 (art. 8-2) were also satisfied. According to the Government and the Commission, the interference permitted by the contested legislation was "necessary in a democratic society in the interests of national security" and/or "for the prevention of disorder or crime". Before the Court the Government submitted that the interference was additionally justified "in the interests of ... public safety" and "for the protection of the rights and freedoms of others".

45. The G 10 defines precisely, and thereby limits, the purposes for which the restrictive measures may be imposed. It provides that, in order to protect against "imminent dangers" threatening "the free democratic constitutional order", "the existence or security of the Federation or of a Land", "the security of the (allied) armed forces" stationed on the territory of the Republic or the security of "the troops of one of the Three Powers stationed in the Land of Berlin", the responsible authorities may authorise the restrictions referred to above (see paragraph 17).

46. The Court, sharing the view of the Government and the Commission, finds that the aim of the G 10 is indeed to safeguard national security and/or to prevent disorder or crime in pursuance of Article 8 para. 2 (art. 8-2). In these circumstances, the Court does not deem it necessary to decide whether the further purposes cited by the Government are also relevant.

On the other hand, it has to be ascertained whether the means provided under the impugned legislation for the achievement of the above-mentioned

aim remain in all respects within the bounds of what is necessary in a democratic society.

47. The applicants do not object to the German legislation in that it provides for wide-ranging powers of surveillance; they accept such powers, and the resultant encroachment upon the right guaranteed by Article 8 para. 1 (art. 8-1), as being a necessary means of defence for the protection of the democratic State. The applicants consider, however, that paragraph 2 of Article 8 (art. 8-2) lays down for such powers certain limits which have to be respected in a democratic society in order to ensure that the society does not slide imperceptibly towards totalitarianism. In their view, the contested legislation lacks adequate safeguards against possible abuse.

48. As the Delegates observed, the Court, in its appreciation of the scope of the protection offered by Article 8 (art. 8), cannot but take judicial notice of two important facts. The first consists of the technical advances made in the means of espionage and, correspondingly, of surveillance; the second is the development of terrorism in Europe in recent years. Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime.

49. As concerns the fixing of the conditions under which the system of surveillance is to be operated, the Court points out that the domestic legislature enjoys a certain discretion. It is certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field (cf., mutatis mutandis, the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 45-46, para. 93, and the Golder judgment of 21 February 1975, Series A no. 18, pp. 21-22, para. 45; cf., for Article 10 para. 2, the Engel and others judgment of 8 June 1976, Series A no. 22, pp. 41-42, para. 100, and the Handyside judgment of 7 December 1976, Series A no. 24, p. 22, para. 48).

Nevertheless, the Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.

50. The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on all the circumstances

of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law.

The functioning of the system of secret surveillance established by the contested legislation, as modified by the Federal Constitutional Court's judgment of 15 December 1970, must therefore be examined in the light of the Convention.

51. According to the G 10, a series of limitative conditions have to be satisfied before a surveillance measure can be imposed. Thus, the permissible restrictive measures are confined to cases in which there are factual indications for suspecting a person of planning, committing or having committed certain serious criminal acts; measures may only be ordered if the establishment of the facts by another method is without prospects of success or considerably more difficult; even then, the surveillance may cover only the specific suspect or his presumed "contact-persons" (see paragraph 17 above). Consequently, so-called exploratory or general surveillance is not permitted by the contested legislation.

Surveillance may be ordered only on written application giving reasons, and such an application may be made only by the head, or his substitute, of certain services; the decision thereon must be taken by a Federal Minister empowered for the purpose by the Chancellor or, where appropriate, by the supreme Land authority (see paragraph 18 above). Accordingly, under the law there exists an administrative procedure designed to ensure that measures are not ordered haphazardly, irregularly or without due and proper consideration. In addition, although not required by the Act, the competent Minister in practice and except in urgent cases seeks the prior consent of the G 10 Commission (see paragraph 21 above).

52. The G 10 also lays down strict conditions with regard to the implementation of the surveillance measures and to the processing of the information thereby obtained. The measures in question remain in force for a maximum of three months and may be renewed only on fresh application; the measures must immediately be discontinued once the required conditions have ceased to exist or the measures themselves are no longer necessary; knowledge and documents thereby obtained may not be used for other ends, and documents must be destroyed as soon as they are no longer needed to achieve the required purpose (see paragraphs 18 and 20 above).

As regards the implementation of the measures, an initial control is carried out by an official qualified for judicial office. This official examines the information obtained before transmitting to the competent services such information as may be used in accordance with the Act and is relevant to the purpose of the measure; he destroys any other intelligence that may have been gathered (see paragraph 20 above).

53. Under the G 10, while recourse to the courts in respect of the ordering and implementation of measures of surveillance is excluded, subsequent control or review is provided instead, in accordance with Article 10 para. 2 of the Basic Law, by two bodies appointed by the people's elected representatives, namely, the Parliamentary Board and the G 10 Commission.

The competent Minister must, at least once every six months, report on the application of the G 10 to the Parliamentary Board consisting of five Members of Parliament; the Members of Parliament are appointed by the Bundestag in proportion to the parliamentary groupings, the opposition being represented on the Board. In addition, the Minister is bound every month to provide the G 10 Commission with an account of the measures he has ordered. In practice, he seeks the prior consent of this Commission. The latter decides, ex officio or on application by a person believing himself to be under surveillance, on both the legality of and the necessity for the measures in question; if it declares any measures to be illegal or unnecessary, the Minister must terminate them immediately. The Commission members are appointed for the current term of the Bundestag by the Parliamentary Board after consultation with the Government; they are completely independent in the exercise of their functions and cannot be subject to instructions (see paragraph 21 above).

54. The Government maintain that Article 8 para. 2 (art. 8-2) does not require judicial control of secret surveillance and that the system of review established under the G 10 does effectively protect the rights of the individual. The applicants, on the other hand, qualify this system as a "form of political control", inadequate in comparison with the principle of judicial control which ought to prevail.

It therefore has to be determined whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the "interference" resulting from the contested legislation to what is "necessary in a democratic society".

55. Review of surveillance may intervene at three stages: when the surveillance is first ordered, while it is being carried out, or after it has been terminated. As regards the first two stages, the very nature and logic of secret surveillance dictate that not only the surveillance itself but also the accompanying review should be effected without the individual's knowledge. Consequently, since the individual will necessarily be prevented from seeking an effective remedy of his own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding the individual's rights. In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 para. 2 (art. 8-2), are not to be exceeded. One of the fundamental principles of a democratic

society is the rule of law, which is expressly referred to in the Preamble to the Convention (see the Golder judgment of 21 February 1975, Series A no. 18, pp. 16-17, para. 34). The rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.

56. Within the system of surveillance established by the G 10, judicial control was excluded, being replaced by an initial control effected by an official qualified for judicial office and by the control provided by the Parliamentary Board and the G 10 Commission.

The Court considers that, in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge.

Nevertheless, having regard to the nature of the supervisory and other safeguards provided for by the G 10, the Court concludes that the exclusion of judicial control does not exceed the limits of what may be deemed necessary in a democratic society. The Parliamentary Board and the G 10 Commission are independent of the authorities carrying out the surveillance, and are vested with sufficient powers and competence to exercise an effective and continuous control. Furthermore, the democratic character is reflected in the balanced membership of the Parliamentary Board. The opposition is represented on this body and is therefore able to participate in the control of the measures ordered by the competent Minister who is responsible to the Bundestag. The two supervisory bodies may, in the circumstances of the case, be regarded as enjoying sufficient independence to give an objective ruling.

The Court notes in addition that an individual believing himself to be under surveillance has the opportunity of complaining to the G 10 Commission and of having recourse to the Constitutional Court (see paragraph 23 above). However, as the Government conceded, these are remedies which can come into play only in exceptional circumstances.

57. As regards review a posteriori, it is necessary to determine whether judicial control, in particular with the individual's participation, should continue to be excluded even after surveillance has ceased. Inextricably linked to this issue is the question of subsequent notification, since there is in principle little scope for recourse to the courts by the individual concerned unless he is advised of the measures taken without his knowledge and thus able retrospectively to challenge their legality.

The applicants' main complaint under Article 8 (art. 8) is in fact that the person concerned is not always subsequently informed after the suspension of surveillance and is not therefore in a position to seek an effective remedy before the courts. Their preoccupation is the danger of measures being

improperly implemented without the individual knowing or being able to verify the extent to which his rights have been interfered with. In their view, effective control by the courts after the suspension of surveillance measures is necessary in a democratic society to ensure against abuses; otherwise adequate control of secret surveillance is lacking and the right conferred on individuals under Article 8 (art. 8) is simply eliminated.

In the Government's view, the subsequent notification which must be given since the Federal Constitutional Court's judgment (see paragraphs 11 and 19 above) corresponds to the requirements of Article 8 para. 2 (art. 8-2). In their submission, the whole efficacy of secret surveillance requires that, both before and after the event, information cannot be divulged if thereby the purpose of the investigation is, or would be retrospectively, thwarted. They stressed that recourse to the courts is no longer excluded after notification has been given, various legal remedies then becoming available to allow the individual, inter alia, to seek redress for any injury suffered (see paragraph 24 above).

58. In the opinion of the Court, it has to be ascertained whether it is even feasible in practice to require subsequent notification in all cases.

The activity or danger against which a particular series of surveillance measures is directed may continue for years, even decades, after the suspension of those measures. Subsequent notification to each individual affected by a suspended measure might well jeopardise the long-term purpose that originally prompted the surveillance. Furthermore, as the Federal Constitutional Court rightly observed, such notification might serve to reveal the working methods and fields of operation of the intelligence services and even possibly to identify their agents. In the Court's view, in so far as the "interference" resulting from the contested legislation is in principle justified under Article 8 para. 2 (art. 8-2) (see paragraph 48 above), the fact of not informing the individual once surveillance has ceased cannot itself be incompatible with this provision since it is this very fact which ensures the efficacy of the "interference". Moreover, it is to be recalled that, in pursuance of the Federal Constitutional Court's judgment of 15 December 1970, the person concerned must be informed after the termination of the surveillance measures as soon as notification can be made without jeopardising the purpose of the restriction (see paragraphs 11 and 19 above).

59. Both in general and in relation to the question of subsequent notification, the applicants have constantly invoked the danger of abuse as a ground for their contention that the legislation they challenge does not fulfil the requirements of Article 8 para. 2 (art. 8-2) of the Convention. While the possibility of improper action by a dishonest, negligent or over-zealous official can never be completely ruled out whatever the system, the considerations that matter for the purposes of the Court's present review are

the likelihood of such action and the safeguards provided to protect against it.

The Court has examined above (at paragraphs 51 to 58) the contested legislation in the light, inter alia, of these considerations. The Court notes in particular that the G 10 contains various provisions designed to reduce the effect of surveillance measures to an unavoidable minimum and to ensure that the surveillance is carried out in strict accordance with the law. In the absence of any evidence or indication that the actual practice followed is otherwise, the Court must assume that in the democratic society of the Federal Republic of Germany, the relevant authorities are properly applying the legislation in issue.

The Court agrees with the Commission that some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention (see, mutatis mutandis, the judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A no. 6, p. 32, para. 5). As the Preamble to the Convention states, "Fundamental Freedoms ... are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which (the Contracting States) depend". In the context of Article 8 (art. 8), this means that a balance must be sought between the exercise by the individual of the right guaranteed to him under paragraph 1 (art. 8-1) and the necessity under paragraph 2 (art. 8-2) to impose secret surveillance for the protection of the democratic society as a whole.

60. In the light of these considerations and of the detailed examination of the contested legislation, the Court concludes that the German legislature was justified to consider the interference resulting from that legislation with the exercise of the right guaranteed by Article 8 para. 1 (art. 8-1) as being necessary in a democratic society in the interests of national security and for the prevention of disorder or crime (Article 8 para. 2) (art. 8-2). Accordingly, the Court finds no breach of Article 8 (art. 8) of the Convention.

III. ON THE ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

61. The applicants also alleged a breach of Article 13 (art. 13) which provides:

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

62. In the applicants' view, the Contracting States are obliged under Article 13 (art. 13) to provide an effective remedy for any alleged breach of the Convention; any other interpretation of this provision would render it

meaningless. On the other hand, both the Government and the Commission consider that there is no basis for the application of Article 13 (art. 13) unless a right guaranteed by another Article of the Convention has been violated.

63. In the judgment of 6 February 1976 in the Swedish Engine Drivers' Union case, the Court, having found there to be in fact an effective remedy before a national authority, considered that it was not called upon to rule whether Article 13 (art. 13) was applicable only when a right guaranteed by another Article of the Convention has been violated (Series A no. 20, p. 18, para. 50; see also the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 46, para. 95). The Court proposes in the present case to decide on the applicability of Article 13 (art. 13), before examining, if necessary, the effectiveness of any relevant remedy under German law.

64. Article 13 (art. 13) states that any individual whose Convention rights and freedoms "are violated" is to have an effective remedy before a national authority even where "the violation has been committed" by persons in an official capacity. This provision, read literally, seems to say that a person is entitled to a national remedy only if a "violation" has occurred. However, a person cannot establish a "violation" before a national authority unless he is first able to lodge with such an authority a complaint to that effect. Consequently, as the minority in the Commission stated, it cannot be a prerequisite for the application of Article 13 (art. 13) that the Convention be in fact violated. In the Court's view, Article 13 (art. 13) requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. Thus Article 13 (art. 13) must be interpreted as guaranteeing an "effective remedy before a national authority" to everyone who claims that his rights and freedoms under the Convention have been violated.

65. Accordingly, although the Court has found no breach of the right guaranteed to the applicants by Article 8 (art. 8), it falls to be ascertained whether German law afforded the applicants "an effective remedy before a national authority" within the meaning of Article 13 (art. 13).

The applicants are not claiming that, in relation to particular surveillance measures actually applied to them, they lacked an effective remedy for alleged violation of their rights under the Convention. Rather, their complaint is directed against what they consider to be a shortcoming in the content of the contested legislation. While conceding that some forms of recourse exist in certain circumstances, they contend that the legislation itself, since it prevents them from even knowing whether their rights under the Convention have been interfered with by a concrete measure of surveillance, thereby denies them in principle an effective remedy under national law. Neither the Commission nor the Government agree with this

contention. Consequently, although the applicants are challenging the terms of the legislation itself, the Court must examine, inter alia, what remedies are in fact available under German law and whether these remedies are effective in the circumstances.

66. The Court observes firstly that the applicants themselves enjoyed "an effective remedy", within the meaning of Article 13 (art. 13), in so far as they challenged before the Federal Constitutional Court the conformity of the relevant legislation with their right to respect for correspondence and with their right of access to the courts. Admittedly, that Court examined the applicants' complaints with reference not to the Convention but solely to the Basic Law. It should be noted, however, that the rights invoked by the applicants before the Constitutional Court are substantially the same as those whose violation was alleged before the Convention institutions (cf., mutatis mutandis, the judgment of 6 February 1976 in the Swedish Engine Drivers' Union case, Series A no. 20, p. 18, para. 50). A reading of the judgment of 15 December 1970 reveals that the Constitutional Court carefully examined the complaints brought before it in the light, inter alia, of the fundamental principles and democratic values embodied in the Basic Law.

67. As regards the issue whether there is "an effective remedy" in relation to the implementation of concrete surveillance measures under the G 10, the applicants argued in the first place that to qualify as a "national authority", within the meaning of Article 13 (art. 13), a body should at least be composed of members who are impartial and who enjoy the safeguards of judicial independence. The Government in reply submitted that, in contrast to Article 6 (art. 6), Article 13 (art. 13) does not require a legal remedy through the courts.

In the Court's opinion, the authority referred to in Article 13 (art. 13) may not necessarily in all instances be a judicial authority in the strict sense (see the Golder judgment of 21 February 1975, Series A no. 18, p. 16, para. 33). Nevertheless, the powers and procedural guarantees an authority possesses are relevant in determining whether the remedy before it is effective.

68. The concept of an "effective remedy", in the applicants' submission, presupposes that the person concerned should be placed in a position, by means of subsequent information, to defend himself against any inadmissible encroachment upon his guaranteed rights. Both the Government and the Commission were agreed that no unrestricted right to notification of surveillance measures can be deduced from Article 13 (art. 13) once the contested legislation, including the lack of information, has been held to be "necessary in a democratic society" for any one of the purposes mentioned in Article 8 (art. 8).

The Court has already pointed out that it is the secrecy of the measures which renders it difficult, if not impossible, for the person concerned to seek

any remedy of his own accord, particularly while surveillance is in progress (see paragraph 55 above). Secret surveillance and its implications are facts that the Court, albeit to its regret, has held to be necessary, in modern-day conditions in a democratic society, in the interests of national security and for the prevention of disorder or crime (see paragraph 48 above). The Convention is to be read as a whole and therefore, as the Commission indicated in its report, any interpretation of Article 13 (art. 13) must be in harmony with the logic of the Convention. The Court cannot interpret or apply Article 13 (art. 13) so as to arrive at a result tantamount in fact to nullifying its conclusion that the absence of notification to the person concerned is compatible with Article 8 (art. 8) in order to ensure the efficacy of surveillance measures (see paragraphs 58 to 60 above). Consequently, the Court, consistently with its conclusions concerning Article 8 (art. 8), holds that the lack of notification does not, in the circumstances of the case, entail a breach of Article 13 (art. 13).

69. For the purposes of the present proceedings, an "effective remedy" under Article 13 (art. 13) must mean a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in any system of secret surveillance. It therefore remains to examine the various remedies available to the applicants under German law in order to see whether they are "effective" in this limited sense.

70. Although, according to the G 10, there can be no recourse to the courts in respect of the ordering and implementation of restrictive measures, certain other remedies are nevertheless open to the individual believing himself to be under surveillance: he has the opportunity of complaining to the G 10 Commission and to the Constitutional Court (see paragraphs 21 and 23 above). Admittedly, the effectiveness of these remedies is limited and they will in principle apply only in exceptional cases. However, in the circumstances of the present proceedings, it is hard to conceive of more effective remedies being possible.

71. On the other hand, in pursuance of the Federal Constitutional Court’s judgment of 15 December 1970, the competent authority is bound to inform the person concerned as soon as the surveillance measures are discontinued and notification can be made without jeopardising the purpose of the restriction (see paragraphs 11 and 19 above). From the moment of such notification, various legal remedies - before the courts - become available to the individual. According to the information supplied by the Government, the individual may: in an action for a declaration, have reviewed by an administrative court the lawfulness of the application to him of the G 10 and the conformity with the law of the surveillance measures ordered; bring an action for damages in a civil court if he has been prejudiced; bring an action for the destruction or, if appropriate, restitution of documents; finally, if none of these remedies is successful, apply to the Federal Constitutional

Court for a ruling as to whether there has been a breach of the Basic Law (see paragraph 24 above).

72. Accordingly, the Court considers that, in the particular circumstances of this case, the aggregate of remedies provided for under German law satisfies the requirements of Article 13 (art. 13).

IV. ON THE ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

73. The applicants finally alleged a breach of Article 6 para. 1 (art. 6-1) which provides:

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

74. According to the applicants, the surveillance measures which can be taken under the contested legislation amount both to an interference with a "civil right", and to the laying of a "criminal charge" within the meaning of Article 6 para. 1 (art. 6-1). In their submission, the legislation violates this Article (art. 6-1) in so far as it does not require notification to the person concerned in all cases after the termination of surveillance measures and excludes recourse to the courts to test the lawfulness of such measures. On the other hand, both the Government and the Commission concur in thinking that Article 6 para. 1 (art. 6-1) does not apply to the facts of the case under either the "civil" or the "criminal" head.

75. The Court has held that in the circumstances of the present case the G 10 does not contravene Article 8 (art. 8) in authorising a secret surveillance of mail, post and telecommunications subject to the conditions specified (see paragraphs 39 to 60 above).

Since the Court has arrived at this conclusion, the question whether the decisions authorising such surveillance under the G 10 are covered by the judicial guarantee set forth in Article 6 (art. 6) – assuming this Article (art. 6) to be applicable - must be examined by drawing a distinction between two stages: that before, and that after, notification of the termination of surveillance.

As long as it remains validly secret, the decision placing someone under surveillance is thereby incapable of judicial control on the initiative of the person concerned, within the meaning of Article 6 (art. 6); as a consequence, it of necessity escapes the requirements of that Article.

The decision can come within the ambit of the said provision only after discontinuance of the surveillance. According to the information supplied

by the Government, the individual concerned, once he has been notified of such discontinuance, has at his disposal several legal remedies against the possible infringements of his rights; these remedies would satisfy the requirements of Article 6 (art. 6) (see paragraphs 24 and 71 above).

The Court accordingly concludes that, even if it is applicable, Article 6 (art. 6) has not been violated.

FOR THESE REASONS, THE COURT

1. holds unanimously that it has jurisdiction to rule on the question whether the applicants can claim to be victims within the meaning of Article 25 (art. 25) of the Convention;

2. holds unanimously that the applicants can claim to be victims within the meaning of the aforesaid Article (art. 25);

3. holds unanimously that there has been no breach of Article 8, Article 13 or Article 6 (art. 8, art. 13, art. 6) of the Convention.

Done in French and English, both texts being authentic, at the Human Rights Building, Strasbourg, this sixth day of September, nineteen hundred and seventy-eight.

For the President
Gérard WIARDA
Vice-President

On behalf of the Registrar
Herbert PETZOLD
Deputy Registrar

The separate opinion of Judge PINHEIRO FARINHA is annexed to the present judgment in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 50 para. 2 of the Rules of Court.

G.W.
H.P.

SEPARATE OPINION OF JUDGE PINHEIRO FARINHA

(Translation)

I agree with the judgment's conclusions, but on different grounds.

1. The G 10 Act specifies, in Article 1 para. 1, the cases in which the competent authorities may impose restrictions, that is to say, may open and inspect mail and post, read telegraphic messages, listen to and record telephone conversations. It empowers those authorities so to act, inter alia, in order to protect against "imminent dangers" threatening the "free democratic constitutional order", "the existence or the security of the Federation or of a Land", "the security of the (allied) armed forces" stationed on the territory of the Republic and the security of "the troops of one of the Three Powers stationed in the Land of Berlin". According to Article 1 para. 2, these measures may be taken only where there are factual indications (tatsächliche Anhaltspunkte) for suspecting a person of planning, committing, or having committed certain criminal acts punishable under the Criminal Code, such as offences against the peace or security of the State (sub-paragraph 1, no. 1), the democratic order (sub-paragraph 1, no. 2), external security (sub-paragraph 1, no. 3) and the security of the allied armed forces (sub-paragraph 1, no. 5) (see paragraph 17 of the judgment).

For all those persons to whom the G 10 can be applied, the mere facts of its existence creates a very real menace that their exercise of the right to respect for their private and family life and their correspondence may be the subject of surveillance.

Clearly, therefore, a person may claim to be a victim for the purposes of Article 25 (art. 25) of the Convention. Consequently, the applicants have a direct interest (Jose Alberto dos Reis, Codigo do Processo Civil Anotado, vol. 1, p. 77), which is an ideal condition (Carnelutti, Sistemo del diritto processuale civile, vol. 1, pp. 361 and 366) for an application to the Commission.

In my view, the applicants are the victims of a menace and for this reason can claim to be victims within the meaning of Article 25 (art. 25).

2. I would mention in passing one point of concern, namely, that the majority opinion, contained in paragraph 56, could take the interpretation of Article 8 (art. 8) in a direction which, if I may say so, might not be without risk.

The measures are ordered, on written application giving reasons, either by the supreme Land authority in cases falling within its jurisdiction or by a Federal Minister empowered for the purpose by the Chancellor. The Chancellor has entrusted these functions to the Ministers of the Interior and of Defence, each of whom, in the sphere falling within his competence, must personally take the decision as to the application of the measures

(Article 1 para. 5, sub-paragraphs 1 and 2) (see paragraph 18 of the judgment).

Implementation of the measures ordered is supervised by an official qualified for judicial office (Article 1 para. 7, sub-paragraph 1) (see paragraph 20 of the judgment).

I believe that separation of powers is a basic principle of a democratic society and that, since the measures can be ordered where there are mere factual indications that criminal acts are about to be or are in the course of being committed, this principle requires that the measures be ordered by an independent judge - as was in fact contemplated by the German legislature (see paragraph 22 of the judgment).

I have difficulty in accepting that the political authority may decide by itself whether there exist factual indications that criminal acts are about to be or are in the course of being committed.

3. Acting in the general interest, the States, as the High Contracting Parties, safeguard the Convention against any breaches attributable to another State; such breaches can consist in the danger and threat to democracy which the publication of a law in itself may pose.

In cases originating in an application by individuals, it is necessary to show, in addition to the threat or danger, that there has been a specific violation of the Convention of which they claim to be the victims.

There is no doubt that a law can in itself violate the rights of an individual if it is directly applicable to that individual without any specific measure of implementation.

This is the case with a law which denies those who reside in a particular area access to certain educational establishments, and with a law which makes sex education one of the compulsory subjects on the curriculum: these laws are applicable without the need for any implementing measure (see the "Belgian Linguistic" case and the Kjeldsen, Busk Madsen and Pedersen case).

The same does not hold true for the German G 10.

The Act certainly makes provision for telephone-tapping and inspection of mail, although it delimits the scope of such measures and regulates the methods of enforcing them.

Surveillance of an "exploratory" or general kind is not, however, authorised by the legislation in question. If it were, then the Act would be directly applicable.

Instead, the measures cannot be applied without a specific decision by the supreme Land authority or the competent Federal Minister who must, in addition, consider whether there exist any factual indications that a criminal act is about to be or is in the course of being committed.

Thus, only where a surveillance measure has been authorised and taken against a given individual does any question arise of an interference by a

public authority with the exercise of that individual's right to respect for his private and family life and his correspondence.

So far as the case sub judice is concerned, on the one hand, the applicants do not know whether the G 10 has in fact been applied to them (see paragraph 12 of the judgment) and, on the other hand, the respondent Government state - and we have no reason to doubt this statement - that "at no time have surveillance measures provided for by the Act passed in pursuance of Article 10 of the Basic Law been ordered or implemented against the applicants.

The applicants have not been subjected to such measures either as persons suspected of one or more of the offences specified in the Act or as third parties within the meaning of Article 1, paragraph 2, sub-paragraph 2, of the G 10.

There is also no question of the applicants' having been indirectly involved in a surveillance measure directed against another person - at least, not in any fashion which would have permitted their identification.

Finally, there is no question of the applicants' having been subjected to surveillance by mistake - for example through confusion over a telephone number -, since in such cases the person concerned is notified of the surveillance measure" (see paragraph 13 of the judgment).

The Court may take into consideration only the case of the applicants (Engel and others judgment of 8 June 1976, Series A no. 22, p. 43, para. 106) and not the situation of other persons not having authorised them to lodge an application with the Commission in their name.

These are the reasons which lead me to conclude, as the Court does, that the case sub judice does not disclose any violation of the Convention.

In the case of Laskey, Jaggard and Brown
v. the United Kingdom (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Bernhardt, President,
Mr L.-E. Pettiti,
Mr C. Russo,
Mr A. Spielmann,
Sir John Freeland,
Mr M.A. Lopes Rocha,
Mr L. Wildhaber,
Mr P. Kuris,
Mr E. Levits,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 28 October 1996 and 20 January 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

_____
Notes by the Registrar

1. The case is numbered 109/1995/615/703-705. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 December 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in three applications (nos. 21627/93, 21826/93 and 21974/93) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) on 14 December 1992 by three British nationals, Mr Colin Laskey, Mr Roland Jaggard and Mr Anthony Brown.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46)

(art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 of the Convention (art. 8).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the late Mr Laskey's father and the two other applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 8 February 1996, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr C. Russo, Mr A. Spielmann, Mr M.A. Lopes Rocha, Mr L. Wildhaber, Mr P. Kuris and Mr E. Levits (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Registrar received the Government's and the applicants' memorials on 2 and 15 July 1996 respectively.

5. On 17 July 1996, the President granted leave to Rights International, a New York-based non-governmental human rights organisation, to submit written comments on specified aspects of the case (Rule 37 para. 2). The comments were received on 16 August 1996.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 October 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr I. Christie, Assistant Legal Adviser,
Foreign and Commonwealth Office, Agent,
Mr D. Pannick QC,
Mr M. Shaw, Counsel,
Mr S. Bramley,
Ms B. Moxon, Advisers;

(b) for the Commission

Mr G. Ress, Delegate;

(c) for the applicants

Lord Lester of Herne Hill QC,
Ms A. Worrall QC, Counsel,
Mr D. Jonas,
Mr A. Hamilton,
Mr I. Geffen, Solicitors,

Mr J. Wadham, Adviser.

The Court heard addresses by Mr Ress, Lord Lester of Herne Hill, Ms Worrall and Mr Pannick.

AS TO THE FACTS

I. The circumstances of the case

7. Mr Laskey, Mr Jaggard and Mr Brown, all British citizens, were born in 1943, 1947 and 1935 respectively. Mr Laskey died on 14 May 1996.

8. In 1987, in the course of routine investigations into other matters, the police came into possession of a number of video films which were made during sado-masochistic encounters involving the applicants and as many as forty-four other homosexual men. As a result the applicants, with several other men, were charged with a series of offences, including assault and wounding, relating to sado-masochistic activities that had taken place over a ten-year period. One of the charges involved a defendant who was not yet 21 years old - the age of consent to male homosexual practices at the time. Although the instances of assault were very numerous, the prosecution limited the counts to a small number of exemplary charges.

The acts consisted in the main of maltreatment of the genitalia (with, for example, hot wax, sandpaper, fish hooks and needles) and ritualistic beatings either with the assailant's bare hands or a variety of implements, including stinging nettles, spiked belts and a cat-o'-nine tails. There were instances of branding and infliction of injuries which resulted in the flow of blood and which left scarring.

These activities were consensual and were conducted in private for no apparent purpose other than the achievement of sexual gratification. The infliction of pain was subject to certain rules including the provision of a code word to be used by any "victim" to stop an "assault", and did not lead to any instances of infection, permanent injury or the need for medical attention.

9. The activities took place at a number of locations, including rooms equipped as torture chambers. Video cameras were used to record events and the tapes copied and distributed amongst members of the group. The prosecution was largely based on the contents of those videotapes. There was no suggestion that the tapes had been sold or used other than by members of the group.

10. The applicants pleaded guilty to the assault charges after the trial judge ruled that they could not rely on the consent of the "victims" as an answer to the prosecution case.

11. On 19 December 1990, the defendants were convicted and sentenced to terms of imprisonment. On passing sentence, the trial judge commented: "... the unlawful conduct now before the court would be dealt with equally in the prosecution of heterosexuals or bisexuals if carried out by them. The homosexuality of the defendants is only the background against which the case must be viewed."

Mr Laskey was sentenced to imprisonment for four years and six months. This included a sentence of four years' imprisonment for aiding and abetting keeping a disorderly house (see paragraph 31 below)

and a consecutive term of six months' imprisonment for possession of an indecent photograph of a child. Under section 47 of the Offences against the Person Act 1861 ("the 1861 Act" - see paragraph 27 below), Mr Laskey also received concurrent sentences of twelve months' imprisonment in respect of various counts of assault occasioning actual bodily harm and aiding and abetting assault occasioning actual bodily harm.

12. Mr Jaggard was sentenced to imprisonment for three years. He received two years' imprisonment for aiding and abetting unlawful wounding - contrary to section 20 of the 1861 Act (see paragraph 25 below) -, and a further twelve months' imprisonment for assault occasioning actual bodily harm, aiding and abetting the same offence, and unlawful wounding.

13. Mr Brown was sentenced to imprisonment for two years and nine months. He received twelve months' imprisonment for aiding and abetting assault occasioning actual bodily harm, a further nine months' imprisonment for assault occasioning actual bodily harm, and a further twelve months' imprisonment for further assaults occasioning actual bodily harm.

14. The applicants appealed against conviction and sentence.

15. On 19 February 1992, the Court of Appeal, Criminal Division, dismissed the appeals against conviction. Since, however, the court found that the applicants did not appreciate that their actions in inflicting injuries were criminal, reduced sentences were imposed.

16. Mr Laskey's sentence was thus reduced to eighteen months' imprisonment as regards the charge of aiding and abetting keeping a disorderly house. This sentence was to run concurrently with another three months' sentence in respect of the various counts of assault and consecutively with six months' imprisonment for the possession of an indecent photograph of a child, totalling two years' imprisonment.

17. Mr Jaggard's and Mr Brown's sentences were reduced to six months' and three months' imprisonment respectively.

18. The applicants appealed to the House of Lords on the following certified point of law of public importance:

> "Where A wounds or assaults B occasioning him actual bodily harm in the course of a sado-masochistic encounter, does the prosecution have to prove lack of consent on the part of B before they can establish A's guilt under section 20 or section 47 of the 1861 Act?"

19. On 11 March 1993, the appeal, known as the case of R. v. Brown ([1993] 2 All England Law Reports 75), was dismissed by a majority of the House of Lords, two of the five law lords dissenting.

20. Lord Templeman, in the majority, held after reviewing the case-law that:

> "... the authorities dealing with the intentional infliction of bodily harm do not establish that consent is a defence to a charge under the Act of 1861. They establish that consent is a defence to the infliction of bodily harm in the course of some lawful activities. The question is whether the defence

should be extended to the infliction of bodily harm in the course of sado-masochistic encounters ...

Counsel for the appellants argued that consent should provide a defence ... because it was said every person has a right to deal with his own body as he chooses. I do not consider that this slogan provides a sufficient guide to the policy decision which must now be taken. It is an offence for a person to abuse his own body and mind by taking drugs. Although the law is often broken, the criminal law restrains a practice which is regarded as dangerous and injurious to individuals and which if allowed and extended is harmful to society generally. In any event the appellants in this case did not mutilate their own bodies. They inflicted harm on willing victims ...

In principle there is a difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty. The violence of sado-masochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous. I am not prepared to invent a defence of consent for sado-masochistic encounters which breed and glorify cruelty ...

Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised."

21. Lord Jauncey of Tullichettle found that:

"In my view the line falls properly to be drawn between assault at common law and the offence of assault occasioning actual bodily harm created by section 47 of the 1861 Act, with the result that consent of the victim is no answer to anyone charged with the latter offence ... unless the circumstances fall within one of the well known exceptions such as organised sporting contests or games, parental chastisement or reasonable surgery ... the infliction of actual or more serious bodily harm is an unlawful activity to which consent is no answer.

... Notwithstanding the views which I have come to, I think it right to say something about the submissions that consent to the activity of the appellants would not be injurious to the public interest.

Considerable emphasis was placed by the appellants on the well-ordered and secret manner in which their activities were conducted and upon the fact that these activities had resulted in no injuries which required medical attention. There was, it was said, no question of proselytising by the appellants. This latter submission sits ill with the following passage in the judgment of the Lord Chief Justice:

> 'They [Laskey and Cadman] recruited new participants; they jointly organised proceedings at the house where much of this activity took place; where much of the pain inflicting equipment was stored.
>
> Cadman was a voyeur rather than a sado-masochist, but both he and Laskey through their operations at the

> Horwich premises were responsible in part for the corruption of a youth "K" who is now it seems settled into a normal heterosexual relationship.'

Be that as it may, in considering the public interest it would be wrong to look only at the activities of the appellants alone, there being no suggestion that they and their associates are the only practitioners of homosexual sado-masochism in England and Wales. This House must therefore consider the possibility that these activities are practised by others and by others who are not so controlled or responsible as the appellants are claiming to be. Without going into details of all the rather curious activities in which the appellants engaged it would appear to be good luck rather than good judgment which has prevented serious injury from occurring. Wounds can easily become septic if not properly treated, the free flow of blood from a person who is HIV-positive or who has AIDS can infect another and an inflicter who is carried away by sexual excitement or by drink or drugs could very easily inflict pain and injury beyond the level to which the receiver had consented. Your Lordships have no information as to whether such situations have occurred in relation to other sado-masochistic practitioners. It was no doubt these dangers which caused Lady Mallalieu to restrict her propositions in relation to the public interest to the actual rather than the potential result of the activity. In my view such a restriction is quite unjustified. When considering the public interest potential for harm is just as relevant as actual harm. As Mathew J. said in Coney 8 Queen's Bench 534, 547:

> 'There is however abundant authority for saying that no consent can render that innocent which is in fact dangerous.'

Furthermore, the possibility of proselytisation and corruption of young men is a real danger even in the case of these appellants and the taking of video recordings of such activities suggests that secrecy may not be as strict as the appellants claimed to your Lordships."

22. Lord Mustill and Lord Slynn of Hadley dissented. The first considered that the case should not be treated as falling within the criminal law of violence but rather within the criminal law of private sexual relations. He gave weight to the arguments of the appellants concerning Article 8 of the Convention (art. 8), finding that the decisions of the European authorities clearly favoured the right of the appellants to conduct their private life undisturbed by the criminal law. He considered after an examination of the relevant case-law that it was appropriate for the House of Lords to tackle afresh the question whether public interest required penalising the infliction of this degree of harm in private on a consenting recipient, where the purpose was not profit but gratification of sexual desire. He found no convincing argument on grounds of health (alleged risk of infections or spread of AIDS), the alleged risk of the activities getting out of hand or any possible risk of corruption of youth which might require the offences under the 1861 Act to be interpreted as applying to this conduct.

23. Lord Slynn of Hadley found that as the law stood adults were

able to consent to acts done in private which did not result in serious bodily harm. He agreed that it was in the end a matter of policy in an area where social and moral factors were extremely important and where attitudes could change. It was however for the legislature to decide whether such conduct should be brought within the criminal law and not for the courts in the interests of "paternalism" to introduce into existing statutory crimes relating to offences against the person concepts which did not properly fit there.

24. The proceedings were given widespread press coverage. All the applicants lost their jobs and Mr Jaggard required extensive psychiatric treatment.

II. Relevant domestic law and practice

A. Offences against the persons

1. The Offences against the Person Act 1861

25. Section 20 of the Offences against the Person Act 1861 ("the 1861 Act") provides:

> "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, ... shall be liable ... to [imprisonment] ... for not more than five years."

26. According to the case-law, to constitute a wound for the purposes of the section, the whole skin must be broken, not merely the outer layer or epidermis.

27. By section 47 of the 1861 Act:

> "Whosoever shall be convicted on indictment of any assault occasioning actual bodily harm shall be liable ... to imprisonment for not more than five years."

Actual bodily harm is defined as "any hurt or injury calculated to interfere with health or comfort" (Liksey J, in R. v. Miller [1954] 2 Queen's Bench Reports 282, at 292).

2. Case-law prior to R. v. Brown

28. In the case of R. v. Donovan ([1934] 2 King's Bench Reports, at 498), the accused had beaten with a cane a girl for the purposes of sexual gratification, with her consent. Swift J held:

> "It is an unlawful act to beat another person with such a degree of violence that the infliction of actual bodily harm is a probable consequence, and when such an act is proved, consent is immaterial."

29. In Attorney-General's Reference (No. 6 of 1980) ([1980] Queen's Bench Reports, at 715) where two men quarrelled and decided to fight each other, Lord Lane CJ in the Court of Appeal had held:

> "It is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our

judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent. Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases."

3. Case-law subsequent to R. v. Brown

30. In R. v. Wilson ([1996] 3 Weekly Law Reports, at 125), where a man had been convicted of assault occasioning actual bodily harm for having branded his initials with a hot knife on his wife's buttocks with her consent, the Court of Appeal, Criminal Division, allowed the appeal. In the course of the court's judgment, Lord Justice Russell stated:

"... there is no factual comparison to be made between the instant case and the facts of either Donovan or Brown: Mrs Wilson not only consented to that which the appellant did, she instigated it. There was no aggressive intent on the part of the appellant ...

...

We do not think that we are entitled to assume that the method adopted by the appellant and his wife was any more dangerous or painful than tattooing ...

Consensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgment, a proper matter for criminal investigation, let alone criminal prosecution."

B. Offences against public decency

31. Keeping a "disorderly house" is a common law offence. A disorderly house is defined as

"one which is not regulated by the restraints of morality and which is so conducted as to violate law and good order. There must be an element of 'open house', but it does not need to be open for the public at large ... Where indecent performances or exhibitions are alleged as rendering the premises a disorderly house, it must be proved that matters are there performed or exhibited of such a character that their performance or exhibition in a place of common resort (a) amounts to an outrage of public decency, or (b) tends to corrupt or deprave, or (c) is otherwise calculated to injure the public interest so as to call for condemnation and punishment" ([1996] Archbold's Criminal Pleading, Evidence and Practice 20, at 224).

PROCEEDINGS BEFORE THE COMMISSION

32. Mr Laskey, Mr Jaggard and Mr Brown applied to the Commission

on 14 December 1992. They relied on Articles 7 and 8 of the Convention (art. 7, art. 8), complaining that their convictions were the result of an unforeseeable application of a provision of the criminal law which, in any event, amounted to an unlawful and unjustifiable interference with their right to respect for their private life.

33. On 18 January 1995, the Commission declared the applications (nos. 21627/93, 21826/93 and 21974/93) admissible as to the complaint under Article 8 of the Convention (art. 8). In its report of 26 October 1995 (Article 31) (art. 31), it expressed the opinion, by eleven votes to seven, that there had been no violation of that provision (art. 8).

The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment (1).

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Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-I), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS TO THE COURT

34. At the hearing, the Government invited the Court to agree with the majority of the Commission that there had been no breach of the Convention in this case.

The applicants, for their part, asked the Court to consider the position of each individual applicant upon the basis of the agreed facts and the charges which were pertinent to them and to find a violation of their right to respect for their private lives through the expression of their sexual personality, as guaranteed by Article 8 of the Convention (art. 8).

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION (art. 8)

35. The applicants contended that their prosecution and convictions for assault and wounding in the course of consensual sado-masochistic activities between adults was in breach of Article 8 of the Convention (art. 8), which provides:

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

It was common ground among those appearing before the Court that the criminal proceedings against the applicants which resulted in their conviction constituted an "interference by a public authority"

with the applicants' right to respect for their private life. It was similarly undisputed that the interference had been "in accordance with the law". Furthermore, the Commission and the applicants accepted the Government's assertion that the interference pursued the legitimate aim of the "protection of health or morals", within the meaning of the second paragraph of Article 8 (art. 8-2).

36. The Court observes that not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8 (art. 8). In the present case, the applicants were involved in consensual sado-masochistic activities for purposes of sexual gratification. There can be no doubt that sexual orientation and activity concern an intimate aspect of private life (see, mutatis mutandis, the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, p. 21, para. 52). However, a considerable number of people were involved in the activities in question which included, inter alia, the recruitment of new "members", the provision of several specially equipped "chambers", and the shooting of many videotapes which were distributed among the "members" (see paragraphs 8 and 9 above). It may thus be open to question whether the sexual activities of the applicants fell entirely within the notion of "private life" in the particular circumstances of the case.

However, since this point has not been disputed by those appearing before it, the Court sees no reason to examine it of its own motion in the present case. Assuming, therefore, that the prosecution and conviction of the applicants amounted to an interference with their private life, the question arises whether such an interference was "necessary in a democratic society" within the meaning of the second paragraph of Article 8 (art. 8-2).

"Necessary in a democratic society"

37. The applicants maintained that the interference in issue could not be regarded as "necessary in a democratic society". This submission was contested by the Government and by a majority of the Commission.

38. In support of their submission, the applicants alleged that all those involved in the sado-masochistic encounters were willing adult participants; that participation in the acts complained of was carefully restricted and controlled and was limited to persons with like-minded sado-masochistic proclivities; that the acts were not witnessed by the public at large and that there was no danger or likelihood that they would ever be so witnessed; that no serious or permanent injury had been sustained, no infection had been caused to the wounds, and that no medical treatment had been required. Furthermore, no complaint was ever made to the police - who learnt about the applicants' activities by chance (see paragraph 8 above).

The potential for severe injury or for moral corruption was regarded by the applicants as a matter of speculation. To the extent that issues of public morality had arisen - with reference to Mr Laskey's conviction for keeping a disorderly house and for the possession of an indecent photograph of a child (see paragraph 11 above) - these had been dealt with under the relevant sexual offences provisions and appropriately punished. In any event, such issues fell outside the scope of the case as presented before the Court.

39. The applicants submitted that their case should be viewed as one involving matters of sexual expression, rather than violence. With due regard to this consideration, the line beyond which consent is no defence to physical injury should only be drawn at the level of intentional or reckless causing of serious disabling injury.

40. For the Government, the State was entitled to punish acts of violence, such as those for which the applicants were convicted, that could not be considered of a trifling or transient nature, irrespective of the consent of the victim. In fact, in the present case, some of these acts could well be compared to "genital torture" and a Contracting State could not be said to have an obligation to tolerate acts of torture because they are committed in the context of a consenting sexual relationship. The State was moreover entitled to prohibit activities because of their potential danger.

The Government further contended that the criminal law should seek to deter certain forms of behaviour on public-health grounds but also for broader moral reasons. In this respect, acts of torture - such as those in issue in the present case - may be banned also on the ground that they undermine the respect which human beings should confer upon each other. In any event, the whole issue of the role of consent in the criminal law is of great complexity and the Contracting States should enjoy a wide margin of appreciation to consider all the public-policy options.

41. The Commission noted that the injuries that were or could be caused by the applicants' activities were of a significant nature and degree, and that the conduct in question was, on any view, of an extreme character. The State authorities therefore acted within their margin of appreciation in order to protect its citizens from real risk of serious physical harm or injury.

42. According to the Court's established case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued; in determining whether an interference is "necessary in a democratic society", the Court will take into account that a margin of appreciation is left to the national authorities (see, inter alia, the Olsson v. Sweden (no. 1) judgment of 24 March 1988, Series A no. 130, pp. 31-32, para. 67), whose decision remains subject to review by the Court for conformity with the requirements of the Convention.

The scope of this margin of appreciation is not identical in each case but will vary according to the context. Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned (see the Buckley v. the United Kingdom judgment of 25 September 1996, Reports of Judgments and Decisions 1996-IV, pp. 1291-92, para. 74).

43. The Court considers that one of the roles which the State is unquestionably entitled to undertake is to seek to regulate, through the operation of the criminal law, activities which involve the infliction of physical harm. This is so whether the activities in question occur in the course of sexual conduct or otherwise.

44. The determination of the level of harm that should be tolerated by the law in situations where the victim consents is in the first instance a matter for the State concerned since what is at stake is

related, on the one hand, to public health considerations and to the general deterrent effect of the criminal law, and, on the other, to the personal autonomy of the individual.

45. The applicants have contended that, in the circumstances of the case, the behaviour in question formed part of private morality which is not the State's business to regulate. In their submission the matters for which they were prosecuted and convicted concerned only private sexual behaviour.

The Court is not persuaded by this submission. It is evident from the facts established by the national courts that the applicants' sado-masochistic activities involved a significant degree of injury or wounding which could not be characterised as trifling or transient. This, in itself, suffices to distinguish the present case from those applications which have previously been examined by the Court concerning consensual homosexual behaviour in private between adults where no such feature was present (see the Dudgeon judgment cited above, the Norris v. Ireland judgment of 26 October 1988, Series A no. 142, and the Modinos v. Cyprus judgment of 22 April 1993, Series A no. 259).

46. Nor does the Court accept the applicants' submission that no prosecution should have been brought against them since their injuries were not severe and since no medical treatment had been required.

In deciding whether or not to prosecute, the State authorities were entitled to have regard not only to the actual seriousness of the harm caused - which as noted above was considered to be significant - but also, as stated by Lord Jauncey of Tullichettle (see paragraph 21 above), to the potential for harm inherent in the acts in question. In this respect it is recalled that the activities were considered by Lord Templeman to be "unpredictably dangerous" (see paragraph 20 above).

47. The applicants have further submitted that they were singled out partly because of the authorities' bias against homosexuals. They referred to the recent judgment in the Wilson case (see paragraph 30 above), where, in their view, similar behaviour in the context of a heterosexual couple was not considered to deserve criminal punishment.

The Court finds no evidence in support of the applicants' allegations in either the conduct of the proceedings against them or the judgment of the House of Lords. In this respect it recalls the remark of the trial judge when passing sentence that "the unlawful conduct now before the court would be dealt with equally in the prosecution of heterosexuals or bisexuals if carried out by them" (see paragraph 11 above).

Moreover, it is clear from the judgment of the House of Lords that the opinions of the majority were based on the extreme nature of the practices involved and not the sexual proclivities of the applicants (see paragraphs 20 and 21 above).

In any event, like the Court of Appeal, the Court does not consider that the facts in the Wilson case were at all comparable in seriousness to those in the present case (see paragraph 30 above).

48. Accordingly, the Court considers that the reasons given by the national authorities for the measures taken in respect of the

applicants were relevant and sufficient for the purposes of Article 8 para. 2 (art. 8-2).

49. It remains to be ascertained whether these measures were proportionate to the legitimate aim or aims pursued.

The Court notes that the charges of assault were numerous and referred to illegal activities which had taken place over more than ten years. However, only a few charges were selected for inclusion in the prosecution case. It further notes that, in recognition of the fact that the applicants did not appreciate their actions to be criminal, reduced sentences were imposed on appeal (see paragraphs 15-17 above). In these circumstances, bearing in mind the degree of organisation involved in the offences, the measures taken against the applicants cannot be regarded as disproportionate.

50. In sum, the Court finds that the national authorities were entitled to consider that the prosecution and conviction of the applicants were necessary in a democratic society for the protection of health within the meaning of Article 8 para. 2 of the Convention (art. 8-2).

51. In view of this conclusion the Court, like the Commission, does not find it necessary to determine whether the interference with the applicants' right to respect for private life could also be justified on the ground of the protection of morals. This finding, however, should not be understood as calling into question the prerogative of the State on moral grounds to seek to deter acts of the kind in question.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 8 of the Convention (art. 8).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 February 1997.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the concurring opinion of Mr Pettiti is annexed to this judgment.

Initialled: R. B.

Initialled: H. P.

CONCURRING OPINION OF JUDGE PETTITI

(Translation)

I concurred with all my colleagues in finding that there had been no violation of Article 8 of the Convention (art. 8). However, my reasoning differs from theirs in some respects.

Firstly, the Court implicitly accepted that Article 8 (art. 8) was applicable since it assumed there had been an interference, and the application referred to State interference under Article 8 (art. 8): "the institution of criminal proceedings infringed that Article (art. 8)."

In my view, that Article (art. 8) was not even applicable in the instant case. The concept of private life cannot be stretched indefinitely.

Not every aspect of private life automatically qualifies for protection under the Convention. The fact that the behaviour concerned takes place on private premises does not suffice to ensure complete immunity and impunity. Not everything that happens behind closed doors is necessarily acceptable. It is already the case in criminal law that the "rape" of a spouse where there is doubt whether consent was given may lead to prosecution. Other types of behaviour may give rise to civil proceedings (internal telephone tapping for example). Sexual acts and abuse, even when not criminal, give rise to liability.

The case could have been looked at differently, both in domestic law and subsequently under the Convention. Can one consider that adolescents taking part in sado-masochistic activities have given their free and informed consent where their elders have used various means of enticement, including financial reward?

In domestic law, sado-masochistic activities could be made the subject of a specific criminal offence without that being contrary to Article 8 (art. 8) of the European Convention on Human Rights.

It seems to me that the wording used by the Court in paragraph 42 is too vague. The margin of appreciation has been used by the Court mainly in dealing with issues of morals or problems of civil society, but above all so as to afford better protection to others; consequently, a reference to the Müller and Others v. Switzerland judgment would have been preferable to the reference to the Buckley v. the United Kingdom judgment (see Olivier de Schutter's commentary on that judgment in Revue trimestrielle des droits de l'homme, Brussels, 1997, pp. 64-93).

It seemed to me necessary to expand paragraph 43 by noting "to regulate and punish practices of sexual abuse that are demeaning even if they do not involve the infliction of physical harm".

The dangers of unrestrained permissiveness, which can lead to debauchery, paedophilia (see paragraph 11 of the judgment) or the torture of others, were highlighted at the Stockholm World Conference. The protection of private life means the protection of a person's intimacy and dignity, not the protection of his baseness or the promotion of criminal immoralism.

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

COURT (PLENARY)

CASE OF MALONE v. THE UNITED KINGDOM

(Application no. 8691/79)

JUDGMENT

STRASBOURG

2 August 1984

In the Malone case,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 50 of the Rules of Court* and composed of the following judges:

Mr. G. WIARDA, *President,*
Mr. R. RYSSDAL,
Mr. J. CREMONA,
Mr. Thór VILHJÁLMSSON,
Mr. W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. D. EVRIGENIS,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. E. GARCÍA DE ENTERRÍA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. J. GERSING,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar,*

Having deliberated in private on 22 and 23 February and on 27 June 1984,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 16 May 1983, within the period of three months laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in an application (no. 8691/79) against the United Kingdom of Great Britain and

* Note by the registry: The revised Rules of Court, which entered into force on 1 January 1983, are applicable to the present case.

Northern Ireland lodged with the Commission on 19 July 1979 under Article 25 (art. 25) by a United Kingdom citizen, Mr. James Malone.

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 8 and 13 (art. 8, art. 13) of the Convention.

3. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Mr. Malone stated that he wished to participate in the proceedings pending before the Court and designated the lawyers who would represent him (Rule 30).

4. The Chamber of seven judges to be constituted included, as ex officio members, Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 para. 3 (b)). On 27 May 1983, the President of the Court drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. M. Zekia, Mrs. D. Bindschedler-Robert, Mr. G. Lagergren, Mr. R. Bernhardt and Mr. J. Gersing (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43) .

Mr. Zekia and Mr. Bernhardt, who were prevented from taking part in the consideration of the case, were subsequently replaced by Mr. B. Walsh and Mr. E. García de Enterría, substitute judges (Rules 22 para. 1 and 24 para. 1).

5. Mr. Wiarda assumed the office of President of the Chamber (Rule 21 para. 5). He ascertained, through the Registrar, the views of the Agent of the Government of the United Kingdom ("the Government"), the Delegate of the Commission and the lawyers for the applicant regarding the need for a written procedure. On 24 June, he directed that the Agent and the lawyers for the applicant should each have until 16 September to file a memorial and that the Delegate should be entitled to file, within two months from the date of the transmission to him by the Registrar of whichever of the aforesaid documents should last be filed, a memorial in reply (Rule 37 para. 1).

On 14 September, the President extended until 14 October each of the time-limits granted to the Agent and the applicant's lawyers.

6. The Government's memorial was received at the registry on 14 October, the applicant's memorial on 25 October. The Secretary to the Commission informed the Registrar by letter received on 22 December that the Delegate did not wish to file any written reply to these memorials but would be presenting his comments at the hearings.

7. On 27 October, the Chamber unanimously decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 50). On the same day, after consulting, through the Registrar, the Agent of the Government, the Delegate of the Commission and the lawyers for the applicant, the

President of the Court directed that the oral proceedings should open on 20 February 1984 (Rule 38).

8. By letter received on 6 October 1983, the Post Office Engineering Union ("the POEU") requested leave under Rule 37 para. 2 to submit written comments, indicating, inter alia, its "specific occupational interest" in the case and five themes it would want to develop in written comments. On 3 November, the President granted leave but on narrower terms than those sought: he specified that the comments should bear solely on certain of the matters referred to in the POEU's list of proposed themes and then only "in so far as such matters relate to the particular issues of alleged violation of the Convention which are before the Court for decision in the Malone case". He further directed that the comments should be filed not later than 3 January 1984.

On 16 December 1983, this time-limit was extended by the President by three weeks. The POEU's comments were received at the registry on 26 January 1984.

9. On 17 February 1984, the lawyers for the applicant filed the applicant's claims for just satisfaction under Article 50 (art. 50) of the Convention. On the same day, the Government supplied two documents whose production the Registrar had asked for on the instructions of the President. By letter received on 19 February, the Government, with a view to facilitating the hearings the following day, gave a clarification regarding a certain matter in the case.

10. The hearings were held in public at the Human Rights Building, Strasbourg, on 20 February. Immediately prior to their opening, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government
  Mr. M. EATON, Legal Counsellor,
  Foreign and Commonwealth Office, *Agent*,
  Sir Michael HAVERS, Q.C., M.P., Attorney General,
  Mr. N. BRATZA, Barrister-at-Law, *Counsel*,
  Mr. H. STEEL, Law Officers' Department,
  Mrs. S. EVANS, Legal Adviser, Home Office, *Advisers*;
- for the Commission
  Mr. C. NØRGAARD, President
  of the Commission, *Delegate*;
- for the applicant
  Mr. C. ROSS-MUNRO, Q.C.,
  Mr. D. SEROTA, Barrister-at-Law, *Counsel*.

The Court heard addresses by Sir Michael Havers for the Government, by Mr. Nørgaard for the Commission and by Mr. Ross-Munro for the applicant, as well as their replies to its questions.

11. On 27 February, in fulfilment of an undertaking given at the hearing, the Government supplied copies of extracts from a document which had been referred to in argument at the hearing. By letter received on 5 June, they notified the Registrar of an amendment to this document.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

12. Mr. James Malone was born in 1937 and is resident in Dorking, Surrey. In 1977, he was an antique dealer. It appears that he has since ceased business as such.

13. On 22 March 1977, Mr. Malone was charged with a number of offences relating to dishonest handling of stolen goods. His trial, which took place in June and August 1978, resulted in his being acquitted on certain counts and the jury disagreeing on the rest. He was retried on the remaining charges between April and May 1979. Following a further failure by the jury to agree, he was once more formally arraigned; the prosecution offered no evidence and he was acquitted.

14. During the first trial, it emerged that details of a telephone conversation to which Mr. Malone had been a party prior to 22 March 1977 were contained in the note-book of the police officer in charge of the investigations. Counsel for the prosecution then accepted that this conversation had been intercepted on the authority of a warrant issued by the Secretary of State for the Home Department.

15. In October 1978, the applicant instituted civil proceedings in the Chancery Division of the High Court against the Metropolitan Police Commissioner, seeking, inter alia, declarations to the effect that interception, monitoring and recording of conversations on his telephone lines without his consent was unlawful, even if done pursuant to a warrant of the Secretary of State. The Solicitor General intervened in the proceedings on behalf of the Secretary of State but without being made a party. On 28 February 1979, the Vice-Chancellor, Sir Robert Megarry, dismissed the applicant's claim (Malone v. Commissioner of Police of the Metropolis (No. 2), [1979] 2 All England Law Reports 620; also reported at [1979] 2 Weekly Law Reports 700). An account of this judgment is set out below (at paragraphs 31-36).

16. The applicant further believed that both his correspondence and his telephone calls had been intercepted for a number of years. He based his belief on delay to and signs of interference with his correspondence. In particular, he produced to the Commission bundles of envelopes which had

been delivered to him either sealed with an adhesive tape of an identical kind or in an unsealed state. As to his telephone communications, he stated that he had heard unusual noises on his telephone and alleged that the police had at times been in possession of information which they could only have obtained by telephone tapping. He thought that such measures had continued since his acquittal on the charges against him.

It was admitted by the Government that the single conversation about which evidence emerged at the applicant's trial had been intercepted on behalf of the police pursuant to a warrant issued under the hand of the Secretary of State for the prevention and detection of crime. According to the Government, this interception was carried out in full conformity with the law and the relevant procedures. No disclosure was made either at the trial of the applicant or during the course of the applicant's proceedings against the Commissioner of Police as to whether the applicant's own telephone number had been tapped or as to whether other and, if so, what other, telephone conversations to which the applicant was a party had been intercepted. The primary reasons given for withholding this information were that disclosure would or might frustrate the purpose of telephone interceptions and might also serve to identify other sources of police information, particularly police informants, and thereby place in jeopardy the source in question. For similar reasons, the Government declined to disclose before the Commission or the Court to what extent, if at all, the applicant's telephone calls and correspondence had been intercepted on behalf of the police authorities. It was however denied that the resealing with adhesive tape or the delivery unsealed of the envelopes produced to the Commission was attributable directly or indirectly to any interception. The Government conceded that, as the applicant was at the material time suspected by the police of being concerned in the receiving of stolen property and in particular of stolen antiques, he was one of a class of persons against whom measures of interception were liable to be employed.

17. In addition, Mr. Malone believed that his telephone had been "metered" on behalf of the police by a device which automatically records all numbers dialled. As evidence for this belief, he asserted that when he was charged in March 1977 the premises of about twenty people whom he had recently telephoned were searched by the police. The Government affirmed that the police had neither caused the applicant's telephone calls to be metered nor undertaken the alleged or any search operations on the basis of any list of numbers obtained from metering.

18. In September 1978, the applicant requested the Post Office and the complaints department of the police to remove suspected listening devices from his telephone. The Post Office and the police both replied that they had no authority in the matter.

II. RELEVANT LAW AND PRACTICE

A. Introduction

19. The following account is confined to the law and practice in England and Wales relating to the interception of communications on behalf of the police for the purposes of the prevention and detection of crime. The expression "interception" is used to mean the obtaining of information about the contents of a communication by post or telephone without the consent of the parties involved.

20. It has for long been the practice for the interception of postal and telephone communications in England and Wales to be carried out on the authority of a warrant issued by a Secretary of State, nowadays normally the Secretary of State for the Home Department (the Home Secretary). There is no overall statutory code governing the matter, although various statutory provisions are applicable thereto. The effect in domestic law of these provisions is the subject of some dispute in the current proceedings. Accordingly, the present summary of the facts is limited to what is undisputed, the submissions in relation to the contested aspects of these provisions being dealt with in the part of the judgment "as to the law".

21. Three official reports available to the public have described and examined the working of the system for the interception of communications.

Firstly, a Committee of Privy Councillors under the chairmanship of Lord Birkett was appointed in June 1957 "to consider and report upon the exercise by the Secretary of State of the executive power to intercept communications and, in particular, under what authority, to what extent and for what purposes this power has been exercised and to what use information so obtained has been put; and to recommend whether, how and subject to what safeguards, this power should be exercised ...". The Committee’s report (hereinafter referred to as "the Birkett report") was published in October 1957 (as Command Paper 283). The Government of the day announced that they accepted the report and its recommendations, and were taking immediate steps to implement those recommendations calling for a change in procedure. Subsequent Governments, in the person of the Prime Minister or the Home Secretary, publicly reaffirmed before Parliament that the arrangements relating to the interception of communications were strictly in accordance with the procedures described and recommended in the Birkett report.

Secondly, a Command Paper entitled "The Interception of Communications in Great Britain" was presented to Parliament by the then Home Secretary in April 1980 (Command Paper 7873 - hereinafter referred to as "the White Paper"). The purpose of the White Paper was to bring up to date the account given in the Birkett report.

Finally, in March 1981 a report by Lord Diplock, a Lord of Appeal in Ordinary who had been appointed to monitor the relevant procedures on a continuing basis (see paragraphs 54 and 55 below), was published outlining the results of the monitoring he had carried out to date.

22. The legal basis of the practice of intercepting telephone communications was also examined by the Vice-Chancellor in his judgment in the action which the applicant brought against the Metropolitan Police Commissioner (see paragraphs 31-36 below).

23. Certain changes have occurred in the organisation of the postal and telephone services since 1957, when the Birkett Committee made its report. The Post Office, which ran both services, was then a Department of State under the direct control of a Minister (the Postmaster General). By virtue of the Post Office Act 1969, it became a public corporation with a certain independence of the Crown, though subject to various ministerial powers of supervision and control exercised at the material time by the Home Secretary. The Post Office Act 1969 was repealed in part and amended by the British Telecommunications Act 1981. That Act divided the Post Office into two corporations: the Post Office, responsible for mail, and British Telecommunications, responsible for telephones. The 1981 Act made no change of substance in relation to the law governing interceptions. For the sake of convenience, references in the present judgment are to the position as it was before the 1981 Act came into force.

B. Legal position relating to interception of communications prior to 1969

24. The existence of a power vested in the Secretary of State to authorise by warrant the interception of correspondence, in the sense of detaining and opening correspondence transmitted by post, has been acknowledged from early times and its exercise has been publicly known (see the Birkett report, Part I, especially paras. 11, 17 and 39). The precise origin in law of this executive authority is obscure (ibid., para. 9). Nevertheless, although none of the Post Office statutes (of 1710, 1837, 1908 or 1953) contained clauses expressly conferring authority to intercept communications, all recognised the power as an independently existing power which it was lawful to exercise (ibid., paras. 17 and 38).

25. At the time of the Birkett report, the most recent statutory provision recognising the right of interception of a postal communication was section 58 sub-section 1 of the Post Office Act 1953, which provides:

> "If any officer of the Post Office, contrary to his duty, opens ... any postal packet in course of transmission by post, or wilfully detains or delays ... any such postal packet, he shall be guilty of a misdemeanour ... .

> Provided that nothing in this section shall extend to ... the opening, detaining or delaying of a postal packet ... in obedience to an express warrant in writing under the hand of a Secretary of State."

"Postal packet" is defined in section 87 sub-section 1 of the Act as meaning:

> "a letter, postcard, reply postcard, newspaper, printed packet, sample packet or parcel and every packet or article transmissible by post, and includes a telegram".

Section 58, which is still in force, reproduced a clause that had been on the statute book without material amendment since 1710.

26. So far as telecommunications are further concerned, it is an offence under section 45 of the Telegraph Act 1863 if an official of the Post Office "improperly divulges to any person the purport of any message". Section 11 of the Post Office (Protection) Act 1884 creates a similar offence in relation to telegrams. In addition, section 20 of the Telegraph Act 1868 makes it a criminal offence if any Post Office official "shall, contrary to his duty, disclose or in any way make known or intercept the contents or any part of the contents of any telegraphic message or any message entrusted to the [Post Office] for the purpose of transmission".

These provisions are still in force.

27. It was held in a case decided in 1880 (Attorney General v. Edison Telephone Company, (1880) 6 Queen’s Bench Division 244) that a telephone conversation is a "telegraphic communication" for the purposes of the Telegraph Acts. It has not been disputed in the present proceedings that the offences under the Telegraph Acts apply to telephone conversations.

28. The power to intercept telephone messages has been exercised in England and Wales from time to time since the introduction of the telephone. Until the year 1937, the Post Office, which was at that time a Department of Government, acted upon the view that the power which the Crown exercised in intercepting telephone messages was a power possessed by any operator of telephones and was not contrary to law. Consequently, no warrants by the Secretary of State were issued and arrangements for the interception of telephone conversations were made directly between the police authorities and the Director-General of the Post Office. In 1937, the position was reviewed by the Home Secretary and the Postmaster General (the Minister then responsible for the administration of the Post Office) and it was decided, as a matter of policy, that it was undesirable that records of telephone conversations should be made by Post Office servants and disclosed to the police without the authority of the Secretary of State. The view was taken that the power which had for long been exercised to intercept postal communications on the authority of a warrant of the Secretary of State was, by its nature, wide enough to include the interception of telephone communications. Since 1937 it had accordingly been the practice of the Post Office to intercept telephone conversations

only on the express warrant of the Secretary of State (see the Birkett report, paras. 40-41).

The Birkett Committee considered that the power to intercept telephone communications rested upon the power plainly recognised by the Post Office statutes as existing before the enactment of the statutes (Birkett report, para. 50). It concluded (ibid., para. 51):

> "We are therefore of the opinion that the state of the law might fairly be expressed in this way.
>
> (a) The power to intercept letters has been exercised from the earliest times, and has been recognised in successive Acts of Parliament.
>
> (b) This power extends to telegrams.
>
> (c) It is difficult to resist the view that if there is a lawful power to intercept communications in the form of letters and telegrams, then it is wide enough to cover telephone communications as well."

C. Post Office Act 1969

29. Under the Post Office Act 1969, the "Post Office" ceased to be a Department of State and was established as a public corporation of that name with the powers, duties and functions set out in the Act. In consequence of the change of status of the Post Office and of the fact that the Post Office was no longer under the direct control of a Minister of the Crown, it became necessary to make express statutory provision in relation to the interception of communications on the authority of a warrant of the Secretary of State. By section 80 of the Act it was therefore provided as follows:

> "A requirement to do what is necessary to inform designated persons holding office under the Crown concerning matters and things transmitted or in course of transmission by means of postal or telecommunication services provided by the Post Office may be laid on the Post Office for the like purposes and in the like manner as, at the passing of this Act, a requirement may be laid on the Postmaster General to do what is necessary to inform such persons concerning matters and things transmitted or in course of transmission by means of such services provided by him."

30. The 1969 Act also introduced, for the first time, an express statutory defence to the offences under the Telegraph Acts mentioned above (at paragraph 26), similar to that which exists under section 58 para. 1 of the Post Office Act 1953. This was effected by paragraph 1 sub-paragraph 1 of Schedule 5 to the Act, which reads:

> "In any proceedings against a person in respect of an offence under section 45 of the Telegraph Act 1863 or section 11 of the Post Office (Protection) Act 1884 consisting in the improper divulging of the purport of a message or communication or an offence under section 20 of the Telegraph Act 1868 it shall be a defence for him to prove that

the act constituting the offence was done in obedience to a warrant under the hand of a Secretary of State."

D. Judgment of Sir Robert Megarry V.-C. in Malone v. Commissioner of Police of the Metropolis

31. In the civil action which he brought against the Metropolitan Police Commissioner, Mr. Malone sought various relief including declarations to the following effect:

- that any "tapping" (that is, interception, monitoring or recording) of conversations on his telephone lines without his consent, or disclosing the contents thereof, was unlawful even if done pursuant to a warrant of the Home Secretary;
- that he had rights of property, privacy and confidentiality in respect of conversations on his telephone lines and that the above-stated tapping and disclosure were in breach of those rights;
- that the tapping of his telephone lines violated Article 8 (art. 8) of the Convention.

In his judgment, delivered on 28 February 1979, the Vice-Chancellor noted that he had no jurisdiction to make the declaration claimed in respect of Article 8 (art. 8) of the Convention. He made a detailed examination of the domestic law relating to telephone tapping, held in substance that the practice of tapping on behalf of the police as recounted in the Birkett report was legal and accordingly dismissed the action.

32. The Vice-Chancellor described the central issue before him as being in simple form: is telephone tapping in aid of the police in their functions relating to crime illegal? He further delimited the question as follows:

> "... the only form of telephone tapping that has been debated is tapping which consists of the making of recordings by Post Office officials in some part of the existing telephone system, and the making of those recordings available to police officers for the purposes of transcription and use. I am not concerned with any form of tapping that involved electronic devices which make wireless transmissions, nor with any process whereby anyone trespasses onto the premises of the subscriber or anyone else to affix tapping devices or the like. All that I am concerned with is the legality of tapping effected by means of recording telephone conversations from wires which, though connected to the premises of the subscriber, are not on them." ([1979] 2 All England Law Reports, p. 629)

33. The Vice-Chancellor held that there was no right of property (as distinct from copyright) in words transmitted along telephone lines (ibid., p. 631).

As to the applicant’s remaining contentions based on privacy and confidentiality, he observed firstly that no assistance could be derived from cases dealing with other kinds of warrant. Unlike a search of premises, the process of telephone tapping on Post Office premises did not involve any act of trespass and so was not prima facie illegal (ibid., p. 640). Secondly,

referring to the warrant of the Home Secretary, the Vice-Chancellor remarked that such warrant did not "purport to be issued under the authority of any statute or of the common law". The decision to introduce such warrants in 1937 seemed "plainly to have been an administrative decision not dictated or required by statute" (ibid.). He referred, however, to section 80 of the Post Office Act 1969 and Schedule 5 to the Act, on which the Solicitor General had based certain contentions summarised as follows:

> "Although the previous arrangements had been merely administrative, they had been set out in the Birkett report a dozen years earlier, and the section plainly referred to these arrangements; ... A warrant was not needed to make the tapping lawful: it was lawful without any warrant. But where the tapping was done under warrant ... [section 80] afforded statutory recognition of the lawfulness of the tapping." (ibid., p. 641)

"In their essentials", stated the Vice-Chancellor, "these contentions seem to me to be sound." He accepted that, by the 1969 Act,

> "Parliament has provided a clear recognition of the warrant of the Home Secretary as having an effective function in law, both as providing a defence to certain criminal charges, and also as amounting to an effective requirement for the Post Office to do certain acts" (ibid., pp. 641-642).

The Vice-Chancellor further concluded that there was in English law neither a general right of privacy nor, as the applicant had contended, a particular right of privacy to hold a telephone conversation in the privacy of one’s home without molestation (ibid., pp. 642-644). Moreover, no duty of confidentiality existed between the Post Office and the telephone subscriber; nor was there any other obligation of confidence on a person who overheard a telephone conversation, whether by means of tapping or otherwise (ibid., pp. 645-647).

34. Turning to the arguments based on the Convention, the Vice-Chancellor noted firstly that the Convention was not part of the law of England and, as such, did not confer on the applicant direct rights that could be enforced in the English courts (ibid., p. 647).

He then considered the applicant’s argument that the Convention, as interpreted by the European Court in the case of Klass and Others (judgment of 6 September 1978, Series A no. 28), could be used as a guide to assist in the determination of English law on a point that was uncertain. He observed that the issues before him did not involve construing legislation enacted with the purpose of giving effect to obligations imposed by the Convention. Where Parliament had abstained from legislating on a point that was plainly suitable for legislation, it was difficult for the court to lay down new rules that would carry out the Crown’s treaty obligations, or to discover for the first time that such rules had always existed. He compared the system of safeguards considered in the Klass case with the English system, as described in the Birkett report, and concluded:

"... Not a single one of these safeguards is to be found as a matter of established law in England, and only a few corresponding provisions exist as a matter of administrative procedure.

It does not, of course, follow that a system with fewer or different safeguards will fail to satisfy Article 8 (art. 8) in the eyes of the European Court of Human Rights. At the same time, it is impossible to read the judgment in the Klass case without it becoming abundantly clear that a system which has no legal safeguards whatever has small chance of satisfying the requirements of that Court, whatever administrative provisions there may be. ... Even if the system [in operation in England] were to be considered adequate in its conditions, it is laid down merely as a matter of administrative procedure, so that it is unenforceable in law, and as a matter of law could at any time be altered without warning or subsequent notification. Certainly in law any 'adequate and effective safeguards against abuse' are wanting. In this respect English law compares most unfavourably with West German law: this is not a subject on which it is possible to feel any pride in English law.

I therefore find it impossible to see how English law could be said to satisfy the requirements of the Convention, as interpreted in the Klass case, unless that law not only prohibited all telephone tapping save in suitably limited classes of case, but also laid down detailed restrictions on the exercise of the power in those limited classes."

This conclusion did not, however, enable the Vice-Chancellor to decide the case in the way the applicant sought:

"It may perhaps be that the common law is sufficiently fertile to achieve what is required by the first limb of [the above-stated proviso]: possible ways of expressing such a rule may be seen in what I have already said. But I see the greatest difficulty in the common law framing the safeguards required by the second limb. Various institutions or offices would have to be brought into being to exercise various defined functions. The more complex and indefinite the subject-matter the greater the difficulty in the court doing what it is really appropriate, and only appropriate, for the legislature to do. Furthermore, I find it hard to see what there is in the present case to require the English courts to struggle with such a problem. Give full rein to the Convention, and it is clear that when the object of the surveillance is the detection of crime, the question is not whether there ought to be a general prohibition of all surveillance, but in what circumstances, and subject to what conditions and restrictions, it ought to be permitted. It is those circumstances, conditions and restrictions which are at the centre of this case; and yet it is they which are the least suitable for determination by judicial decision.

... Any regulation of so complex a matter as telephone tapping is essentially a matter for Parliament, not the courts; and neither the Convention nor the Klass case can, I think, play any proper part in deciding the issue before me." (ibid., pp. 647-649)

He added that "this case seems to me to make it plain that telephone tapping is a subject which cries out for legislation", and continued:

"However much the protection of the public against crime demands that in proper cases the police should have the assistance of telephone tapping, I would have thought that in any civilised system of law the claims of liberty and justice would require that telephone users should have effective and independent safeguards against possible abuses. The fact that a telephone user is suspected of crime increases rather than diminishes this requirement: suspicions, however reasonably held, may sometimes

prove to be wholly unfounded. If there were effective and independent safeguards, these would not only exclude some cases of excessive zeal but also, by their mere existence, provide some degree of reassurance for those who are resentful of the police or believe themselves to be persecuted." (ibid., p. 649)

35. As a final point of substance, the Vice-Chancellor dealt, in the following terms, with the applicant's contention that as no power to tap telephones had been given by either statute or common law, the tapping was necessarily unlawful:

"I have already held that, if such tapping can be carried out without committing any breach of the law, it requires no authorisation by statute or common law; it can lawfully be done simply because there is nothing to make it unlawful. Now that I have held that such tapping can indeed be carried out without committing any breach of the law, the contention necessarily fails. I may also say that the statutory recognition given to the Home Secretary's warrant seems to me to point clearly to the same conclusion." (ibid., p. 649)

36. The Vice-Chancellor therefore held that the applicant's claim failed in its entirety. He made the following concluding remarks as to the ambit of his decision:

"Though of necessity I have discussed much, my actual decision is closely limited. It is confined to the tapping of the telephone lines of a particular person which is effected by the Post Office on Post Office premises in pursuance of a warrant of the Home Secretary in a case in which the police have just cause or excuse for requesting the tapping, in that it will assist them in performing their functions in relation to crime, whether in prevention, detection, discovering the criminals or otherwise, and in which the material obtained is used only by the police, and only for those purposes. In particular, I decide nothing on tapping effected for other purposes, or by other persons, or by other means; nothing on tapping when the information is supplied to persons other than the police; and nothing on tapping when the police use the material for purposes other than those I have mentioned. The principles involved in my decision may or may not be of some assistance in such other cases, whether by analogy or otherwise: but my actual decision is limited in the way that I have just stated." (ibid., p. 651)

E. Subsequent consideration of the need for legislation

37. Following the Vice-Chancellor's judgment, the necessity for legislation concerning the interception of communications was the subject of review by the Government, and of Parliamentary discussion. On 1 April 1980, on the publication of the White Paper, the Home Secretary announced in Parliament that after carefully considering the suggestions proffered by the Vice-Chancellor in his judgment, the Government had decided not to introduce legislation. He explained the reasons for this decision in the following terms:

"The interception of communications is, by definition, a practice that depends for its effectiveness and value upon being carried out in secret, and cannot therefore be subject to the normal processes of parliamentary control. Its acceptability in a

> democratic society depends on its being subject to ministerial control, and on the readiness of the public and their representatives in Parliament to repose their trust in the Ministers concerned to exercise that control responsibly and with a right sense of balance between the value of interception as a means of protecting order and security and the threat which it may present to the liberty of the subject.
>
> Within the necessary limits of secrecy, I and my right hon. Friends who are concerned are responsible to Parliament for our stewardship in this sphere. There would be no more sense in making such secret matters justiciable than there would be in my being obliged to reveal them in the House. If the power to intercept were to be regulated by statute, then the courts would have power to inquire into the matter and to do so, if not publicly, then at least in the presence of the complainant. This must surely limit the use of interception as a tool of investigation. The Government have come to the clear conclusion that the procedures, conditions and safeguards described in the [White] Paper ensure strict control of interception by Ministers, are a good and sufficient protection for the liberty of the subject, and would not be made significantly more effective for that purpose by being embodied in legislation. The Government have accordingly decided not to introduce legislation on these matters" (Hansard, House of Commons, 1 April 1980, cols. 205-207).

He gave an assurance that "Parliament will be informed of any changes that are made in the arrangements" (ibid., col. 208).

38. In the course of the Parliamentary proceedings leading to the enactment of the British Telecommunications Act 1981, attempts were made to include in the Bill provisions which would have made it an offence to intercept mail or matters sent by public telecommunication systems except pursuant to a warrant issued under conditions which corresponded substantially to those described in the White Paper. The Government successfully opposed these moves, primarily on the grounds that secrecy, which was essential if interception was to be effective, could not be maintained if the arrangements for interception were laid down by legislation and thus became justiciable in the courts. The present arrangements and safeguards were adequate and the proposed new provisions were, in the Government's view, unworkable and unnecessary (see, for example, the statement of the Home Secretary in the House of Commons on 1 April 1981, Hansard, cols. 334-338). The 1981 Act eventually contained a re-enactment of section 80 of the Post Office Act 1969 applicable to the Telecommunications Corporation (Schedule 3, para. 1, of the 1981 Act). Section 80 of the 1969 Act itself continues to apply to the Post Office.

39. In its report presented to Parliament in January 1981 (Command Paper 8092), the Royal Commission on Criminal Procedure, which had been appointed in 1978, also considered the possible need for legislation in this field. In the chapter entitled "Investigative powers and the rights of the citizen", the Royal Commission made the following recommendation in regard to what it termed "surreptitious surveillance" (paras. 3.56-3.60):

> "... [A]lthough we have no evidence that the existing controls are inadequate to prevent abuse, we think that there are strong arguments for introducing a system of

> statutory control on similar lines to that which we have recommended for search warrants. As with all features of police investigative procedures, the value of prescribing them in statutory form is that it brings clarity and precision to the rules; they are open to public scrutiny and to the potential of Parliamentary review. So far as surveillance devices in general are concerned this is not at present so.
>
> ...
>
> We therefore recommend that the use of surveillance devices by the police (including the interception of letters and telephone communications) should be regulated by statute."

These recommendations were not adopted by the Government.

40. A few months later, the Law Commission, a permanent body set up by statute in 1965 for the purpose of promoting reform of the law, produced a report on breach of confidence (presented to Parliament in October 1981 - Command Paper 8388). This report examined, inter alia, the implications for the civil law of confidence of the acquisition of information by surveillance devices, and made various proposals for reform of the law (paras. 6.35 - 6.46). The Law Commission, however, felt that the question whether "the methods which the police ... may use to obtain information should be defined by statute" was a matter outside the scope of its report (paras. 6.43 and 6.44 in fine). No action has been taken by the Government on this report.

F. The practice followed in relation to interceptions

41. Details of the current practices followed in relation to interceptions are set out in the Government's White Paper of 1980. The practices there summarised are essentially the same as those described and recommended in the Birkett report, and referred to in Parliamentary statements by successive Prime Ministers and Home Secretaries in 1957, 1966, 1978 and 1980.

42. The police, H.M. Customs and Excise and the Security Service may request authority for the interception of communications for the purposes of "detection of serious crime and the safeguarding of the security of the State" (paragraph 2 of the White Paper). Interception may take place only on the authority of the Secretary of State given by warrant under his own hand. In England and Wales, the power to grant such warrants is exercised by the Home Secretary or occasionally, if he is ill or absent, by another Secretary of State on his behalf (ibid.). In the case of warrants applied for by the police to assist them in the detection of crime, three conditions must be satisfied before a warrant will be issued:

(a) the offence must be "really serious";

(b) normal methods of investigation must have been tried and failed or must, from the nature of things, be unlikely to succeed;

(c) there must be good reason to think that an interception would be likely to lead to an arrest and a conviction.

43. As is indicated in the Birkett report (paras. 58-61), the concept of "serious crime" has varied from time to time. Changing circumstances have made some acts serious offences which were not previously so regarded; equally, some offences formerly regarded as serious enough to justify warrants for the interception of communications have ceased to be so regarded. Thus, the interception of letters believed to contain obscene or indecent matter ceased in the mid-1950s (Birkett report, para. 60); no warrants for the purpose of preventing the transmission of illegal lottery material have been issued since November 1953 (ibid., para. 59). "Serious crime" is defined in the White Paper, and subject to the addition of the concluding words has been consistently defined since September 1951 (Birkett report, para. 64), as consisting of "offences for which a man with no previous record could reasonably be expected to be sentenced to three years' imprisonment, or offences of lesser gravity in which either a large number of people is involved or there is good reason to apprehend the use of violence" (White Paper, para. 4). In April 1982, the Home Secretary announced to Parliament that, on a recommendation made by Lord Diplock in his second report (see paragraph 55 below), the concept of a serious offence was to be extended to cover offences which would not necessarily attract a penalty of three years' imprisonment on first conviction, but in which the financial rewards of success were very large (Hansard, House of Commons, 21 April 1982, col. 95).

Handling (including receiving) stolen goods, knowing or believing them to be stolen, is an offence under section 22 of the Theft Act 1968, carrying a maximum penalty of fourteen years' imprisonment. According to the Government, the receiving of stolen property is regarded as a very serious offence since the receiver lies at the root of much organised crime and encourages large-scale thefts (see the Birkett report, para. 103). The detection of receivers of stolen property was at the time of the Birkett report (ibid.), and remains, one of the important uses to which interception of communications is put by the police.

44. Applications for warrants must be made in writing and must contain a statement of the purpose for which interception is requested and of the facts and circumstances which support the request. Every application is submitted to the Permanent Under-Secretary of State - the senior civil servant - at the Home Office (or, in his absence, a nominated deputy), who, if he is satisfied that the application meets the required criteria, submits it to the Secretary of State for approval and signature of a warrant. In a case of exceptional urgency, if the Secretary of State is not immediately available to sign a warrant, he may be asked to give authority orally, by telephone; a warrant is signed and issued as soon as possible thereafter (White Paper, para. 9).

In their submissions to the Commission and the Court, the Government supplemented as follows the information given in the White Paper. Except in cases of exceptional urgency, an application will only be considered in the Home Office if it is put forward by a senior officer of the Metropolitan Police, in practice the Assistant Commissioner (Crime), and also, in the case of another police force, by the chief officer of police concerned. Close personal consideration is given by the Secretary of State to every request for a warrant submitted to him. In the debate on the British Telecommunications Bill in April 1981, the then Home Secretary confirmed before Parliament that he did not and would not sign any warrant for interception unless he were personally satisfied that the relevant criteria were met (Hansard, House of Commons, 1 April 1981, col. 336).

45. Every warrant sets out the name and address of the recipient of mail in question or the telephone number to be monitored, together with the name and address of the subscriber. Any changes require the authority of the Secretary of State, who may delegate power to give such authority to the Permanent Under-Secretary. If both the mail and the telephone line of a person are to be intercepted, two separate warrants are required (White Paper, para. 10).

46. Every warrant is time-limited, specifying a date on which it expires if not renewed. Warrants are in the first place issued with a time-limit set at a defined date not exceeding two months from the date of issue. Warrants may be renewed only on the personal authority of the Secretary of State and may be renewed for not more than one month at a time. In each case where renewal of a warrant is sought, the police are required first to satisfy the Permanent Under-Secretary of State at the Home Office that the reasons for which the warrant was first issued are still valid and that the case for renewal is justified: a submission to the Secretary of State for authority to renew the warrant is only made if the Permanent Under-Secretary is so satisfied (White Paper, para. 11).

47. Warrants are reviewed monthly by the Secretary of State. When an interception is considered to be no longer necessary, it is immediately discontinued and the warrant is cancelled on the authority of the Permanent Under-Secretary of State at the Home Office. In addition to the monthly review of each warrant by the Secretary of State, the Metropolitan Police carry out their own review each month of all warrants arising from police applications: where an interception is deemed to be no longer necessary, instructions are issued to the Post Office to discontinue the interception forthwith and the Home Office is informed so that the warrant can be cancelled (Birkett report, paras. 72-74; White Paper, paras. 12-13).

48. In accordance with the recommendations of the Birkett report (para. 84), records are kept in the Home Office, showing in respect of each application for a warrant:

(a) the ground on which the warrant is applied for;

(b) a copy of the warrant issued or a note of rejection of the application;
(c) the dates of any renewals of the warrant;
(d) a note of any other decisions concerning the warrant;
(e) the date of cancellation of the warrant (White Paper, para. 14).

49. On the issue of a warrant, the interception is effected by the Post Office. Telephone interceptions are carried out by a small staff of Post Office employees who record the conversation but do not themselves listen to it except from time to time to ensure that the apparatus is working correctly. In the case of postal communications, the Post Office makes a copy of the correspondence. As regards the interception of communications for the purpose of the detection of crime, in practice the "designated person holding office under the Crown" to whom the Post Office is required by sub-section 80 of the Post Office Act 1969 to transmit the intercepted information (see paragraph 29 above) is invariably the Commissioner of Police of the Metropolis. The product of the interception - that is, the copy of the correspondence or the tape-recording - is made available to a special unit of the Metropolitan Police who note or transcribe only such parts of the correspondence or the telephone conversation as are relevant to the investigation. When the documentary record has been made, the tape is returned to the Post Office staff, who erase the recording. The tape is subsequently re-used. The majority of recordings are erased within one week of their being taken (Birkett report, paras. 115-117; White Paper, para. 15).

50. A Consolidated Circular to Police, issued by the Home Office in 1977, contained the following paragraphs in a section headed "Supply of information by Post Office to police":

> "1.67 Head Postmasters and Telephone Managers have been given authority to assist the police as indicated in paragraph 1.68 below without reference to Post Office Headquarters, in circumstances where the police are seeking information
>
> (a) in the interests of justice in the investigation of a serious indictable offence; or
>
> (b) when they are acting in a case on the instructions of the Director of Public Prosecutions; or
>
> (c) when a warrant has been issued for the arrest of the offender, or the offence is such that he can be arrested without a warrant; or
>
> ...
>
> 1.68 Head Postmasters, or (in matters affecting the telecommunication service) Telephone Managers, may afford the following facilities in response to a request made by the officer locally in charge of the force at the town where the Head Postmaster is stationed
>
> ...

(g) Telegrams. Telegrams may be shown to the police on the authority of the sender or addressee. Apart from this the Post Office is prepared to give authority in particular cases of serious crime where the inspection of a telegram is a matter of urgency, and will do so at once on telephonic application, by a chief officer of police or a responsible officer acting on his behalf, to the Chief Inspector, Post Office Investigation Division. ...

...

1.69 ...

1.70 As regards any matter not covered by paragraphs 1.67 and 1.68 above, if the police are in urgent need of information which the Post Office may be able to furnish in connection with a serious criminal offence, the police officer in charge of the investigation should communicate with the Duty Officer, Post Office Investigation Division who will be ready to make any necessary inquiries of other branches of the Post Office and to communicate any information which can be supplied."

In May 1984, the Home Office notified chief officers of police that paragraph 1.68 (g), described as containing advice and information to the police which was "in some respects misleading", was henceforth to be regarded as deleted, with the exception of the first complete sentence. At the same time, chief officers of police were reminded that the procedures for the interception of communications were set out in the White Paper and rigorously applied in all cases.

51. The notes or transcriptions of intercepted communications are retained in the police interception unit for a period of twelve months or for as long as they may be required for the purposes of investigation. The contents of the documentary record are communicated to the officers of the appropriate police force engaged in the criminal investigation in question. When the notes or transcriptions are no longer required for the purposes of the investigation, the documentary record is destroyed (Birkett report, para. 118; White Paper, para. 15). The product of intercepted communications is used exclusively for the purpose of assisting the police to pursue their investigations: the material is not tendered in evidence, although the interception may itself lead to the obtaining of information by other means which may be tendered in evidence (Birkett report, para. 151; White Paper, para. 16). In accordance with the recommendation of the Birkett Committee (Birkett report, para. 101), information obtained by means of an interception is never disclosed to private individuals or private bodies or to courts or tribunals of any kind (White Paper, para. 17).

52. An individual whose communications have been intercepted is not informed of the fact of interception or of the information thereby obtained, even when the surveillance and the related investigations have terminated.

53. For security reasons it is the normal practice not to disclose the numbers of interceptions made (Birkett report, paras. 119-121; White Paper, paras. 24-25). However, in order to allay public concern as to the extent of

interception, both the Birkett report and the White Paper gave figures for the number of warrants granted annually over the years preceding their publication. The figures in the White Paper (Appendix III) indicate that in England and Wales between 1969 and 1979 generally something over 400 telephone warrants and something under 100 postal warrants were granted annually by the Home Secretary. Paragraph 27 of the White Paper also gave the total number of Home Secretary warrants in force on 31 December for the years 1958 (237), 1968 (273) and 1978 (308). The number of telephones installed at the end of 1979 was, according to the Government, 26,428,000, as compared with 7,327,000 at the end of 1957. The Government further stated that over the period from 1958 to 1978 there was a fourfold increase in indictable crime, from 626,000 to 2,395,000.

54. When the White Paper was published on 1 April 1980, the Home Secretary announced in Parliament that the Government, whilst not proposing to introduce legislation (see paragraph 37 above), intended to appoint a senior member of the judiciary to conduct a continuous independent check so as to ensure that interception of communications was being carried out for the established purposes and in accordance with the established procedures. His terms of reference were stated to be:

> "to review on a continuing basis the purposes, procedures, conditions and safeguards governing the interception of communications on behalf of the police, HM Customs and Excise and the security service as set out in [the White Paper]; and to report to the Prime Minister" (Hansard, House of Commons, 1 April 1980, cols. 207-208).

It was further announced that the person appointed would have the right of access to all relevant papers and the right to request additional information from the departments and organisations concerned. For the purposes of his first report, which would be published, he would examine all the arrangements set out in the White Paper; his subsequent reports on the detailed operation of the arrangements would not be published, but Parliament would be informed of any findings of a general nature and of any changes that were made in the arrangements (ibid.).

55. Lord Diplock, a Lord of Appeal in Ordinary since 1968, was appointed to carry out the review. In his first report, published in March 1981, Lord Diplock recorded, inter alia, that, on the basis of a detailed examination of apparently typical cases selected at random, he was satisfied

(i) that, in each case, the information provided by the applicant authorities to the Secretary of State in support of the issue of a warrant was stated with accuracy and candour and that the procedures followed within the applicant authorities for vetting applications before submission to the Secretary of State were appropriate to detect and correct any departure from proper standards;

(ii) that warrants were not applied for save in proper cases and were not continued any longer than was necessary to carry out their legitimate purpose.

Lord Diplock further found from his examination of the system that all products of interception not directly relevant to the purpose for which the warrant was granted were speedily destroyed and that such material as was directly relevant to that purpose was given no wider circulation than was essential for carrying it out.

In early 1982, Lord Diplock submitted his second report. As the Secretary of State informed Parliament, Lord Diplock's general conclusion was that during the year 1981 the procedure for the interception of communications had continued to work satisfactorily and the principles set out in the White Paper had been conscientiously observed by all departments concerned.

In 1982, Lord Diplock resigned his position and was succeeded by Lord Bridge of Harwich, a Lord of Appeal in Ordinary since 1980.

G. "Metering"

56. The process known as "metering" involves the use of a device called a meter check printer which registers the numbers dialled on a particular telephone and the time and duration of each call. It is a process which was designed by the Post Office for its own purposes as the corporation responsible for the provision of telephone services. Those purposes include ensuring that the subscriber is correctly charged, investigating complaints of poor quality service and checking possible abuse of the telephone service. When "metering" a telephone, the Post Office - now British Telecommunications (see paragraph 23 above) - makes use only of signals sent to itself.

In the case of the Post Office, the Crown does not require the keeping of records of this kind but, if the records are kept, the Post Office may be compelled to produce them in evidence in civil or criminal cases in the ordinary way, namely by means of a subpoena duces tecum. In this respect the position of the Post Office does not differ from that of any other party holding relevant records as, for instance, a banker. Neither the police nor the Crown are empowered to direct or compel the production of the Post Office records otherwise than by the normal means.

However, the Post Office do on occasions make and provide such records at the request of the police if the information is essential to police enquiries in relation to serious crime and cannot be obtained from other sources. This practice has been made public in answer to parliamentary questions on more than one occasion (see, for example, the statement by the Home Secretary to Parliament, Hansard, House of Commons, 23 February 1978, cols. 760-761).

H. Possible domestic remedies in respect of the alleged violation of the Convention

57. Commission, Government and applicant are agreed that, at least in theory, judicial remedies are available in England and Wales, in both the civil and the criminal courts, in respect of interceptions of communications carried out unlawfully. The remedies referred to by the Government were summarised in the pleadings as follows:

(i) In the event of any interception or disclosure of intercepted material effected by a Post Office employee "contrary to duty" or "improperly" and without a warrant of the Secretary of State, a criminal offence would be committed under the Telegraph Acts 1863 and 1868 and the Post Office (Protection) Act 1884 (as regards telephone interceptions) and under the Post Office Act 1953 (as regards postal interceptions) (see paragraphs 25-27 above). On complaint that communications had been unlawfully intercepted, it would be the duty of the police to investigate the matter and to initiate a prosecution if satisfied that an offence had been committed. If the police failed to prosecute, it would be open to the complainant himself to commence a private prosecution.

(ii) In addition to (i) above, in a case of unlawful interception by a Post Office employee without a warrant, an individual could obtain an injunction from the domestic courts to restrain the person or persons concerned and the Post Office itself from carrying out further unlawful interception of his communications: such an injunction is available to any person who can show that a private right or interest has been interfered with by a criminal act (see, for example, Gouriet v. The Union of Post Office Workers, [1977] 3 All England Law Reports 70; Ex parte Island Records Ltd., [1978] 3 All England Law Reports 795).

(iii) On the same grounds, an action would lie for an injunction to restrain the divulging or publication of the contents of intercepted communications by employees of the Post Office, otherwise than under a warrant of the Secretary of State, or to any person other than the police.

Besides these remedies, unauthorised interference with mail would normally constitute the tort of trespass to (that is, wrongful interference with) chattels and so give rise to a civil action for damages.

58. The Government further pointed to the following possible non-judicial remedies:

(i) In the event that the police were themselves implicated in an interception carried out without a warrant, a complaint could additionally be lodged under section 49 of the Police Act 1964, which a chief officer of police would, by the terms of the Act, be obliged to investigate and, if an offence appeared to him to have been committed, to refer to the Director of Public Prosecutions.

(ii) If a complainant were able to establish merely that the police or the Secretary of State had misappreciated the facts or that there was not an adequate case for imposing an interception, the individual concerned would be able to complain directly to the Secretary of State himself or through his Member of Parliament: if a complainant were to give the Home Secretary information which suggested that the grounds on which a warrant had been issued did not in fact fall within the published criteria or were inadequate or mistaken, the Home Secretary would immediately cause it to be investigated and, if the complaint were found to be justified, would immediately cancel the warrant.

(iii) Similarly, if there were non-compliance with any of the relevant administrative rules of procedure set out in the Birkett report and the White Paper, a remedy would lie through complaint to the Secretary of State who would, in a proper case, cancel or revoke a warrant and thereby terminate an interception which was being improperly carried out.

According to the Government, in practice there never has been a case where a complaint in any of the three above circumstances has proved to be well-founded.

PROCEEDINGS BEFORE THE COMMISSION

59. In his application of 19 July 1979 to the Commission (no. 8691/79), Mr. Malone complained of the admitted interception of a telephone conversation to which he had been a party. He further stated his belief that, at the behest of the police, his correspondence as well as that of his wife had been intercepted, his telephone lines "tapped" and, in addition, his telephone "metered" by a device recording all the numbers dialled. He claimed that by reason of these matters, and of relevant law and practice in England and Wales, he had been the victim of breaches of Articles 8 and 13 (art. 8, art. 13) of the Convention.

60. The Commission declared the application admissible on 13 July 1981.

In its report adopted on 17 December 1982 (Article 31) (art. 31), the Commission expressed the opinion:

- that there had been a breach of the applicant’s rights under Article 8 (art. 8) by reason of the admitted interception of a telephone conversation to which he was a party and of the law and practice in England and Wales governing the interception of postal and telephone communications on behalf of the police (eleven votes, with one abstention);

- that it was unnecessary in the circumstances of the case to investigate whether the applicant’s rights had also been interfered with by the

procedure known as "metering" of telephone calls (seven votes to three, with two abstentions);

- that there had been a breach of the applicant's rights under Article 13 (art. 13) in that the law in England and Wales did not provide an "effective remedy before a national authority" in respect of interceptions carried out under a warrant (ten votes to one, with one abstention).

The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

61. At the hearings on 20 February 1984, the Government maintained the submissions set out in their memorial, whereby they requested the Court

> "(1) with regard to Article 8 (art. 8),
>
> (i) to decide and declare that the interference with the exercise of the rights guaranteed by Article 8 para. 1 (art. 8-1) of the Convention resulting from the measures of interception of communications on behalf of the police in England and Wales for the purpose of the detection and prevention of crime, and any application of those measures to the applicant, were and are justified under paragraph 2 of Article 8 (art. 8-2) as being in accordance with the law and necessary in a democratic society for the prevention of crime and for the protection of the rights and freedoms of others and that accordingly there has been no breach of Article 8 (art. 8) of the Convention;
>
> (ii) (a) to decide and declare that it is unnecessary in the circumstances of the present case to investigate whether the applicant's rights under Article 8 (art. 8) were interfered with by the so-called system of 'metering'; alternatively (b) to decide and declare that the facts found disclose no breach of the applicant's rights under Article 8 (art. 8) by reason of the said system of 'metering';
>
> (2) with regard to Article 13 (art. 13),
>
> to decide and declare that the circumstances of the present case disclose no breach of Article 13 (art. 13) of the Convention".

AS TO THE LAW

I. ALLEGED BREACH OF ARTICLE 8 (art. 8)

62. Article 8 (art. 8) provides as follows:

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

The applicant alleged violation of this Article (art. 8) under two heads. In his submission, the first violation resulted from interception of his postal and telephone communications by or on behalf of the police, or from the law and practice in England and Wales relevant thereto; the second from "metering" of his telephone by or on behalf of the police, or from the law and practice in England and Wales relevant thereto.

A. Interception of communications

1. Scope of the issue before the Court

63. It should be noted from the outset that the scope of the case before the Court does not extend to interception of communications in general. The Commission's decision of 13 July 1981 declaring Mr. Malone's application to be admissible determines the object of the case brought before the Court (see, inter alia, the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 63, para. 157). According to that decision, the present case "is directly concerned only with the question of interceptions effected by or on behalf of the police" - and not other government services such as H.M. Customs and Excise and the Security Service - "within the general context of a criminal investigation, together with the legal and administrative framework relevant to such interceptions".

2. Whether there was any interference with an Article 8 (art. 8) right

64. It was common ground that one telephone conversation to which the applicant was a party was intercepted at the request of the police under a warrant issued by the Home Secretary (see paragraph 14 above). As telephone conversations are covered by the notions of "private life" and "correspondence" within the meaning of Article 8 (art. 8) (see the Klass and

Others judgment of 6 September 1978, Series A no. 28, p. 21, para. 41), the admitted measure of interception involved an "interference by a public authority" with the exercise of a right guaranteed to the applicant under paragraph 1 of Article 8 (art. 8-1).

Despite the applicant's allegations, the Government have consistently declined to disclose to what extent, if at all, his telephone calls and mail have been intercepted otherwise on behalf of the police (see paragraph 16 above). They did, however, concede that, as a suspected receiver of stolen goods, he was a member of a class of persons against whom measures of postal and telephone interception were liable to be employed. As the Commission pointed out in its report (paragraph 115), the existence in England and Wales of laws and practices which permit and establish a system for effecting secret surveillance of communications amounted in itself to an "interference ... with the exercise" of the applicant's rights under Article 8 (art. 8), apart from any measures actually taken against him (see the above-mentioned Klass and Others judgment, ibid.). This being so, the Court, like the Commission (see the report, paragraph 114), does not consider it necessary to inquire into the applicant's further claims that both his mail and his telephone calls were intercepted for a number of years.

3. Whether the interferences were justified

65. The principal issue of contention was whether the interferences found were justified under the terms of paragraph 2 of Article 8 (art. 8-2), notably whether they were "in accordance with the law" and "necessary in a democratic society" for one of the purposes enumerated in that paragraph.

(a) "In accordance with the law"

(i) General principles

66. The Court held in its Silver and Others judgment of 25 March 1983 (Series A no. 61, pp. 32-33, para. 85) that, at least as far as interferences with prisoners' correspondence were concerned, the expression "in accordance with the law/ prévue par la loi" in paragraph 2 of Article 8 (art. 8-2) should be interpreted in the light of the same general principles as were stated in the Sunday Times judgment of 26 April 1979 (Series A no. 30) to apply to the comparable expression "prescribed by law/ prévues par la loi" in paragraph 2 of Article 10 (art. 10-2).

The first such principle was that the word "law/loi" is to be interpreted as covering not only written law but also unwritten law (see the above-mentioned Sunday Times judgment, p. 30, para. 47). A second principle, recognised by Commission, Government and applicant as being applicable in the present case, was that "the interference in question must have some basis in domestic law" (see the the above-mentioned Silver and Others

judgment, p. 33, para. 86). The expressions in question were, however, also taken to include requirements over and above compliance with the domestic law. Two of these requirements were explained in the following terms:

> "Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." (Sunday Times judgment, p. 31, para. 49; Silver and Others judgment, p. 33, paras. 87 and 88)

67. In the Government's submission, these two requirements, which were identified by the Court in cases concerning the imposition of penalties or restrictions on the exercise by the individual of his right to freedom of expression or to correspond, are less appropriate in the wholly different context of secret surveillance of communications. In the latter context, where the relevant law imposes no restrictions or controls on the individual to which he is obliged to conform, the paramount consideration would appear to the Government to be the lawfulness of the administrative action under domestic law.

The Court would reiterate its opinion that the phrase "in accordance with the law" does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention (see, mutatis mutandis, the above-mentioned Silver and Others judgment, p. 34, para. 90, and the Golder judgment of 21 February 1975, Series A no. 18, p. 17, para. 34). The phrase thus implies - and this follows from the object and purpose of Article 8 (art. 8) - that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 (art. 8-1) (see the report of the Commission, paragraph 121). Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident (see the above-mentioned Klass and Others judgment, Series A no. 28, pp. 21 and 23, paras. 42 and 49). Undoubtedly, as the Government rightly suggested, the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially

dangerous interference with the right to respect for private life and correspondence.

68. There was also some debate in the pleadings as to the extent to which, in order for the Convention to be complied with, the "law" itself, as opposed to accompanying administrative practice, should define the circumstances in which and the conditions on which a public authority may interfere with the exercise of the protected rights. The above-mentioned judgment in the case of Silver and Others, which was delivered subsequent to the adoption of the Commission's report in the present case, goes some way to answering the point. In that judgment, the Court held that "a law which confers a discretion must indicate the scope of that discretion", although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law (ibid., Series A no. 61, pp. 33-34, paras. 88-89). The degree of precision required of the "law" in this connection will depend upon the particular subject-matter (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 31, para. 49). Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.

(ii) Application in the present case of the foregoing principles

69. Whilst the exact legal basis of the executive's power in this respect was the subject of some dispute, it was common ground that the settled practice of intercepting communications on behalf of the police in pursuance of a warrant issued by the Secretary of State for the purposes of detecting and preventing crime, and hence the admitted interception of one of the applicant's telephone conversations, were lawful under the law of England and Wales. The legality of this power to intercept was established in relation to telephone communications in the judgment of Sir Robert Megarry dismissing the applicant's civil action (see paragraphs 31-36 above) and, as shown by the independent findings of the Birkett report (see paragraph 28 in fine above), is generally recognised for postal communications.

70. The issue to be determined is therefore whether, under domestic law, the essential elements of the power to intercept communications were laid down with reasonable precision in accessible legal rules that sufficiently indicated the scope and manner of exercise of the discretion conferred on the relevant authorities.

This issue was considered under two heads in the pleadings: firstly, whether the law was such that a communication passing through the services of the Post Office might be intercepted, for police purposes, only pursuant to a valid warrant issued by the Secretary of State and, secondly, to what extent the circumstances in which a warrant might be issued and implemented were themselves circumscribed by law.

71. On the first point, whilst the statements of the established practice given in the Birkett report and the White Paper are categorical para. 55 of the Birkett report and para. 2 of the White Paper - see paragraph 42 above), the law of England and Wales, as the applicant rightly pointed out (see paragraph 56 of the Commission's report), does not expressly make the exercise of the power to intercept communications subject to the issue of a warrant. According to its literal terms, section 80 of the Post Office Act 1969 provides that a "requirement" may be laid on the Post Office to pass information to the police, but it does not in itself render illegal interceptions carried out in the absence of a warrant amounting to a valid "requirement" (see paragraph 29 above). The Commission, however, concluded that this appeared to be the effect of section 80 when read in conjunction with the criminal offences created by section 58 para. 1 of the Post Office Act 1953 and by the other statutory provisions referred to in paragraph 1, sub-paragraph 1 of Schedule 5 to the 1969 Act (see paragraphs 129-135 of the report, and paragraphs 25, 26 and 30 above). The reasoning of the Commission was accepted and adopted by the Government but, at least in respect of telephone interceptions, disputed by the applicant. He relied on certain dicta to the contrary in the judgment of Sir Robert Megarry (see paragraphs 31-36 above, especially paragraphs 33 and 35). He also referred to the fact that the 1977 Home Office Consolidated Circular to Police made no mention, in the section headed "Supply of information by Post Office to police", of the warrant procedure (see paragraph 50 above).

72. As to the second point, the pleadings revealed a fundamental difference of view as to the effect, if any, of the Post Office Act 1969 in imposing legal restraints on the purposes for which and the manner in which interception of communications may lawfully be authorised by the Secretary of State.

73. According to the Government, the words in section 80 - and, in particular, the phrase "for the like purposes and in the like manner as, at the passing of this Act, a requirement may be laid" - define and restrict the power to intercept by reference to the practice which prevailed in 1968. In the submission of the Government, since the entry into force of the 1969 Act a requirement to intercept communications on behalf of the police can lawfully be imposed on the Post Office only by means of a warrant signed personally by the Secretary of State for the exclusive purpose of the detection of crime and satisfying certain other conditions. Thus, by virtue of section 80 the warrant must, as a matter of law, specify the relevant name,

address and telephone number; it must be time-limited and can only be directed to the Post Office, not the police. In addition, the Post Office is only required and empowered under section 80 to make information available to "designated persons holding office under the Crown". Any attempt to broaden or otherwise modify the purposes for which or the manner in which interceptions may be authorised would require an amendment to the 1969 Act which could only be achieved by primary legislation.

74. In its reasoning, which was adopted by the applicant, the Commission drew attention to various factors of uncertainty arguing against the Government's view as to the effect of the 1969 Act (see paragraphs 136-142 of the report).

75. Firstly, the relevant wording of the section, and especially the word "may", appeared to the Commission to authorise the laying of a requirement on the Post Office for whatever purposes and in whatever manner it would previously have been lawfully possible to place a ministerial duty on the Postmaster General, and not to be confined to what actually did happen in practice in 1968. Yet at the time of the Birkett report (see, for example, paragraphs 15, 21, 27, 54-55, 56, 62 and 75), and likewise at the time when the 1969 Act was passed, no clear legal restrictions existed on the permissible "purposes" and "manner". Indeed the Birkett report at one stage (paragraph 62) described the Secretary of State's discretion as "absolute", albeit specifying how its exercise was in practice limited.

76. A further difficulty seen by the Commission is that, on the Government's interpretation, not all the details of the existing arrangements are said to have been incorporated into the law by virtue of section 80 but at least the principal conditions, procedures or purposes for the issue of warrants authorising interceptions. Even assuming that the reference to "like purposes" and "like manner" is limited to previous practice as opposed to what would have been legally permissible, it was by no means evident to the Commission what aspects of the previous "purposes" and "manner" have been given statutory basis, so that they cannot be changed save by primary legislation, and what aspects remain matters of administrative discretion susceptible of modification by governmental decision. In this connection, the Commission noted that the notion of "serious crime", which in practice serves as a condition governing when a warrant may be issued for the purpose of the detection of crime, has twice been enlarged since the 1969 Act without recourse to Parliament (see paragraphs 42-43 above).

77. The Commission further pointed out that the Government's analysis of the law was not shared by Sir Robert Megarry in his judgment of February 1979. He apparently accepted the Solicitor General's contentions before him that section 80 referred back to previous administrative arrangements for the issue of warrants (see paragraph 33 above). On the other hand, he plainly considered that these arrangements remained

administrative in character and had not, even in their principal aspects, been made binding legal requirements by virtue of section 80 (see paragraph 34 above).

78. It was also somewhat surprising, so the Commission observed, that no mention of section 80 as regulating the issue of warrants should have been made in the White Paper published by the Government in the wake of Sir Robert Megarry's judgment (see paragraph 21 above). Furthermore, the Home Secretary, when presenting the White Paper to Parliament in April 1980, expressed himself in terms suggesting that the existing arrangements as a whole were matters of administrative practice not suitable for being "embodied in legislation", and were subject to change by governmental decision of which Parliament would be informed (see paragraphs 37 in fine and 54 in fine above).

79. The foregoing considerations disclose that, at the very least, in its present state the law in England and Wales governing interception of communications for police purposes is somewhat obscure and open to differing interpretations. The Court would be usurping the function of the national courts were it to attempt to make an authoritative statement on such issues of domestic law (see, mutatis mutandis, the Deweer judgment of 27 February 1980, Series A no. 35, p. 28, in fine, and the Van Droogenbroeck judgment of 24 June 1982, Series A no. 50, p. 30, fourth sub-paragraph). The Court is, however, required under the Convention to determine whether, for the purposes of paragraph 2 of Article 8 (art. 8-2), the relevant law lays down with reasonable clarity the essential elements of the authorities' powers in this domain.

Detailed procedures concerning interception of communications on behalf of the police in England and Wales do exist (see paragraphs 42-49, 51-52 and 54-55 above). What is more, published statistics show the efficacy of those procedures in keeping the number of warrants granted relatively low, especially when compared with the rising number of indictable crimes committed and telephones installed (see paragraph 53 above). The public have been made aware of the applicable arrangements and principles through publication of the Birkett report and the White Paper and through statements by responsible Ministers in Parliament (see paragraphs 21, 37-38, 41, 43 and 54 above).

Nonetheless, on the evidence before the Court, it cannot be said with any reasonable certainty what elements of the powers to intercept are incorporated in legal rules and what elements remain within the discretion of the executive. In view of the attendant obscurity and uncertainty as to the state of the law in this essential respect, the Court cannot but reach a similar conclusion to that of the Commission. In the opinion of the Court, the law of England and Wales does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public

authorities. To that extent, the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking.

(iii) Conclusion

80. In sum, as far as interception of communications is concerned, the interferences with the applicant's right under Article 8 (art. 8) to respect for his private life and correspondence (see paragraph 64 above) were not "in accordance with the law".

(b) "Necessary in a democratic society" for a recognised purpose

81. Undoubtedly, the existence of some law granting powers of interception of communications to aid the police in their function of investigating and detecting crime may be "necessary in a democratic society ... for the prevention of disorder or crime", within the meaning of paragraph 2 of Article 8 (art. 8-2) (see, mutatis mutandis, the above-mentioned Klass and Others judgment, Series A no. 28, p. 23, para. 48). The Court accepts, for example, the assertion in the Government's White Paper (at para. 21) that in Great Britain "the increase of crime,and particularly the growth of organised crime, the increasing sophistication of criminals and the ease and speed with which they can move about have made telephone interception an indispensable tool in the investigation and prevention of serious crime". However, the exercise of such powers, because of its inherent secrecy, carries with it a danger of abuse of a kind that is potentially easy in individual cases and could have harmful consequences for democratic society as a whole (ibid., p. 26, para. 56). This being so, the resultant interference can only be regarded as "necessary in a democratic society" if the particular system of secret surveillance adopted contains adequate guarantees against abuse (ibid., p. 23, paras. 49-50).

82. The applicant maintained that the system in England and Wales for the interception of postal and telephone communications on behalf of the police did not meet this condition.

In view of its foregoing conclusion that the interferences found were not "in accordance with the law", the Court considers that it does not have to examine further the content of the other guarantees required by paragraph 2 of Article 8 (art. 8-2) and whether the system circumstances.

B. Metering

83. The process known as "metering" involves the use of a device (a meter check printer) which registers the numbers dialled on a particular telephone and the time and duration of each call (see paragraph 56 above). In making such records, the Post Office - now British Telecommunications - makes use only of signals sent to itself as the provider of the telephone service and does not monitor or intercept telephone conversations at all.

From this, the Government drew the conclusion that metering, in contrast to interception of communications, does not entail interference with any right guaranteed by Article 8 (art. 8).

84. As the Government rightly suggested, a meter check printer registers information that a supplier of a telephone service may in principle legitimately obtain, notably in order to ensure that the subscriber is correctly charged or to investigate complaints or possible abuses of the service. By its very nature, metering is therefore to be distinguished from interception of communications, which is undesirable and illegitimate in a democratic society unless justified. The Court does not accept, however, that the use of data obtained from metering, whatever the circumstances and purposes, cannot give rise to an issue under Article 8 (art. 8). The records of metering contain information, in particular the numbers dialled, which is an integral element in the communications made by telephone. Consequently, release of that information to the police without the consent of the subscriber also amounts, in the opinion of the Court, to an interference with a right guaranteed by Article 8 (art. 8).

85. As was noted in the Commission's decision declaring Mr. Malone's application admissible, his complaints regarding metering are closely connected with his complaints regarding interception of communications. The issue before the Court for decision under this head is similarly limited to the supply of records of metering to the police "within the general context of a criminal investigation, together with the legal and administrative framework relevant [thereto]" (see paragraph 63 above).

86. In England and Wales, although the police do not have any power, in the absence of a subpoena, to compel the production of records of metering, a practice exists whereby the Post Office do on occasions make and provide such records at the request of the police if the information is essential to police enquiries in relation to serious crime and cannot be obtained from other sources (see paragraph 56 above). The applicant, as a suspected receiver of stolen goods, was, it may be presumed, a member of a class of persons potentially liable to be directly affected by this practice. The applicant can therefore claim, for the purposes of Article 25 (art. 25) of the Convention, to be a "victim" of a violation of Article 8 (art. 8) by reason of the very existence of this practice, quite apart from any concrete measure of implementation taken against him (cf., mutatis mutandis, paragraph 64 above). This remains so despite the clarification by the Government that in fact the police had neither caused his telephone to be metered nor undertaken any search operations on the basis of any list of telephone numbers obtained from metering (see paragraph 17 above; see also, mutatis mutandis, the above-mentioned Klass and Others judgment, Series A no. 28, p. 20, para. 37 in fine).

87. Section 80 of the Post Office Act 1969 has never been applied so as to "require" the Post Office, pursuant to a warrant of the Secretary of State,

to make available to the police in connection with the investigation of crime information obtained from metering. On the other hand, no rule of domestic law makes it unlawful for the Post Office voluntarily to comply with a request from the police to make and supply records of metering (see paragraph 56 above). The practice described above, including the limitative conditions as to when the information may be provided, has been made public in answer to parliamentary questions (ibid.). However, on the evidence adduced before the Court, apart from the simple absence of prohibition, there would appear to be no legal rules concerning the scope and manner of exercise of the discretion enjoyed by the public authorities. Consequently, although lawful in terms of domestic law, the interference resulting from the existence of the practice in question was not "in accordance with the law", within the meaning of paragraph 2 of Article 8 (art. 8-2) (see paragraphs 66 to 68 above).

88. This conclusion removes the need for the Court to determine whether the interference found was "necessary in a democratic society" for one of the aims enumerated in paragraph 2 of Article 8 (art. 8-2) (see, mutatis mutandis, paragraph 82 above).

C. Recapitulation

89. There has accordingly been a breach of Article 8 (art. 8) in the applicant's case as regards both interception of communications and release of records of metering to the police.

II. ALLEGED BREACH OF ARTICLE 13 (art. 13)

90. The applicant submitted that no effective domestic remedy existed for the breaches of Article 8 (art. 8) of which he complained and that, consequently, there had also been a violation of Article 13 (art. 13) which provides:

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

91. Having regard to its decision on Article 8 (art. 8) (see paragraph 89 above), the Court does not consider it necessary to rule on this issue.

III. APPLICATION OF ARTICLE 50 (art. 50)

92. The applicant claimed just satisfaction under Article 50 (art. 50) under four heads: (i) legal costs that he was ordered by Sir Robert Megarry to pay to the Metropolitan Commissioner of Police, assessed at £9,011.00, (ii) costs, including disbursements, paid by him to his own lawyers in

connection with the same action, assessed at £5,443.20, (iii) legal costs incurred in the proceedings before the Commission and the Court, as yet unquantified, and (iv) "compensation of a moderate amount" for interception of his telephone conversations.

He further sought recovery of interest in respect of the first two items.

The Government have so far made no submissions on these claims.

93. The question is thus not yet ready for decision and must be reserved; in the circumstances of the case, it is appropriate to refer the matter back to the Chamber (Rule 53 paras. 1 and 3 of the Rules of Court).

FOR THESE REASONS, THE COURT

1. Holds unanimously that there has been a breach of Article 8 (art. 8) of the Convention;

2. Holds by sixteen votes to two that it is not necessary also to examine the case under Article 13 (art. 13);

3. Holds unanimously that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) refers back to the Chamber the said question.

Done in English and in French at the Human Rights Building, Strasbourg, this second day of August, one thousand nine hundred and eighty-four.

Gérard WIARDA
President

Marc-André EISSEN
Registrar

The separate opinions of the following judges are annexed to the present judgment in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court:

- partially dissenting opinion of Mr. Matscher and Mr. Pinheiro Farinha;

- concurring opinion of Mr. Pettiti.

G.W.
M.-A.E.

PARTIALLY DISSENTING OPINION OF JUDGES MATSCHER AND PINHEIRO FARINHA

(Translation)

We recognise that Article 13 (art. 13) constitutes one of the most obscure clauses in the Convention and that its application raises extremely difficult and complicated problems of interpretation. This is probably the reason why, for approximately two decades, the Convention institutions avoided analysing this provision, for the most part advancing barely convincing reasons.

It is only in the last few years that the Court, aware of its function of interpreting and ensuring the application of all the Articles of the Convention whenever called on to do so by the parties or the Commission has also embarked upon the interpretation of Article 13 (art. 13). We refer in particular to the judgments in the cases of Klass and Others (Series A no. 28, paras. 61 et seq.), Sporrong and Lönnroth (Series A no. 52, para. 88), Silver and Others (Series A no. 61, paras. 109 et seq.) and, most recently, Campbell and Fell (Series A no. 80, paras. 124 et seq.), where the Court has laid the foundation for a coherent interpretation of this provision.

Having regard to this welcome development, we cannot, to our regret, concur with the opinion of the majority of the Court who felt able to forego examining the allegation of a breach of Article 13 (art. 13). In so doing, the majority, without offering the slightest justification, have departed from the line taken inter alia in the Silver and Others judgment, which was concerned with legal issues very similar to those forming the object of the present case.

Indeed, applying the approach followed in the Silver and Others judgment, the Court ought in the present case, and to the same extent, to have arrived at a finding of a violation of Article 13 (art. 13).

CONCURRING OPINION OF JUDGE PETTITI

(Translation)

I have voted with my colleagues for the violation of Article 8 (art. 8), but I believe that the European Court could have made its decision more explicit and not confined itself to ascertaining whether, in the words of Article 8 (art. 8), the interference was "in accordance with the law", an expression which in its French version ("prévue par la loi") is used in Article 8 para. 2, Article 1 of Protocol No. 1 and Article 2 of Protocol No. 4 (art. 8-2, P1-1, P4-2), the term "the law" being capable of being interpreted as covering both written law and unwritten law.

The European Court considered that the finding of a breach on this point made it unnecessary, in the Malone case, to examine the British system currently in force, which was held to have been at fault because of a lack of "law", and to determine whether or not adequate guarantees existed.

In my view, however, the facts as described in the Commission’s report and in the Court’s summary of facts also called for an assessment of the British measures and practices under Article 8 para. 2 (art. 8-2).

This appears necessary to me because of the major importance of the issue at stake, which I would summarise as follows.

The danger threatening democratic societies in the years 1980-1990 stems from the temptation facing public authorities to "see into" the life of the citizen. In order to answer the needs of planning and of social and tax policy, the State is obliged to amplify the scale of its interferences. In its administrative systems, the State is being led to proliferate and then to computerise its personal data-files. Already in several of the member States of the Council of Europe each citizen is entered on 200 to 400 data-files.

At a further stage, public authorities seek, for the purposes of their statistics and decision-making processes, to build up a "profile" of each citizen. Enquiries become more numerous; telephone tapping constitutes one of the favoured means of this permanent investigation.

Telephone tapping has during the last thirty years benefited from many "improvements" which have aggravated the dangers of interference in private life. The product of the interception can be stored on magnetic tapes and processed in postal or other centres equipped with the most sophisticated material. The amateurish tapping effected by police officers or post office employees now exists only as a memory of pre-war novels. The encoding of programmes and tapes, their decoding, and computer processing make it possible for interceptions to be multiplied a hundredfold and to be analysed in shorter and shorter time-spans, if need be by computer. Through use of the "mosaic" technique, a complete picture can be assembled of the life-style of even the "model" citizen.

It would be rash to believe that the number of telephone interceptions is only a few hundred per year in each country and that they are all known to the authorities.

Concurrently with developments in the techniques of interception, the aims pursued by the authorities have diversified. Police interception for the prevention of crime is only one of the practices employed; to this should be added political interceptions, interceptions of communications of journalists and leading figures, not to mention interceptions required by national defence and State security, which are included in the "top-secret" category and not dealt with in the Court's judgment or the present opinion.

Most of the member States of the Council of Europe have felt the need to introduce legislation on the matter in order to bring to an end the abuses which were proliferating and making vulnerable even those in power.

The legislative technique most often employed is that of criminal procedure: the interception of communications is made subject to the decision and control of a judge within the framework of a criminal investigation by means of provisions similar to those governing searches carried out on the authority of a warrant.

The order by the judge must specify the circumstances justifying the measure, if need be subject to review by an appeal court. Variations exist according to the types of system and code of criminal procedure.

The governing principle of these laws is the separation of executive and judicial powers, that is to say, not to confer on the executive the initiative and the control of the interception, in line with the spirit of Article 8 (art. 8).

The British system analysed in the Malone judgment - and held by the Court not to be "in accordance with the law" - is a typical example of a practice that places interception of communications within the sole discretion and under the sole control of the Minister of the Interior, this being compounded by the fact that intercepted material is not disclosed to the judicial authorities (in the form of evidence), which therefore have no knowledge of the interception (see paragraph 51).

Even in the case of interception of communications required by the imperative necessities of counter-espionage and State security, most systems of law include strict rules providing for derogations from the ordinary law, the intervention and control of the Prime Minister or the Minister of Justice, and the recourse to boards or commissions composed of judges at the peak of the judicial hierarchy.

The European Court has, it is true, "considere[d] that it does not have to examine further the content of the other guarantees required by paragraph 2 of Article 8 (art. 8-2) and whether the system complained of furnished those guarantees in the particular circumstances" (paragraph 82).

This reservation makes clear that in limiting itself to finding a violation because the governmental interference was not in accordance with the law, the Court did not intend, even implicitly, to mark approval of the British

system and thus reserved any adjudication on a possible violation of Article 8 para. 2 (art. 8-2).

In my opinion, however, the Court could at this point have completed its reasoning and analysed the components of the system so as to assess their compatibility and draw the conclusion of a breach of Article 8 para. 2 (art. 8-2), there being no judicial control.

Even if a "law", within the meaning of Article 8 paras. 1 and 2 (art. 8-1, art. 8-2), contains detailed rules which do not merely legalise practices but define and delimit them, the lack of judicial control could still entail, in my view, a violation of Article 8 para. 2 (art. 8-2), subject of course to review by the Court.

It must also be borne in mind that the practice of police interception leads to the establishment of "prosecution" files which thereafter carry the risk of rendering inoperative the rules of a fair trial provided for under Article 6 (art. 6) by building up a presumption of guilt. The judicial authorities should therefore be left a full power of appreciation over the field of decision and control.

The object of the laws in Europe protecting private life is to prevent any clandestine disclosure of words uttered in a private context; certain laws have even made illegal any tapping of a telephone communication, any interception of a message without the consent of the parties. The link between laws on "private life" and laws on "interception of communications" is very close.

German law enumerates the offences for the detection of which measures of interception may be ordered. The list of offences set out in this law is entirely directed towards the preservation of democracy, the sole justification for the attendant interference.

In the Klass case and the accompanying comparative examination of the rules obtaining in the different signatory States of the Convention, the need for a system of protection in this sphere was emphasised. It admittedly falls to the State to operate such a system, but only within the bounds set by Article 8 (art. 8).

There were, in the Malone case, factors permitting the Court to draw a distinction between the dangers of a crisis situation caused by terrorism (Klass case) and the dangers of ordinary criminality, and hence to consider that two different sets of rules could be adopted. In so far as the prevention of crime under the ordinary law is concerned, it is difficult to see the reason for ousting judicial control, at the very least such control as would secure at a later stage the right to the destruction of the product of unjustified interceptions.

Reasoning along these lines could have been adopted by the Court, even on an alterative basis. The interference caused by interception of communications is more serious than an ordinary interference since the "innocent" victim is incapable of discovering it.

If, as the British Government submitted, only the suspected criminal is placed under secret surveillance, there can be no ground for denying a measure involving judicial or equivalent control, or for refusing to have a neutral and impartial body situated between the authority deciding on the interception and the authority responsible for controlling the legality of the operation and its conformity with the legitimate aims pursued.

The requirement of judicial control over telephone interceptions does not flow solely from a concern rooted in a philosophy of power and institutions but also from the necessities of protecting private life.

In reality, even justified and properly controlled telephone interceptions call for counter-measures such as the right of access by the subject of the interception when the judicial phase has terminated in the discharge or acquittal of the accused, the right to erasure of the data obtained, the right of restitution of the tapes.

Other measures are necessary, such as regulations safeguarding the confidentiality of the investigation and legal professional privilege, when the interception has involved monitoring a conversation between lawyer and client or when the interception has disclosed facts other than those forming the subject of the criminal investigation and the accusation.

Provisions of criminal procedure alone are capable of satisfying such requirements which, moreover, are consistent with the Council of Europe Convention of 1981 (Private Life, Data Banks). It is in fact impossible to isolate the issue of interception of communications from the issue of data banks since interceptions give rise to the filing and storing of the information obtained. For States which have also ratified the 1981 Convention, their legislation must satisfy these double requirements.

The work of the Council of Europe (Orwell Colloquy in Strasbourg on 2 April 1984, and Data Bank Colloquy in Madrid on 13 June 1984) has been directed towards the same end, namely the protection of the individual threatened by methods of storing and transmission of information. The mission of the Council of Europe and of its organs is to prevent the establishment of systems and methods that would allow "Big Brother" to become master of the citizen’s private life. For it is just as serious to be made subject to measures of interception against one’s will as to be unable to stop such measures when they are illegal or unjustified, as was for example the case with Orwell’s character who, within his own home, was continually supervised by a television camera without being able to switch it off.

The distinction between administrative interceptions and interceptions authorised by a judicial authority must be clearly made in the law in order to comply with Article 8 (art. 8); it would appear preferable to lay down the lawfulness of certain interventions within an established legal framework rather than leaving a legal vacuum permitting arbitrariness. The designation of the collective institutions responsible for ensuring the ex post facto

control of the manner of implementation of measures of interception; the determination of the dates of cancellation of the tapping and monitoring measures, the means of destruction of the product of interception; the inclusion in the code of criminal procedure of all measures applying to such matters in order to afford protection of words uttered in a private context or in a private place, verification that the measures do not constitute an unfair stratagem or a violation of the rights of the defence - all this panoply of requirements must be taken into consideration to judge whether or not the system satisfies the provisions of Article 8 (art. 8). The Malone case prompted queries of this kind since the State cannot enjoy an "unlimited discretion" in this respect (see the Klass judgment).

According to the spirit of the Council of Europe Convention of 1981 on private life and data banks, the right of access includes the right for the individual to establish the existence of the data, to establish the banks of which he is a "data subject", access properly speaking, the right to challenge the data, and the exceptions to and derogations from this right of access in the case notably of police or judicial investigations which must by nature remain secret during the initial phase so as not to alert the criminals or potential criminals.

Recommendation R (83) 10 of the Committee of Ministers of the Council of Europe states that respect for the privacy of individuals should be guaranteed "in any research project requiring the use of personal data".

The nature and implications of data processing are totally different as soon as computerisation enters the picture. The Karlsruhe Constitutional Court has rightly identified the concept of "informational self-determination", that is to say, the right of the individual to decide within what limits data concerning his private life might be divulged and to protect himself against an increasing tendency to make him "public property".

In 1950, techniques for interfering in private life were still archaic; the meaning and import of the term interference as understood at that time cannot prevail over the current meaning. Consequently, interceptions which in previous times necessitated recourse to tapping must be classified as "interferences" in 1984, even if they have been effected without tapping thanks to "bugging" and long-distance listening techniques.

For it is settled, as was recalled in paragraph 42 of the Klass judgment, that Article 8 para. 2 (art. 8-2), since it provides for an exception to a guaranteed right, "is to be narrowly interpreted" and that "powers of secret surveillance of citizens, characterising as they do the police State, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions". To leave to the police alone, even subject to the control of the Home Office, the task of assessing the degree of suspicion or dangerousness cannot, in my opinion, be regarded as an adequate means consistent with the aim pursued, even if that aim be legitimate; and in any event, practices of systematic interception of

communications in the absence of impartial, independent and judicial control would be disproportionate to the aim sought to be achieved. In this connection, the Malone judgment has to read with reference to the reasoning expounded in the Klass judgment.

States must admittedly be left a domestic discretion and the scope of this discretion is admittedly not identical in respect of each of the aims enumerated in Articles 8 and 10 (art. 8, art. 10), but the right to respect for private life against spying by executive authorities comes within the most exacting category of Convention rights and hence entails a certain restriction on this domestic "discretion" and on the margin of appreciation. In this sphere (more than in the sphere of morality - cf. the Handyside judgment), it can be maintained that it is possible, whilst still taking account of the circumstances resulting from the threat posed to democratic societies by terrorism, to identify European standards of State conduct in relation to surveillance of citizens. The shared characteristics of statutory texts or draft legislation on data banks and interception of communications is evidence of this awareness.

The Court in its examination of cases of violation of Article 8 (art. 8) must be able to inquire into all the techniques giving rise to the interference.

The Post Office Engineering Union, during the course of the Malone case, referred to proposals for the adoption of regulations capable of being adapted to new techniques as they are developed and for a system of warrants issued by "magistrates".

The Court has rightly held that there was also violation of Article 8 para. 1 (art. 8-1) in respect of metering.

On this point, it would likewise have been possible to have given a ruling by applying Article 8 para. 2 (art. 8-2). The comprehensive metering of telephone communications (origin, destination, duration), when effected for a purpose other than its sole accounting purpose, albeit in the absence of any interception as such, constitutes an interference in private life. On the basis of the data thereby obtained, the authorities are enabled to deduce information that is not properly meant to be within their knowledge. It is known that, as far as data banks are concerned, the processing of "neutral" data may be as revealing as the processing of sensitive data.

The simple reference in the judgment to the notion of necessity in a democratic society and to the requirement of "adequate guarantees", without any eludication of the principles and principal conditions attaching to these guarantees, might well be inadequate for the purposes of the interpretation that the State should give to the Convention and to the judgment.

The Malone judgment complementing as it does the Klass judgment, in that it arrives at a conclusion of violation by finding unsatisfactory a system that is laid down neither by statute nor by any statutory equivalent in Anglo-Saxon law, takes its place in that continuing line of decisions through which the Court acts as guardian of the Convention. The Court fulfils that function

by investing Article 8 (art. 8) with its full dimension and by limiting the margin of appreciation especially in those areas where the individual is more and more vulnerable as a result of modern technology; recognition of his right to be "left alone" is inherent in Article 8 (art. 8). The Convention protects the community of men; man in our times has a need to preserve his identity, to refuse the total transparency of society, to maintain the privacy of his personality.

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

COURT (CHAMBER)

CASE OF MALONE v. THE UNITED KINGDOM (ARTICLE 50)

(Application no. 8691/79)

JUDGMENT

STRASBOURG

26 April 1985

In the Malone case[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr. G. WIARDA, *President*,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. J. GERSING,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 25 April 1985,

Delivers the following judgment, which was adopted on that date, on the application in the present case of Article 50 (art. 50) of the Convention:

PROCEDURE AND FACTS

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 16 May 1983. The case originated in an application (no. 8691/79) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission on 19 July 1979 by a United Kingdom national, Mr. James Malone.

2. On 27 October 1983, the Chamber constituted to consider the case relinquished jurisdiction in favour of the plenary Court (Rule 50 of the Rules of Court). By judgment of 2 August 1984, the plenary Court held, inter alia, that the applicant had been the victim of a breach of Article 8 (art. 8) of the Convention by reason of the existence in England and Wales of laws and practices permitting the interception of postal and telephone communications and the "metering" of telephones by or on behalf of the police within the context of criminal investigations (Series A no. 82, paragraphs 62-89 of the reasons and point 1 of the operative provisions, pp. 30-40).

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[*] Note by the Registrar: The case is numbered 4/1983/60/94. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

The only outstanding matter to be settled is the question of the application of Article 50 (art. 50) in the present case. Accordingly, as regards the facts, the Court will confine itself here to giving the pertinent details; for further particulars reference should be made to paragraphs 12 to 58 of the above-mentioned judgment (ibid., pp. 10-28).

3. In a memorial filed on 17 February 1984, the applicant had claimed just satisfaction under four heads: (i) legal costs, assessed at £9,011.00, that he had been ordered to pay to the Metropolitan Commissioner of Police in the unsuccessful High Court proceedings he had brought against the latter, (ii) costs, including disbursements, paid by him to his own lawyers in connection with the same action, assessed at £5,443.20, (iii) legal costs incurred in the proceedings before the Commission and the Court, at that stage unquantified, and (iv) "compensation of a moderate amount" for interception of his telephone conversations. He had further sought recovery of interest in respect of the first two items. A quantity of currency (in Pounds sterling, American Dollars and Italian Lire) seized by the police at the time of the applicant's arrest in 1977 was not returned to the applicant on his acquittal in the criminal proceedings but was retained by the Metropolitan Commissioner of Police in part satisfaction of the sum owed to him in costs by the applicant.

At the hearings on 20 February 1984, the Government of the United Kingdom ("the Government") indicated their intention to reply in writing to the applicant's claims for just satisfaction.

In its judgment of 2 August 1984, the Court reserved the matter and referred it back to the Chamber under Rule 53 §§ 1 and 3 (paragraph 93 of the reasons and point 3 of the operative provisions, ibid., pp. 39 and 40). On the same day, the Chamber invited the Government to submit, within the coming two months, their written observations on the question, including notification of any agreement at which they and the applicant might have arrived (ibid., p. 49). Subsequently, Mr. F. Gölcüklü, substitute judge, replaced Mr. E. Garcia de Enterria, who was prevented from taking part in the consideration of the case (Rules 22 § 1 and 24 § 1).

4. The Government's memorial concerning the application of Article 50 (art. 50) was lodged at the registry on 29 September 1984. Two days later the President of the Chamber directed that the Delegate of the Commission and the representatives of the applicant should have one month within which to file any comments or further comments, as the case might be, which they might wish to make in this connection. On 8 October 1984, the Secretary to the Commission advised the Registrar that the Delegate had no observations to make on the question. In view of the negotiations for a friendly settlement taking place between the Government and the applicant, the President of the Chamber on several occasions acceded to requests from the applicant to extend the time-limit fixed for the filing of his further comments.

5. By letter received on 25 February 1985, the applicant's representatives informed the Registrar that a settlement had been reached. The text of the agreement, set out in a letter from the Treasury Solicitor to the applicant's representatives, was communicated to the Court on 13 March 1985 and reads as follows:

> "I write to record the agreement reached between us in respect of your client's Article 50 (art. 50) claim. In full settlement of this, the Government will reimburse your client his costs in the domestic proceedings, pay the net amount of sterling and hand over the other currency held by the Commissioner of Police for the Metropolis, and pay an agreed figure, less any legal aid, in respect of his costs before the Court and Commission.
>
> To be more specific, the Government will:
>
> 1. reimburse £5,443.20;
>
> 2. pay the further sum of £4,725.25 and hand over $4,445 and 3,010,000 lire; and
>
> 3. pay £3,774.10, this sum being subject to reduction by the amount of any legal aid that has been paid or is payable. You wrote to the Commission about this on 21 February 1985 and while the Government will make the payments and hand over in respect of 1 and 2 above within 14 days of receipt by the Government's Agent of the official notification of the Court's approval of the settlement, payment of the net sum due in respect of the Strasbourg proceedings will be made within 14 days of finalization of the legal aid position if this is later than the Court's approval."

6. On 13 March 1985, the President of the Chamber directed that the Delegate of the Commission should have until 25 March to file any observations which he might wish to present on the agreement reached. On 21 March, the Deputy Secretary to the Commission wrote to the Registrar to inform him that the Delegate had no comments to make.

7. Having regard to the respective standpoints adopted by the Government, the applicant and the Commission, the Court decided on 25 April 1985 that there was no need to hold oral hearings.

AS TO THE LAW

8. Article 50 (art. 50) of the Convention provides as follows:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

9. Since its judgment of 2 August 1984 on the main issues in the present case, the Court has been notified of a friendly settlement reached between

the Government and the applicant in respect of the latter's claims under Article 50 (art. 50) (see paragraph 5 above). Having regard to the nature of the terms agreed and to the absence of objection on the part of the Commission's Delegate (see paragraphs 5 and 6 above), the Court finds that the settlement reached is "equitable" within the meaning of Rule 53 § 4 of the Rules of Court. Accordingly, the Court takes formal note of the settlement and concludes that it would be appropriate to strike the case out of its list pursuant to that Rule.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Decides to strike the case out of its list.

Done in English and in French, and notified in writing under Rule 54 § 2, second sub-paragraph, of the Rules of Court on 26 April 1985.

Gérard WIARDA
President

Marc-André EISSEN
Registrar

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

COURT (PLENARY)

CASE OF MARKT INTERN VERLAG GMBH AND KLAUS BEERMANN v. GERMANY

(Application no. 10572/83)

JUDGMENT

STRASBOURG

20 November 1989

In the case of markt intern Verlag GmbH and Klaus Beermann[*],

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 50 of the Rules of Court and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr J.A. CARRILLO SALCEDO,
Mr N. VALTICOS,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 April, 28 September and 25 October 1989,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 14 March 1988 and by the Government of the Federal Republic of Germany ("the Government") on 18 April 1988, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an

[*] Note by the registry: The case is numbered 3/1988/147/201. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

application (no. 10572/83) against the Federal Republic of Germany lodged with the Commission under Article 25 (art. 25) on 11 July 1983 by a German firm of publishers, markt intern Verlag GmbH ("markt intern"), and the editor-in-chief of the information bulletins published by it, Mr Klaus Beermann.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Federal Republic of Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) of the Convention. The Government's application, which referred to Article 48 (art. 48), invited the Court to find that there had been no such breach.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Mr R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 25 March 1988, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr J. Cremona, Mr F. Gölcüklü, Mr L.-E. Pettiti, Mr C. Russo and Mr J. De Meyer (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Deputy Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicants on the need for a written procedure (Rule 37 § 1). In accordance with the order made in consequence, the registry received the Government's memorial on 25 October 1988 and then, on 2 November 1988, the applicants' memorial, which, with the President's leave (Rule 27 § 3), was in German.

In a letter of 20 December 1988, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Deputy Registrar, those who would be appearing before the Court, the President directed that the oral proceedings should open on 25 April 1989 (Rule 38). On 13 February 1989 he gave the representatives of the Government leave to plead in German (Rule 27 § 2).

On 17 March and 25 April 1989, the Registrar received from the Commission and the applicants various documents which, in accordance with the President's instructions, he had requested it to produce.

On 30 March 1989, the Chamber decided under Rule 50 to relinquish jurisdiction forthwith in favour of the plenary Court.

6. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mr J. MEYER-LADEWIG, Ministerialdirigent,
Federal Ministry of Justice, *Agent*,
Mr A. VON MÜHLENDAHL, Regierungsdirektor,
Federal Ministry of Justice,
Mrs S. WERNER, Richterin am Amtsgericht, *Advisers*;

- for the Commission

Mr J.A. FROWEIN, *Delegate*;

- for the applicants

Mr C. TOMUSCHAT, Professor
at Bonn University, *Counsel*.

The Court heard addresses by Mr Meyer-Ladewig and Mr von Mühlendahl for the Government, Mr Frowein for the Commission and Mr Tomuschat for the applicants, as well as their replies to its questions. Mr Tomuschat submitted a number of documents on the occasion of the hearing.

7. On various dates between 30 March and 17 May, the registry received the applicants' claims under Article 50 (art. 50) of the Convention and the Government's observations relating thereto.

AS TO THE FACTS

8. The first applicant, markt intern, is a publishing firm, whose registered office is at Düsseldorf. The second applicant, Mr Klaus Beermann, is its editor-in-chief.

9. Markt intern, which was founded and is run by journalists, seeks to defend the interests of small and medium-sized retail businesses against the competition of large-scale distribution companies, such as supermarkets and mail-order firms. It provides the less powerful members of the retail trade with financial assistance in test cases, lobbies public authorities, political parties and trade associations on their behalf and has, on occasion, made proposals for legislation to the legislature.

However, its principal activity in their support is the publication of a number of bulletins aimed at specialised commercial sectors such as that of chemists and beauty product retailers ("markt intern - Drogerie- und Parfümeriefachhandel"). These are weekly news-sheets which provide information on developments in the market and in particular on the commercial practices of large-scale firms and their suppliers. They are

printed by offset and are sold by open subscription. They do not contain any advertising or any articles commissioned by the groups whose cause they espouse.

Markt intern claims to be independent. Its income is derived exclusively from subscriptions. It also publishes other series of bulletins containing more general consumer information, such as "Steuertip", "Versicherungstip" and "Flugtip", which are aimed respectively at taxpayers, holders of insurance policies and air travellers.

10. On several occasions undertakings which had suffered from the applicants' criticism or their calls for boycotts instituted proceedings against them for infringement of the Unfair Competition Act of 7 June 1909 (Gesetz gegen den unlauteren Wettbewerb - "the 1909 Act").

1. The article published in the "markt intern - Drogerie- und Parfümeriefachhandel" of 20 November 1975

11. On 20 November 1975 an article by Mr Klaus Beermann appeared in the information bulletin for chemists and beauty product retailers. It described an incident involving an English mail-order firm, Cosmetic Club International ("the Club"), in the following terms:

> "'I ordered the April beauty set ... from Cosmetic Club International and paid for it, but returned it a few days later because I was not satisfied. Although the order-form clearly and expressly stated that I was entitled to return the set if I was dissatisfied, and that I would be reimbursed, I have not yet seen a pfennig. There was also no reaction to my reminder of 18 June, in which I gave them until 26 June to reply.' This is the angry report of Maria Lüchau, a chemist at Celle, concerning the commercial practices of this English Cosmetic Club.
>
> On 4 November we telexed the manager of the Club, Doreen Miller, as follows: 'Is this an isolated incident, or is this part of your official policy?' In its swift answer of the following day, the Club claimed to have no knowledge of the set returned by Mrs Lüchau or of her reminder of June. It promised however to carry out a prompt investigation of the case and to clarify the matter by contacting the chemist in Celle.
>
> Notwithstanding this provisional answer from Ettlingen, we would like to put the following question to all our colleagues in the chemists and beauty product trade: Have you had similar experiences to that of Mrs Lüchau with the Cosmetic Club? Do you know of similar cases? The question of whether or not this incident is an isolated case or one of many is crucial for assessing the Club's policy."
>
> "'Habe beim Cosmetic-Club International das Schönheits-Set ... von April bestellt und bezahlt, aber wegen Nichtgefallen nach wenigen Tagen zurückgesandt. Obwohl auf dem Bestellcoupon klar und deutlich geschrieben steht, dass ich bei Nichtgefallen berechtigt bin, das Set zurückzusenden und mir Erstattung zugesichert wird, habe ich bis heute keinen Pfennig wiedergesehen. Auch auf meine Abmahnung vom 18. Juni mit Fristsetzung 26. Juni erfolgte keine Reaktion.' So der empörte Bericht der Celler Drogistin Maria Lüchau über die Geschäftstätigkeit des aus England importierten Cosmetic-Clubs.

Unser Telex vom 4. November an CCI-Geschäftsführerin Doreen Miller: 'Handelt es sich hier um eine Einzelpanne, oder gehört dieses Verhalten zu Ihrer offiziellen Politik?' In seiner prompten Antwort tags drauf will der CCI weder etwas von Frau Lüchaus Set-Retoure noch von ihrer Abmahnung im Juni wissen. Er verspricht aber eine sofortige Untersuchung des Falles sowie eine klärende Kontaktaufnahme mit der Drogistin in Celle.

Unabhängig von dieser vorläufigen Antwort aus Ettlingen unsere Frage an alle Drogerie/Parfümerie-Kollegen: Haben Sie ähnliche Erfahrungen wie Frau Lüchau mit dem Cosmetic-Club gesammelt? Oder sind Ihnen ähnliche Fälle bekannt? Die Ein- oder Mehrmaligkeit solcher Fälle ist für die Beurteilung der CCI-Politik äusserst wichtig."

12. Previously, on 20 September and 18 October 1974 and on 29 October 1975, markt intern had already published articles on the Club and advised retailers and manufacturers to be cautious in their dealings with it because the Club had failed to respect certain dates and promises. On 29 October 1975 markt intern described as correct the Club's statement in a legal pleading that "a change in the attitude of the industry show[ed] that the call for a boycott [had] not failed to make an impression".

2. The interim injunction (einstweilige Verfügung)

13. The Club instituted proceedings in the Hamburg Regional Court (Landgericht) which, on 12 December 1975, pursuant to Articles 936 and 944 of the Code of Civil Procedure, issued an interim injunction prohibiting markt intern from repeating the statements published on 20 November.

3. The proceedings in the main action (Hauptsache)

(a) The proceedings in the Hamburg Regional Court

14. Since the applicants had requested a decision as to the main issue (Articles 936 and 926 of the Code of Civil Procedure), the Club instituted the appropriate proceedings within the time-limit laid down by the court. It asked the court

"to restrain markt intern from publishing in its information bulletins:

1. the statement that Mrs Lüchau had given an angry account of the Club's commercial activities to the effect that she had returned the beauty set - because she was dissatisfied with it - but had not been reimbursed despite sending a reminder,

without stating at the same time that the Club had immediately sent to Mrs Lüchau an enquiry, which it had prepared, for submission to the postal authorities, and that it had assured her that it would reimburse her expenses;

2. the statement that in its immediate response to markt intern, sent on the following day, the Club had stated that it had no knowledge of the beauty set's being returned or of the reminder sent in June,

without making clear at the same time that there was no intention to raise doubts as to the accuracy of the Club's statement;

3. the question asking colleagues of the chemists and beauty product retailers trade whether they had had similar experiences to that of Mrs Lüchau or knew of similar cases - because it was of the greatest importance in assessing the Club's policy to know whether this case was an isolated incident or whether there had been others,

without making clear at the same time that it was not sought to insinuate that the Club's official policy was to accept payment without immediately supplying the products due".

15. The Regional Court gave its decision on 2 July 1976. It dismissed the Club's first head of claim because the statement was accurate and there was no reason to think that markt intern would disseminate it again without indicating what had occurred since the publication of its information sheet of 20 November 1975 (enquiries made to the postal authorities, etc.). On the other hand, it allowed the other two heads of claim, basing its decision on Article 824 of the Civil Code, according to which, "anyone who untruthfully alleges or disseminates a fact liable to affect adversely a person's creditworthiness or to cause him other disadvantages relating to his earning capacity or his career advancement, shall be liable to pay compensation for any such damage he may have caused". It found that Article 823 of the Civil Code was not applicable and left open the question whether the Club could also rely on the 1909 Act.

In the Regional Court's view, in writing that the Club claimed to have no knowledge of the return of the beauty set and of Mrs Lüchau's reminder (the Club's second head of claim), markt intern had not only expressed doubts as to the accuracy of this information but had also virtually asserted, without providing any proof, that the information provided was untruthful.

By inviting chemists to inform it of any "similar experiences" with the Club (the Club's third head of claim), markt intern had solicited information, which, if possible, was to be of a negative character regarding the Club, despite the fact that there were not at that stage sufficient grounds to suggest that the Club's commercial policy was reprehensible.

The Regional Court acknowledged that economic activities were subject to critical review by the press. However, it considered that the principles of the protection of legitimate interests (Article 193 of the Criminal Code) and of the freedom of expression (Article 5 of the Basic Law) did not protect the repetition of untruthful statements.

The court concluded that the applicants' conduct was culpable. Markt intern ought not to have generalised from the case of Mrs Lüchau, the circumstances of which had not yet been clarified, and used it to formulate criticism of the Club. This method of proceeding could not be reconciled with the obligations incumbent on journalists. The defendants ought to have

begun by taking their enquiries further, but not in the form of their request for information from the retailers.

Under the terms of the judgment, for each contravention the applicants were liable to a fine (Ordnungsgeld) or detention (Ordnungshaft) to be fixed by the court, but not exceeding DM 500,000 or six months, respectively.

(b) The proceedings in the Hanseatic Court of Appeal (Hanseatisches Oberlandesgericht)

16. On 31 March 1977 the Hanseatic Court of Appeal found for the applicants and quashed the Regional Court's judgment.

In the Court of Appeal's view, the 1909 Act was not applicable because, by publishing its article on 20 November 1975, markt intern had not acted from competitive motives, in other words with a view to increasing the turnover of chemists and beauty shops, to the detriment of the Club; it had sought to inform its readers that the Club had not dealt as it should have done with a matter concerning one of its own customers. Nor could the Club rely on Articles 824 and 823 of the Civil Code because the allegations published on 20 November 1975 were not untruthful.

As regards the return of the beauty set and Mrs Lüchau's reminder (the Club's first head of claim), the applicants' statements had been consistent with their obligations as journalists. The Criminal Code (Article 193) in principle allowed unfavourable assessments regarding business services in so far as they sought to protect legitimate interests. Article 5 of the Basic Law recognised that the role of the press was to contribute to the forming of public opinion. Finally, there was no risk that markt intern would repeat this particular statement.

The statement that the Club had claimed to have no knowledge of the beauty set and Mrs Lüchau's reminder ("will ... weder ... noch ... wissen") was not objectionable in the circumstances of the case. The form of words merely indicated to the readers that markt intern could not confirm the information provided by the Club.

By its request for information from chemists (the Club's third head of claim), markt intern had not cited facts or made allegations suggesting that the incident in question represented the Club's official policy. It had simply recommended that its readers verify the Club's commercial practices and, indeed, had left open the question whether Mrs Lüchau's case was an isolated incident. It had of course expressed the opinion that it was, in its view, possible that there had been a number of other cases of the same type. This was, however, merely a value judgment.

(c) The proceedings in the Federal Court of Justice (Bundesgerichtshof)

17. The Club appealed to the Federal Court of Justice which, on 16 January 1980, set aside the Hanseatic Court of Appeal's judgment and, varying the Hamburg Regional Court's judgment, ordered the applicants to

refrain from publishing in their information bulletin the statements disseminated by markt intern on 20 November 1975 in the form referred to by the Club in its heads of claim at first instance (see paragraph 14 above).

For each contravention, the applicants were liable to a fine or detention to be fixed by the court, but not exceeding DM 500,000 or six months, respectively.

18. The Federal Court of Justice based its judgment on section 1 of the 1909 Act, according to which:

> "Any person who in the course of business commits, for purposes of competition, acts contrary to honest practices may be enjoined from further engaging in those acts and held liable in damages."

> "Wer im geschäftlichen Verkehre zu Zwecken des Wettbewerbes Handlungen vornimmt, die gegen die guten Sitten verstossen, kann auf Unterlassung und Schadensersatz in Anspruch genommen werden."

(a) Notwithstanding the lack of a competitive relationship between markt intern and the Club, the 1909 Act was said to apply because it was sufficient in this respect that the contested conduct was objectively advantageous to an undertaking, to the detriment of a competitor. That was exactly the aim pursued in this instance. On these points, the Federal Court referred to the established case-law, and in particular its own, concerning the 1909 Act.

In so far as the Court of Appeal had held that the applicants did not intend to intervene in favour of the specialised retail trade to the detriment of the Club, its judgment did not stand up to scrutiny. It had not taken sufficient account of all the circumstances nor attached the correct weight to the evidence adduced. Having regard in particular to the previous reports published by markt intern on the Club (see paragraph 12 above), the Court of Appeal ought to have found that the applicants had not merely provided information as an organ of the press, but had embraced the interests of the specialised chemists trade and, in order to promote those interests, had attacked the Club's commercial practices. The Court of Appeal ought consequently to have concluded that markt intern intended to act in favour of the specialised trade and to the detriment of the Club. In general, it was extremely unusual for the press and the news media to cite an isolated incident such as the case of Mrs Lüchau - according to markt intern it could even have been simply "a breakdown in communications" - in order to raise immediately in public the controversial question whether this case reflected the Club's official policy. The Court of Appeal ought to have regarded markt intern's call for information from its readers concerning negative experiences of a similar type as an even more unusual step, which again revealed the intention to influence the market.

(b) Section 1 of the 1909 Act was thus applicable in this case. It was infringed because the disputed statements were contrary to honest practices on the following grounds:

"By their publication of the article complained of ..., the respondents acted in a way contrary to honest practices within the meaning of section 1 of the 1909 Act. It is immaterial in this connection whether the statements regarding the witness Lüchau (first head of claim) were true. The mere fact that a commercially damaging statement is true does not necessarily constitute a defence against a charge of acting in breach of the principles of fair competition. According to the rules of competition, such statements are acceptable only if they are based on sufficient grounds and if the manner and extent of the criticism in question remains within the limits of what is required by the situation because it is contrary to honest practices to engage in competition by making disparaging statements about competitors (see Federal Court of Justice, Gewerblicher Rechtsschutz und Urheberrecht ("BGH GRUR") 1962, pp. 45 and 48 - Betonzusatzmittel). In this case, at the time of the publication there was not sufficient cause to report this incident. The exact circumstances had not yet been clarified. The appellant in its reply had agreed to undertake an immediate investigation and to contact Mrs Lüchau in order to clarify the position. The respondents were aware that criticism of the appellant could not be fully justified before further clarification had been sought, as they themselves had described the appellant's reply as a provisional answer. Accordingly, they should have taken into consideration that any such premature publication of this incident was bound to have adverse effects on the appellant's business, because it gave the specialised retailers an effective argument which was capable of being used against the appellant with their mutual customers, and one which could be used even if the incident should turn out to be an isolated mishap from which no conclusion could be drawn as to the appellant's business policy. In these circumstances, at all events at the time of the publication, there were not sufficient grounds for reporting this isolated incident. Such conduct is, moreover, very unusual in business competition.

As regards the second head of claim, the appeal on a point of law must be allowed for the simple reason that the sentence: 'The Club claimed to have no knowledge of the set returned by Mrs Lüchau or of her reminder of June' can be understood only in the light of the information contrary to honest competition which is referred to under the first head of claim. As, simply, an additional and related item of information, it qualifies for the same legal assessment, in particular because it was liable to strengthen the unfavourable impression which inevitably resulted from the mere recounting of the incident. The Court of Appeal considered that this was no more than an illustration of the fact that the journalist had not been in a position to verify what had been told to him, but this observation conflicts with its earlier conclusion that the wording used expressed at least serious doubts as to the accuracy of the information and that in this case, consequently, the description of events put forward by the appellant was presented as being, probably, unreliable. The Court of Appeal ought therefore to have stated on what basis it reached a conclusion contrary to the ordinary meaning of the words. It did not do so, so that it may be presumed that at least a significant proportion of the readers of the bulletin would interpret the words employed in accordance with general usage, which was liable to show the appellant in an even more unfavourable light.

The Court of Appeal's dismissal of the third head of claim was based on the following considerations. The question put to chemist and beauty store colleagues asking whether their experiences with the Club had been similar to that of Mrs Lüchau or whether they knew of similar cases, which was said to be very important in assessing the Club's policy, indicated that the respondents considered it possible that a number of cases of this type had occurred. However, this merely represented a value judgment, and as such could not give rise to objections. Yet, under section 1 of the

1909 Act, the decisive issue is not whether the statement is to be regarded as a value judgment or as an allegation of fact. The expression of a value judgment can also exert an unacceptable influence in the field of competition under section 1 of the 1909 Act (see BGH GRUR 1962, p. 47 - Betonzusatzmittel). In this case, there were in any event not sufficient grounds for such a sweeping suspicion. A single case of this type did not constitute evidence for suspecting immediately that the appellant's commercial policy was fraudulent. It is moreover contrary to honest commercial practices to solicit, in such circumstances and at such an early stage, compromising information.

As the respondents were aware of the circumstances giving rise to the criticism that they had acted contrary to honest practices, there can be no reservations, from the subjective point of view, against finding a contravention of section 1 of the 1909 Act. As regards the risk of repetition, regard must be had to the principle laid down by the Federal Court of Justice in its case-law, according to which, where the rules of competition are infringed, there is a presumption of fact that such a risk exists (see Federal Court of Justice, civil cases ("BGHZ") 14, pp. 163 and 171 - Constanze II). This is the case for articles in the press where - as here - the nature of the questions dealt with gives grounds for supposing that the debate was not closed by the publication of the first article (BGHZ 31, pp. 318 and 319 - Alte Herren; BGH, Neue Juristische Wochenschrift ("NJW") 1966, pp. 647 and 649 - Reichstagsbrand). The respondents have not put forward any legally valid evidence that the danger no longer existed."

(d) The proceedings in the Federal Constitutional Court (Bundesverfassungsgericht)

19. The applicants then appealed to the Federal Constitutional Court, claiming a violation of the freedom of the press (Article 5 § 1 of the Basic Law).

Sitting as a committee of three judges, the Constitutional Court decided, on 9 February 1983, not to entertain the appeal. It considered that the appeal did not offer sufficient prospects of success, for the following reasons:

"As the Federal Constitutional Court held in its decision of 15 November 1982 (1 BvR 108/80 and others [Entscheidungen des Bundesverfassungsgerichts, volume 62, pp. 230-248]), the requirements which must be satisfied in order for freedom of expression and of the press to override other legal interests protected under statutes of general application are not fulfilled where an item published in the press is intended to promote, in the context of commercial competition, certain economic interests to the detriment of others. This is the case as regards the statements prohibited by the Federal Court of Justice. The second sentence of Article 5 § 1 of the Basic Law did not therefore require a different interpretation and application of section 1 of the 1909 Act from that given by the judgment appealed.

As that decision is not based on a violation of the second sentence of Article 5 § 1 of the Basic Law (freedom of the press), it is immaterial that the Federal Court did not, in the reasons given for its decision, expressly address the question of the scope of the freedom of the press in relation to the application of section 1 of the 1909 Act."

* * *

20. Mrs Lüchau was not the only customer to complain about the Club. Two others informed the applicants that they had encountered similar

difficulties; the first approached them before the publication of the bulletin of 20 November 1975 and the second after it.

According to its own statements, the Club sold 157,929 beauty sets between 1 December 1974 and 30 November 1975. In 1975, 11,870 identifiable persons returned the sets and were reimbursed.

PROCEEDINGS BEFORE THE COMMISSION

21. In their application of 11 July 1983 to the Commission (no. 10572/83), markt intern and Mr Beermann complained of the restrictions imposed on them by the German courts under section 1 of the 1909 Act.

22. The Commission declared the application admissible on 21 January 1986. In its report of 18 December 1987 (Article 31) (art. 31), it expressed the opinion, by twelve votes to one, that there had been a violation of Article 10 (art. 10). The full text of its opinion is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS BY THE GOVERNMENT TO THE COURT

23. At the hearing on 25 April 1989 the Government requested the Court to hold that this case disclosed no violation by "the Federal Republic of Germany of Article 10 (art. 10) of the European Convention on Human Rights".

AS TO THE LAW

24. The applicants claimed that the prohibition imposed on them by the German courts under section 1 of the 1909 Act and the broad interpretation which those courts gave to that provision had infringed Article 10 (art. 10) of the Convention, according to which:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

[*] Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 165 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

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

The applicants' view was contested by the Government but accepted by the Commission.

A. Applicability of Article 10 (art. 10)

25. The Government primarily disputed the applicability of Article 10 (art. 10). Before the Court they argued that if the case were examined under that provision, it would fall, by reason of the contents of the publication of 20 November 1975 and the nature of markt intern's activities, at the extreme limit of Article 10's (art. 10) field of application. The wording and the aims of the information bulletin in question showed that it was not intended to influence or mobilise public opinion, but to promote the economic interests of a given group of undertakings. In the Government's view, such action fell within the scope of the freedom to conduct business and engage in competition, which is not protected by the Convention.

The applicants did not deny that they defended the interests of the specialised retail trade. However, they asserted that markt intern did not intervene directly in the process of supply and demand. The undertaking depended exclusively on its subscribers and made every effort, as was proper, to satisfy the requirements of its readers, whose preoccupations the mainstream press neglected. To restrict the freedom of expression to news items of a political or cultural nature would result in depriving a large proportion of the press of any protection.

26. The Court recalls that the writer of the article in question reported the dissatisfaction of a consumer who had been unable to obtain the promised reimbursement for a product purchased from a mail-order firm, the Club; it asked for information from its readers as to the commercial practices of that firm. It is clear that the contested article was addressed to a limited circle of tradespeople and did not directly concern the public as a whole; however, it conveyed information of a commercial nature. Such information cannot be excluded from the scope of Article 10 § 1 (art. 10-1) which does not apply solely to certain types of information or ideas or forms of expression (see, mutatis mutandis, the Müller and Others judgment of 24 May 1988, Series A no. 133, p. 19, § 27).

B. Compliance with Article 10 (art. 10)

27. In the Court's view, the applicants clearly suffered an "interference by public authority" in the exercise of the right protected under Article 10 (art. 10), in the form of the injunction issued by the Federal Court of Justice restraining them from repeating the statements appearing in the information bulletin of 20 November 1975. Such an interference infringes the Convention if it does not satisfy the requirements of paragraph 2 of Article 10 (art. 10-2). It should therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" to achieve such aims.

1. "Prescribed by law"

28. In the Government's view, the legal basis for the interference is to be found not only in section 1 of the Unfair Competition Act of 1909 but also, with regard to two of the three contested statements, in section 14 of the same Act ("prohibition of disparaging statements") and Article 824 of the Civil Code (see paragraph 15 above), as applied by the Hamburg Regional Court.

Like the Commission, the Court notes that, while the Federal Court of Justice reinstated for the most part the judgment delivered on 2 July 1976 at first instance, the grounds given for its decision of 16 January 1980 were its own. The Federal Court of Justice based its decision solely on section 1 of the 1909 Act (see paragraph 18 above). It is not necessary to consider whether it could also have relied on the other provisions cited by the Government.

29. The applicants argued that the disputed interference was not "prescribed by law", because it was not foreseeable. The relevant German legislation did not indicate the dividing line between freedom of the press and unfair competition. In the first place, section 1 suffered from an indisputable lack of clarity; it was drafted in vague terms ("gute Sitten"/"honest practices") and conferred a wide discretion on the courts. It did not enable the citizen to foresee, to a degree that was reasonable, whether he would be committing an offence. Secondly, its application was not justified in this case because there was no direct competition between markt intern and the Club. The applicants had not acted "for purposes of competition", as is required under the section in question, but merely carried out their duty as journalists.

The Government maintained, on the other hand, that, because of their considerable experience of litigation, the applicants had been familiar with the text and the interpretation of the 1909 Act long before the contested article was published. On this question the Commission shared the Government's view. The Government added that the relevant provisions of

section 1 satisfied the requirements of accessibility and foreseeability laid down in the Court's case-law.

30. The Court has already acknowledged the fact that frequently laws are framed in a manner that is not absolutely precise. This is so in spheres such as that of competition, in which the situation is constantly changing in accordance with developments in the market and in the field of communication (see the Barthold judgment of 25 March 1985, Series A no. 90, p. 22, § 47, and, mutatis mutandis, the Müller and Others judgment, cited above, Series A no. 133, p. 20, § 29). The interpretation and application of such legislation are inevitably questions of practice (see the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 31, § 49).

In this instance, there was consistent case-law on the matter from the Federal Court of Justice (see, inter alia, BGHZ 14, pp. 163, 170-172 - Constanze II; BGHZ 31, pp. 308, 318-319 - Alte Herren; BGH GRUR 1962, pp. 45 and 48 - Betonzusatzmittel; BGH NJW 1966, pp. 647 and 649 - Reichstagsbrand). This case-law, which was clear and abundant and had been the subject of extensive commentary, was such as to enable commercial operators and their advisers to regulate their conduct in the relevant sphere.

2. Legitimate aim

31. In the view of the Government and the Commission, the contested interference was intended to protect "the rights of others". Initially, the Government also cited the "prevention of disorder" and the "protection of morals", but they did not pursue these submissions before the Court.

According to the actual wording of the judgment of 16 January 1980, the contested article was liable to raise unjustified suspicions concerning the commercial policy of the Club and thus damage its business. The Court finds that the interference was intended to protect the reputation and the rights of others, legitimate aims under paragraph 2 of Article 10 (art. 10-2).

3. "Necessary in a democratic society"

32. The applicants argued that the injunction in question could not be regarded as "necessary in a democratic society". The Commission agreed with this view.

The Government, however, disputed it. In their view, the article published on 20 November 1975 did not contribute to a debate of interest to the general public, but was part of an unlawful competitive strategy aimed at ridding the beauty products market of an awkward competitor for specialist retailers. The writer of the article had sought, by adopting aggressive tactics and acting in a way contrary to usual practice, to promote the competitiveness of those retailers. The Federal Court of Justice and the Federal Constitutional Court had ruled in accordance with well established

case-law, having first weighed all the interests at stake (Güter- und Interessenabwägung).

In addition, in the field of competition, States enjoyed a wide discretion in order to take account of the specific situation in the national market and, in this case, the national notion of good faith in business. The statements made "for purposes of competition" fell outside the basic nucleus protected by the freedom of expression and received a lower level of protection than other "ideas" or "information".

33. The Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the existence and extent of the necessity of an interference, but this margin is subject to a European supervision as regards both the legislation and the decisions applying it, even those given by an independent court (see, as the most recent authority, the Barfod judgment of 22 February 1989, Series A no. 149, p. 12, § 28). Such a margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition. Otherwise, the European Court of Human Rights would have to undertake a re-examination of the facts and all the circumstances of each case. The Court must confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate (see, inter alia, the above-mentioned Barthold judgment, Series A no. 90, p. 25, § 55).

34. In this case, in order to establish whether the interference was proportionate it is necessary to weigh the requirements of the protection of the reputation and the rights of others against the publication of the information in question. In exercising its power of review, the Court must look at the impugned court decision in the light of the case as a whole (see the above-mentioned Barfod judgment, Series A no. 149, p. 12, § 28).

Markt intern published several articles on the Club criticising its business practices and these articles, including that of 20 November 1975, were not without a certain effect (see paragraph 12 above). On the other hand, the Club honoured its promises to reimburse dissatisfied customers and, in 1975, 11,870 of them were reimbursed (see paragraph 20 above).

The national courts did weigh the competing interests at stake. In their judgments of 2 July 1976 and 31 March 1977, the Hamburg Regional Court and the Hanseatic Court of Appeal explicitly referred to the right to freedom of expression and of the press, as guaranteed by Article 5 of the Basic Law (see paragraphs 15 and 16 above) and the Federal Constitutional Court, in its decision of 9 February 1983, considered the case under that provision (see paragraph 19 above). The Federal Court of Justice based its judgment of 16 January 1980 on the premature nature of the disputed publication and on the lack of sufficient grounds for publicising in the information bulletin an isolated incident and, in doing so, took into consideration the rights and legal interests meriting protection (see paragraph 18 above).

35. In a market economy an undertaking which seeks to set up a business inevitably exposes itself to close scrutiny of its practices by its competitors. Its commercial strategy and the manner in which it honours its commitments may give rise to criticism on the part of consumers and the specialised press. In order to carry out this task, the specialised press must be able to disclose facts which could be of interest to its readers and thereby contribute to the openness of business activities.

However, even the publication of items which are true and describe real events may under certain circumstances be prohibited: the obligation to respect the privacy of others or the duty to respect the confidentiality of certain commercial information are examples. In addition, a correct statement can be and often is qualified by additional remarks, by value judgments, by suppositions or even insinuations. It must also be recognised that an isolated incident may deserve closer scrutiny before being made public; otherwise an accurate description of one such incident can give the false impression that the incident is evidence of a general practice. All these factors can legitimately contribute to the assessment of statements made in a commercial context, and it is primarily for the national courts to decide which statements are permissible and which are not.

36. In the present case, the article was written in a commercial context; markt intern was not itself a competitor in relation to the Club but it intended - legitimately - to protect the interests of chemists and beauty product retailers. The article itself undoubtedly contained some true statements, but it also expressed doubts about the reliability of the Club, and it asked the readers to report "similar experiences" at a moment when the Club had promised to carry out a prompt investigation of the one reported case.

According to the Federal Court of Justice (see paragraph 18 above), there was not sufficient cause to report the incident at the time of the publication. The Club had agreed to undertake an immediate investigation in order to clarify the position. Furthermore, the applicants had been aware that criticisms of the Club could not be fully justified before further clarification had been sought, as they themselves had described the reply of the Club as a provisional answer. In the opinion of the Federal Court they should therefore have taken into consideration that any such premature publication of the incident was bound to have adverse effects on the Club’s business because it gave the specialised retailers an effective argument capable of being used against the Club with their customers, and one which could be used even if the incident should turn out to be an isolated mishap from which no conclusion could be drawn as to the Club’s business policy.

37. In the light of these findings and having regard to the duties and responsibilities attaching to the freedoms guaranteed by Article 10 (art. 10), it cannot be said that the final decision of the Federal Court of Justice - confirmed from the constitutional point of view by the Federal

Constitutional Court - went beyond the margin of appreciation left to the national authorities. It is obvious that opinions may differ as to whether the Federal Court's reaction was appropriate or whether the statements made in the specific case by markt intern should be permitted or tolerated. However, the European Court of Human Rights should not substitute its own evaluation for that of the national courts in the instant case, where those courts, on reasonable grounds, had considered the restrictions to be necessary.

38. Having regard to the foregoing, the Court reaches the conclusion that no breach of Article 10 (art. 10) has been established in the circumstances of the present case.

FOR THESE REASONS, THE COURT

Holds, by nine votes to nine, with the casting vote of the President (Rule 20 § 3 of the Rules of Court), that there has been no violation of Article 10 (art. 10) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 November 1989.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint dissenting opinion of Judges Gölcüklü, Pettiti, Russo, Spielmann, De Meyer, Carrillo Salcedo and Valticos;

(b) individual dissenting opinion of Judge Pettiti;

(c) individual dissenting opinion of Judge De Meyer;

(d) dissenting opinion of Judge Martens, approved by Judge Macdonald.

R.R.
M.-A.E

JOINT DISSENTING OPINION OF JUDGES GÖLCÜKLÜ, PETTITI, RUSSO, SPIELMANN, DE MEYER, CARRILLO SALCEDO AND VALTICOS

(Translation)

I.

In the field of human rights, it is the exceptions, and not the principles, which "[are] to be interpreted narrowly"[1].

This proposition is especially true in relation to the freedom of expression.

That principle constitutes "one of the essential foundations" of a democratic society[2], "one of the basic conditions for its progress and for the development of every man"[3]; "it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb ..."[4].

"Due regard being had to the importance of freedom of expression in a democratic society"[5], any interference with it must correspond to a "pressing social need", "be proportionate to the legitimate aim pursued" and be justified on grounds which are not merely "reasonable", but "relevant and sufficient"[6].

In the present case these conditions, which the Court has affirmed on several occasions in previous judgments, were not satisfied.

In any event, in the light of the criteria which the Court has applied hitherto, the "necessity" of the measures taken against the applicants was not "convincingly established"[7].

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[1] See inter alia Klass and Others judgment, 6 September 1978, Series A no. 28, p. 21, § 42, and Sunday Times judgment, 26 April 1979, Series A no. 30, p. 41, § 65.

[2] Handyside judgment, 7 December 1976, Series A no. 24, p. 23, § 49; Sunday Times, cited above, p. 40, § 65; Barthold judgment, 25 March 1985, Series A no. 90, p. 26, § 58; Lingens judgment, 8 July 1986, Series A no. 103, p. 26, § 41; and Müller and Others judgment, 24 May 1988, Series A no. 133, p. 22, § 33.

[3] Above-mentioned judgments, Handyside, loc. cit.; Barthold, loc. cit.; Lingens, loc. cit.; and Müller and Others, loc. cit.

[4] Above-mentioned judgments, Handyside, loc. cit.; Sunday Times, loc. cit.; Lingens, loc. cit.; and Müller and Others, loc. cit.

[5] Barfod judgment, 22 February 1989, Series A no. 149, p. 12, § 28; see also Barthold judgment, cited above, loc. cit.

[6] Above-mentioned judgments, Handyside, pp. 22-24, §§ 48-50; Sunday Times, pp. 36 and 38, §§ 59 and 62; Barthold, p. 25, § 55; Lingens, pp. 25-26, §§ 39-40; and Müller and Others, p. 21, § 32.

[7] Barthold judgment, cited above, p. 26, § 58.

It is just as important to guarantee the freedom of expression in relation to the practices of a commercial undertaking as it is in relation to the conduct of a head of government, which was at issue in the Lingens case. Similarly the right thereto must be able to be exercised as much in the interests of the purchasers of beauty products as in those of the owners of sick animals, the interests at stake in the Barthold case. In fact, freedom of expression serves, above all, the general interest.

The fact that a person defends a given interest, whether it is an economic interest or any other interest, does not, moreover, deprive him of the benefit of freedom of expression.

In order to ensure the openness of business activities[8], it must be possible to disseminate freely information and ideas concerning the products and services proposed to consumers. Consumers, who are exposed to highly effective distribution techniques and to advertising which is frequently less than objective, deserve, for their part too, to be protected, as indeed do retailers.

In this case, the applicants had related an incident which in fact occurred, as has not been contested[9], and requested retailers to supply them with additional information. They had exercised in an entirely normal manner their basic right to freedom of expression.

This right was, therefore, violated in their regard by the contested measures.

II.

Having said this, we consider it necessary to make three further observations in relation to the present judgment.

We find the reasoning set out therein with regard to the "margin of appreciation" of States[10] a cause for serious concern. As is shown by the result to which it leads in this case, it has the effect in practice of considerably restricting the freedom of expression in commercial matters.

By claiming that it does not wish to undertake a re-examination of the facts and all the circumstances of the case[11], the Court is in fact eschewing the task, which falls to it under the Convention[12], of carrying out "European

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[8] § 35 of the judgment.

[9] Moreover it was not an "isolated" case (§ 36 of the judgment), because in 1975 the undertaking in question had to reimburse 11,870 of its clients (§§ 20 and 34 of the judgment).

[10] §§ 33 and 37 of the judgment.

[11] § 33 of the judgment.

[12] Above-mentioned judgments in Handyside, p. 23, § 49; Sunday Times, p. 36, § 59; and § 33 of the present judgment.

supervision"[13] as to the conformity of the contested "measures" "with the requirements" of that instrument[14].

On the question of the need to "weigh the competing interests at stake"[15], it is sufficient to note that in this case the interests which the applicants sought "legitimately" to protect[16] were not taken into consideration at all[17].

[13] Article 19 of the Convention.

[14] Judgment in the case "relating to certain aspects of the laws on the use of languages in education in Belgium", 23 July 1968, Series A no. 6, p. 35, § 10.

[15] § 34 of the judgment.

[16] § 36 of the judgment.

[17] For the rest, we agree substantially with the arguments put forward in §§ 3 to 7 of the dissenting opinion of Judge Martens to which Judge Macdonald has given his approval (see pp. 28-30 below).

INDIVIDUAL DISSENTING OPINION OF JUDGE PETTITI

(Translation)

In addition to the observations put forward in the joint dissenting opinion, I wish to make the following comments.

Freedom of expression is the mainstay of the defence of fundamental rights. Without freedom of expression, it is impossible to discover the violation of other rights.

In this field the States have only a slight margin of appreciation, which is subject to review by the European Court. Only in rare cases can censorship or prohibition of publication be accepted. This has been the prevailing view in the American and European systems since 1776 and 1789 (cf. First Amendment, United States Constitution; case-law of the supreme courts of the United States, Canada, France, etc.).

This is particularly true in relation to commercial advertising or questions of commercial or economic policy, in respect of which the State cannot claim to defend the general interest because the interests of consumers are conflicting. In fact, by seeking to support pressure groups - such as laboratories -, the State is defending a specific interest. It uses the pretext of a law on competition or on prices to give precedence to one group over another. The protection of the interests of users and consumers in the face of dominant positions depends on the freedom to publish even the harshest criticism of products. Freedom must be total or almost total, except where an offence is committed (for example misleading advertising) or where an action is brought for unfair competition, but in those circumstances the solution is not censorship but criminal prosecution or civil proceedings between the undertakings. The arsenal of laws caters for the punishment of misleading advertising.

The limitation of the freedom of expression in favour of the States' margin of appreciation, which is thereby given priority over the defence of fundamental rights, is not consistent with the European Court's case-law or its mission. Such a tendency towards restricting freedoms would also run counter to the work of the Council of Europe in the field of audio-visual technology and trans-frontier satellites aimed at ensuring freedom of expression and protecting the rights of others including those of users and consumers of communication media.

The problem is all the more serious because often the States which seek to restrict the freedom use the pretext of economic infringements or breaches of economic legislation such as anti-competition or anti-trust provisions to institute proceedings for political motives or to protect "mixed" interests (State - industrial) in order to erect a barrier to the freedom of expression (the Eastern block countries provide numerous examples, but the States of the Council of Europe follow this practice too).

The economic pressure which groups or laboratories can exert should not be underestimated. In certain cases this pressure has been such that it has delayed the establishment of the truth and therefore put back the prohibition of a medicine or substance dangerous for the public health.

The economic press of numerous member States publishes each day articles, millions of copies of which are circulated, containing criticism of products in terms a hundred times stronger than those in question in the markt intern case. It is this freedom accorded to that press which ensures the protection of the public at large.

INDIVIDUAL DISSENTING OPINION OF JUDGE DE MEYER

(Translation)

In addition to the observations contained in the joint dissenting opinion[1], I consider it to be necessary to make the following comments.

1. It is questionable whether the "aim" of the interference contested by the applicants was sufficiently "legitimate" to justify that interference, because in fact the measure was designed not to protect "rights of others" in the strict sense, but rather to defend mere commercial interests.

2. Ultimately the Court undertook "a re-examination of the facts and all the circumstances" of the case by adopting, in paragraphs 34 to 37 of the judgment, the disputed assessment of the national courts.

[1] See pages 23-25 above.

DISSENTING OPINION OF JUDGE MARTENS, APPROVED BY JUDGE MACDONALD

(Translation)

1. I am entirely convinced of the correctness of the Court's view that the contested article published by markt intern is in principle protected by the freedom of expression secured under Article 10 (art. 10) of the Convention. The socio-economic press is just as important as the political and cultural press for the progress of our modern societies and for the development of every man. In this connection I refer to the joint dissenting opinion of Judges Gölcüklü, Pettiti, Russo, Spielmann, De Meyer, Carrillo Salcedo and Valticos (hereinabove "the joint dissenting opinion"), and I express my agreement with part I of that opinion.

I also share the Court's opinion that the injunction issued by the Federal Court of Justice constituted an "interference by public authority" which infringes the Convention if it does not satisfy the requirements of paragraph 2 of Article 10 (art. 10-2). Here again I refer to the joint dissenting opinion.

Finally, I agree with the Court that these requirements are satisfied as regards the necessity of being "prescribed by law" and having a "legitimate aim", but I cannot follow the Court in its view that, taking account of the margin of appreciation which the Contracting States enjoy, it should accept that the interference was "necessary in a democratic society". On this point I feel that it is necessary to take the analysis set out in the joint dissenting opinion a step further; indeed this is one of the reasons why I did not feel that I could fully support it.

2. In relation to the third sub-paragraph of paragraph 34 of the Court's judgment, I should like to observe in the first place that, in carrying out the review referred to in the preceding paragraph, the Court ought not to have taken into consideration the decisions of the Hamburg Regional Court and the Hanseatic Court of Appeal, which were both quashed by the decision of a higher court: that of the Federal Court of Justice, which is the only relevant decision as the Constitutional Court found the appeal inadmissible.

3. The Federal Court takes the view that the question whether the contested article published by markt intern was acceptable is to be classified under the law on unfair competition and it is this classification, and the assessments inferred therefrom, which the European Court has endorsed (see paragraphs 33, 35, 36 and 37 of its judgment). In so doing, the European Court has subscribed to an approach which, in my view, is incompatible with the right to the freedom of expression, which the Convention also guarantees to a partisan press organ.

4. The law on unfair competition governs the relationships between competitors on the market. It is based on the assumption that in engaging in

competition the competitors seek only to serve their own interests, while attempting to harm those of others. That is why (as the Federal Court notes in its judgment) the German law on unfair competition prohibits persons from engaging in competition by making denigrating statements about their competitors. It is permissible for a competitor to criticise another publicly only if he has sufficient reasons for so doing and if the nature and scope of his criticism remain within the limits required by the situation. In this field, the prohibition on publishing criticism is therefore the norm and it falls to the person who takes the risk of publishing such criticism to show that there were sufficient grounds for his criticism and that it remains within the strictest limits. In considering whether this proof has been furnished, the court weighs up only the interests of the two competitors.

In the field of freedom of expression the converse is true. In this field the basic assumption is that this right is used to serve the general interest, in particular as far as the press is concerned, and that is why in this context the freedom to criticise is the norm. Thus in this field it falls to the person who alleges that the criticism is not acceptable to prove that his claim is well-founded. In determining whether he has done so, the court must weigh up the general interest, on the one hand, and the individual interests of the party who claims to have been injured, on the other.

5. It follows that to classify under the law on unfair competition the question whether an article published by an organ of the press is acceptable is to place that organ of the press in a legal position which is fundamentally different from that to which it is entitled under Article 10 (art. 10) of the Convention and one which is clearly unfavourable to it. That is why, in my view, for that organ of press, such a classification constitutes a considerable restriction on the exercise of the freedoms guaranteed to it under Article 10 (art. 10). It should therefore be asked whether it can be necessary in a democratic society to restrict the rights and fundamental freedoms of an organ of the press in this way solely because that organ has espoused the cause of specific economic interests, namely those of a particular sector of a specialised trade. I am in no doubt that this question must be answered in the negative. This is clear from the fact that, as far as I know, such a rule extending the scope of the law on unfair competition to the detriment of freedom of the press is unknown in the other member States of the Council of Europe, and rightly so because, in certain respects, all newspapers may be regarded as partisan, having espoused the cause of certain specific interests.

6. In my view, it follows from the foregoing that the Court ought to have considered that in this instance it had to examine a case in which the assessment of the national authorities suffered from a fundamental defect and that, accordingly, it ought itself to have determined whether the interference was necessary in a democratic society. Indeed, in such

circumstances the margin of appreciation plays no role because this margin cannot justify assessments incompatible with the freedoms guaranteed under the Convention. I emphasise this point because, for my part, I do not deny that in the field of freedom of expression the European Court can limit the scope of its review by leaving the States a certain margin of appreciation.

7. In this context I should like to make clear that I cannot agree, either, with the opinion of the Court in so far as it considers that in this instance, in order to determine whether the interference was proportionate, it is necessary to weigh up the requirements of the protection of the reputation and rights of others, on the one hand, and the publication of the information in question on the other (see paragraph 34 of the Court's judgment).

In my view - and here too I find myself in agreement with the joint dissenting opinion - it is necessary to ask whether it was established convincingly (see the Barthold judgment of 25 March 1985, Series A no. 90, p. 25, § 58) that the private interests of the Club were more important than the general interest, in accordance with which not only the specialised reader but also the public as a whole should have been able to acquaint themselves with facts having a certain importance in the context of the struggle of small and medium-sized retail undertakings against the large-scale distribution companies. In answering this question, I, like the authors of the joint dissenting opinion, reach the conclusion that the reply must be negative. Like the Court (see paragraph 35 of its judgment), I take into account the fact that in a market economy an undertaking which seeks to set up a business inevitably exposes itself to close scrutiny of its practices. That is why the Club, which was in that situation, cannot in principle complain that the specialised press, which has given itself the task of defending the interests of its competitors on that market, analyses its commercial strategy and publishes its criticisms thereof. Such criticism contributes, as the Court stressed, to the openness of business activities. Since the freedom of expression also applies to "statements" which hurt, care should be taken not to find such criticism unacceptable too quickly simply because it harms the undertaking criticised. In this instance, it cannot be denied that the article published by markt intern is unfavourable to the Club and reveals a very critical attitude in the latter's regard. On the other hand, it reported an incident which, as has not been contested, in fact occurred and it did not purport to offer a definitive assessment of the Club's commercial practices, but invited retailers to supply additional information. For my part, I am not convinced that it is truly necessary to prohibit such an article in a democratic society.

8. It is for the above reasons that I voted in favour of finding a violation of Article 10 (art. 10).

In the case of Miailhe v. France (no. 2) (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Bernhardt, President,
Mr L.-E. Pettiti,
Mr C. Russo,
Mr N. Valticos,
Mrs E. Palm,
Mr R. Pekkanen,
Mr A.N. Loizou,
Mr P. Jambrek,
Mr P. Kuris,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 28 March and 27 August 1996,

Delivers the following judgment, which was adopted on the last-mentioned date:

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Notes by the Registrar

1. The case is numbered 47/1995/553/639. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 29 May 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 18978/91) against the French Republic lodged with the Commission under Article 25 (art. 25) by a French national, Mr William Miailhe, who also has Philippine nationality, on 16 September 1991.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 of the Convention (art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 8 June 1995, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr B. Walsh, Mr C. Russo, Mr N. Valticos, Mrs E. Palm, Mr A.N. Loizou, Mr P. Jambrek and Mr P. Kuris (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently Mr R. Pekkanen, substitute judge, replaced Mr Walsh, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the French Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 20 and 28 November 1995 respectively. On 1 February 1996 the Secretary to the Commission informed the Registrar that the Delegate did not wish to reply in writing.

On 13 December 1995 and 22 January 1996 the Commission produced the documents of the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 March 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr M. Perrin de Brichambaut, Director of Legal Affairs,
Ministry of Foreign Affairs, Agent,
Mr B. Nedelec, magistrat, on secondment to the Legal
Affairs Department, Ministry of Foreign Affairs,
Mr E. Bourgoin, Director of Taxes, Legal Department,
Ministry of the Budget,
Mr B. Hacquin, département Director of Taxes, on
secondment to the Ministry of Justice, Counsel;

(b) for the Commission

Mr J.-C. Soyer, Delegate;

(c) for the applicant

Mr D. Baudin, of the Conseil d'Etat and
Court of Cassation Bar,
Mr F. Goguel, of the Paris Court of Appeal Bar, Counsel.

The Court heard Mr Soyer, Mr Baudin, Mr Goguel and Mr Perrin de Brichambaut.

AS TO THE FACTS

I. Circumstances of the case

6. Mr Miailhe has dual French and Philippine nationality. He was honorary consul of the Philippines in Bordeaux from 1960 to May 1983 and also looked after that country's consulate in Toulouse.

A. The origins of the case - the customs prosecution

7. On 5 and 6 January 1983 customs officers seized nearly 15,000 documents at the applicant's Bordeaux residence, on premises housing the head offices of companies he managed and the consulate of the Republic of the Philippines. This operation was part of an investigation to determine, among other things, whether the applicant and his mother were to be regarded as being resident in France.

The judicial investigation that had been commenced on a complaint lodged by the director of customs investigations alleging unlawful accumulation and holding of assets abroad ended in a judgment of the Criminal Court of 2 December 1992 in which the court ruled that the public prosecution and the proceedings for imposition of customs penalties in respect of Mr and Mrs Miailhe were barred as a result of changes in the criminal law and ordered the return of the seized documents. These were returned in January 1993.

8. Mr Miailhe challenged before the Strasbourg institutions the lawfulness of the customs seizures made pursuant to Articles 64 and 454 of the Customs Code. Those proceedings led to two judgments of the European Court of Human Rights. In the first of these it was held that there had been a breach of Article 8 of the Convention (art. 8), on the ground that the house searches and seizures made by customs officers without a judicial warrant had interfered with the private life of the applicant, his mother and his wife; and in the second, France was ordered to pay Mr Miailhe 50,000 French francs (FRF) in respect of non-pecuniary damage and FRF 60,000 for costs and expenses (see the Miailhe v. France (no. 1) judgments of 25 February 1993, Series A no. 256-C, and 29 November 1993, Series A no. 277-C).

B. The administrative tax-inspection proceedings

9. On 4 March 1983 the National Head Office for Tax Investigations sent the applicant notice of a full audit of his overall tax position in respect of his income for the years 1979, 1980, 1981 and 1982.

Since Mr Miailhe regarded himself as being resident for tax purposes in the Philippines, and accordingly not under an obligation to pay tax to the French State, the Revenue asked him to produce copies of his tax assessment notices in the Philippines and documents giving details of all bank accounts in his name both in France and abroad.

On 20 April 1983 Mr Miailhe replied that it was impossible for him to forward some of the documents that had been kept by the customs and which he had asked to have returned to him.

10. During May 1983 the tax inspector exercised the right of inspection provided in Articles L.81 et seq. of the Code of Tax Procedure and Article 64A of the Customs Code.

At the offices of his customs colleagues he examined the 9,478 documents that had been kept and classified by the customs authorities and made copies of 1,200 to 1,300 of them.

11. On 9 February 1984 the tax inspector asked the Philippine authorities for administrative assistance as provided for in Article 26 of the Franco-Philippine Tax Convention of 9 January 1976 "for the avoidance of double taxation and prevention of fiscal evasion in relation to income tax" (see paragraph 27 below).

On 21 March 1985 he inspected 41 sheets concerning returns and annexes of the applicant and his mother for the years 1980 and 1982, 27 sheets concerning returns, appended financial statements and certificates from the accountant of the AMIBU company managed by the applicant in respect of the years 1979, 1980 and 1981, and three sheets relating to a provisional accounting statement and a bank reconciliation as at 15 September 1982.

These documents reached the Revenue's administrative headquarters in Paris on 8 November 1984.

12. At the end of the tax audit four supplementary assessments were served on Mr Miailhe: on 22 December 1983 for the year 1979, on 4 December 1984 for the year 1980, on 19 February 1985 for the year 1981 and on 12 March 1985 for the year 1982. The Revenue subsequently amended the notices in respect of the years 1979, 1980 and 1981, once on 16 July 1985, in the light of comments by the applicant, and again on 8 November 1985, to correct erroneous reasons.

13. The relevant documents to be studied for each category of proceedings - administrative, tax and criminal - were not all the same, since different tax years and bases of assessment were involved, as were failures to make returns and real-property and agricultural taxes distinct from the general income tax to which the dispute over tax residence related more particularly.

C. Appeals against the assessments to the administrative courts

14. Mr Miailhe challenged the supplementary tax assessments for the years 1979-82 in the administrative courts, which have jurisdiction in tax matters, by lodging an appeal founded partly on the non-adversarial nature of the Revenue's preparation of the case against him.

In a judgment of 12 December 1991 the Bordeaux Administrative Court held that the applicant had not proved that he had expressly asked the Revenue to produce the documents on which it had allegedly based the assessments for the years 1980, 1981 and 1982 and ordered further inquiries on this point. As to the assessment raised for the year 1979, on the other hand, the court found that the Revenue had failed to accede to an application for production made by the applicant's lawyer and accordingly remitted the additional tax sought from the applicant in the category of income from movable assets and in respect of income from undetermined sources for that year. An appeal by the Minister for the Budget regarding the remission of tax granted for the single year 1979 was dismissed by the Bordeaux Administrative Court of Appeal.

An appeal on points of law against the Administrative Court's judgment is pending before the Conseil d'Etat. The

Administrative Court has not yet ruled on the merits as regards the supplementary tax assessments for the years 1980, 1981 and 1982.

15. In other proceedings brought against the Revenue by the AMIBU company, managed by the applicant, the Bordeaux Administrative Court of Appeal found that the tax assessment challenged by the company was based in part on documents seized by the customs in circumstances that had been held to be contrary to Article 8 of the Convention (art. 8). In a judgment of 15 June 1995 it allowed the company's application for remission of tax as follows:

> "While the unlawfulness of the seizure, in proceedings brought under different legislation, of documents on the basis of which the Revenue, exercising its right of inspection, assessed the taxes has no effect on the lawfulness of the tax proceedings, it is such as to deprive those documents of any probative value, including inasmuch as they revealed to the Revenue that the taxpayer was in a position to have his tax assessed by the Revenue of its own motion. Where an international judicial body set up by an international treaty or agreement that has been lawfully ratified or approved has ruled that the seizure of documents did not comply with the said treaty or agreement, the court having jurisdiction in tax matters must regard the seized documents as having no probative value ..."

D. The criminal proceedings for tax evasion

16. On 15 April 1986 the Tax Offences Board ("the CIF") gave approval for a complaint to be lodged seeking the imposition of criminal tax penalties, pursuant to Article L.228 of the Code of Tax Procedure (see paragraph 29 below).

In consequence, the Department of Revenue lodged a complaint, together with an application to join the proceedings as a civil party, against the applicant for tax evasion in respect of the years 1981 and 1982. It accused him of not having made any general tax return for 1981 and of having understated his agricultural income for 1982.

17. The Revenue annexed to its complaint some of the documents given to it by the customs authorities. It did not at that juncture append any of the documents forwarded by the Philippine authorities, although the tax inspector's summary report that had been placed in the file of the judicial investigation mentioned the correspondence between the French and the Philippine authorities.

The investigating judge raised this point with the tax inspector, who referred back to his central authorities and subsequently told the judge that his authorities had hesitated to produce in criminal proceedings documents which the ordinary judicial authorities could not have procured for themselves. At the judge's request, the inspector added to the file the documents from the Philippines provided by his authorities, that is to say the only documents concerning Mr Miailhe in respect of the offences charged. The documents not placed in the file related either to Mrs Miailhe and the AMIBU company - and neither of these was implicated - or, in respect of the defendant, to the years 1980 and 1982, which the proceedings for failure to make a tax return were not concerned with.

18. On 6 May 1988 the investigating judge committed the applicant for trial at the Bordeaux Criminal Court on a charge of having fraudulently evaded, in part, assessment and payment of income tax for the years 1981 and 1982 "by having failed to make certain category-specific returns (in respect of income from movable assets, 'RCM', and industrial and commercial profits, 'BIC', Article 92 of the General Tax Code) within the prescribed time-limits (in respect of 1981) and by having omitted from his returns (for 1981 and 1982) part of his income from farming and real property, thus deliberately concealing in his overall returns part of the sums liable to tax".

1. In the Bordeaux Criminal Court

19. Before any defence on the merits Mr Miailhe filed submissions in which he sought to have the Revenue's complaint and the judicial investigation proceedings declared null and void. He argued that the customs seizures were null and void, that the adversarial principle had not been respected by the Revenue and that the latter, in particular during the judicial investigation, had withheld documents from the judicial authorities and made false statements.

He himself filed certain documents that he had been able to obtain from the Philippine authorities: the French tax authorities' request to their Philippine opposite numbers, the Philippine authorities' reply indicating that Mr and Mrs Miailhe had been resident for tax purposes in the Philippines for 1980 and 1982, information concerning the AMIBU company, untranslated bank documents, a certificate by a registered accountant to the effect that Mr Miailhe's tax return for 1982 had been made in good faith, a statement of his income and expenditure for 1982, an amortisation table for 1981, a statement of his income for 1981, the tax return he made in the Philippines for 1981 and a tax return for 1982.

20. On 11 January 1989 the Criminal Court gave its judgment.

It began by dismissing all Mr Miailhe's preliminary objections.

As regards the first of those, it pointed out that on an appeal by the applicant concerning the lawfulness of the seizures, the Court of Cassation had upheld a judgment of the Paris Court of Appeal in which that court had said that "the customs officials did not exceed their powers and that there was no manifest, deliberate violation of a personal freedom"; the customs seizures were covered by paragraph 2 of Article 8 of the Convention (art. 8-2) and the seized documents had been lawfully made available to the Revenue.

It dealt with the second objection as follows:

> "... on account of the principle that tax and criminal proceedings are independent, the [criminal] courts cannot rule on the nullity of tax proceedings. The only exception to this principle is provided in Article L.47 of the Code of Tax Procedure ... This Article provides that proceedings shall be null and void where a notice of audit does not mention that the taxpayer has the right to be assisted by an adviser of his own choosing. As the defendant does not dispute that this information was given to him, he cannot rely on any other argument in order to obtain from the criminal courts a declaration that the tax proceedings are null and void."

As to the last objection, the court found, in the light of the documents produced by the applicant at the hearing, that the letters and documents exchanged by the French and Philippine authorities were not in the file and it held:

> "... The failure to place in the file some documents of importance to the accused's defence, which had been sought in their entirety by the investigating judge, amounts to a breach of his rights.
>
> That breach of the rights of the defence cannot, however, have the consequence that the earlier proceedings were a nullity. By producing these documents at the hearing, the accused was able to explain their content and have them submitted to adversarial argument. The breach of his rights did not therefore have the effect of prejudicing his interests."

21. Ruling on the question whether Mr Miailhe was under an obligation to make a return in France of his category-specific income and whether he had with fraudulent intent evaded paying that tax for the year 1981, the court held that the applicant was resident for tax purposes in France at the time, both under French law and under the Franco-Philippine Convention. In order to determine whether there had been fraudulent intent, it relied among other things on a manuscript document written by Mr Miailhe that was reproduced in the tax-audit report and on the applicant's conduct in producing only at the hearing his full return for 1981, which had been submitted to the tax inspector with the figures whited out.

As to the undeclared income from farming and real property for the years 1981 and 1982, the court found that the applicant had lent money to himself through the bank accounts of his companies and subsequently deducted from his agricultural income the interest charges and exchange losses. He thus realised a tax loss for those years and legally exported his capital by means of the repayments.

The court concluded that Mr Miailhe had personally put in place fraudulent arrangements designed to evade liability to and payment of tax in France. It sentenced him to three years' imprisonment, of which six months were to be served immediately, and a fine of FRF 150,000. Extracts from the judgment were ordered to be published in the French Official Gazette and in the daily newspapers Le Monde, Le Figaro and Sud-Ouest.

2. In the Bordeaux Court of Appeal

22. The defendant appealed and in the Bordeaux Court of Appeal reiterated the three objections of nullity already raised, stating as to the last of them that:

> "... although he ha[d] been able to obtain a number of withheld documents by seeking them from the Philippine authorities, he ha[d] been unable to inspect most of the documents attached to the correspondence, he still [did] not know what they contained and ha[d] been unable to give explanations concerning them; in particular, he ha[d] not been able to refer to the withheld documents before the Tax Offences Board; ..."

23. The Court of Appeal gave judgment on 7 June 1989.

It joined the objections to the merits and dismissed them, referring "in the case of the first two applications for a declaration of nullity that were reiterated but not strongly argued" to the reasoning of the Criminal Court. The last objection, concerning the withholding of documents and the false statements, it dismissed as follows:

> "These documents should have been handed over but provide no information that could have any bearing on the decision of the court below or of this court: for the most part they did not concern Miailhe or the period in question, 1981; ... the documents not filed were of no relevance to the case and, at all events, were produced at the hearing in the court below and examined adversarially on that occasion; the same reasoning, except for the adversarial examination of the documents, applies to the Tax Offences Board; moreover, at first instance no application was made for a declaration that the proceedings before the Board were null and void.
>
> As regards the very large number of other documents handed over but not placed in the file, their existence, alleged by [the applicant], has not been proved and they cannot be taken into account in any way."

24. On the merits the court held, as to the first offence of failure to declare income for 1981, that the applicant was a French resident for tax purposes under French law alone, as the Franco-Philippine Convention did not operate in the instant case since there was no conflict between the two sets of national legislation. The court pointed out that the Revenue's calculations had been based on documents signed in France by Mr Miailhe, which it listed. The court held that he had had fraudulent intent from a scrutiny of notes by him that had been seized and were in the file and documents that he had placed in it himself, which showed that notwithstanding his alleged status as Philippine resident and citizen, he had not discharged his obligation to declare his world income in the Philippines either.

The Court of Appeal, which upheld the Criminal Court's judgment in its entirety, sentenced the defendant to three years' imprisonment, of which ten months were to be served immediately, and a fine of FRF 250,000.

3. In the Court of Cassation

25. Mr Miailhe lodged an appeal on points of law, which was dismissed by the Court of Cassation (Criminal Division) on 18 March 1991.

The judgment read as follows:

> "As to the second ground of appeal, based on the breach of Article 8 (art. 8) of the ... Convention ...
>
> ...
>
> The ground must therefore fail;
>
> As to the third ground of appeal, based on a breach of ...

Article 6 (art. 6) of the ... Convention ...

...

Firstly, the accused merely raised, in the court of trial before any defence on the merits, an objection of nullity going to the lawfulness of the supplementary tax assessment proceedings, which, as they are purely administrative, are irrelevant to the criminal proceedings.

That being so, the first limb of the ground of appeal, which raises for the first time before the Court of Cassation the objection based on the alleged nullity of the proceedings before the Tax Offences Board gave its opinion, is inadmissible under Article 385 of the Code of Criminal Procedure.

Secondly, as a ground for refusing to allow the objection that the ordinary criminal proceedings were a nullity on account of the Revenue's withholding of documents useful to the defence, the Court of Appeal noted that under the Franco-Philippine Tax Convention of 9 January 1976, the French authorities sought administrative assistance from the Philippine authorities. The accused maintained that 71 documents were sent to the French authorities in this way. The accused, who had been able to obtain some of these documents, produced them at the hearing in the Criminal Court. After studying these documents, the Court of Appeal found that they were of no relevance to the case, most of them not concerning [William] Miailhe or the period referred to in the charge. At all events, they were produced at the hearing in the Criminal Court and examined adversarially on that occasion. The Court of Appeal added that the existence of the other documents allegedly sent and not placed in the file had not been proved.

In ruling as it did, the Court of Appeal, which based its judgment only on the documents produced at the hearing, provided a legal basis for its decision.

The second limb of the ground of appeal must likewise fail."

26. The applicant was committed to prison on 18 March 1991 and was released on licence on 21 July of the same year. He was placed under judicial supervision until 8 November 1991.

II. Relevant international and domestic law

A. The Franco-Philippine Convention of 9 January 1976

27. At Kingston on 9 January 1976 the French and Philippine Governments signed a convention "for the avoidance of double taxation and prevention of fiscal evasion in relation to income tax". Article 26 ("Exchange of information") provides:

"1. The competent authorities of the Contracting States shall exchange such information (being information which is at their disposal under their respective tax administrative practices and those which may be procured by special inquiry) as is necessary for the carrying out of this Convention and of the

domestic laws of the Contracting States concerning taxes covered by this Convention, in particular, for the prevention of fraud or evasion of such taxes. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons or authorities other than those (including a court or administrative body) concerned with the assessment, collection, or enforcement in respect of taxes which are the subject of the Convention or with the prosecution, claims and appeals relating thereto.

2. In no case shall the provisions of paragraph 1 be construed so as to impose on one of the Contracting States the obligation:

(a) to carry out administrative measures at variance with the laws or the administrative practices of that or of the other Contracting State;

(b) to supply particulars which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) ..."

B. The Code of Tax Procedure

28. Administrative tax-inspection proceedings are governed by the Code of Tax Procedure. By Article L.47 of that code,

"A full audit of the overall tax position of a natural person in regard to income tax or an audit of accounts cannot be undertaken unless the taxpayer has been informed of it by the sending or handing over of a notice of audit.

Such a notice must specify the years in respect of which the audit is to be made and expressly mention, failing which the proceedings will be null and void, that the taxpayer has the right to be assisted by an adviser of his own choosing.

In the event of an unannounced inspection for the purpose of identifying physical features of the business or establishing the existence and state of the books, the notice of an audit of the accounts shall be handed over at the beginning of the search operation. A thorough scrutiny of the books may only begin after the taxpayer has been given a reasonable time to seek the assistance of an adviser."

The courts with jurisdiction in tax matters, which in the case of direct taxes are the administrative courts, are competent in principle to deal with irregularities in administrative tax-inspection proceedings. They ensure that the safeguards afforded to taxpayers are complied with. Thus "a final decision by a criminal court cannot prevent a taxpayer from arguing before a court with jurisdiction in tax matters that the audit which gave rise to the impugned tax assessments was irregular" (Conseil d'Etat, 9 April 1986, no. 22691, Revue de jurisprudence fiscale, June 1986, no. 625).

29. Article L.228 of the Code of Tax Procedure provides:

"To be admissible, complaints seeking the imposition of

> criminal penalties in respect of direct taxes, value-added tax and other turnover taxes, registration fees, land registry fees and stamp duty must be lodged by the administrative authorities after approval from the Tax Offences Board.
>
> The Board shall consider the cases submitted to it by the Minister of Finance. The taxpayer shall be given notice of the application to the Board, which shall invite him to send it, within thirty days, any information it considers necessary.
>
> The Minister shall be bound by the Board's opinions."

The Revenue is not required by any provision of statute or of regulations to institute criminal proceedings in respect of the offences referred to in Article 1741 of the General Tax Code (Conseil d'Etat, 5 November 1980, Droit fiscal 1981, p. 365).

The CIF was set up under the Act of 29 December 1977 in order to afford taxpayers fresh safeguards and it is made up of six senior members of the Conseil d'Etat (judges of the administrative courts) and six senior members of the Court of Audit (judges of the financial courts). Parliament absolutely excluded the possibility of the CIF being a court of first instance. It refused to allow the CIF's opinions to contain reasons, in order to avoid influencing the ordinary courts. As long as there is no breach of due process, a taxpayer accused of tax evasion may not challenge in the criminal courts the lawfulness of the administrative proceedings which took place prior to the CIF's favourable opinion; the criminal court must only establish the existence and date of that opinion (Court of Cassation, Criminal Division, 2 December 1985, Recueil Dalloz Sirey ("DS") 1986, p. 489).

The only function of the criminal courts that hear tax-evasion cases is to punish the offence. The Court of Cassation has held:

> "... Criminal proceedings instituted under Article 1741 of the General Tax Code and the administrative proceedings for establishing the tax base and the scope of tax are in their nature and purpose different and independent from each other ... the function of courts which try criminal cases under Article 1741 is limited to determining whether the defendant evaded or attempted to evade tax by reprehensible subterfuges in respect of sums exceeding the statutory allowance." (Criminal Division, 9 April 1970, DS 1970, p. 755)

Article L.47 provides that any breach of its provisions shall entail a nullity of the proceedings "without any distinction being made between administrative proceedings and criminal proceedings ... Since the latter proceedings may be based on findings made by the inspectors in the books and documents held by a taxpayer, compliance with the requirements of [Article L.47] is an essential safeguard of the rights of the defence, which it is for the criminal courts to ensure are respected" (Court of Cassation, Criminal Division, 4 December 1978, Venutolo, DS 1979, p. 90). However, "it is not within the jurisdiction of the criminal courts to assess the lawfulness of the tax proceedings ... The criminal courts' response to failure to comply with the provisions of Article L.47, in that it departs from the general principle of the separation of administrative and ordinary courts, must be based on a strict construction and accordingly cannot

be extended beyond the cases to which the statute expressly meant to limit it" (Court of Cassation, Criminal Division, 9 May 1983, DS 1983, p. 621).

PROCEEDINGS BEFORE THE COMMISSION

30. Mr Miailhe applied to the Commission on 16 September 1991. Relying on Article 6 of the Convention (art. 6), he complained firstly of a breach of the principle of equality of arms during the administrative phase of the proceedings, before the CIF gave its opinion, and secondly of a breach of the rights of the defence during the trial.

31. The Commission declared the application (no. 18978/91) admissible on 6 April 1994. In its report of 11 April 1995 (Article 31) (art. 31), it expressed the opinion by eleven votes to two that there had been a breach of Article 6 para. 1 (art. 6-1). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment (1).

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Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-IV), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

32. In their memorial the Government asked the Court to "dismiss all the applicant's complaints".

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 OF THE CONVENTION (art. 6-1)

33. Mr Miailhe complained that he had not had access to all the documents held by the Revenue and that this had contravened the principle of equality of arms during the administrative stage before the Tax Offences Board (CIF) gave its opinion and had infringed the rights of the defence during the criminal trial. He relied on Article 6 para. 1 of the Convention (art. 6-1), which provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an independent and impartial tribunal ..."

A. The Government's preliminary objections

34. Before the Court the Government reiterated the three objections they had already raised before the Commission. The first of these was that the application was incompatible ratione materiae with the Convention inasmuch as it related to the supplementary tax assessment proceedings; the second, that domestic remedies had not been exhausted in respect of the supplementary tax assessment proceedings and the procedure of consulting the CIF; and the third, that the applicant was not a victim in respect of the complaint that the documents seized by the customs had not been produced.

They maintained, firstly, that the application contained two separate complaints. The Court could not entertain the first of these since it concerned the administrative supplementary tax assessment stage and the Revenue's refusal to hand over documents seized by the customs, a refusal which had allegedly made it impossible for Mr Miailhe to meet the requests for proof or to respond to the supplementary tax assessment notices. The Commission had, the Government continued, unjustly dealt with the different sets of proceedings together notwithstanding that they were independent of each other. The administrative tax-inspection proceedings, disputes over which came within the jurisdiction of the administrative courts that were currently dealing with another identical complaint of Mr Miailhe's concerning failure to produce documents during the supplementary tax assessment proceedings, were not covered by Article 6 of the Convention (art. 6); they were unconnected with the administrative proceedings before the CIF, whose opinion, though certainly a mandatory prerequisite for lodging a criminal complaint of tax evasion, was not binding on the authorities and still less on the courts.

Furthermore, as the Court of Cassation had declared inadmissible the ground of appeal relating to the procedure of consulting the CIF, the Commission should have dismissed that part of the application.

Lastly, the applicant had never sought to obtain any of the documents seized by the customs relating to the years concerned in the present case; he could not therefore complain of a refusal by the authorities.

In short, the Court had to deal solely with the criminal proceedings that ended with the Court of Cassation's judgment of 18 March 1991 whereby Mr Miailhe's conviction for tax evasion became final.

35. According to the Delegate of the Commission, the CIF's favourable opinion, without which no application could be made to the criminal courts, had had a decisive bearing on the outcome of the criminal trial, and Mr Miailhe had properly exhausted domestic remedies by alleging in the national courts that all the proceedings that had taken place before the CIF's opinion was given were null and void. The proceedings before the CIF ought, under the Court's case-law in the Imbrioscia v. Switzerland case (judgment of 24 November 1993, Series A no. 275), to afford the safeguards required by Article 6 of the Convention (art. 6).

36. The applicant stated that his complaint of failure to respect the adversarial principle referred only to the procedure of consulting the CIF, which was decisive for the subsequent criminal trial. He was not for the time being attacking the proceedings relating solely to tax, which had not yet been concluded in the administrative courts. He added that he had continually asked for the seized documents.

37. The Court notes at the outset that the administrative supplementary tax assessment proceedings are currently pending before the Conseil d'Etat as the court which hears appeals on points of law (see paragraph 14 above). To that extent, the objection of incompatibility ratione materiae and, in so far as it relates to those proceedings, the objection that domestic remedies have not been exhausted are devoid of purpose.

The second objection, that domestic remedies have not been exhausted as regards the procedure of consulting the CIF, has already been considered by the Commission, which decided to dismiss it. The Court sees no reason to depart from the Commission's analysis and dismisses it likewise.

The third objection, that the applicant was not a victim, goes to the merits of the case, and the Court therefore joins it to them.

B. The merits of the complaint

38. In Mr Miailhe's view, Article 6 (art. 6) had the consequence that the Revenue could base its prosecutions only on information that had been obtained fairly. Yet all the documents used against him to determine his place of principal residence - which was at the heart of the case - had been found among documents that had been seized unlawfully and related to his or his family's private life. He had not had access to them to defend himself during the administrative proceedings, up to and including the CIF's decision.

Essentially, the applicant said he was the victim of the consequences of the original breach of Article 8 of the Convention (art. 8) found by the Court in the Miailhe (no. 1) judgment; the prosecuting authorities had rendered his criminal conviction unfair, based as it was almost exclusively on the documents seized by the customs in circumstances held to have been contrary to the Convention.

Moreover, it was only at the stage of the judicial investigation in the criminal proceedings, on an order from the investigating judge, that the Revenue had placed in the file the documents it had obtained from the Philippine authorities, and then only some of them. Mr Miailhe had made an oral request to the judge to obtain all these documents. While he had himself been able to procure some of them from the Philippine authorities, he did not have a key document, the letter in which the Philippine authorities recognised his status as a Philippine resident.

By producing only the documents that supported its submissions to the trial court, the Revenue had therefore deprived him of the means of proving that he was resident for tax purposes in the Philippines and infringed the rights of the defence. The trial court had, moreover, acknowledged that documents had indeed been withheld.

39. The Commission accepted Mr Miailhe's submissions in substance. It pointed out that he had not been in a position to make useful submissions to the CIF on account of the refusal to hand over to him prosecution documents obtained by the customs in circumstances condemned by the European Court. Furthermore, the failure to produce all the documents supplied by the Philippine authorities had deprived the applicant of a fair trial.

40. In the Government's submission, the seized documents were passed on by the customs to the Revenue in accordance with national statutory provisions, and there was nothing at the time to warrant regarding those documents as having been seized unlawfully under French law. Moreover, in its judgment of 6 December 1995 in a leading case the Conseil d'Etat by implication invalidated the approach adopted in the applicant's favour by the Bordeaux Administrative Court of Appeal (see paragraph 15 above), as there was no "contamination by procedural defects" in respect of

documents lawfully made available to the Revenue by the judicial authorities where the documents had subsequently been declared null and void by the criminal courts. Furthermore, Mr Miailhe, the Government said, had never sought production of the documents seized in respect of the relevant proceedings and supplementary tax assessment years. He had asked only for the documents from the Philippine assistance file.

Contrary to the Commission's findings on the consultation procedure prior to the lodging of a complaint for tax evasion, the Government continued to maintain that the CIF was a non-judicial body. It had been established to afford taxpayers new procedural safeguards and limited the discretion previously enjoyed by the Minister, who was now bound where an opinion was to the effect that a complaint should not be lodged. It ruled on the advisability of prosecution, and its opinion, which was purely advisory, could not in any circumstances be regarded as tantamount to a judgment at first instance in regard to the taxpayer.

As to the Philippine documents, the Government submitted that their existence had never been concealed and that the only ones relevant to the case had eventually been placed in the case file. The courts, which had considered the reasons put forward by the authorities to explain why they had not been produced, had based their judgments on grounds of fact and of law.

The applicant had been able to present argument on the whole of the file, which also contained other documents, and as he had enjoyed equality of arms at the trial, he had not found himself at a disadvantage.

41. The Court notes, firstly, that the documents seized by the customs were passed on by them to the Revenue in May 1983 (see paragraph 10 above). Three years later the Revenue lodged a complaint alleging tax evasion against Mr Miailhe, whom it accused of having fraudulently omitted to declare his general income for 1981 and of having understated his agricultural income for 1982 (see paragraph 16 above). It had already served supplementary tax assessments on him, on 19 February 1985 in respect of the year 1981 and on 12 March 1985 in respect of the year 1982 (see paragraph 12 above).

The applicant now complained that he had not been given the documents seized by the customs in breach of Article 8 of the Convention (art. 8) so that he could contest the fraud charges by proving that he was resident for tax purposes in the Philippines, both during the criminal proceedings and during the preceding stage before the CIF.

The Court points out that the Miailhe (no. 1) judgment on the merits was given on 25 February 1993, that is to say after the customs had passed documents on to the Revenue.

Of the private letters and personal documents referred to in the judgment, those which were used for the judicial investigation in the criminal proceedings had been annexed to the summary tax-audit report filed by the Revenue in support of its complaint (see paragraph 17 above). At the investigating judge's request, the Revenue added documents from the Philippines (see paragraph 17 above). All those documents were in the criminal

case file, to which the applicant had access.

42. Admittedly, that file did not contain all of the documents provided by the Philippine authorities (see paragraphs 11 and 17 above). However, the documents relevant to the criminal case were added to the file during the judicial investigation, at the request of the investigating judge alone.

On this point the Criminal Court held (see paragraph 20 above):

> "... The failure to place in the file some documents of importance to the accused's defence, which had been sought in their entirety by the investigating judge, amounts to a breach of his rights.
>
> [It] cannot, however, have the consequence that the earlier proceedings were a nullity. By producing these documents at the hearing, the accused was able to explain their content and have them submitted to adversarial argument. The breach of his rights did not therefore have the effect of prejudicing his interests."

The Court of Appeal held (see paragraph 23 above):

> "These documents should have been handed over but provide no information that could have any bearing on the decision of the court below or of this Court: for the most part they did not concern Miailhe or the period in question, 1981; ... the documents not filed were of no relevance to the case and, at all events, were produced at the hearing in the court below and examined adversarially on that occasion; the same reasoning, except for the adversarial examination of the documents, applies to the Tax Offences Board; ...
>
> As regards the very large number of other documents handed over but not placed in the file, their existence, alleged by [the applicant], has not been proved and they cannot be taken into account in any way."

By himself filing some of the documents from the Philippines (see paragraph 19 above), Mr Miailhe had the possibility of establishing the genuineness of his links with the Philippines. Such evidence, however, was relevant only to the first offence of failure to declare his general income for the year 1981, as the second offence concerned agricultural and land income that he had declared in France.

43. It is not for the Court to substitute its view for that of the national courts which are primarily competent to determine the admissibility of evidence (see, among other authorities, the Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, p. 29, para. 46). It must nevertheless satisfy itself that the proceedings as a whole were fair, having regard to any possible irregularities before the case was brought before the courts of trial and appeal and checking that those courts had been able to remedy them if there were any (see the Imbrioscia judgment previously cited, p. 14, para. 38).

44. The Court points out that in the instant case the ordinary courts did, within the limits of their jurisdiction, consider the objections of nullity raised by Mr Miailhe and dismissed them.

Furthermore, it appears clearly from their decisions that they based their rulings - among other things as to residence for tax purposes - solely on the documents in the case file, on which the parties had presented argument at hearings before them, thereby ensuring that the applicant had a fair trial. The failure to produce certain documents during the procedure of consulting the CIF or in the criminal proceedings therefore did not infringe Mr Miailhe's defence rights or the principle of equality of arms (see, among other authorities, the Bendenoun v. France judgment of 24 February 1994, Series A no. 284, p. 22, para. 53).

45. The Court notes, besides, that before the CIF the taxpayer may, within thirty days of the application to it, communicate any information he deems necessary.

When it is consulted on the advisability of lodging a complaint for the offences referred to in Article 1741 of the General Tax Code, the CIF gives an opinion which is binding on the Minister (Article L.228 of the Code of Tax Procedure - see paragraph 29 above).

The criminal courts - the Criminal Court and the Court of Appeal - have unfettered discretion to assess the facts of an alleged fraud and may acquit.

The fact that there are no adversarial proceedings before the CIF gives its opinion may in some cases give rise to a fear that the taxpayer will find himself in a more difficult position. Nevertheless, only the preliminary intervention of an advisory body is concerned. In the instant case there was a judicial investigation and no direct summons.

Furthermore, the criminal proceedings that were set in motion following the Revenue's complaint were conducted at two levels of jurisdiction - first instance and appeal - and this enabled Mr Miailhe, to whom it was further open to lodge an appeal on points of law, to present argument on the prosecution evidence and the charges against him.

46. In conclusion, the proceedings in issue, taken as a whole, were fair. There has therefore been no breach of Article 6 para. 1 (art. 6-1).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that the objection of incompatibility ratione materiae with the Convention and the objection that domestic remedies have not been exhausted, in so far as the latter relates to the administrative supplementary tax assessment proceedings, are devoid of purpose;

2. Dismisses the objection that domestic remedies have not been exhausted as to the procedure of consulting the Tax Offences Board;

3. Joins to the merits the objection that the applicant is not a victim and dismisses it;

4. Holds that there has been no breach of Article 6 para. 1 of the Convention (art. 6-1).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 September 1996.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

COURT (CHAMBER)

CASE OF MIAILHE v. FRANCE (ARTICLE 50)

(Application no. 12661/87)

JUDGMENT

STRASBOURG

29 November 1993

In the case of Miailhe v. France[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[**] and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr Thór VILHJÁLMSSON,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr C. RUSSO,
Mr N. VALTICOS,
Mrs E. PALM,
Mr J.M. MORENILLA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,

and also of Mr M.-A. EISSEN, *Registrar*,

Having deliberated in private on 29 October and 25 November 1993,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE AND FACTS

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 13 December 1991, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12661/87) against the French Republic lodged with the Commission under Article 25 (art. 25) by three French nationals, Mr William Miailhe, who also has Philippine nationality, his mother Victoria, née Desbarats, and his wife Brigitte, née Damade, on 11 December 1986.

2. In a judgment of 25 February 1993 ("the principal judgment") the Court found that there had been a breach of Article 8 (art. 8) of the Convention, as house searches and seizures by the customs had infringed the applicants' right to respect for their private life and their correspondence

[*] The case is numbered 86/1991/338/411. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

(Series A no. 256-C, pp. 87-91, paras. 28-40 and point 2 of the operative provisions).

Only the question of the application of Article 50 (art. 50) in the case remains to be determined. For the facts of the case, reference should be made to paragraphs 6-15 of the principal judgment (ibid., pp. 78-83).

3. As the question of awarding just satisfaction was not ready for decision, although the criminal proceedings against Mr and Mrs Miailhe had already ended, it was reserved in whole in the principal judgment. The Court invited the Government and the applicants to submit in writing, within three months, their observations on the matter and, in particular, to notify it of any agreement they might reach (ibid., p. 91, para. 44 and point 4 of the operative provisions).

4. The Registrar received the applicants' memorial on 25 May 1993, the Government's memorial on 14 September and the observations of the Delegate of the Commission on 21 October.

5. At the deliberations on 25 November 1993 Mrs E. Palm, substitute judge, replaced Mr L. Wildhaber, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1 of the Rules of Court). The Court decided that in the circumstances of the case it was unnecessary to hold a hearing.

AS TO THE LAW

6. Under Article 50 (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. Pecuniary damage

7. Mr Miailhe sought 300,000 French francs (FRF) in respect of three heads of pecuniary damage: the freezing of his bank accounts and shares in businesses for eight years owing to the registration of asset-freezing orders made by the authorities and the impossibility of taking out mortgage loans needed to finance his wine-growing business; secretarial expenses incurred in restoring order to his offices and to the documents seized by the customs; and travel expenses between Manila and France, in particular in order to

attend interviews to which he had been summoned by the investigating judge.

For their part, Mrs Victoria Miailhe and Mrs Brigitte Miailhe each sought FRF 20,000 in respect of the deprivation of papers needed for day-to-day living, their contribution to the work and cost of reconstituting files, and travel expenses made necessary by the criminal proceedings.

8. In the Government's submission, the breach found in the principal judgment had had no influence on the asset-freezing orders, the journeys or the deprivation of private papers. While certain filing costs might have been necessary, they were entailed by all seizures, irrespective of the procedure used. Furthermore, the applicants had been entitled at any time to seek the return or a photocopy of any of the papers in question.

9. The Delegate of the Commission did not express any view.

10. The Court discerns no causal link between, on the one hand, the lack of judicial authorisation for the house searches and the seizures - a lack it held to be contrary to Article 8 (art. 8) - and, on the other hand, the pecuniary damage alleged by the applicants, and it accordingly disallows this part of their claim.

2. Non-pecuniary damage

11. In respect of non-pecuniary damage, Mr Miailhe sought FRF 300,000 and Mrs Victoria and Mrs Brigitte Miailhe each sought FRF 100,000. Mr Miailhe pleaded the loss of his consular duties, while the two Mrs Miailhe relied on their social position at the material time and the great age of the applicant's mother, whose personal souvenirs had been violated without notice and without any consideration for her.

12. The Government relied on the lack of any causal link between the breach of Article 8 (art. 8) and the alleged damage. As regards Mr Miailhe, they pointed out that the merits and length of the customs proceedings were not in issue before the Convention institutions and that the applicant was honorary consul - and not consul - of the Philippines in Bordeaux. As regards the two Mrs Miailhe, they said that if the house searches had been judicially authorised, this would not have entailed any prior warning or any listing of the documents to be seized.

13. The Delegate of the Commission thought that the finding of a breach constituted sufficient compensation.

14. The Court considers that the applicants must have sustained non-pecuniary damage for which the finding of a breach does not on its own afford sufficient reparation. Making its assessment on an equitable basis as required by Article 50 (art. 50), it awards Mr Miailhe FRF 50,000, Mrs Victoria Miailhe FRF 25,000 and Mrs Brigitte Miailhe FRF 25,000 under this head.

B. Costs and expenses

15. The applicants also each sought reimbursement of one-third of the costs and expenses incurred in the French courts and subsequently before the Convention institutions (lawyers - Mr Goguel: FRF 250,000; Mr Baudin: FRF 90,000; Mr Boerner: FRF 16,000; and Mr Régnier: FRF 9,637).

16. The Government maintained that the costs incurred in the domestic courts were unconnected with the breach found by the Court, and they referred to the Court's case-law as regards those incurred before the Convention institutions.

17. The Delegate of the Commission recommended reasonable compensation.

18. The Court notes that the applicants did not provide any detailed statements of costs or any vouchers. It considers, however, that it should, on an equitable basis, take into account the costs incurred at Strasbourg and part of those that were designed to bring the breach of Article 8 (art. 8) to an end and secure redress for it. Applying its usual criteria in the matter, it awards each of the applicants a lump sum of FRF 60,000.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that the respondent State is to pay, within three months,
   (a) 50,000 (fifty thousand) French francs to Mr Miailhe, 25,000 (twenty-five thousand) francs to Mrs Victoria Miailhe and 25,000 (twenty-five thousand) francs to Mrs Brigitte Miailhe in respect of non-pecuniary damage; and
   (b) 60,000 (sixty thousand) francs to each of the applicants in respect of costs and expenses;

2. Dismisses the remainder of the applicants' claim.

Done in English and in French, and notified in writing on 29 November 1993 pursuant to Rule 55 para. 2, second sub-paragraph, of the Rules of Court.

Rudolf BERNHARDT
President

Marc-André EISSEN
Registrar

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

COURT (CHAMBER)

CASE OF MIAILHE v. FRANCE (No. 1)

(Application no. 12661/87)

JUDGMENT

STRASBOURG

25 February 1993

In the case of Miailhe v. France[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[**] and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr Thór VILHJÁLMSSON,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr C. RUSSO,
Mr N. VALTICOS,
Mr J.M. MORENILLA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 24 September 1992 and 27 January 1993,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 13 December 1991, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12661/87) against the French Republic lodged with the Commission under Article 25 (art. 25) by three nationals of that State, Mr William Miailhe, who also has Philippine nationality, his mother Victoria, née Desbarats, and his wife Brigitte, née Damade, on 11 December 1986.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by

[*] The case is numbered 86/1991/338/411. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

the respondent State of its obligations under Articles 8 and 13 (art. 8, art. 13).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

3. On 24 January 1992 the President of the Court decided, under Rule 21 para. 6 and in the interests of the proper administration of justice, that a single Chamber should be constituted to consider the instant case and the cases of Funke and Crémieux v. France[*].

The Chamber to be constituted for this purpose included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President (Rule 21 para. 3 (b)). On the same day, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Matscher, Mr C. Russo, Mr N. Valticos, Mr J.M. Morenilla, Mr M.A. Lopes Rocha and Mr L. Wildhaber (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the French Government ("the Government"), the Delegate of the Commission and the applicants' lawyers on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicants' memorial on 12 June 1992 and the Government's memorial on 19 June. On 17 July the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

On 24 July the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 September 1992. The Court had held a preparatory meeting beforehand. Mr R. Bernhardt, the Vice-President of the Court, replaced Mr Ryssdal, who was unable to take part in the further consideration of the case (Rule 21 para. 5, second sub-paragraph).

There appeared before the Court:

-for the Government

Mr B. GAIN, Head of the Human Rights Section,
Department of Legal Affairs, Ministry of Foreign Affairs, *Agent*,
Miss M. PICARD, magistrat,
on secondment to the Department of Legal Affairs, Ministry of Foreign Affairs,
Mr J. CARRÈRE, magistrat,

[*] Cases nos. 82/1991/334/407 and 83/1991/335/408.

on secondment to the Department of Criminal Affairs and Pardons, Ministry of Justice,
Mrs C. SIGNERINICRE, Head of the Legal Affairs Office, Department of Customs, Ministry of the Budget,
Mrs R. CODEVELLE, Inspector of Customs, Department of Customs, Ministry of the Budget,
Mr G. ROTUREAU, Chief Inspector of Customs, Strasbourg Regional Head Office of Customs, *Counsel*;

- for the Commission
Mr S. TRECHSEL, *Delegate*;

- for the applicants
Mr D. BAUDIN, of the Conseil d'État and Court of Cassation Bar,
Mr F. GOGUEL, avocat, *Counsel*.

The Court heard addresses by Mr Gain for the Government, Mr Trechsel for the Commission and Mr Baudin and Mr Goguel for the applicants.

On 3 November Mr Baudin confirmed his submissions concerning the possible application of Article 50 (art. 50) of the Convention.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. Mr William Miailhe has dual French and Philippine nationality and has his home at Malate (Greater Manila) in the Philippines. He is a company director and in early 1983 was also honorary consul of the Philippines in Bordeaux, having just resigned as French foreign-trade counsellor in Manila.

Mrs Victoria Miailhe and Mrs Brigitte Miailhe, both of French nationality, are respectively the mother and the wife of the first applicant. They are housewives.

A. The house searches and seizures of documents

7. On 5 and 6 January 1983 officers from the Bordeaux customs, accompanied by a senior police officer (officier de police judiciaire), made two searches of premises in Bordeaux which housed the head offices of the companies managed by Mr Miailhe and which served as the Philippines consulate. The applicants - who in France lived at Château Siran (Labarde, Gironde) - used to receive there all private mail that was not sent direct to Manila. The searches took place from 9.15 a.m. to 3.50 p.m. on the first day

and from 9.15 a.m. to 12.50 p.m. on the second day, the applicant and his secretary being present on both occasions.

The officers seized nearly 15,000 documents. They placed them unsorted in eight cardboard boxes which they sealed and took away to the customs' regional head office.

Work on removing the seals and classifying the documents began on 21 January 1983, in the presence of a senior police officer and Mr Miailhe. The latter asked for and obtained a photocopy of documents that he said he needed urgently for his work.

After being suspended at the applicant's request, the work resumed on 28 January in the presence of two senior police officers; Mr Miailhe's lawyer had indicated by telephone that his client refused to attend.

In all, the customs registered 9,478 documents. They considered the remainder to be of no relevance to their inquiries and returned them in two sealed boxes.

8. The searches and seizures in issue were based on Articles 64 and 454 of the Customs Code (see paragraphs 17-18 below) and were part of an investigation to determine whether the applicants were to be regarded as being resident in France and whether they had contravened the legislation on financial dealings with foreign countries.

B. The court proceedings

1. The criminal proceedings against the applicants

9. On a complaint lodged by the director of customs investigations on 29 January 1985, the Bordeaux public prosecutor's office began a judicial investigation in respect of the three applicants on 19 February 1985.

A local investigating judge charged them on 20 June 1985 with offences against the legislation and regulations governing financial dealings with foreign countries.

In a final application of 18 June 1991 the Bordeaux public prosecutor requested the investigating judge to commit Mr and Mrs Miailhe for trial at the Bordeaux Criminal Court and to discharge Mrs Victoria Miailhe. On 3 July 1991 the judge made orders to this effect.

The trial was due to begin on 17 June 1992 but was postponed to 25 November 1992 at Mr and Mrs Miailhe's request. In a judgment of 2 December 1992 the Criminal Court ruled that the public prosecution and the proceedings for imposition of customs penalties in respect of Mr and Mrs Miailhe were barred as a result of changes in the criminal law. It also ordered the return of the seized documents.

2. The applicants' proceedings to have the reports and seizures declared null and void

(a) In the Paris District Court

10. On 11 August 1983 the three applicants had instituted proceedings against the Director-General of Customs and Excise in the Paris District Court (1st district), which they asked to

> "Hold that under domestic law customs officers may make house searches as provided in Articles 454 and 64 of the Customs Code only in order to look for goods.
>
> Hold that seizure of documents by customs officers cannot be regarded as being in accordance with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
>
> Hold that seizure of letters from lawyers to their clients amounts to an interference with the rights of the defence.
>
> And consequently,
>
> Declare the seizures of 5 and 6 January 1983 null and void."

11. On 20 December 1983 the court declined jurisdiction in favour of the Paris tribunal de grande instance.

(b) In the Paris tribunal de grande instance

12. The Miailhes applied to the Paris tribunal de grande instance, which likewise held that it had no jurisdiction. In its judgment of 16 May 1984 it gave the following reasons:

> "That being so, as was held in the aforementioned judgment of 20 December 1983, the ordinary courts have no jurisdiction to assess the lawfulness of the actions in issue unless there has been a flagrantly unlawful act (voie de fait).
>
> The customs officers made the seizures under Article 454 of the Customs Code.
>
> That Article, which empowers authorised officers to establish offences against the regulations governing financial dealings with foreign countries as provided in Article 64 of the Customs Code, lays down a rule that applies not only to searches for goods held unlawfully but also to those for documents likely to constitute the subject-matter or evidence of these offences.
>
> The seizures that are alleged to be null and void were therefore carried out by the authorities within the framework laid down by law for establishing offences against the regulations governing financial dealings with foreign countries, whose constitutionality is not for the Court to review.
>
> Although the European Convention for the Protection of Human Rights and Fundamental Freedoms provides in Article 8 (art. 8) that 'everyone has the right to respect for his private and family life, his home and his correspondence', interference

by a public authority with the exercise of this right is provided for in the same Article (art. 8) where such interference 'is in accordance with the law and is necessary ... in the interests of ... the economic well-being of the country, [and] for the prevention of ... crime ...'. The customs' action was taken in that context.

The provisions of Article 136 of the Code of Criminal Procedure on house searches relate to operations referred to in that code and do not apply to searches made under the Customs Code, which continue to be governed by the special legislation on the matter. The Act of 29 December 1977, which requires the intervention of the judicial authorities in respect of house searches during the investigation and establishment of offences against tax and business regulations, moreover provides in section 17 that 'house searches made pursuant to the Customs Code shall continue to be governed by existing legislation'.

The Constitutional Council's decision on which the plaintiffs relied is likewise irrelevant to that legislation.

The ordinary courts consequently have no jurisdiction to review the lawfulness of the seizures made at the home of Mr and Mrs Miailhe. The Court must decline jurisdiction."

(c) In the Paris Court of Appeal

13. The Miailhes appealed, seeking a declaration that the seizures on 5 and 6 January 1983 were null and void and an order for return of the documents held by the customs.

14. On 23 October 1984 the Paris Court of Appeal upheld the judgment of 16 May 1984 in the following terms:

"The seizures in issue were not challenged on the ground of any formal defect.

The courts below correctly held that the powers conferred on customs officers by Articles 64 and 454 of the Customs Code, special provisions which are not overridden by the more general ones of Article 136 of the Code of Criminal Procedure and the Act of 29 December 1977, cover the seizure of documents likely to constitute the subject-matter or evidence of offences against the regulations governing financial dealings with foreign countries.

To this extent the principles relating to the protection of private life, the home and correspondence cannot be an obstacle to applying these provisions.

However, although coming within the ambit of the aforementioned Articles 64 and 454, the unlawful seizure or retention of purely private documents that were manifestly irrelevant to the financial or business transactions which prompted the authorities' intervention could amount to a flagrantly unlawful act, since such an infringement of civil liberties would then be wholly severable from the authorities' powers.

In the instant case it appears from the search and seizure reports which have been put in evidence that on 5 and 6 January 1983 the authors of them placed a very large number of documents under seal in the offices of Mr Miailhe and in his presence, and that he, while protesting against the principle of the seizure, made no objection based

on the nature of any given document. On 21 January 1983 the seals were removed and all the documents were classified, and Mr Miailhe and his secretary availed themselves of the opportunity they were afforded to take a photocopy of those documents 'which they needed for their work in the coming days'. Once again, Mr Miailhe made no reference to the presence of purely private papers or letters among his business papers.

On 28 January 1983 the same customs officers proceeded to go through the documents in detail and seized them. Mr Miailhe had been summoned to attend but made it known that he refused to do so. Notwithstanding his absence, numerous documents were exempted from seizure 'as being of no relevance to their inquiries' and were placed in two sealed cardboard boxes and returned to Mr Miailhe some days later.

In these circumstances it appears that the officials took the most meticulous precautions in order not to exceed their powers under the law and that if it is subsequently shown that they have inadvertently kept purely private papers unconnected with their investigation - papers of which the three appellants have never given any particulars -, Mr Miailhe must be held largely responsible, and at all events it could only have occurred as a result of an involuntary mistake and not of a manifest, deliberate violation of a personal freedom."

(d) In the Court of Cassation

15. An appeal on points of law by the applicants was dismissed by the Commercial Division of the Court of Cassation on 17 June 1986. Its judgment read as follows:

"As to the first ground:

The Court of Appeal is criticised for having ruled as it did, in that, according to the applicants, in confining itself to noting that the seizure in dispute was made as part of an investigation into the status as a French resident of Mr Miailhe, the Philippines consul in Bordeaux, without even determining whether the purpose of the operation was to seize documents likely to constitute the subject-matter or evidence of an offence against the regulations governing financial dealings with foreign countries, the Court of Appeal infringed Articles 64 and 454 of the Customs Code.

It appears from the Court of Appeal's own reasons and those it adopted, however, that the disputed seizures were made during an investigation to ascertain whether Mr Miailhe had, as a French resident, committed offences against the legislation governing financial dealings with foreign countries. The ground has not been made out.

As to the second ground:

The Court of Appeal is further criticised for having ruled as it did, in that, according to the applicants, it could not, without infringing Article 455 of the New Code of Civil Procedure, omit to answer the submission in which Mr and Mrs Miailhe argued that, independently of the existence of any flagrantly unlawful act which might have been committed against them, Article 66 of the Constitution entrusted the judiciary with the

protection of every aspect of the liberty of the individual, and in particular the inviolability of the home.

In its judgment, however, the Court of Appeal held that, although coming within the ambit of the aforementioned Articles 64 and 454, the unlawful seizure or retention of purely private papers that were manifestly irrelevant to the transactions which had prompted the authorities' intervention could amount to a flagrantly unlawful act, since such an infringement of civil liberties would then be severable from the authorities' powers. The Court of Appeal also noted that the customs officials took the most meticulous precautions in order not to exceed their powers and that there was no manifest, deliberate violation of a personal freedom. In so holding, the Court of Appeal answered the submissions made, and it follows that the ground is not made out.

As to the third ground:

Lastly, the Court of Appeal is criticised for having ruled as it did, in that, according to the applicants, by raising of its own motion the points of pure fact that the customs officers classified the 15,000 documents seized and then went through them, which allegedly led to some of them being returned to Mr Miailhe on account of their irrelevance to the investigation, the Court of Appeal exceeded its powers and violated Articles 4, 7, 12 and 16 simultaneously of the New Code of Civil Procedure.

The Court of Appeal, however, held that the facts it noted appeared from the search and seizure reports put in evidence, which have been produced. Its judgment is therefore not susceptible to the criticism made in this ground."

II. RELEVANT CUSTOMS LAW

16. The criminal provisions of customs law in France are treated as a special body of criminal law.

A. Establishment of offences

1. Officials authorised to establish offences

17. Two provisions of the Customs Code are relevant as regards these officials:

Article 453

"The officials designated below shall be empowered to establish offences against the legislation and regulations governing financial dealings with foreign countries:

1. customs officers;

2. other officials of the Ministry of Finance with the rank of at least inspector;

3. senior police officers (officiers de police judiciaire).

The reports made by senior police officers shall be forwarded to the Minister for Economic Affairs and Finance, who shall refer cases to the prosecuting authorities if he thinks fit."

Article 454

"The officials referred to in the preceding Article shall be empowered to carry out house searches in any place as provided in Article 64 of this code."

2. House searches

(a) The rules applicable at the material time

18. When the house searches were made (5 and 6 January 1983), Article 64 of the Customs Code was worded as follows:

"1. When searching for goods held unlawfully within the customs territory, except for built-up areas with a population of at least 2,000, and when searching in any place for goods subject to the provisions of Article 215 hereinafter, customs officers may make house searches if accompanied by a local municipal officer or a senior police officer (officier de police judiciaire).

2. In no case may such searches be made during the night.

3. Customs officers may act without the assistance of a local municipal officer or a senior police officer

(a) in order to make searches, livestock counts, and inspections at the homes of holders of livestock accounts or owners of rights of pasture; and

(b) in order to look for goods which, having been followed and kept under uninterrupted surveillance as provided in Article 332 hereinafter, have been taken into a house or other building, even if situated outside the customs zone.

4. If entry is refused, customs officials may force an entry in the presence of a local municipal officer or a senior police officer."

(b) The rules applicable later

19. The Budget Acts of 30 December 1986 (section 80-I and II) and 29 December 1989 (section 108-III, 1 to 3) amended Article 64, which now provides:

"1. In order to investigate and establish the customs offences referred to in Articles 414-429 and 459 of this code, customs officers authorised for the purpose by the Director- General of Customs and Excise may make searches of all premises, even private ones, where goods and documents relating to such offences are likely to be held and may seize them. They shall be accompanied by a senior police officer (officier de police judiciaire).

2. (a) Other than in the case of a flagrant offence (flagrant délit), every search must be authorised by an order of the President of the tribunal de grande instance of the locality in which the customs headquarters responsible for the department in charge of the proceedings is situated, or a judge delegated by him.

Against such an order there shall lie only an appeal on points of law as provided in the Code of Criminal Procedure; such an appeal shall not have a suspensive effect. The time within which an appeal on points of law must be brought shall run from the date of notification or service of the order.

The order shall contain:

(i) where applicable, a mention of the delegation by the President of the tribunal de grande instance;

(ii) the address of the premises to be searched;

(iii) the name and position of the authorised official who has sought and obtained leave to make the searches.

The judge shall give reasons for his decision by setting out the matters of fact and law that he has accepted and which create a presumption in the case that there have been unlawful activities of which proof is sought.

If, during the search, the authorised officials discover the existence of a bank strongbox which belongs to the person occupying the premises searched and in which documents, goods or other items relating to the activities referred to in paragraph 1 above are likely to be found, they may, with leave given by any means by the judge who made the original order, immediately search the strongbox. Such leave shall be mentioned in the report provided for in paragraph 2(b) below.

The judge shall take practical steps to check that each application for leave made to him is well-founded; each application shall contain all information in the possession of the customs authorities that may justify the search.

He shall designate the senior police officer responsible for being present at the operations and keeping him informed of their progress.

The search shall be carried out under the supervision of the judge who has authorised it. Where it takes place outside the territorial jurisdiction of his tribunal de grande instance, he shall issue a rogatory letter, for the purposes of such supervision, to the President of the tribunal de grande instance in the jurisdiction of which the search is being made.

The judge may go to the scene during the operation.

He may decide at any time to suspend or halt the search.

The judicial order shall be notified orally to the occupier of the premises or his representative on the spot at the time of the search, who shall receive a complete copy against acknowledgement of receipt or signature in the report provided for in paragraph 2(b) below. If the occupier of the premises or his representative is absent,

the judicial order shall be notified after the search by means of a registered letter with recorded delivery. Notification shall be deemed to have been made on the date of receipt entered in the record of delivery.

Failing receipt, the order shall be served as provided in Articles 550 et seq. of the Code of Criminal Procedure.

The time-limits and procedures for appeal shall be indicated on notification and service documents.

(b) Searches may not be commenced before 6 a.m. or after 9 p.m. They shall be made in the presence of the occupier of the premises or his representative; if this is impossible, the senior police officer shall requisition two witnesses chosen from persons not under his authority or that of the customs.

Only the customs officers mentioned in paragraph 1 above, the occupier of the premises or his representative and the senior police officer may inspect documents before they are seized.

The senior police officer shall ensure that professional confidentiality and the rights of the defence are respected in accordance with the provisions of the third paragraph of Article 56 of the Code of Criminal Procedure; Article 58 of that code shall apply.

The report, to which shall be appended an inventory of the goods and documents seized, shall be signed by the customs officers, the senior police officer and the persons mentioned in the first sub-paragraph of this section (b); in the event of a refusal to sign, mention of that fact shall be made in the report.

Where an on-the-spot inventory presents difficulties, the documents seized shall be placed under seal. The occupier of the premises or his representative shall be informed that he may be present at the removal of the seals, which shall take place in the presence of the senior police officer; the inventory shall then be made.

A copy of the report and of the inventory shall be given to the occupier of the premises or his representative.

A copy of the report and the inventory shall be sent to the judge who made the order within three days of its being drawn up.

3. Customs officers may act without the assistance of a senior police officer

(a) in order to make searches, livestock counts and inspections at the homes of holders of livestock accounts or owners of rights of pasture; and

(b) in order to look for goods which, having been followed and kept under uninterrupted surveillance as provided in Article 332 hereinafter, have been taken into a house or other building, even if situated outside the customs zone.

4. If entry is refused, customs officers may force an entry in the presence of a senior police officer."

B. Prosecution of offences

20. Article 458 of the Customs Code provides:

> "Offences against the legislation and regulations governing financial dealings with foreign countries may be prosecuted only on a complaint by the Minister for Economic Affairs and Finance or one of his representatives authorised for the purpose."

PROCEEDINGS BEFORE THE COMMISSION

21. The three applicants applied to the Commission on 11 December 1986. They complained of the searches and seizures made on premises of theirs by customs officers. They relied on Article 8 (art. 8) of the Convention (infringement of their right to respect for their private life, their home and their correspondence) and Article 13 (art. 13) (lack of any effective remedy before a national authority).

22. The Commission declared the application (no. 12661/87) admissible on 3 October 1990. In its report of 8 October 1991 (made under Article 31) (art. 31), the Commission expressed the opinion that there had been no breach of Article 8 (art. 8) (by eleven votes to seven) or Article 13 (art. 13) (unanimously). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS TO THE COURT

23. In their memorial the Government requested the Court to dismiss all the complaints raised by the applicants.

24. Counsel for the applicants asked the Court to

> "hold [that their clients] ha[d] been victims of a breach of Article 8 (art. 8) of the Convention ... by the authorities of the French Republic;
>
> reserve the application of Article 50 (art. 50) of the said Convention until the conclusion of the criminal proceedings in France against William and Brigitte Miailhe for offences against French exchange-control regulations; and

[*] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 256-C of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

award William and Brigitte Miailhe, on an interim basis, and Mrs Victoria Miailhe, in final settlement, the sums indicated in the foregoing reasons in compensation for their non- pecuniary damage and the expenses incurred in upholding their rights".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

25. In the applicants' submission, the house searches and seizures made in the instant case were in breach of Article 8 (art. 8), which provides:

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

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

A. The Government's preliminary objection

26. As they had done before the Commission, the Government raised an objection of inadmissibility on the ground that the application to Strasbourg had been lodged prematurely, as Mr and Mrs Miailhe could, at the outset of their trial at the Bordeaux Criminal Court on 25 November 1992 (see paragraph 9 above), complain that the customs' action forming the basis of the prosecution had been unlawful.

27. The Court notes that Mr and Mrs Miailhe brought proceedings to have customs reports on the facts and on the seizures declared null and void (see paragraphs 10-15 above) and pursued them to a conclusion, without omitting to plead Article 8 (art. 8). They cannot be criticised for not having - or not yet having - made use of a legal remedy which would have been - or would be - directed to essentially the same end. The objection must therefore be dismissed.

Besides, the Bordeaux Criminal Court ruled on 2 December 1992 that the criminal proceedings were barred (see paragraph 9 above).

B. Merits of the complaint

28. The Government conceded that there had been an interference with the applicants' right to respect for their private life, and the Commission

additionally found that there had been an interference with their right to respect for their home.

The Court considers it pointless in this instance to ascertain whether the premises occupied by the applicants could be considered as a home; it refers, mutatis mutandis, to the Niemietz v. Germany judgment of 16 December 1992 (Series A no. 251-B, p. 34, paras. 30-31). In the present case, it is sufficient to note that there was an interference with the applicants' private life and their correspondence.

29. It must accordingly be determined whether the interferences in question satisfied the conditions in paragraph 2 (art. 8-2).

1. "In accordance with the law"

30. The applicants contended that the interferences had no legal basis. As worded at the time, Article 64 of the Customs Code was, they claimed, contrary to the 1958 Constitution because it did not make house searches and seizures subject to judicial authorisation. Admittedly, its constitutionality could not be reviewed, since it had come into force before the Constitution had. Nevertheless, in the related field of taxation the Constitutional Council had rejected section 89 of the Budget Act for 1984, concerning the investigation of income-tax and turnover-tax offences holding, inter alia:

> "While the needs of the Revenue's work may dictate that tax officials should be authorised to make investigations in private places, such investigations can only be conducted in accordance with Article 66 of the Constitution, which makes the judiciary responsible for protecting the liberty of the individual in all its aspects, in particular the inviolability of the home. Provision must be made for judicial participation in order that the judiciary's responsibility and supervisory power may be maintained in their entirety." (Decision no. 83-164 DC of 29 December 1983, Official Gazette (Journal officiel), 30 December 1983, p. 3874)

31. The Government, whose arguments the Commission accepted in substance, maintained that in Article 64 of the Customs Code, as supplemented by a fairly substantial body of case-law, the power to search houses was defined very closely and represented a transposition to customs legislation and the regulations governing financial dealings with foreign countries of the power of search provided for in ordinary criminal procedure. Provision was first made for it in an Act of 6 August 1791 and subsequently in a legislative decree of 12 July 1934, and it had been widened in 1945 to cover investigations into exchange- control offences and confirmed on several occasions. In the Government's submission, its constitutionality could not be put in doubt, any more than that of Article 454 of the same code, since review of the constitutionality of statutes took place between their enactment by Parliament and promulgation and was within the sole competence of the Constitutional Council, to the exclusion of all other courts.

As to the "quality" of the national legal rules vis-à-vis the Convention, it was ensured by the precision with which the legislation and case-law laid down the scope and manner of exercise of the relevant power, and this eliminated any risk of arbitrariness. Thus even before the reform of 1986-89 (see paragraph 19 above), the courts had supervised customs investigations ex post facto but very efficiently. And in any case, Article 8 (art. 8) of the Convention contained no requirement that house searches and seizures should be judicially authorised in advance.

32. The Court does not consider it necessary to determine the issue in this instance, as at all events the interferences complained of are incompatible with Article 8 (art. 8) in other respects (see paragraphs 38-40 below).

2. Legitimate aim

33. The Government and the Commission considered that the interferences in question were in the interests of "the economic well- being of the country" and "the prevention of crime".

Notwithstanding the applicants' arguments to the contrary, the Court is of the view that the interferences were in pursuit of at any rate the first of these legitimate aims.

3. "Necessary in a democratic society"

34. In the applicants' submission, the interferences could not be regarded as "necessary in a democratic society". The authorities, they said, had misused their powers under Article 64 of the Customs Code for the specific purpose of collecting evidence to establish that there had been an interruption in their permanent residence in Manila (see paragraph 6 above) at a time of strict exchange controls. In their view, the needs of the investigation in no way justified either the mass seizure of all Mr Miailhe's papers, including ones belonging to other members of the family, or the refusal to return a set of personal documents (doctor's prescriptions, correspondence with lawyers, etc.). More generally, the applicants complained that there were no curbs on customs powers or safeguards against abuse by customs officers, a situation which they claim had been typical of the French system before the reform of 1986-89.

35. The Government, whose contentions the Commission accepted in substance, argued that house searches and seizures were the only means available to the authorities for investigating offences against the legislation governing financial dealings with foreign countries and thus preventing the flight of capital and tax evasion. In such fields there was a corpus delicti only very rarely if at all; the "physical manifestation" of the offence therefore lay mainly in documents which a guilty party could easily conceal or destroy. Such persons, however, had the benefit of substantial safeguards,

strengthened by very rigorous judicial supervision: decision-making by the head of the customs district concerned, the rank of the officers authorised to establish offences, the presence of a senior police officer (officier de police judiciaire), the timing of searches, the preservation of lawyers' and doctors' professional secrecy, the possibility of invoking the liability of the public authorities, etc. In short, even before the reform of 1986-89, the French system had ensured that there was a proper balance between the requirements of law enforcement and the protection of the rights of the individual.

As regards the circumstances of the case, the Government made two observations. Firstly, the Bordeaux public prosecutor's final application (see paragraph 9 above) made clear the scale of the offences with which Mr and Mrs Miailhe were charged. Secondly, the latter had never indicated to the national courts what personal documents the customs had seized wrongly.

36. The Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the need for an interference, but it goes hand in hand with European supervision. The exceptions provided for in paragraph 2 of Article 8 (art. 8-2) are to be interpreted narrowly (see the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 21, para. 42), and the need for them in a given case must be convincingly established.

37. Undoubtedly, in the field under consideration - the prevention of capital outflows and tax evasion - States encounter serious difficulties owing to the scale and complexity of banking systems and financial channels and to the immense scope for international investment, made all the easier by the relative porousness of national borders. The Court therefore recognises that they may consider it necessary to have recourse to measures such as house searches and seizures in order to obtain physical evidence of exchange-control offences and, where appropriate, to prosecute those responsible. Nevertheless, the relevant legislation and practice must afford adequate and effective safeguards against abuse (see, among other authorities and mutatis mutandis, the Klass and Others judgment previously cited, Series A no. 28, p. 23, para. 50).

38. This was not so in the instant case. At the material time - and the Court does not have to express an opinion on the legislative reforms of 1986 and 1989, which were designed to afford better protection for individuals (see paragraph 19 above) - the customs authorities had very wide powers; in particular, they had exclusive competence to assess the expediency, number, length and scale of inspections. Above all, in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law, which were emphasised by the Government (see paragraph 35 above), appear too lax and full of loopholes for the interferences with the applicants' rights to have been strictly proportionate to the legitimate aim pursued.

39. To these general considerations may be added a particular observation. The seizures made on the applicants' premises were wholesale and, above all, indiscriminate, to such an extent that the customs considered several thousand documents to be of no relevance to their inquiries and returned them to the applicants (see paragraph 7 above).

40. In sum, there has been a breach of Article 8 (art. 8).

II. ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

41. In the proceedings before the Commission, the applicants also relied on Article 13 (art. 13), but they did not do so before the Court, which does not consider that it must examine the issue of its own motion.

III. APPLICATION OF ARTICLE 50 (art. 50)

42. Under Article 50 (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

43. The applicants invited the Court to defer its decision on the application of this provision until the criminal proceedings in France against Mr and Mrs Miailhe had been concluded. They asked it, however, to award each of them - in final settlement in the case of Mrs Victoria Miailhe, and on an interim basis in the cases of Mr Miailhe and his wife - 100,000 French francs (FRF) for non-pecuniary damage and FRF 100,000 for costs.
The Government and the Delegate of the Commission expressed no opinion.

44. In the Court's view, the question is not ready for decision although the criminal proceedings against Mr and Mrs Miailhe have ended with the Bordeaux Criminal Court's judgment of 2 December 1992 (see paragraph 9 above). Accordingly, it must be reserved and the further procedure must be fixed, due regard being had to the possibility of an agreement between the respondent State and the applicants (Rule 54 paras. 1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objection;

2. Holds by eight votes to one that there has been a breach of Article 8 (art. 8);

3. Holds unanimously that it is not necessary also to examine the case under Article 13 (art. 13);

4. Holds unanimously that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves it in whole;

(b) invites the Government and the applicants to submit in writing, within three months, their observations on the matter and, in particular, to notify the Court of any agreement they may reach;

(c) reserves the further procedure and delegates to the President of the Chamber power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 February 1993.

Rudolf BERNHARDT
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the dissenting opinion of Mr Thór Vilhjálmsson is annexed to this judgment.

R.B.
M.-A.E.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

I have voted against the finding of a violation of Article 8 (art. 8) of the Convention in this case. My reasons are much the same as those set out by the majority of the Commission in its report.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF MONORY v. ROMANIA AND HUNGARY

(*Application no. 71099/01*)

JUDGMENT

STRASBOURG

5 April 2005

FINAL

05/07/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Monory v. Hungary and Romania,

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

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr R. TÜRMEN,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 17 February 2004 and 15 March 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 71099/01) against Romania and Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr György Monory ("the applicant"), on 23 November 2000.

2. The applicant was represented by Mrs L. Farkas, a lawyer practising in Budapest. The Hungarian Government were represented by Mr L. Höltz, Deputy-State Secretary in the Ministry of Justice. The Romanian Government ("the Government") were represented by their Agents, Mr B. Aurescu succeeded by Mrs R. Rizoiu.

3. The applicant alleged, in particular, that the Romanian authorities had failed to make sufficient efforts to secure to him the return of his child with a view to reasserting the exercise of his parental rights, following his wife's wrongful removal of the child, and that no effective remedy existed at his disposal to bring his complaint before the Romanian courts, in violation of Articles 8 and 13 of the Convention.

The applicant's complaint against Hungary concerns the length of proceedings for divorce and child custody, allegedly in violation of Article 6 § 1 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 17 February 2004, the Court declared the application partly admissible.

6. The applicant and the Governments filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1946 and lives in Nagymaros, Hungary.

A. Abduction of the applicant's daughter and divorce proceedings initiated in Romania

9. In 1994 the applicant married Ms C.M., who is a national of both Romania and Hungary. On 16 February 1995 their daughter V. was born. The parents had joint custody in respect of the child, according to Hungarian law. They lived in Nagymaros.

10. In December 1998 they visited the wife's family in Romania. The applicant returned to Hungary, while C.M. stayed in Romania with V. and promised to return by 30 January 1999.

11. On 4 January 1999 C.M. filed for divorce, custody of V. and maintenance before the Satu Mare District Court in Romania. On 17 January 1999, she informed the applicant by telephone that she had decided to live in Romania and would not allow him to take V. to Hungary, despite him still being her husband and having joint custody of their daughter.

12. In a decision of 8 October 2003, the Satu Mare District Court established the residence of the child with her mother, pending the outcome of the divorce proceedings and required the applicant to pay alimony for his daughter. It also granted the applicant visiting rights to his child. On 19 February 2004 the decision became final.

B. Proceedings under the Hague Convention before the Romanian courts

13. In the meantime, on 20 January 1999 the applicant submitted a request for the return of his daughter to Hungary under Article 3 of the

Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Hague Convention"). The request was submitted through the Hungarian Ministry of Justice ("the Hungarian Ministry") to the Romanian Ministry of Justice ("the Romanian Ministry"). He argued that V. was the victim of international kidnapping and had been retained in Romania unlawfully within the meaning of Article 72 § 1 of the Hungarian Code on Family Law.

14. The Romanian Ministry, acting as the Central Authority responsible for the obligations established by the Hague Convention, instituted proceedings on behalf of the applicant before the Satu Mare District Court. On 8 June 1999 the District Court found no violation of the relevant Articles of the Hague Convention and refused the applicant's request. It considered that the retention of the child was not unlawful in so far as the applicant did not have exclusive custody rights in respect of his daughter and, thus, Article 3 of the Hague Convention was not applicable. The court considered that, in any case, the return of the child would constitute a great risk for her since she was already integrated into the new environment created by the mother during her stay in Romania.

15. On 5 October 1999 the Hungarian Nagymaros Guardianship Authority, at the applicant's request, declared that C.M. had not instituted the correct administrative proceedings, as required by the Hungarian Code on Family Law, with respect to their daughter's lawful removal to, and retention in Romania. It proposed that the child's residence be established with her father.

16. On 22 October 1999 the Satu Mare County Court dismissed the applicant's appeal against the decision of 8 June 1999. It recalled that the applicant did not have exclusive custody rights with respect to his daughter. It further considered that the return of the child would deprive the mother of the exercise of her parental rights. Lastly, the county court stated that, as long as the marriage of the parents was still valid, they should have the custody matters resolved by a competent court.

17. The Romanian Ministry appealed on points of law against this decision, alleging that the county court had incorrectly interpreted the applicable law and the facts of the case. They recalled that, according to the Hague Convention, the court should have applied Hungarian law, by which the retention of the child across the border by her mother without the father's consent was illegal.

18. On 2 February 2000 the Oradea Court of Appeal dismissed the appeal. It recalled that under Hungarian law the parents exercised parental rights jointly. However, due to the concrete family situation, it was normal that the parent living abroad would have to make more effort in order to exercise these rights. Furthermore, it considered that the child had already become integrated into the new environment. It held therefore that it was in the best interests of the child that she remain with her mother.

C. Proceedings for divorce and custody, mainly before the Hungarian courts

19. In parallel, on 28 April 1999 the applicant filed for the custody of V. before the Vác District Court in Hungary. On 17 May 1999 the applicant requested the court to proceed with the case as a matter of urgency and to hear witnesses.

20. On 21 May 1999 the District Court, via the Ministry of Justice, notified the defendant in Romania of the action.

21. On 30 August 1999 the applicant requested, by way of an interim measure, that V. be temporarily placed in his care and that the mother's custody rights be terminated.

22. On 8 September 1999 the District Court held a hearing, dismissed the applicant's request for interim measures and suspended the case until the proceedings on the Hague Convention issues had been finalised. The District Court noted that the divorce proceedings before the Romanian Satu Mare District Court had also been suspended on an earlier date for the same reason. The applicant appealed against this decision on 16 September 1999.

23. On 21 September 1999 the Pest County Public Prosecutor's Office interceded in the proceedings for the applicant and endorsed his appeal of 16 September filed against the decision of the Vác District Court. On 30 September 1999 both the applicant's and the public prosecutor's appeals were served on the defendant, who received them on 28 December 1999.

24. On 29 October 1999 the applicant requested the District Court to grant him, by way of an interim measure, custody of the child, to terminate the mother's parental rights and to proceed with the case urgently.

25. On 31 January 2000 the applicant renewed his request for custody of the child. He also filed a motion for bias against the District Court and the presiding judges. He renewed this motion on 21 February 2000.

26. On 29 February 2000 the Pest County Regional Court upheld the dismissal of the applicant's request for interim measures but instructed the District Court to resume its proceedings. This decision, notified via the Hungarian Ministry, reached the defendant on 29 May 2000.

27. On 19 May 2000 the District Court ordered that a study be made in the homes of both parties in order to ascertain their living conditions. A study was carried out in the applicant's home on 8 June 2000. The order was served on the defendant on 10 July 2000 and the relevant documents forwarded on 23 January 2001 to the Ministry of Justice with a view to carrying out a similar study in the defendant's home in Romania.

28. The applicant's repeated motions for bias were dismissed on 27 September, 26 and 30 October and 11 December 2000.

29. On 5 January 2001 the District Court joined to the proceedings the applicant's further claim for divorce which had been filed on 3 July 2000. The defendant was notified of this step on 1 March 2001.

30. On 21 and 30 January 2001 respectively, the applicant submitted further documents and requested the court to summon other witnesses.

31. The applicant's renewed request of 31 January 2001 for an interim measure was dismissed by the District Court on 15 February 2001.

32. On 6 June 2001 the District Court held a hearing and heard four witnesses. The defendant failed to appear. The court therefore requested her to submit her observations on the minutes of the hearing within 15 days and ordered her to submit a written response to the applicant's claim for custody of the child.

33. On 8 June 2001 a lawyer practising in Hungary informed the court that the defendant had authorised him to represent her in the case. On 2 July 2001 the defendant submitted her counter-claim and motions for evidence.

34. On 5 July and 30 October 2001 the Hungarian Ministry made an enquiry with its Romanian counterpart as to whether the envisaged study of the defendant's home could be carried out. In their reply of 10 December 2001, the Romanian Ministry stated that the relevant documents had been lost.

35. A hearing was held on 7 November 2001 at which the District Court heard a witness. The defendant's representative informed the court that the request to carry out a study of the defendant's living conditions had been served on the defendant by mistake. Consequently, the District Court asked the Hungarian Ministry to send the request again to the Satu Mare District Court.

36. On 8 November 2001 the District Court refused to regulate the applicant's access rights by way of an interim measure.

37. On 22 and 29 November 2001 the District Court invited the applicant to update the addresses of two of his witnesses who could not be summoned. On the previous day the applicant had appealed against the order of 8 November 2001.

38. On 19 December 2001 the District Court held a hearing and heard witnesses. It also set a statutory three-month time-limit for the parties to reconsider or confirm the continuation of the divorce proceedings.

39. Meanwhile, on 14 November 2001 the witness requested by the Vác District Court was heard by the Satu Mare District Court. The minutes were forwarded to the Hungarian Ministry and their translation was completed on 3 December 2001 and 27 February 2002, respectively.

40. On the applicant's appeal, the Pest County Regional Court quashed the order of 8 November 2001 and requested the District Court to take a new decision.

41. After the Hungarian Ministry had replaced the lost documents, on 13 February 2002 the Romanian Satu Mare District Court carried out the requested home study. The translation of the resultant documents reached the Hungarian Vác District Court on 21 May 2002.

42. Meanwhile, on 15 February 2002 the District Court regulated the applicant's access rights. This order was amended by the Regional Court on 2 April 2002.

43. On 26 March 2002 the Pest County Regional Court rejected the applicant's renewed motion for bias against the Vác District Court and fined him 15,000 Hungarian forints (HUF) for having repeatedly challenged judges without substantiating the requests.

44. On 27 May 2002 the District Court appointed an expert in child psychology. The expert's examination of V., scheduled for 2 July 2002, was cancelled as the defendant was unwilling to attend because she was unable to meet the travel costs.

45. On 16 July 2002 the District Court dismissed the applicant's request for an interim measure of 4 July 2002 to order that V. spend her summer vacation in Hungary.

46. The defendant failed to appear with the child at examinations scheduled for 2 July and 11 November 2002, 13 January and 26 February 2003. On 4 December 2002 the District Court imposed a fine of HUF 20,000 on the defendant. On 22 January 2003 the court warned the defendant that she was obliged to appear at the examinations. At a later date, the court amended the instructions for the expert and ordered her to assess who was the most suitable parent to raise the child. The defendant was examined on 14 May 2003.

47. On 26 June 2003 the expert submitted her opinion, finding the mother more suitable to raise V.

48. On 4 July 2003 the District Court, as an interim measure, regulated the applicant's access rights for the summer of 2003.

49. The District Court held hearings on 12 September and 29 October 2003. In a judgment delivered on the latter date, the court declared the couple's divorce and divided the matrimonial property. It also granted the defendant custody of V. and ordered the applicant to pay her maintenance of HUF 10,000 per month.

50. On 5 January 2004 the applicant appealed against the judgment. He withdrew the appeal 15 days later. Consequently, on 21 January 2004 the judgment became final.

II. RELEVANT DOMESTIC LAW

51. The relevant provisions of the Hague Convention on the Civil Aspects of International Child Abduction provide as follows:

Article 3

"The removal or the retention of a child is to be considered wrongful where

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention..."

Article 5

"For the purposes of this Convention –

a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;..."

Article 7

"Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures -

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep other each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application."

Article 8

"Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child..."

Article 10

"The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child."

Article 11

"The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be."

Article 18

"The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."

52. Paragraph 68 of the Explanatory Report on the 1980 Hague Child Abduction Convention drafted by Elisa Pérez-Vera in 1980, interprets Article 3 of the Convention as follows:

"The first source referred to in Article 3 is law, where it is stated that custody 'may arise ... by operation of law'. That leads us to stress one of the characteristics of this Convention, namely its application to the protection of custody rights which were exercised prior to any decision thereon. This is important, since one cannot forget that,

in terms of statistics, the number of cases in which a child is removed prior to a decision on its custody are quite frequent. Moreover, the possibility of the dispossessed parent being able to recover the child in such circumstances, except within the Convention's framework, is practically non-existent, unless he in his turn resorts to force, a course of action which is always harmful to the child."

The same Report, in its paragraph 84, comments on Article 5 in the following terms:

"...although nothing is said in this article about the possibility of custody rights being exercised singly or jointly, such a possibility is clearly envisaged... the whole tenor of Article 3 leaves no room for doubt that the Convention seeks to protect joint custody as well. As for knowing when joint custody exists, that is a question which must be decided in each particular case, and in the light of the law of the child's habitual residence."

53. The relevant provisions of the Hungarian Code on Civil Procedure are:

Section 2

"(1) A court shall - in accordance with Section 1 - enforce the parties' right to have their disputes determined in fair proceedings and within a reasonable length of time."

Section 3

"(1) The task of a law court is to endeavour to find out the truth in accordance with the aim of the present Act. The court shall, therefore, see in its line of duties that the parties exercise their rights properly throughout the procedure and meet the obligations they are bound to meet in the lawsuit. The court is obliged to provide the necessary information to a party who has no counsel and to remind him of his rights and obligations. The court shall consider pleas and declarations submitted by a party not by their formal designation but according to their contents.

(2) The court shall see, in its line of duties, that cases be tried thoroughly and within a reasonable length of time."

THE LAW

I. COMPLAINTS AGAINST ROMANIA

A. Alleged violation of Article 8 of the Convention

54. The applicant complained that the Romanian authorities, namely courts and administrative bodies, had failed to ensure the swift return of his daughter after his wife had retained the child in Romania without his consent. In so doing, the authorities had failed to secure his parental rights with respect to his daughter, in violation of his right to respect for his family life enshrined in Article 8 of the Convention, which reads, in so far as relevant, as follows:

> "1. Everyone has the right to respect for his ... family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of the rights and freedoms of others."

1. Scope of the issue before the Court

55. The Court recalls that the admissibility decision of 17 February 2004, based on the parties' submissions, limited the examination of the complaint to the proceedings concerning the return of the child to Hungary where the family had a common residence. The applicant also maintained in his observations that his aim was to have his child returned to Hungary. Therefore, reference to the proceedings for access or visiting rights was made only in so far as it was necessary to examine the Government's submissions concerning the other possible avenues which the applicant could have pursued.

56. In his supplementary observations of 15 April 2004, the applicant broadened the complaint and submitted that the failure of the Romanian authorities to return the child, and thus to re-establish his parental rights, had violated his access and visiting rights. By dismissing his request for the return of the child, the courts had obliged him to conduct two parallel sets of proceedings for divorce, custody and alimony before both the Romanian and Hungarian courts. This had led to a violation of his right to respect for his family life, in so far as the Romanian courts failed to take into account the proceedings before the Hungarian courts and to regulate visiting rights in his favour.

In this context, he claimed that the visiting rights which were granted to him by the Romanian courts, in the decision of 19 February 2004, might have proved difficult to implement should he have chosen to enforce them.

57. Subsequently, the applicant submitted, in his written observations on the merits of the complaint raised under this Article, that his visiting rights have been brought to the Court's attention only in so far as they were a direct consequence of the outcome of the Hague proceedings initiated before the Romanian courts. In a letter of 22 September 2004, he had recalled that, in the initial application submitted to the Court, he could not have raised the issue of visiting rights, as at that time the proceedings focused solely on the return of his child.

58. The Romanian Government pointed out that Article 21 of the Hague Convention creates a separate procedure for the establishment of visiting rights, distinct from proceedings for the return of a child. However, the applicant did not institute the former proceedings. Furthermore, although he was granted visiting rights in the decision of 19 February 2004, the applicant did not prove that he had taken any steps towards their implementation.

59. The Court agrees with the Government that, as regards visiting rights, the applicant did not exhaust all effective remedies as he did not institute proceedings for access rights under Article 21 of the Hague Convention, nor did he seek the enforcement of the decision granting him visiting rights.

60. Therefore, the Court will only take this matter into account to the extent that it is relevant to the applicant's complaint under Article 8 of the Convention due to the failure to return the child to Hungary. It will, therefore, limit its examination to the complaint as it was communicated and assessed in the admissibility decision of 17 February 2004.

2. Submissions of the parties

a) The applicant

61. The applicant contended that the decisions of the Romanian courts dealing with his request for the return of his child and the position of the Romanian Ministry throughout the proceedings, initiated at his request under the Hague Convention, constituted an interference with his right to respect for his family life. The authorities made it impossible for him to have his child returned to the family's common residence and to exercise his parental rights according to Hungarian law.

62. The proceedings, instituted by the applicant on 20 January 1999 and finalised by the courts on 2 February 2000, took too long for a case of this type. This contradicts the requirements of the Hague Convention to resolve the matter expeditiously. Furthermore, had the Romanian courts applied Hungarian law, as required by the Hague Convention, they would have

acknowledged his custody rights as outlined in that Convention, and allowed his request for the return of his child. He concluded that there had been flaws and shortcomings in the proceedings that resulted in the violation of his Article 8 rights.

b) The Government

63. In the Government's view there was no interference with the applicant's right to respect for his family life.

64. Concerning the period before the final decision of the domestic courts, ruling on the Hague Convention procedure, the State authorities had fulfilled their duties under the Convention, which were limited to lodging the application for the return of the child, as requested by the applicant, representing him before the courts and availing themselves of all possible appeals against the court decisions that were unfavourable to him.

65. Moreover, the State authorities had no further obligations under the Hague Convention as no court had granted the applicant the right to exercise sole parental responsibility or any other right superior to that of the mother. The present case is therefore distinct from those of *Ignaccolo-Zenide v. Romania* (no. 31679/96, ECHR 25 January 2000), *Maire v. Portugal* (no. 48206/99, 26 June 2003) and *Iglesias Gil and A.U.I. v. Spain* (no. 56673/00, 29 April 2003), where the respective applicants had been granted such rights by means of final court decisions.

66. As for the proceedings for the return of the child and their outcome, no interference with the applicant's Article 8 rights occurred, in so far as the domestic courts had found that the removal of the child by the applicant's wife had not been "wrongful" within the meaning of the Hague Convention. The domestic courts, who were better placed to examine the issue, had dealt in substance with all the arguments presented by the parties and had reached their decisions based on Hungarian law concerning custody matters, which conferred equal parental rights on the applicant and his wife. There was nothing in the reasoning of the domestic courts that could qualify their decisions as arbitrary. The Government relied on cases like *Olsson v. Sweden* ((No. 1), judgment of 24 March 1988, Series A no. 130, p. 32, § 68), *Tiemann v. France and Germany* ((dec.), no. 47457/99 and 47458/99, ECHR 2000-IV), *Hokkanen v. Finland* (judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55) and *Bronda v. Italy* (judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1491, § 59).

67. The Government contended, therefore, that once the domestic courts had established that the removal of the child had not been unlawful, the applicant's request for the return of his child no longer satisfied the requirements of the Hague Convention and the Romanian authorities had no further obligations towards the applicant. They relied on the ruling of the Court in the cases of *Guichard v. France* ((dec.), no. 56838/00, 2 September

2003) and *Paradis and others v. Germany* ((dec.), no. 4783/03, 15 May 2003).

68. Should the Court consider that there had been an interference with the applicant's rights, the Government contended that it was in accordance with Article 8 § 2 of the Convention. The domestic courts had rejected the applicant's request in the light of the provisions of the Hague Convention which had been incorporated into the domestic legal system by law no. 100/1992. The courts had adopted their decisions in the best interests of the child, as required by both the Hague and the European Conventions.

3. The Court's assessment

69. The Court notes, firstly, that it is common ground that the relationship between the applicant and his daughter came within the sphere of family life under Article 8 of the Convention.

70. The Court reiterates that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 (see, among other authorities, *Tiemann* (dec.) and *Bronda*, p. 1489, § 51, cited above).

The events under consideration in the instant case, in so far as they give rise to the responsibility of the respondent States, clearly amounted to an interference with the applicant's right to respect for his family life, as it restricted his enjoyment of his daughter's company.

71. The Court must accordingly determine whether there has been a breach of the right of the applicant to respect for his family life.

72. Although the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there are in addition positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in both contexts the State enjoys a certain margin of appreciation (see *Ignaccolo-Zenide*, cited above, § 94; *Iglesias Gil and A.U.I.*, cited above, § 48, and *Sylvester v. Austria*, no. 36812/97, 40104/98, § 51, 24 April 2003).

73. The positive obligations imposed on States by Article 8 include taking measures to ensure a parent's reunification with his or her child (see *Ignaccolo-Zenide*, cited above, § 94, and *Nuutinen v. Finland*, no. 32842/96, § 127, ECHR 2000-VIII). The Court has already interpreted these positive obligations in the light of the Hague Convention, Article 7 of which contains a non-exhaustive list of measures to be taken by States in order to secure the prompt return of the child, including the institution of judicial proceedings (see *Ignaccolo-Zenide*, cited above, § 95). The same

interpretation can be followed in the present case in so far as, at the material time, both Romania and Hungary were parties to the Hague Convention.

74. The Court notes that the Romanian Ministry, acting as the Central Authority for the purpose of the Hague Convention, had chosen to act upon the applicant's request for the return of his child. It transpires that the authorities acted genuinely as if the removal had been unlawful.

75. The Court recalls that Article 13 of the Hague Convention allows the Central Authority to reject applications which are clearly ill-founded. Such a decision has already been found to comply with Article 8 of the Convention in the case of *Guichard*, cited above. However, in the present case, the State organs did not reject the applicant's request and, by choosing to act upon it, they must be presumed to have consented to all the obligations arising under that Convention. The Court therefore disagrees with the Government's view that their duties were limited to bringing the law suit for the return of the child before the competent courts.

76. Moreover, the Court does not share the Government's view that no further obligation lay with the State authorities under the Hague Convention as no court had granted the applicant sole parental responsibility. The Court recalls that joint custody, exercised by parents who are not divorced, is recognised by Article 3 paragraph (b) of the Hague Convention. This is supported by the Explanatory Report on the Hague Convention (see paragraph 52 above). There is nothing in the Convention excluding married couples. Moreover, the Hague Convention has been interpreted by domestic courts of other European States as being applicable prior to the proceedings on divorce and child custody (see, *inter alia*, *Sylvester*, cited above, §§ 13 and 16, and *Couderc v. Czech Republic* (dec.), no. 54429/00, 30 January 2001).

77. The Hungarian law applicable in the present case granted the parents joint custody. Neither of them, therefore, had superior parental rights over their daughter (see paragraph 9 above). As for the residence of the child, Hungarian law imposed an obligation on the mother to obtain the approval of the father or of the Hungarian Guardianship Authority if she wished to change the child's residence (see paragraph 15 above). It appears from the file that she did not fulfil this obligation. Moreover, it was not until 8 October 2003 that the child's residence was formally established with her mother in Romania (see paragraph 12 above).

78. The Court acknowledges that the present case is to be distinguished from the cases of *Ignaccolo-Zenide*, *Maire* and *Iglesias Gil and A.U.I.*, cited above, where the applicants were in possession of a return order which the State authorities had failed to enforce. However, this distinction has little impact on the Article 8 issue in the present case. While in the previous cases the authorities' obligation to act arose from a court order, in the present case their obligation arose by virtue of the applicable Hungarian law and Article 3 of the Hague Convention.

79. Consequently, the Romanian authorities were bound to comply with all obligations set out in Article 7 of the Hague Convention. They should have taken or caused to be taken all provisional measures, including extra-judicial ones, which could have helped prevent "further harm to the child or prejudice to the interested parties". However, the authorities did not take any such measure but limited themselves to representing the applicant before the Romanian courts. The Court considers therefore that the authorities failed to observe their full obligations under Article 7 of the Hague Convention.

80. As for the interpretation given by the courts to the Hague Convention in the light of Hungarian law, it is to be noted that all court instances that dealt with the case dismissed from the outset the applicability of Article 3 of the Hague Convention. The courts found that, according to Hungarian law, the applicant did not have the right to have the child returned to him. However, it appears that the child had been removed from her usual place of residence in breach of the formalities under Hungarian law. Moreover, the applicant had not been successful in his attempt to have the legality of the situation restored, despite his joint custody rights over the child.

81. In the Court's view, this interpretation by the Romanian courts contradicts the obvious meaning of the Hague Convention which transpires from its very text, its Explanatory Report and the recognised common practice (see paragraph 76 above). It deprives Article 3 and, therefore, the Hague Convention itself, of much of its useful effect. Furthermore, as Article 8 of the European Convention was examined in the light of the Hague Convention, the national courts' interpretation of the latter weakened the guarantees of Article 8. In these circumstances, the Court considers that the matter went beyond a simple matter of the interpretation and application of domestic legislation falling within the exclusive competence of the national authorities. The Court concludes that the domestic courts' interpretation of the guarantees of the Hague Convention led to a violation of Article 8 of the European Convention (see, *mutatis mutandis*, *Iglesias Gil and A.U.I.*, cited above, § 61).

82. Furthermore, in matters pertaining to the reunification of children with their parents, the adequacy of a measure is also to be judged by the swiftness of its implementation, such cases requiring urgent handling, as the passage of time can have irremediable consequences for the relations between the children and the parent who does not live with them (see *Ignaccolo-Zenide*, cited above, § 102, and *Nuutinen*, cited above, § 110). Indeed, Article 11 of the Hague Convention imposes a six-week time-limit for the required decision, failing which the decision body may be requested to give reasons for the delay. Despite this recognised urgency, in the instant case a period of more than twelve months elapsed from the date on which the applicant lodged his request for the return of the child to that on which

the final decision was taken. However, no satisfactory explanation was put forward by the Government for this delay.

83. The Court recalls that the interests of the child are paramount in such cases. Thus it may well have been justified, eight months after the removal from Hungary of the applicant's daughter, for the courts to hold that the child had adapted to her new environment and that it was in her best interests to remain in Romania with her mother although, at that time, no final decision had established her residence there (see paragraphs 12 and 15 above). However, where the Court accepts that a change in the relevant facts may exceptionally justify such a decision, it must be satisfied that the change was not brought about by the State's actions or inactions (see, *mutatis mutandis, Sylvester*, cited above, § 59).

84. Having found that the time it took for the courts to adopt the final decision in the present case failed to meet the urgency of the situation, the Court concludes that the change in the child's circumstances was considerably influenced by the slow reaction of the authorities.

85. Based on its conclusions reached at paragraphs 79, 81 and 84 above, and notwithstanding the respondent States' margin of appreciation in the matter, the Court concludes that the Romanian authorities failed to make adequate and effective efforts to assist the applicant in his attempt to have his child returned to him with a view to exercising his parental rights. Consequently, there has been a breach of Article 8 of the Convention.

B. Alleged violation of Article 13 of the Convention

86. The applicant contended that the Romanian authorities did not provide him with an effective remedy for his Article 8 complaint, in violation of Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

87. The Government submitted that the applicant was able to bring his claim for the return of his child before the judicial bodies in Romania. The domestic courts ruled on the matter with full jurisdiction and examined the merits of the applicant's arguments. They recalled that Article 13 did not require the successful outcome of the proceedings (see, *mutatis mutandis*, *Lindberg v. Sweden* (dec.), no. 48198/99, 15 January 2004).

88. However, having regard to its conclusion in paragraph 85 above, the Court does not find it necessary to rule separately on this complaint (see, *mutatis mutandis, Pavletic v. Slovakia*, no. 39359/98, § 101, 22 June 2004).

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION BY HUNGARY

89. The applicant complained that the length of the proceedings for divorce and child custody in his case exceeded a reasonable time within the meaning of Article 6 § 1 of the Convention, which, in so far as relevant, reads:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

90. The Government contested this view. They maintained that the international aspects of the dispute – namely, the involvement of the Romanian authorities in the examination of the parties' living conditions, the correspondence between the Hungarian and the Romanian authorities and the translation of documents – had inevitably slowed down the proceedings.

A. Period to be taken into consideration

91. The Court observes that the proceedings commenced on 28 April 1999 and ended on 21 January 2004. They thus lasted nearly four years and nine months. Despite the fact that the examination of interim measures on most occasions involved two court instances, the merits of the case were determined by only one instance. However, as of 29 October 2003, the applicant was solely responsible for the further delay, as he lodged an appeal which he subsequently withdrew.

B. Reasonableness of the length of the proceedings

92. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII). Regarding this latter element, special diligence is required in child custody disputes (*Laino v. Italy* [GC], no. 3158/96, § 18, ECHR 1999-I). The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Frydlender*, cited above). Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the

instant case the overall length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

There has accordingly been a breach of Article 6 § 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

93. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. Non-pecuniary damage in respect of Romania

94. The applicant claimed non-pecuniary damage of 80,000 euros (EUR) in respect of the violation of his rights by Romania.

95. The Romanian Government contended that the amount claimed by the applicant was excessive and asked for an assessment on an equitable basis inspired by the case-law of the Court in the matter.

96. The Court sees no reason to doubt that the applicant suffered distress as a result of the impossibility to have his child returned to him or to exercise his parental rights. It considers that sufficient just satisfaction would not be provided solely by a finding of a violation. Having regard to the sums awarded in comparable cases (see *Ignaccolo-Zenide*, §117; *Sylvester*, § 84; *Iglesias Gil and A.U.I.*, § 67, and *Maire*, § 82, cited above, as well as *Sophia Gudrun Hansen v. Turkey*, no. 36141/97, § 115, 23 September 2003), and making an assessment on an equitable basis as required by Article 41, the Court awards the applicant EUR 15,000 under this head.

2. Non-pecuniary damage in respect of Hungary

97. The applicant claimed EUR 60,000 in respect of non–pecuniary damage from Hungary.

98. The Hungarian Government found the applicant's claim excessive.

99. The Court considers that the applicant must have sustained some non-pecuniary damage. Ruling on an equitable basis, it awards award him EUR 3,000 under this head.

B. Costs and expenses

100. The applicant claimed HUF 1,100,000, around EUR 4,550, for costs and expenses incurred during the proceedings before both the Romanian and Hungarian courts, and HUF 424,000 (around EUR 1,750) in attorneys' fees, of which HUF 100,000 (around EUR 415) is owed to his previous legal counsellor, Mr L. Molnar.

101. Both Governments agreed to reimburse those legal costs and expenses which the applicant could prove he had actually advanced in respect of the proceedings concerning them, in so far as they had been actually and necessarily incurred and were reasonable as to quantum.

102. According to Rule 60 § 2 of the Rules of the Court, which was brought to the applicant's attention in a letter of 23 February 2004, itemised particulars of all claims made, together with the relevant supporting documents, are to be submitted, failing which the Chamber may reject the claim in whole or in part.

103. The applicant submitted his claims without any supporting documents. Therefore the full claim cannot be awarded. Nevertheless, it accepts that the applicant must have incurred some legal costs and expenses. Accordingly, it considers it reasonable to make an award of EUR 1,000 in this respect (EUR 500 to be paid by each respondent Government).

C. Default interest

104. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention by Romania;

2. *Holds* that it is not necessary to examine separately whether there has been a violation of Article 13 of the Convention by Romania;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention by Hungary;

4. *Holds*

(a) that the Romanian Government is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage, plus EUR 500 (five hundred euros) in costs and expenses, to be converted into Hungarian forints at the rate applicable at the date of settlement, plus any tax that may be chargeable;

(b) that the Hungarian Government is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros) in respect of non-pecuniary damage, plus EUR 500 (five hundred euros) in costs and expenses, to be converted into Hungarian forints at the rate applicable at the date of settlement, plus any tax that may be chargeable;

(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 5 April 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

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

FIRST SECTION

CASE OF NEWS VERLAGS GmbH & Co.KG v. AUSTRIA

(Application no. 31457/96)

JUDGMENT

STRASBOURG

11 January 2000

FINAL

11/04/2000

In the case of News Verlags GmbH & Co.KG v. Austria,

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

Mrs E. PALM, *President*,
Mr J. CASADEVALL,
Mr R. TÜRMEN,
Mr C. BÎRSAN,
Mr W. FUHRMANN,
Mrs W. THOMASSEN,
Mr R. MARUSTE, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 31 August and 7 December 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 31457/96) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a company with its seat in Austria, News Verlags GmbH & Co.KG ("the applicant company"), on 13 March 1996.

The applicant company complained that court decisions prohibiting it from publishing the picture of the suspect in the context of reports on the criminal proceedings against him violated its right to freedom of expression and discriminated against it. It invoked Article 10 of the Convention taken alone and in conjunction with Article 14.

2. On 16 April 1998 the Commission (First Chamber) decided to give notice of the application to the Austrian Government ("the Government") and invited them to submit their observations on its admissibility and merits.

3. The Government submitted their observations on 20 July 1998, after an extension of the time-limit fixed for that purpose. The applicant company replied on 16 November 1998, also after an extension of the time-limit.

4. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998, and in accordance with Article 5 § 2 thereof, the application was examined by the Court.

5. In accordance with Rule 52 § 1 of the Rules of Court, the President of the Court, Mr L. Wildhaber, assigned the case to the First Section. The Chamber constituted within that Section included *ex officio* Mr W. Fuhrmann, the judge elected in respect of Austria (Article 27 § 2 of

the Convention and Rule 26 § 1 (a)), and Mrs E. Palm, President of the Section (Rule 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr J. Casadevall, Mr R. Türmen, Mr C. Bîrsan, Mrs W. Thomassen and Mr R. Maruste (Rule 26 § 1 (b)).

6. On 1 June 1999 the Chamber declared the application admissible[1]. Furthermore, the Chamber decided, in case no friendly settlement could be reached, to hold a hearing in accordance with Rule 59 § 2.

7. The text of the Court's admissibility decision was sent to the parties on 18 June 1999 and the parties were invited to submit, before 2 August 1999, such further information or observations on the merits as they wished. The applicant company was also invited to submit its claims for just satisfaction under Article 41 of the Convention (Rule 60).

8. The Court placed itself at the disposal of the parties with a view to securing a friendly settlement (Article 38 § 1 (b) of the Convention and Rule 62).

9. The President of the Chamber granted the applicant company leave to use the German language at the hearing (Rules 34 § 3 and 36 § 5).

10. The Registrar received the Government's memorial on 2 August 1999 and the applicant company's memorial on 16 August 1999. The President of the Chamber decided that the applicant company's memorial was nevertheless to be included in the case file (Rule 38 § 1).

11. A public hearing was held on 31 August 1999 in the Human Rights Building in Strasbourg.

There appeared before the Court:

(a) *for the Government*
Mr W. OKRESEK, Federal Chancellery, *Agent*,
Mrs B. GÖTH, Federal Ministry of Justice, *Counsel*;

(b) *for the applicant company*
Mr G. LANSKY,
Mr D. HEINE, *Counsel*.

The Court heard addresses by Mr Lansky and Mr Okresek.

1. *Note by the Registry*. The text of the Court’s decision is obtainable from the Registry.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant, a limited liability company with its seat in Tulln, is the owner and publisher of the magazine *News*.

13. In December 1993 a series of letter bombs was sent to politicians and other persons in the public eye in Austria. Some of the addressees were severely injured.

14. On 10 December 1993 B., a right-wing extremist, was arrested on suspicion of having been involved in the so-called letter-bomb campaign. He was taken into detention on remand. Preliminary investigations were instituted against him on suspicion of attempted murder and of having committed offences under the National Socialism Prohibition Act (*Verbotsgesetz* – "the Prohibition Act"). He was later charged with offences under the Prohibition Act and with having aided and abetted assault.

15. In December 1993 the applicant company published a special issue and later an article in one of the regular issues of its magazine *News*, dealing with the letter-bomb campaign, the activities of the extreme right and, in particular, the suspect B. The respective reports were illustrated with several pictures of B. The cover page of the special issue for instance showed a small picture of B., subtitled in big letters "The Mad World of Perpetrators". Under the headline "Terror for the Führer" a full-page picture showed B. together with two other persons. According to the comments, this picture was taken in a courtroom, where B. stood up in protest when the verdict was pronounced against his "Führer", the neo-Nazi leader G.K. Furthermore, it was stated that, when G.K. was sentenced to ten years' imprisonment, his companions, including B., swore vengeance. According to another comment on the same page, these companions who had been supposed to be harmless lunatics were now arrested as bomb terrorists. The cover page of the second issue carried the headline "Victims and Nazis" and showed a large picture of one of the victims and a smaller picture of B. and two others. The victim was quoted as saying: "I want to meet the perpetrators." At the bottom of the page the words "Nazi scene uncovered" appeared. In the article, a further picture of B. and another suspect, R., was shown. According to the comment, it had been taken on the occasion of the trial of the neo-Nazi leader G.K. The comment went on to state that R. and B., who had both wished to succeed G.K., were now suspected of having dispatched the bombs. Moreover, a wedding picture of B. was published. The comment accompanying it stated that, according to the investigations of the police, B. and R. had probably collaborated in order to organise the letter-bomb campaign. In the article itself, B. was described as pathologically ambitious,

one of the most brutal members of the neo-Nazi scene and the possible successor to the neo-Nazi leader G.K.

16. On 21 January 1994 B. brought proceedings under section 78 of the Copyright Act (*Urheberrechtsgesetz*) against the applicant company, requesting that the latter be prohibited from publishing his picture in connection with reports on any criminal proceedings against him. He also requested a preliminary injunction (*einstweilige Verfügung*) to that effect.

17. On 9 March 1994 the Vienna Commercial Court (*Handelsgericht*) dismissed B.'s application for a preliminary injunction.

18. The court observed that section 78 of the Copyright Act prohibited publishing a person's picture if the publication violated that person's legitimate interests. However, where criminal proceedings were conducted against the person concerned, that interest had to be weighed against the public interest in receiving information. As the present case related to very serious offences based on anti-democratic, subversive ideology, the publication of a suspect's picture was justified in principle. Further, the court found that it did not have to examine whether the accompanying comment violated B.'s right to respect for his private life as he had failed to indicate which passages of the articles at issue might go beyond the limits of acceptable reporting.

19. On 22 September 1994 the Vienna Court of Appeal (*Oberlandesgericht*), upon B.'s appeal, issued a preliminary injunction prohibiting the applicant company from publishing B.'s picture in connection with reports on the criminal proceedings against him on suspicion of having committed offences under the Prohibition Act and of having aided and abetted assault through letter-bomb attacks.

20. The Court of Appeal pointed out that section 78 of the Copyright Act was directed against the abuse of pictures in public. Section 78 sought above all to prevent a person from being disparaged by the publication of a picture, or his private life being made public or his picture being used in a way giving rise to misinterpretation, or in a disparaging and degrading manner. Further, the court observed that section 78 of the said Act did not define the term “legitimate interests”, thus conferring discretion on the courts in order to enable them to take the particular circumstances of each case into account. It also required the courts to weigh the interest of the person concerned in the protection of his or her picture against the publisher's interest in conveying information.

21. The Court of Appeal went on to say that, in assessing whether a person's legitimate interests within the meaning of section 78 of the Copyright Act had been violated, not only the picture itself, but also the accompanying text had to be taken into account. Also, a person suspected of having committed an offence had a legitimate interest in not being denounced in public by the publication of a picture in connection with a disparaging text. In the present case, the contested publication constituted

not only a gross insult, but also a serious violation of the presumption of innocence. Quoting some headlines and comments from the articles at issue, the Court of Appeal noted that the applicant company had called B. a "perpetrator" of the letter-bomb attacks, a "Nazi", a "terrorist for the 'Führer'" and a companion of the neo-Nazi G.K. who had been sentenced to ten years' imprisonment. These gross violations of B.'s legitimate interests justified a prohibition on the publication of his picture in the context of the criminal proceedings which were at the time conducted against him.

22. Despite this line of reasoning, the judgment had the effect of prohibiting the publication of B.'s picture not only in connection with a text that was prejudicial but – even more restrictively – in connection with reports on the criminal proceedings against him irrespective of the accompanying text.

23. On 22 November 1994 the Supreme Court (*Oberster Gerichtshof*) rejected both parties' extraordinary appeals on points of law (*außerordentlicher Revisionsrekurs*), finding that they did not raise any important legal issues. As to the applicant company's appeal, it found that section 7a of the Media Act (*Mediengesetz*), to which the applicant company had referred in its submissions, did not lead to the result that a suspect's legitimate interests could not be violated by the publication of his picture. There was thus no contradiction with section 78 of the Copyright Act. Further, there were no clear indications in the present case that the public interest justified the publishing of B.'s picture. Thus, the appellate court's decision was not based on a gross misinterpretation of the law.

24. Supplementing his application of 21 January 1994, B. had in the meantime filed an alternative claim (*Eventualbegehren*), requesting that the applicant company be ordered to refrain from publishing his picture in connection with such statements as had been made in the articles at issue and which he listed in detail.

25. On 19 April 1995 the Vienna Commercial Court, in the main proceedings, granted B.'s alternative claim, ordering the applicant company to refrain from publishing B.'s picture where the publication was likely to violate B.'s legitimate interests, namely in connection with statements in which B. was referred to as the perpetrator of the letter-bomb attacks or as being involved in terror or letter-bomb attacks, or in connection with such statements – listed in detail – as had been made in the articles at issue.

26. The court found that the publication of B.'s picture together with the accompanying text constituted not only a gross insult, but also a serious violation of the presumption of innocence. These gross violations of B.'s legitimate interests justified a prohibition on publishing his picture in the context of the criminal proceedings against him, but only if he was referred to as the perpetrator of the offences or if otherwise the rules of objective reporting were violated. Having regard to the seriousness of the charges brought against B. and the notoriety of the victims, the public interest in B.'s

appearance outweighed his interest in not having his picture published as long as such reports did not overstep the boundaries of objective journalism. Further, the court emphasised that it did not intend to sanction reporting (*Wortberichterstattung*) as such. It repeated that, when assessing a person's claim under section 78 of the Copyright Act, the text accompanying the pictures was of importance. It made a difference whether a person, along with the publication of his picture, was stigmatised as the perpetrator of a crime or whether an objective report on the criminal proceedings against him was given.

27. On 30 August 1995 the Vienna Court of Appeal dismissed the applicant company's appeal but granted B.'s appeal. It ordered the applicant company to refrain from publishing B.'s picture in connection with reports on the criminal proceedings against him on suspicion of having committed offences under the Prohibition Act and of having aided and abetted assault through letter-bomb attacks.

28. The court recalled the reasons given in its decision of 22 September 1994 (see paragraphs 20-21 above) concluding once again that the publication of B.'s picture in the context of the accompanying comments had constituted a gross violation of his legitimate interests, which justified a prohibition on publishing his picture in the context of the criminal proceedings against him. It added that the onus was not upon B. to specify the statements which the applicant company had to refrain from publishing in connection with the pictures since, in general, new accusations were published in the course of the proceedings, and there was no interest in repeating the previous ones. Thus, the Commercial Court's judgment was worded too narrowly.

29. On 24 October 1995 the Supreme Court rejected the applicant company's extraordinary appeal on points of law. It found that the applicant company undoubtedly had a right to impart information about the proceedings conducted against B. However, the right to impart information had to be distinguished from the right to publish pictures of B., which had to be balanced against B.'s interest in the protection of his picture. Even the publication of a picture accompanied by a correct statement of facts, which violated neither section 7a nor section 7b of the Media Act, could infringe the legitimate interests of the person concerned. Finally, the Supreme Court, referring to Article 10 of the Convention, found that the applicant company's right to freedom of expression had not been violated, since it had not been prohibited from reporting on the proceedings, but only from publishing B.'s picture in that context.

30. In December 1995 a first-instance court acquitted B. of the charges of assault but convicted him of offences under the Prohibition Act. The criminal proceedings against B. received extensive news coverage. Contrary to the applicant company, other newspapers remained free to publish B.'s picture.

31. On 18 December 1995 the Vienna Court of Appeal, in proceedings brought by B. under section 7b of the Media Act, found that the applicant company had violated the presumption of innocence and ordered it to pay 50,000 Austrian schillings by way of compensation to B. The court found that in its articles of December 1993 the applicant company had referred to B. as the perpetrator of the "letter-bomb terror".

II. RELEVANT DOMESTIC LAW

A. The Copyright Act

32. The relevant provision of the Copyright Act reads as follows:

Section 78

"(1) Images of persons shall neither be exhibited publicly, nor disseminated in any other way in which they are made accessible to the public, where the legitimate interests of the person in question or, in the event that they have died without having authorised or ordered publication, of a close relative would be injured.

..."

This provision has been interpreted in the Supreme Court's case-law. In particular the Supreme Court found that in determining whether the publication of a person's picture violated his or her "legitimate interests" regard was to be had to the accompanying text. Where the publisher of the picture claimed that there was a public interest in its publication, the courts had to carry out a weighing of the respective interests involved. As regards reporting on criminal cases, the Supreme Court constantly held that there was no predominating public interest in the publication of the suspect's picture if it had no additional independent information value. The only effect was that the intensity of such reporting was increased by joining the suspect's picture and, thus, made his or her appearance known to the public at large (see for instance, MuR 1990, p. 224; SZ 63/75, p. 373; MuR 1995, p. 64; MuR 1996, p. 33).

B. The Media Act

33. The relevant provisions of the Media Act read as follows:

Section 7a

"(1) Where publication is made, through any medium, of a name, image or other particulars which are likely to lead to the disclosure to a larger not directly informed circle of people of the identity of a person who

1. has been the victim of an offence punishable by the courts, or

2. is suspected of having committed, or has been convicted of, a punishable offence,

and where legitimate interests of that person are thereby injured and there is no predominant public interest in the publication of such details on account of the person's position in society, of some other connection with public life, or of other reasons, the victim shall have a claim against the owner of the medium (publisher) for damages for the injury suffered. The award of damages shall not exceed 200,000 schillings; additionally, section 6(1), second sentence, shall apply.

(2) Legitimate interests of the victim shall in any event be injured if the publication

1. in the case of subsection (1)1 is such as to give rise to an interference with the victim's strictly private life or to his or her exposure,

2. in the case of subsection (1)2 relates to a juvenile or merely to a lesser indictable offence or may substantially prejudice the victim's advancement.

..."

Section 7b

"(1) Where a person who is suspected of having committed a punishable offence but has not been finally convicted is portrayed in a medium as guilty, or as the offender and not merely a suspect, the victim shall have a claim in damages against the owner of the medium (publisher) for the injury suffered. The award of damages shall not exceed 200,000 schillings; additionally, section 6(1), second sentence, shall apply.

..."

FINAL SUBMISSIONS TO THE COURT

34. In their memorial, the Government asked the Court to declare that there had been no violation of Article 10.

35. The applicant company requested the Court to hold that there had been a violation of Article 10 of the Convention as well as of Article 14 taken in conjunction with Article 10.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

36. The applicant company alleged that the injunctions, as issued by the Vienna Court of Appeal and confirmed by the Supreme Court, prohibiting it from publishing the picture of the suspect, B., in connection with reports on the criminal proceedings against him, irrespective of the accompanying text, constituted a violation of Article 10 of the Convention which reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Whether there was an interference

37. The Government disputed that the contested injunctions constituted an interference with the applicant company's right to freedom of expression. They conceded that the publication of a picture may in some cases be protected by Article 10 of the Convention, but argued that this was not the case if a photograph published in the context of reporting had no information value either in itself or in connection with the information conveyed. In the Government's view, the publication of B.'s picture did not add any information to the applicant company's reports.

38. The applicant company contested this view. It maintained that the choice of the form and the means of communicating information was for the person conveying the information. It also stressed that the reporting at issue was a unity of text and pictures which was protected by Article 10 in its entirety as well as in its single components.

39. The Court recalls that it is not for the Court, or for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed (see the Jersild v. Denmark judgment of 23 September 1994, Series A no. 298, pp. 23-24, § 31).

40. The Court considers that the prohibition on the publication of B.'s picture in the context of reports on the criminal proceedings against him, which limited the applicant company's choice as to the form in which it could present such reports, constituted an interference with its right to freedom of expression, which is in breach of Article 10 unless it satisfies the requirements of the second paragraph of that Article.

B. Whether the interference was "prescribed by law"

41. The applicant company, in its memorial, conceded that the interference at issue was based on section 78 of the Copyright Act. At the hearing before the Court it expressed doubts as to whether this provision prescribed the conditions under which the publication of a person's picture may be prohibited with sufficient clarity, without however elaborating on the issue in detail. The Government for their part, asserted that section 78 of the Copyright Act formed the legal basis for the injunctions.

42. The Court recalls that the relevant national law must be formulated with sufficient precision to enable the persons concerned – if need be with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see the Worm v. Austria judgment of 29 August 1997, *Reports of Judgments and Decisions* 1997-V, p. 1548, § 38).

43. Section 78 of the Copyright Act employs somewhat imprecise wording, namely "legitimate interests" and thereby confers broad discretion on the courts. The Court has, however, acknowledged the fact that frequently laws are framed in a manner that is not absolutely precise (see the markt intern Verlag GmbH and Klaus Beermann v. Germany judgment of 20 November 1989, Series A no. 165, pp. 18-19, § 30, with further references). Such considerations are particularly cogent in the sphere of the publication of a person's picture, where the courts are called upon to weigh that person's rights, such as for instance the right to respect for his or her private life, against the publisher's right to freedom of expression. Moreover, the Court notes that the notion of "legitimate interests" has been interpreted in the Supreme Court's case-law (see paragraph 32 above). The Court concludes that it cannot be said that the Vienna Court of Appeal's application of section 78 of the Copyright Act went beyond what could reasonably be foreseen in the circumstances.

Accordingly, the Court is satisfied that the interference was "prescribed by law".

C. Whether the interference pursued a legitimate aim

44. It was common ground that the contested injunctions aimed at "the protection of the reputation or rights of others". The Government

emphasised that they aimed in particular at protecting B.'s right to a fair trial based on respect for the presumption of innocence and his right to respect for his private life. The Government added that the interference eventually also served to maintain the authority and impartiality of the judiciary.

45. The Court notes that the judgments of the domestic courts show that the injunctions were intended to protect B. against insult and defamation and against violations of the presumption of innocence. Thus they had the aim of protecting "the reputation or rights of others" and also "the authority and impartiality of the judiciary" in so far as that term has been interpreted to include the protection of the rights of litigants in general (see the *Sunday Times* v. the United Kingdom (no. 1) judgment of 26 April 1979, Series A no. 30, p. 34, § 56).

46. The interference complained of, thus, had aims that were legitimate under paragraph 2 of Article 10.

D. Whether the interference was "necessary in a democratic society"

47. The applicant company mainly disputed that the injunctions were "necessary" for achieving the aforementioned aims. It submitted in particular that the overall background of the publications had to be taken into account. The letter-bomb attacks were directed against politicians and other persons committed to protecting the rights of groups suffering persecution and discrimination. Being based on National Socialist ideology they were perceived as a threat to the democratic order of the Republic. Accordingly, its reporting in this context had to be seen as a contribution to a political debate. Moreover, the applicant company emphasised that B., who was the main suspect in the criminal proceedings reported upon, was not unknown to the public. Being a militant right-wing extremist, he had attracted public attention and received media coverage already before the letter-bomb attacks. The applicant company added that B.'s picture was published by all other media while the criminal proceedings against him were pending and that he was indeed convicted of offences under the National Socialist Prohibition Act by final judgment.

48. The applicant company conceded that in cases concerning the publication of an individual's picture in the context of reporting, a conflict may arise between the freedom of the press and the individual's right to protection of his or her private and family life. However, the photographs of B. used in its reports did not infringe B.'s personal integrity, as they were not in themselves degrading or defamatory. The applicant company also accepted that the State may be called upon to ensure that the media do not infringe the presumption of innocence, as reports on pending proceedings may endanger the impartiality of the courts. However, it argued that in the present case the injunctions were disproportionate as they contained an

absolute prohibition on the publication of B.'s picture, irrespective of the accompanying text.

49. The Government stressed that the publication of B.'s picture encroached upon his right to respect for his private life and, having regard to the disparaging text accompanying it, also violated the presumption of innocence. In such a case section 78 of the Copyright Act affords the person concerned the requisite protection of his or her rights under Articles 6 and 8 of the Convention. As this provision applies when "legitimate interests" of the person concerned are violated, it calls for weighing the person's interest in banning the publication against the interest of the media in providing information.

50. The Government asserted that the injunctions were proportionate, as the Austrian courts correctly weighed the interests involved. Having regard to the accompanying text in the original articles giving rise to the dispute, which referred to B. as the perpetrator of the letter-bomb attacks, and the extraordinary public attention any reporting on the issue attracted, the publication of B.'s picture constituted a particularly serious violation of his rights. The Government concluded that the relatively wide scope of the injunctions was necessary as the identification of which accompanying texts should be banned in connection with the publication of the pictures was not expedient. Moreover, the injunctions did not affect the applicant company's right to publish comments on the proceedings against B.

51. Finally, the Government contested that the applicant company's reporting contributed to a political debate and stressed that the applicant company's allegations that B. was the perpetrator of the letter-bomb attacks were simply false. In this context they pointed out that B. was acquitted of the charges of aiding and abetting assault, while the true perpetrator has meanwhile been convicted by final judgment.

52. The Court recalls its well-established case-law that the adjective "necessary", within the meaning of Article 10 § 2 implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision embracing both the law and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

In exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned court decisions in isolation; it must look at them in the light of the case as a whole, including the articles held against the applicant company and the context in which they were written. The Court must determine whether the interference at issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national courts to justify it are "relevant and sufficient" (see for instance the *Sunday Times* (no. 1) judgment cited above, p. 38, § 62; the *Observer* and

Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30, § 59; and the recapitulation in *Sürek v. Turkey (no. 1)*, [GC], no. 26682/95, § 58, ECHR 1999-IV).

53. In the present case the Vienna Court of Appeal, by judgment of 22 September 1994 in preliminary injunction proceedings (see paragraphs 19-22 above) and by judgment of 30 August 1995 in the subsequent main proceedings (see paragraphs 27-28 above), issued injunctions prohibiting the applicant company from publishing B.'s picture in the context of the criminal proceedings against him irrespective of the accompanying text. Its judgments were upheld by the Supreme Court (see paragraphs 23 and 29 above).

54. The articles which gave rise to the injunction proceedings were written against the background of a spectacular series of letter bombs which had been sent to politicians and other persons in the public eye in Austria and had severely injured several victims. The attacks, thus, were a news item of major public concern. The applicant company's articles dealt with the activities of the extreme right and in particular with B., who had been arrested as the main suspect. Being a right-wing extremist, he had entered the public scene well before the series of letter-bomb attacks. Moreover, it has to be borne in mind that the offences he was suspected of, namely offences under the Prohibition Act and aiding and abetting assault through letter bombs, were offences with a political background directed against the foundations of a democratic society. It may be added that the photographs of B., with the possible exception of one wedding picture, did not disclose any details of his private life. Thus, the Court cannot subscribe to the Government's argument that the publications at issue encroached upon B.'s right to respect for his private life.

These circumstances have to be taken into account when assessing whether the reasons adduced by the Austrian courts for justifying the injunctions were "relevant" and "sufficient" and whether the injunctions were "proportionate to the legitimate aims pursued".

55. Another factor of particular importance for the Court's determination in the present case is the essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others or of the proper administration of justice, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III).

56. This duty extends to the reporting and commenting on court proceedings which, provided that they do not overstep the bounds set out above, contribute to their publicity and are thus perfectly consonant with the requirement under Article 6 § 1 of the Convention that hearings be public. Not only do the media have the task of imparting such information and

ideas: the public has a right to receive them (see the Worm judgment cited above, pp. 1551-52, § 50). This is all the more so where, as in the present case, a person is involved who has laid himself open to public scrutiny by expressing extremist views (see, *mutatis mutandis*, the Worm judgment, ibid.). However, the limits of permissible comment on pending criminal proceedings may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of justice (ibid.). Thus, the fact that B. had a right under Article 6 § 2 of the Convention to be presumed innocent until proved guilty is also of relevance for the balancing of competing interests which the Court must carry out (see Bladet Tromsø *and Stensaas* cited above, § 65).

57. The Vienna Court of Appeal stated in the reasons for its decision of 22 September 1994 and its subsequent judgment of 30 August 1995 that it was not the publication of B.'s picture in itself but its combination with comments which were insulting and contrary to the presumption of innocence that violated B.'s legitimate interests within the meaning of section 78 of the Copyright Act. Notwithstanding these remarks, and contrary to the Vienna Commercial Court which had regard to this link between pictures and text and prohibited the applicant company only from publishing B.'s picture in connection with statements in which he was insulted or referred to as the perpetrator of the letter-bomb attacks, the Vienna Court of Appeal imposed an absolute prohibition on the applicant company. It considered that it was not for B. to specify the statements the applicant company had to refrain from making but, unlike the Commercial Court (see paragraphs 25-26 above), it failed to give reasons for its approach.

58. The Court acknowledges that there may be good reasons for prohibiting the publication of a suspect's picture in itself, depending on the nature of the offence at issue and the particular circumstances of the case. A similar line of argument was followed by the Supreme Court, which stated that even the publication of a picture accompanied by a correct statement of fact could infringe the legitimate interests of the person concerned. However, no reasons to that effect were adduced by the Vienna Court of Appeal. Nor did it, contrary to the Vienna Commercial Court, carry out a weighing of B.'s interest in the protection of his picture against the public interest in its publication which, as the Government pointed out, is required under section 78 of the Copyright Act. This is all the more surprising as the publication of a suspect's picture is not generally prohibited under section 7a of the Austrian Media Act unless the suspect is a juvenile or the offences are only of a minor nature, but depends precisely on a weighing of the respective interests. In sum the reasons adduced by the Vienna Court of Appeal, though “relevant”, are not “sufficient”.

59. It is true, as the Government pointed out, that the injunctions did not in any way restrict the applicant company's right to publish comments on the criminal proceedings against B. However, they restricted the applicant company's choice as to the presentation of its reports, while it was undisputed that other media were free to continue to publish B.'s picture throughout the criminal proceedings against him. Having regard to these circumstances and to the domestic courts' finding that it was not the pictures used by the applicant company but only their combination with the text that interfered with B.'s rights, the Court finds that the absolute prohibition on the publication of B.'s picture went further than was necessary to protect B. against defamation or against violation of the presumption of innocence. Thus, there is no reasonable relationship of proportionality between the injunctions as formulated by the Vienna Court of Appeal and the legitimate aims pursued.

60. It follows from these considerations that the interference with the applicant company's right to freedom of expression was not "necessary in a democratic society". Accordingly, there has been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 10

61. The applicant company asserted that the injunctions also constituted a violation of Article 14 of the Convention taken in conjunction with Article 10 as it was discriminated against in relation to other media.

62. Having regard to its findings under Article 10 of the Convention taken alone (see in particular paragraph 59 above), the Court does not consider it necessary to examine this complaint.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

63. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

64. The applicant company claimed compensation for pecuniary as well as for non-pecuniary damage. As to pecuniary damage it submitted that it had, as a result of the prohibition on the publication of B.'s picture, suffered a loss of circulation and a loss of income from advertising which is directly

dependent on circulation. As to non-pecuniary damage, the applicant company alleged that the impugned court decisions caused prejudice to its reputation. In its memorial the applicant company did not specify any amounts claimed as compensation. At the hearing it requested 50,000 euros in respect of non-pecuniary damage.

65. The Government asserted that the applicant company had failed to show that it had actually sustained pecuniary damage. As to non-pecuniary damage, the Government considered that the finding of a violation would constitute sufficient just satisfaction.

66. As to pecuniary damage, the Court, like the Government, finds that the applicant company has failed to substantiate its claim.

As to non-pecuniary damage for the alleged loss of reputation, the Court will leave open whether a corporate applicant can claim non-pecuniary damage of this sort (see, *mutatis mutandis*, *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 79, ECHR 1999-V) as, in the circumstances of the case, the finding of a violation provides sufficient just satisfaction as regards any non-pecuniary damage the applicant company might have sustained.

B. Costs and expenses

67. In its memorial the applicant company claimed 151,327.32 Austrian schillings (ATS) as costs and expenses incurred in the domestic proceedings and ATS 78,977.70 for the Strasbourg proceedings. It further claimed ATS 45,800 for its participation at the hearing before the Court.

68. The Government did not comment on these claims.

69. The Court recalls that, according to its case-law, it has to consider whether the costs and expenses were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for example, Bladet Tromsø *and Stensaas* cited above, § 80). The Court considers that these conditions are met as regards the costs and expenses incurred in the domestic proceedings and, consequently, awards the sum of ATS 151,327.32. As to the costs for the Strasbourg proceedings, the Court finds the claim reasonable and, consequently, awards the full amount, namely ATS 124,777.70.

C. Default interest

70. According to the information available to the Court, the statutory rate of interest applicable in Austria at the date of adoption of the present judgment is 4% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;

2. *Holds* that it is not necessary to examine the complaint under Article 14 of the Convention taken in conjunction with Article 10;

3. *Holds* that the present judgment constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained;

4. *Holds*
   (a) that the respondent State is to pay the applicant company, within three months from the date on which this judgment becomes final according to Article 44 § 2 of the Convention, ATS 276,105.02 (two hundred and seventy-six thousand one hundred and five Austrian schillings two groschen), for costs and expenses;
   (b) that simple interest at an annual rate of 4% shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* the remainder of the applicant company's claims for just satisfaction.

Done in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 11 January 2000.

Michael O'BOYLE
Registrar

Elisabeth PALM
President

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In the case of Olsson v. Sweden (no. 2)*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr F. Matscher,
Mr L.-E. Pettiti,
Mr B. Walsh,
Mr C. Russo,
Mr S.K. Martens,
Mrs E. Palm,
Mr A.N. Loizou,
Mr A.B. Baka,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 24 April and 30 October 1992,

Delivers the following judgment, which was adopted on the last-mentioned date:

_____
Notes by the Registrar

* The case is numbered 74/1991/326/398. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

_____

PROCEDURE

1. The case was referred to the Court on 20 August 1991 by the Government of the Kingdom of Sweden ("the Government"), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 13441/87) against Sweden lodged with the European Commission of Human Rights ("the Commission") under Article 25 (art. 25) by two Swedish citizens, Mr Stig and Mrs Gun Olsson, on 23 October 1987.

The object of the application was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 (art. 8) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated

that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Mrs E. Palm, the elected judge of Swedish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 28 September 1991 the President drew by lot, in the presence of the Registrar, the names of the seven other members, namely Mr F. Matscher, Mr L.-E. Pettiti, Mr B. Walsh, Mr C. Russo, Mr S.K. Martens, Mr A.N. Loizou and Mr A.B. Baka (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the representative of the applicants on the organisation of the procedure (Rules 37 para. 1 and 38).

In accordance with the orders made in consequence the registry received, on 23 January 1992, the applicants' memorial and, on 6 February, the Government's. On 6 April the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

On 7 and 27 April the Commission filed a number of documents which the Registrar had sought from it on the President's instructions. These included some, but not all, of the documents requested by the applicants.

5. A number of documents were filed by the applicants and by the Government on various dates between 3 February and 15 April 1992.

6. As further directed by the President, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 April 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr C.H. Ehrenkrona, Legal Adviser,
Ministry for Foreign Affairs, Agent,
Mrs I. Stenkula, Legal Adviser,
Ministry of Health and Social Affairs,
Mrs B. Larson, Former Chief District Officer,
Social Services in Gothenburg, Advisers;

(b) for the Commission

Mr Gaukur Jörundsson, Delegate;

(c) for the applicants

Mrs S. Westerberg, lawyer, Counsel,
Mrs B. Hellwig, Adviser.

The Court heard addresses by Mr Ehrenkrona for the Government, by Mr Gaukur Jörundsson for the Commission and by

Mrs Westerberg for the applicants, as well as replies to questions put by the Court and by its President.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Introduction

7. The applicants, Mr Stig and Mrs Gun Olsson, who are husband and wife, are Swedish citizens and live at Angered, near Gothenburg in Sweden. There were three children of the marriage, namely Stefan, Helena and Thomas, born in June 1971, December 1976 and January 1979, respectively.

8. The present proceedings, which concern mainly Helena and Thomas, are a sequel to the case which the Court decided in its judgment of 24 March 1988, Series A no. 130 (hereinafter referred to as "Olsson I"). That case concerned the period from 16 September 1980, when the applicants' three children were taken into public care, to 18 June 1987, when the public care of Helena and Thomas was terminated (see paragraph 10 below). The main issue in that case was whether the decision to take the children into care, the manner in which it had been implemented and the refusals to terminate the care had given rise to violations of Article 8 (art. 8) of the Convention. In the context of the case now under review it is of importance to note that with regard to this issue the Court held that "the implementation of the care decision, but not that decision itself or its maintenance in force, gave rise to a breach of Article 8 (art. 8)" (Olsson I, p. 38, para. 84).

For the background to this case the Court refers in the first place to Part I of Olsson I (pp. 9-19, paras. 8-32).

B. Proceedings relating to the applicants' requests for termination of the public care order

9. A first request by the applicants for termination of the public care order was dismissed by the Social District Council no. 6 in Gothenburg ("the Social Council") on 1 June 1982. The dismissal was upheld by the County Administrative Court (länsrätten) on 17 November and by the Administrative Court of Appeal (kammarrätten) in Gothenburg on 28 December 1982. The applicants applied unsuccessfully for leave to appeal to the Supreme Administrative Court (regeringsrätten).

A fresh request, submitted to the Social Council in the autumn of 1983, was, according to the Government, rejected on 6 December 1983. Apparently, no appeal was lodged against this decision.

10. A further request by the applicants for termination of the public care, apparently lodged on 16 August 1984, was rejected by the Social Council on 30 October 1984 as far as concerns Helena and Thomas and, after further investigations, on 17 September 1985 as regards Stefan. Appeals by the parents against these decisions were dismissed by the County Administrative Court on 3 October 1985 and 3 February 1986, respectively, after it had obtained expert opinions from Chief Doctors Per H. Jonsson and George Finney and from a psychologist, Mr Göran Löthman, on 22 and 30 August 1985 and held a

hearing on 20 September 1985 in the former case.

The applicants thereupon appealed to the Administrative Court of Appeal in Gothenburg, which joined the two cases. On 12 February 1986 the court decided to request an opinion from the County Administrative Board (länsstyrelsen), which it received on 15 April 1986. A hearing was scheduled for 21 August 1986 but was postponed until 4 February 1987. After the hearing, at which the applicants gave evidence, the court, by judgment of 16 February 1987, directed that the public care of Stefan be terminated and dismissed the appeal in so far as it concerned Helena and Thomas.

Following an appeal by the parents, the Supreme Administrative Court, by judgment of 18 June 1987, directed that the public care of Helena and Thomas should terminate, there being no sufficiently serious circumstances to warrant its continuation.

C. Prohibition on removal and related proceedings

1. Decision to prohibit removal and refusal to suspend its implementation

11. In the above-mentioned proceedings, the Supreme Administrative Court pointed out that the question to be determined in deciding whether care should be discontinued pursuant to section 5 of the 1980 Act (see the above-mentioned Olsson I judgment, pp. 25-26, para. 49) was whether there was still a need for care. The problems associated with the removal of a child from a foster home and its possible detrimental effects on him and with his reunion with his natural parents were matters to be considered not under section 5 but in separate proceedings, namely an examination under section 28 of the Social Services Act 1980 (socialtjänstlagen 1980: 620; see paragraph 57 below).

12. On 23 June 1987 the Social Council prohibited, pursuant to section 28 of the Social Services Act, the applicants from removing Helena and Thomas from their respective foster homes. This decision referred, inter alia, to the two reports by Chief Doctors Jonsson and Finney (see paragraph 10 above). The latter report noted that Thomas was no longer depressive but still had traits of a childhood disturbance, in the form of delayed development and anguish in unfamiliar situations.

The Social Council's decision took account of the fact that Helena and Thomas had not been under the care of the applicants for a long time, that the contacts between the parents and the children had been very sparse and that the children had become emotionally attached to their respective foster families and environment. Regard was also had to the fact that Thomas was showing signs of greater stability, that Helena had expressed a wish not to move and that increased demands had been placed upon the natural parents by reason of Stefan's return to their home. There was a risk, which was not of a minor nature, that if Helena and Thomas were to be removed from their foster homes, their physical and mental health would thereby be harmed.

13. On 25 June 1987 the County Administrative Court rejected a request by the applicants for suspension (inhibition) of the prohibition order. That decision was confirmed by the

Administrative Court of Appeal on 2 July 1987 and, on 17 August, the Supreme Administrative Court refused leave to appeal.

2. First set of proceedings challenging the prohibition on removal

14. In the meantime, shortly after the decision of 23 June 1987 to prohibit removal, the applicants had appealed against it to the County Administrative Court. The court sought expert opinions from Chief Doctors Jonsson and Finney. According to these opinions, dated 14 July and 3 September 1987, the prohibition was in Helena's and Thomas's best interests because:

(a) Helena had shown signs of anxiety at the prospect of being forced to return to her biological parents. For instance, on learning about the lifting of the public care order, she had gone into hiding for two days; moreover, together with Thomas, she had worked out escape plans in the event of a return. Whilst deriving a feeling of support from her foster parents and friends, she felt extremely uncertain, critical and hesitant about her natural parents. Although the latter had demanded her return, they had not, in her view, indicated a willingness to form a relationship with her and this confused her. Removing Helena from her foster home against her own wishes would entail a substantial risk to her mental well-being and also to her physical health if, in desperation, she were to carry out her plan of escaping from the applicants' home;

(b) Thomas had suffered from certain childhood disturbances and had a retarded development. It was especially on the emotional plane that he was handicapped; he was very dependent upon his foster mother and was in a fragile phase of his development. To remove Thomas would have devastating effects on his mental development, both emotionally and intellectually.

Further, the psychologist Löthman, also considered, in an opinion supplied to the court on 3 September 1987, that remaining in the foster home was in Thomas's best interests. Mr Löthman observed that Thomas had developed in a positive manner, although he continued to be psychologically vulnerable and to have great emotional needs. His attachment to the foster family had clearly been strong and positive; he had dismissed the idea, which gave rise to fear and anxiety on his part, of returning to his natural parents. In that event he intended to escape.

Both the Social Council and the guardian ad litem, Mr Åberg, recommended that the appeal be rejected. The applicants did not ask for a hearing and the court did not hold one. By judgment of 3 November 1987, it dismissed the appeal.

15. The applicants appealed to the Administrative Court of Appeal, asking it to revoke the prohibition on removal or, in the alternative, to limit the measure in time, at the most until 6 January 1988. Again they did not ask for a hearing; the Social Council and the guardian ad litem recommended that the appeal be dismissed. The court examined the case on the basis of the case-file and, by judgment of 30 December 1987, rejected the appeal.

16. The applicants then proceeded with an appeal to the Supreme Administrative Court, reiterating their request for revocation of the prohibition on removal or, in the alternative, for limitation of the measure in time, until 15 March 1988. On this occasion they asked for an oral hearing.

Leave to appeal was granted on 4 February 1988. On the same date the court requested the National Board of Health and Welfare (socialstyrelsen - "the Board") and the Social Council to submit their opinions on the case, which they did on 22 and 23 March 1988, respectively.

Both opinions stressed the necessity of prohibiting removal of the children. The Social Council intended, should the appeal be dismissed, to ask for the custody of the children to be transferred to their respective foster parents.

The Board, for its part, pointed out that, having regard to the long duration of the placement of the children in foster homes and to the limited contacts they had had, further contacts must be arranged under such conditions as would make the children feel secure and would recognise their attachment to and feelings of security in the foster homes. Referring to the child psychiatrists' and the psychologist's reports, the Board made mainly the same observations as those mentioned above (see paragraphs 12 and 14). It further noted, with regard to Thomas, that whilst it would take time for a child of his character to build up confidence in adults, his foster mother had succeeded in creating an environment in which he could feel confident. With regard to Helena, the Board also stated that she had reached a phase of puberty and emancipation, the normal course of which might be disturbed if she were forced to leave the foster home.

The Board further stressed that the relationship between the natural parents and the children was of decisive importance for the question of removal where, as in this case, the children had been placed in foster homes for long periods of time. In order to bring about a good relationship, co-operation between - on the one hand - the applicants and - on the other hand - the social welfare authorities and the foster parents was essential. It appeared from the case-file that the applicants' lawyer had not sought to achieve such co-operation, which was unfortunate for the children. It had had the consequence that no such relationship had been established between the children and their parents as would make it possible for the children to move to their parents without there being a serious risk of harm to the children. The Board recommended that the Social Council examine the possibility of having the custody of the children transferred to the foster parents.

17. The Supreme Administrative Court rejected the applicants' request for a hearing. With regard to the merits, in a judgment of 30 May 1988 it dismissed their claim for revocation of the prohibition on removal; it accepted, on the other hand, that the measure should be limited in time and modified the decision under appeal in such a way that the prohibition was to run until 30 June 1989. The judgment contained the following reasons:

> "When section 28 ... is applied to this case a balance must be struck between, on the one hand, respect for the [applicants'] and their children's private and family life,

including the [applicants'] rights as guardians according to the Parental Code, and, on the other hand, the need to safeguard the children's health (see the third paragraph of section 2 of Chapter 1 of the Instrument of Government [regeringsformen] and sections 1 and 12 of the Social Services Act; through these provisions the protection of private and family life referred to in Article 8 (art. 8) of the Convention ... can be ensured) ...

... When [public] care is terminated according to section 5 of the 1980 Act reunion should normally take place as soon as possible [and] ... needs to be prepared in an active and competent manner. Appropriate preparations should be made immediately after the care has been terminated. This should be done even if a prohibition under section 28 ... has been issued ... . The character and the extent of the preparations, as well as the time required for them, depend on the circumstances in each case; one or more suitably arranged and successful visits by the children to their parents' home must always be required. The need for a prohibition on removal of a more permanent nature can normally only be assessed after appropriate preparations have been made. It is the Social Council's responsibility to arrange the ... preparations for reuniting parents and children after the care has been terminated ... [This] responsibility includes an obligation to try persistently to make the parents and their lawyer participate, actively and in the children's best interests, in the preparations. The Social Council is not discharged from its responsibility by the mere fact that [they], by appealing against the Council's decisions or in other ways, show that they dislike measures taken by the Council or its staff. According to section 68 of the Social Services Act, the County Administrative Board should assist the Council with advice and ensure that the Council performs its tasks properly.

Pending the beginning and completion of appropriate preparations for reunion of parents and children the question of a more temporary prohibition on removal under section 28 ... may also arise. Such a prohibition should be seen as a temporary measure until the child can be separated from the foster home without any risk of harm as mentioned in that provision.

...

It appears from the examination of the present case that no appropriate preparations have been made to reunite the parents and the children. Instead, the time which has elapsed since the Supreme Administrative Court decided to terminate the public care seems to have been spent on litigation.

The issue whether a prohibition on removal under section 28 ... is needed in this case must therefore be examined without taking account of the effect of preparations that have been made. The Supreme Administrative Court's decision should thus concern the kind of temporary prohibition on removal that, according to what has been stated above, can be issued pending more appropriate preparatory measures.

From the examination - above all the opinion given by the Board and the medical certificates it quotes - it appears clearly that for the time being, before any preparations have been made, there is a risk which is not of a minor nature that Helena's and Thomas's physical and mental health would be harmed were they to be separated from their foster homes. Accordingly, there are sufficient reasons for a prohibition on removal under section 28 ...

As regards the duration of a prohibition on removal, the Supreme Administrative Court has in a previous decision (see Regeringsrättens Årsbok, RÅ 1984 2:78) stated inter alia the following: if, when the prohibition is issued, it is already possible to assess with sufficient certainty that there will be no such risk after a specific date - when some measures will have been taken or they will have had time to produce effects -, the prohibition must run only until that date. If, on the other hand, it is uncertain when the child could be transferred to the parents without this involving a risk which is not of a minor nature, the prohibition ought to remain in force until further notice and the question of a removal ought to be raised again at a later stage, when the risk of harming the child's health can be better assessed.

An application of this rule to the present case would mean that a prohibition on removal should remain in force until further notice. However, the circumstances of this case are different from those of the previous case, as no appropriate preparations have been made to reunite the parents and the children, owing to the serious conflict between the Social Council, on the one hand, and the parents and their lawyer, on the other. Furthermore it must be presumed in this case that only a fixed time-limit might induce the parties - without any further litigation - to co-operate in taking appropriate preparatory steps in the children's interest. If, within a certain time-limit, no such preparations have been made or their result is unacceptable, the Social Council may raise the question of a prolonged prohibition based on the circumstances pertaining at that time.

Having regard to the foregoing, the Supreme Administrative Court finds that the prohibition on removal should remain in force until 30 June 1989.

The European Court of Human Rights has, in its judgment of 24 March 1988, found that Sweden violated Article 8 (art. 8) of the Convention in one respect ... . This violation concerned the implementation of the care decision and, inter alia, the fact that the children were placed in foster homes situated so far away from their parents. The issue in this case is another, namely when and on what conditions the children can be reunited with their parents in view of the termination of the care by the Supreme Administrative Court on 18 June 1987. A prohibition on removal ... is therefore not in conflict with the judgment of 24 March 1988."

3. Request to return the children in accordance with Chapter 21 of the Parental Code

18. A request made by the applicants on 10 August 1987 that Helena and Thomas be returned to them in accordance with section 7 of Chapter 21 of the Parental Code (föräldrabalken; see paragraph 71 below) had been rejected by the County Administrative Court of Gävleborg, after a hearing on 1 March 1988, by two separate judgments of 15 March 1988. The court had found that there was a not insignificant risk of harming the children's mental health by separating them from the foster homes.

In a judgment of 11 July 1988 the Administrative Court of Appeal dismissed the applicants' appeal. On 23 September 1988 the Supreme Administrative Court refused them leave to appeal.

4. Appointments of a guardian ad litem

19. In connection with the above proceedings concerning the prohibition on removal, the District Court (tingsrätten) of Gothenburg, at the Social Council's request, had appointed Mr Claes Åberg on 17 July 1987 as guardian ad litem for Helena and Thomas (section 2 of Chapter 18 of the Parental Code). The appointment had not been notified to the applicants, who had not been heard on the matter; when their representative had learned about it, on 4 August, the time-limit for appealing against it had expired.

The applicants had asked the District Court to dismiss the guardian ad litem. It had done so on 26 October, on the ground that Mr Åberg, by having applied for legal aid on the children's behalf to the County Administrative Court on 31 July, had accomplished the task for which he had been appointed.

20. On 27 October 1987 the Social Council had again asked the District Court to appoint Mr Åberg as guardian ad litem. On this occasion the court had invited the applicants to state their views before it took a decision. It had granted the request on 12 February 1988.

The applicants appealed to the Court of Appeal (hovrätten) for Western Sweden, which dismissed the appeal on 23 August 1988. On 8 November 1988 the Supreme Court (högsta domstolen) refused them leave to appeal.

5. Second set of proceedings challenging the prohibition on removal

21. On 28 September 1988 the applicants made a fresh request to the Social Council to lift the prohibition on removal, invoking - as a new circumstance - the Commission's opinion in the Eriksson v. Sweden case (annexed to the Court's judgment of 22 June 1989, Series A no. 156, pp. 38-55). The request was rejected.

22. In a judgment of 12 December 1988 the County Administrative Court dismissed an appeal by the applicants against the Social Council's decision. The court, referring to the reasoning in the Supreme Administrative Court's judgment of 30 May 1988 (see paragraph 17 above), pointed out that no appropriate preparatory measures for reunion as mentioned therein had been taken. It considered that there would still be a risk of harm to the children if the prohibition on removal were lifted.

23. A further appeal by the applicants to the Administrative Court of Appeal was rejected on 22 December 1988. It noted that Mr Olsson had met the children on 11 and 12 October 1988 at their respective foster homes and schools and that the children had visited the applicants' home on 16 and 17 December, accompanied by the foster parents. The court found, nevertheless, for the reasons expressed in the County Administrative Court's judgment, that the prohibition should be maintained.

Leave to appeal was refused by the Supreme Administrative Court on 14 February 1989.

6. Renewal of prohibition on removal and related proceedings

24. On 27 June 1989, a few days before the expiry of the prohibition on removal, the Social Council decided to renew it until further notice. Moreover, it refused a request by the applicants that the children spend their summer holidays with them in Alingsås and visit them every weekend, unaccompanied by the foster parents (see paragraph 50 below).

25. On appeal, the County Administrative Court, by judgment of 4 September 1989, confirmed the prohibition on removal but decided that it was to run only until 31 March 1990. The court again relied on the reasoning in the Supreme Administrative Court's judgment of 30 May 1988 and noted, moreover, that few measures had been taken in preparation for removal. It was highly unsatisfactory that, as long as two years after the termination of the public care, the conditions for executing that decision had not been fulfilled. The court considered that reasons still existed for maintaining the prohibition on removal and that, accordingly, the Swedish judiciary and public authorities had failed in this respect. Even though the applicants and their lawyer had not contributed to a desirable extent to facilitating the children's reunion with their parents, the main responsibility for doing this lay with the Social Council, which, as stressed by the court, also had a duty to implement judgments.

26. Both the applicants and the Social Council appealed to the Administrative Court of Appeal; the applicants sought to have the prohibition lifted, whereas the Social Council asked for it to be maintained until further notice. By judgment of 23 January 1990 the court confirmed the lower court's decision, but extended the time-limit for the prohibition until 1 August 1990.

The applicants were refused leave to appeal by the Supreme Administrative Court on 8 March 1990.

7. Further renewal of the prohibition on removal and related proceedings

27. The Social Council asked the County Administrative Court, on 12 July 1990, to issue a new prohibition on removal, to be effective until further notice. By judgment of 27 July 1990, the court renewed the prohibition until 28 February 1991. It noted that no preparatory measures with a view to reuniting the children and the parents had been taken; such measures were necessary in view of the atmosphere of hostility that existed between the parties to the proceedings, which was detrimental to Helena and Thomas. There were

therefore good reasons to maintain the prohibition on removal. The need for this measure was also shown by the fact that the question of a transfer of the custody of the children to the foster parents was scheduled for examination by the District Court in the autumn (see paragraphs 53-54 below).

The applicants lodged an appeal against this judgment with the Administrative Court of Appeal. They have apparently asked the court to stay the proceedings pending the final outcome of those concerning the transfer of custody.

D. The applicants' access to the children subsequent to the entry into force of the prohibition on removal

28. Prior to the termination of the public care of Helena and Thomas on 18 June 1987, the applicants' contacts with the children had been sparse. Access had, since February 1983, been restricted to one visit every third month in the foster homes. However, no such visits occurred during the period from June 1984 until April 1987, when Mr Olsson and the elder son Stefan visited them (for further details, see the above-mentioned Olsson I judgment, pp. 15-16, paras. 21, 24-26). It does not appear that any formal decision with regard to access was taken in connection with the decision of 23 June 1987 to prohibit the applicants from removing Helena and Thomas from the foster homes.

1. Particulars concerning the applicants' access to Helena and Thomas

29. Since the prohibition on removal was imposed on 23 June 1987, the following meetings have taken place between the applicants and Helena and Thomas:

(a) 22 July 1988: a meeting of a few hours in a park in Gothenburg, the children being accompanied by one of the foster parents;

(b) 11 and 12 October 1988: visits by Mr Olsson in the foster homes;

(c) 16 and 17 December 1988: visits by the children, accompanied by the foster mothers, in the applicants' home, the night being spent in a hotel;

(d) 8 and 9 April 1989: visits by the applicants in the foster homes;

(e) 16 and 17 June 1989: visits by the children, accompanied by the foster mothers, in the applicants' home, the night being spent in a hotel.

2. Access claims and related proceedings

30. Shortly after the decision of 23 June 1987 to prohibit removal, the applicants, through their lawyer, asked the social welfare authorities to arrange for Helena and Thomas to visit them in their home in Gothenburg. By letter of 27 October 1987 from the social welfare officer, they were advised that they should first visit the children so that they could get to know them better and prepare for a visit by the children in Gothenburg together with the

foster parents. Subject to prior consultation with the foster parents, the applicants were free to decide on the further arrangements for visits in the foster homes. Finally, the letter indicated a possibility of refunding travel and subsistence expenses incurred by the applicants in connection with their visits.

Throughout the autumn of 1987, there was an exchange of letters between the applicants' lawyer and the social welfare authorities - mainly the Chief District Officer - on the question of access. Whilst the applicants insisted that the children visit them without the foster parents, the Chief District Officer, referring to the justifications for the prohibition on removal, maintained that since Mrs Olsson had not met the children since 1984, both applicants should first visit them in their respective foster home environment. Moreover, in the event of a visit by the children in the applicants' home, at least one of the foster parents should be present.

31. On 18 December 1987 the Chairman of the Social Council refused a request by the applicants to visit Helena and Thomas without the foster parents being present. She found no reason to amend the Chief District Officer's decision on the matter. On 21 December the Social Council was informed of the refusal; it decided to take note of it but did not take any specific measures.

32. The applicants appealed against the Chairman's decision to the County Administrative Court, asking it to confer on them a right of access as requested. In a decision of 8 March 1988, the court found that it was not possible to appeal, under section 73 of the Social Services Act (see paragraph 60 below), against measures prescribed by the Social Council as to the manner, time and place of access and refused the appeal.

On 29 April 1988 the Administrative Court of Appeal upheld that judgment, noting that the Chairman's decision had not been taken under section 28 of that Act and did not fall into any other category of measures which could be appealed against pursuant to section 73.

33. The applicants then proceeded with an appeal to the Supreme Administrative Court, alleging that the Chairman's decision of 18 December 1987 was unlawful and that the absence of a right of appeal against it constituted a violation of Article 13 (art. 13) of the Convention. The court granted leave to appeal and, in a decision (beslut) of 18 July 1988, refused the appeal. It stated:

> "Under section 16 of the [1980 Act] ..., a Social Council may restrict the right of access in respect of children taken into public care under this Act. As regards the right of access to children while a prohibition on removal is in force, no similar power has been vested in the Social Council in the relevant legislation. As there is no legal provision empowering the Social Council to restrict the right of access while the prohibition on removal is in force ..., the instructions given by the Chairman of the Social Council in order to limit the right of access have no legal effect. Nor can any right of appeal be inferred from general principles of administrative law or from the European Convention on Human Rights."

34. On 15 August 1988 the applicants lodged a municipal appeal (kommunalbesvär; see paragraph 63 below) with the Administrative Court of Appeal against the Chairman's decision of 18 December 1987. The court found that that decision could not form the object of a municipal appeal and that, in so far as the appeal might be considered as directed against the Social Council's failure to take any specific measures when informed of the decision (see paragraph 31 above), it was out of time. The appeal was thus dismissed on 10 October 1988.

35. In the meantime, on 21 March and 11 April 1988, the social welfare authorities had rejected requests by the applicants' lawyer that Helena and Thomas be allowed to attend their grandmother's funeral and a special burial ceremony and, in this connection, stay for one night at the applicants' home. The social welfare authorities had pointed, inter alia, to the fact that the children hardly knew their grandmother and to the need to arrange contacts in an environment in which the children could feel safe and confident.

36. In June and July 1988 the social welfare officer contacted the applicants and arranged for talks involving Mr Olsson and the foster parents, to plan the meeting which took place in Gothenburg on 22 July 1988 (see paragraph 29 above). Mrs Olsson did not participate in these preparations, as she insisted on having access on her own terms. However, as suggested by the social welfare officer, Helena's foster mother was invited to the applicants' home after a preparatory meeting. On one occasion the officer asked Mr Olsson for his and his wife's telephone number in order to facilitate contacts, but he declined to give it.

After the meeting on 22 July 1988, Mr Olsson told the social welfare authorities that he had been disappointed; he had felt that he was being watched and controlled and Helena had called her foster mother "mummy".

37. On 8 August 1988 the social welfare authorities dismissed a request made by the applicants on 2 August that Helena and Thomas be allowed to join them - on 5 August or at the latest on 8 August - for the rest of the summer holidays, on the ground that meetings should be arranged in such a way as not to jeopardise the children's health and development.

38. On 11 August 1988 the applicants' lawyer demanded that the children be permitted to visit them every weekend and school holiday until 30 June 1989. At a meeting with two social welfare officers on 17 August 1988, Mr Olsson showed understanding of the view that such visits were not appropriate and stated that he would recommend a "soft line" in the efforts to bring about suitable access. On his suggestion, the next meetings were planned to take place in the foster homes in October. On 18 August the Social Council rejected the request of 11 August.

39. On 19 August 1988 the applicants' lawyer reiterated the request for access at weekends. In reply, the social welfare officer informed her of the discussion with Mr Olsson on 17 August (see paragraph 38 above). A few days later, Mr Olsson told social welfare officers that he was dissatisfied, on account of their attempts to delay access as much as possible. They reminded him that he had himself proposed that the next meeting with the children should be in October. The meetings were held on 11 and

12 October 1988 (see paragraph 29 above). On this occasion the social welfare authorities booked and paid for air tickets and hotel rooms for two persons, but Mrs Olsson declined to go.

3. Access plan

40. On 7 December 1988 the Chief District Officer recommended an access plan to the Social Council. The recommendation referred, inter alia, to two expert opinions, one by Chief Doctor Jonsson and another by Chief Doctor Finney and the psychologist, Mr Löthman, dated 10 and 12 October 1988, dealing specifically with the question of access. The former noted, with respect to Helena, that it was important to place emphasis on her own wishes, to improve her possibilities of knowing about her natural parents and to arrange the access in a manner which would make it an everyday event; she should meet the applicants together with the foster parents. The latter opinion stressed, with regard to Thomas, that access should be resumed only if he so wished to which end certain preparatory measures aimed at motivating him should be made - and only if meetings were attended by the foster parents. It was essential that the natural parents and the foster parents co-operate in the child's best interests.

The plan envisaged access as follows:

(a) on 16 and 17 December 1988: visit by the children, accompanied by the foster mothers, in the applicants' home; if this was successful:

(b) visit by the applicants in the foster homes over two days in February 1989; if this went well:

(c) visit by the applicants to Thomas in his foster home and to Helena, if she so wishes, in April 1989; again, if this went well:

(d) visit similar to that mentioned at (a), to be organised over a few days in June 1989 with a possibility of letting the children choose to spend the night at the applicants' home rather than at a hotel, provided that the foster mother accompany them;

(e) in addition to the above, the applicants should be able to arrange visits by agreement with the foster parents.

41. The applicants met Helena and Thomas as envisaged at (a) and, on 20 December 1988, the Social Council adopted the plan. It was communicated to the applicants and their lawyer for comments, but they objected to it.

4. Further access claims

42. During 1989 and 1990 the applicants, through their lawyer, continued to make a large number of requests for access; in particular, they demanded that the children visit them during weekends at their own home and without the foster parents being present.

Several of these requests were refused by the social welfare authorities for such reasons as the children being opposed to visiting the parents and wishing to be visited by them instead (letters of 27 September 1989 and 7 February 1990) or too short

notice having been given to organise the visits (letters of 28 March and 13 September 1989) or indications by Mr Olsson that he would give the children a certain period to reflect on the matter during which he would not claim access (letter of 11 October 1989).

Moreover, the social welfare authorities dismissed on 21 April and 26 May 1989 requests that Helena and Thomas attend the birthday celebrations of their grandfather and their brother Stefan. In the former case, regard was had to the fact that Helena did not wish to go and, in the latter case, to the fact that the date in question was inconvenient, being the last day of the school year.

Furthermore, on 21 March 1989 the Social Council refused access for the purposes of a medical examination, which the applicants had requested in order to obtain a medical certificate to be used in the proceedings before the Commission. The decision was based on an opinion by the Board that further examination of the children might be harmful to them and would be of no assistance in those proceedings.

43. In a report of 30 May 1989 to the social welfare authorities, Chief Doctor Finney recommended that access should continue to some extent between the applicants and Thomas and should be arranged in his foster home, not in the applicants' home. A similar view was expressed by the psychologist, Mr Löthman, in his report of the same date. According to a report of 13 June supplied by Chief Doctor Jonsson to the social authorities, Helena found that travelling to the applicants' home was a trying experience and preferred being visited by them. In his view, contacts served to fulfil her need to be kept informed about the applicants.

The Chief District Officer, in a report of 15 June 1989, made the following assessment of the question of access. Having regard to the fact that visits by the children in the applicants' home would not only conflict with expert opinions but were also not welcomed by the children, access arrangements should primarily consist of the parents visiting the children in the foster homes. However, should the children express an interest in visiting the applicants, the social welfare authorities would assist in arranging such contacts. In the light of these considerations, the Chief District Officer adopted a plan for visits by the parents in August and October 1989 and then by the children in December 1989. The applicants were invited to contact the social welfare authorities on the matter, but did not do so. The reason for this, as later explained by Mr Olsson, was that on a previous occasion he had not been received properly by the social welfare officer responsible for their case.

44. By letter of 16 November 1989, the applicants again asked for the children to be allowed to visit them every weekend; they also sought permission, firstly, for themselves and their son Stefan to visit the children in one of the foster homes without the foster parents being present and, secondly, for their lawyer to meet Helena and Thomas to inform them of the applicants' and Stefan's situation and to explain to them why they had been taken into public care and why the applicants did not wish to visit them in the foster homes in the foster parents' presence.

The Head of the Social Service (socialförvaltningen) in Gothenburg replied by letter of 20 November 1989 that the social

welfare officer would contact them as soon as possible with a view to making a suitable arrangement for their next meeting with the children.

45. On 21 November 1989 the social welfare authorities received a letter from the applicants' lawyer reiterating the claims of 16 November. A further letter was received on 22 December, requesting access to the children in one of the foster homes in the absence of the foster parents. In reply to the latter, the social welfare authorities informed the lawyer on 27 December that they would contact the foster parents directly on the matter.

46. On 21 December 1989 the applicants had reported the officer in charge of their case to the Public Prosecution Authority (åklagarmyndigheten) of Gothenburg for misuse of power and asked for her immediate arrest. The reason for this action was her failure to comply with their request of 16 November 1989. On 30 January 1990 the Public Prosecution Authority discontinued the criminal investigation, finding no indication that a criminal offence had been committed.

47. In a letter dated 25 January 1990, the social welfare authorities invited the applicants to talks in order to find a solution to the problem of access but, by letter received on 1 February from the applicants' lawyer, they were advised that such talks would serve no purpose.

48. In response to letters from the applicants' lawyer, dated 13 February and 2 March 1990 and mainly reiterating their requests made in November and December 1989, the social welfare authorities, by letter of 8 March, pointed out that they were not opposed to meetings; they invited the applicants to contact the foster parents to make arrangements, failing which the applicants would be contacted by the latter.

49. On 14 May 1990 the applicants' lawyer demanded that the children be left to be met by the parents at Gothenburg airport on certain specified dates and, on 5 June, she requested that this be arranged every weekend. In the meantime, on 17 May, the social welfare authorities had replied that Thomas's foster mother would write to them and had also asked the applicants to contact the foster parents by telephone, as the former had a secret telephone number. On 6 June the lawyer asked the Social Council to grant - immediately after 1 July (the date of the entry into force of the 1990 Act; see paragraphs 64 and 67 below) - access every weekend at the applicants' own home and in the absence of the foster parents.

In this connection, the Chief District Officer submitted to the Social Council a report, dated 2 July 1990, making observations similar to those in her report of 15 June 1989 (see paragraph 43 above) and recommending that the request be dismissed. The report noted, inter alia, that since the meeting in June 1989, the children had become strongly opposed to visiting their parents but were open to being visited by them. The applicants' demands as to the forms of access had had the effect of increasing the gap between them and the children.

On 4 September 1990 the Social Council dismissed the applicants' request for access every weekend at their own home, finding that access should instead take place in the foster homes in

conformity with the children's wishes.

5. Further proceedings concerning access

50. The applicants' lawyer, in her capacity as a member of the municipality of Gothenburg, filed two municipal appeals (see paragraph 63 below) with the Administrative Court of Appeal: one was against the Social Council's decision of 27 June 1989 (see paragraph 24 above) in so far as it concerned access and the other against its decision of 20 December 1988 adopting an access plan (see paragraphs 40-41 above).

With regard to the first appeal, the court found, by judgment of 8 January 1990, that the contested part of the Social Council's decision of 27 June 1989 was unlawful and annulled it.

As to the second appeal, the court held, in another judgment of the same date, that the adoption of the plan formed part of the measures considered necessary by the Social Council in order to permit removal of the children without there being any risk of harm to them. The plan was not a formal decision on the applicants' right of access, especially since it provided that they could visit the children in accordance with the latter's wishes.

On 8 March and 27 December 1990, respectively, the Supreme Administrative Court refused the applicants' lawyer leave to appeal against the second judgment and the Social Council leave to appeal against the first.

51. Moreover, on 28 July 1989 the applicants complained to the Parliamentary Ombudsman (justitieombudsmannen) who, in an opinion of 2 May 1990, stated, inter alia, that it appeared from the examination of the case that the Social Council had acted solely out of consideration for the children. In view of this fact and of the lacunae in the Social Services Act 1980 on the question of regulation of access (see paragraph 62 below) - which had led to legislative amendments in 1990 (see paragraphs 64 and 67 below) -, she declared the matter closed.

52. The applicants also lodged an appeal with the County Administrative Court against the Social Council's decision of 4 September 1990 (see paragraph 49 above). It was dismissed by judgment of 12 December 1990. The court found that the applicants' allegation that the foster parents had influenced the children against their natural parents was not borne out by the investigations in the case; on the contrary, they showed that the children wished to meet their parents, albeit on their terms. Moreover, the sort of access requested did not take the children's interests into account and would not benefit them. There was therefore no ground for allowing access during weekends, as requested by the applicants. The court did not examine their claim for access during school holidays as this had not been dealt with by the Social Council.

The applicants further appealed to the Administrative Court of Appeal. They appear to have asked the court to keep their appeal in abeyance pending the outcome of the transfer of custody proceedings (see paragraphs 53-54 below).

E. Transfer of custody

53. Although the present judgment is not concerned with the question of transfer of custody, the decisions by the Swedish authorities on the matter are described below in so far as they may shed light on the case.

The Social Council decided on 31 October 1989 to institute proceedings in the District Court of Alingsås for a transfer of the custody of Helena and Thomas to their respective foster parents. After holding a preliminary hearing on 27 February 1990, the court, by judgment of 24 January 1991, transferred the custody. It ordered that the applicants should each year receive three day-time visits from the children at their home and be able to visit them at the foster homes for three weekends.

54. The applicants appealed against the District Court's judgment to the Court of Appeal for Western Sweden. The latter held a hearing at which it took evidence from two welfare officers who had been responsible for the case, the children's respective foster parents, Chief Doctors Jonsson and Finney, as well as Helena and a contact person (kontaktman) of hers within the social services. The applicants maintained, inter alia, that the foster parents were unsuited as custodians. In particular, they contended that they had learned after the District Court judgment that Helena's foster father, Mr Larsson, had been charged in 1986-87 with assault, including sexual assault, and sexual exploitation of a minor, namely another foster girl called "Birgitta". Mr Larsson had been acquitted by Hudiksvall District Court due to lack of evidence. However, he had stated during the police investigations that he had acted in a manner which, according to the applicants, constituted sexual assault, although it had not been covered by the charges. The public prosecutor had appealed against the acquittal but had subsequently withdrawn the appeal.

By judgment of 24 January 1992, the Court of Appeal upheld the Alingsås District Court's judgment. It stated, inter alia, that, having regard to Helena's and Thomas's age and degree of maturity, great importance should be attached to their views about the questions of custody and access. It was clear that they both wanted to remain in their foster homes. Moreover, contacts between the applicants and the children had been very infrequent, especially in recent years. According to the applicants, they had been prevented from exercising their right of access partly because they had previously felt unwelcome and been badly treated by the foster parents, and partly because the social welfare authorities had been opposed to providing financial assistance for journeys to meet the children. However, these allegations were refuted by the social welfare officers and the foster parents. In the view of the Court of Appeal, the absence of contacts was due rather to lack of desire and initiative on the part of the applicants to visit the children. In addition, the applicants had kept their telephone number secret.

The claim that the foster parents were unsuited as custodians was mainly directed against Helena's foster father, Mr Larsson. The court found that when giving evidence before it, he had left an impression of reliability and honesty, despite the fact that he must have been under pressure due to his wife's illness and the manner in which he was questioned by the applicants' lawyer. Further, the court observed that the conditions in the Larssons' home had been examined carefully on a number of occasions during the

relevant period; Helena had good contacts with people in her environment and had since recently had a contact person who had been heard by the court; moreover, she had visited the applicants on her own in March 1991: on no occasion had she said that she had been assaulted by Mr Larsson or shown any sign to this effect. At the hearing before the court, she had emphatically denied that he had behaved improperly towards her. The court found that there was no evidence to support the allegation that Helena had been, or ran a risk of being, a victim of improper conduct on the part of Mr Larsson. As regards Mrs Larsson's illness, the Court of Appeal noted that she spent most of her time at home and that both Mr Larsson's and Helena's statements indicated that the emotional ties between Helena and Mrs Larsson had been strengthened, rather than weakened, since she became ill. The illness could thus not constitute an obstacle to the transfer of custody. Finally, the investigations provided no evidence to suggest that Thomas's foster parents, Mr and Mrs Bäckius, were unsuited. On the contrary, what emerged in the proceedings was that both children were well cared for in the foster homes, in a secure and stimulating environment.

A further appeal by the applicants to the Supreme Court is currently pending.

II. RELEVANT DOMESTIC LAW

A. The Child Welfare Act 1960 and the 1980 legislation replacing it

55. Decisions concerning the applicants' children were based on the Child Welfare Act 1960 (barnavårdslagen 1960:97 - "the 1960 Act"), the Social Services Act 1980 (socialtjänstlagen 1980:620) and the 1980 Act containing Special Provisions on the Care of Young Persons (lagen 1980: 621 med särskilda bestämmelser om vård av unga - "the 1980 Act").

The Social Services Act 1980 contains provisions regarding supportive and preventive measures effected with the approval of the individuals concerned. The 1980 Act (1980:621), which provided for compulsory care measures, complemented the Social Services Act 1980; when they entered into force on 1 January 1982, they replaced the 1960 Act. In general, decisions taken under the 1960 Act, which were still in force on 31 December 1981, were considered to have been taken under the 1980 Act. As from 1 July 1990 the relevant legislation has been amended (see paragraphs 64-67 below).

56. It is primarily the responsibility of the municipalities to promote a positive development for the young. For this purpose each municipality has a Social Council, composed of lay members assisted by a staff of professional social workers.

1. Prohibition on removal

57. The Social Council could, after the termination of public care (for details of the Swedish law on compulsory care, see the Olsson I judgment, pp. 20-27, paras. 35-50), issue a prohibition on removal under section 28 of the Social Services Act, which read as follows:

> "The Social Council may for a certain period of time or until further notice prohibit the guardian of a minor from

> taking the minor from a home referred to in section 25 [i.e. a foster home], if there is a risk, which is not of a minor nature, of harming the child's physical or mental health if separated from that home.
>
> If there are reasonable grounds to assume that there is such a risk, although the necessary investigations have not been completed, a temporary prohibition may be issued for a maximum period of four weeks, pending the final decision in the matter.
>
> A prohibition issued under this section does not prevent a removal of the child from the home on the basis of a decision under Chapter 21 of the Parental Code."

The preparatory work (Prop. 1979/80:1, p. 541) relevant to this provision mentioned that a purely passing disturbance or other occasional disadvantage to the child was not sufficient ground for issuing a prohibition on removal. It stated that the factors to be considered when deciding whether or not to issue such a prohibition included the child's age, degree of development, character, emotional ties and present and prospective living conditions, as well as the time he had been cared for away from the parents and his contacts with them while separated. If the child had reached the age of 15, his own preference should not be opposed without good reasons; if he was younger, it was still an important factor to be taken into account.

The Standing Social Committee of the Parliament stated in its report (Socialutskottets betänkande 1979/80:44, p. 78), inter alia, that a prohibition might be issued if removal could involve a risk of harm to the child's physical or mental health, thus even where no serious objections existed in regard to the guardian. The Committee also stressed that the provision was aimed at safeguarding the best interests of the child and that those interests must prevail whenever they conflicted with the guardian's interest in deciding the domicile of the child. It also took as its point of departure the assumption that a separation generally involved a risk of harm to the child. Repeated transfers and transfers which took place after a long time, when the child had developed strong links with the foster home, should thus not be accepted without good reasons: the child's need for secure relations and living conditions should be decisive.

58. According to the case-law of the Supreme Administrative Court (RÅ 1984 2:78), while a prohibition on removal is in force, the Social Council is under a duty to ensure that appropriate measures aimed at reuniting parents and child are taken without delay.

59. Section 28 of the Social Services Act did not apply to children who were being cared for in foster homes under section 1 of the 1980 Act. As long as such care continued, the right of the guardian to determine the domicile of the child was suspended. Whilst that right in principle revived on the termination of such care, it could be further suspended by an application of section 28 by the social welfare authorities.

60. Under section 73 of the Social Services Act, a decision taken under section 28 could be appealed to the administrative

courts. In practice, besides the natural parents both the child concerned and the foster parents have been allowed to lodge such appeals. In the proceedings before the administrative courts, a special guardian may be appointed to protect the interests of the child, should these come into conflict with those of the child's legal guardian.

2. Regulation of access

61. While a child was in public care under the 1980 Act, the Social Council was empowered to impose restrictions on the parents' right of access to him, in so far as necessary for the purposes of the care decision (section 16). Such restrictions could be appealed against to the administrative courts by both the parents and the child.

62. The legal position concerning restrictions on access during a prohibition on removal was different. As held by the Supreme Administrative Court on 18 July 1988, a decision by the Social Council to restrict the access rights of Mr and Mrs Olsson - who were the appellants in that case - while a prohibition on removal under section 28 of the Social Services Act was in force had no legal effect and no appeal to the administrative courts would lie against such a decision (see paragraph 33 above).

3. Municipal appeal

63. Pursuant to sections 1 and 2 of Chapter 7 of the 1977 Municipal Act (kommunallagen 1977:179), a member (medlem, e.g. a resident) of a municipality may lodge a municipal appeal (kommunalbesvär) with the Administrative Court of Appeal against decisions by municipalities on the following grounds: failure to observe the statutory procedures, infringement of the law, ultra vires conduct, violation of the complainant's own rights, or other unfairness. The appeal has to be filed within three weeks from the date on which approval of the minutes of the decision has been announced on the municipal notice-board. If the court upholds the appeal, it may quash the decision, but not give a new decision.

B. New legislation

64. The provisions of the Social Services Act which related to a prohibition on removal are now contained, in amended form, in the 1990 Act with Special Provisions on the Care of Young Persons (lagen 1990:52 med särskilda bestämmelser om vård av unga - "the 1990 Act"). This entered into force on 1 July 1990.

65. Section 24 of the 1990 Act, which corresponds to the previous section 28 of the Social Services Act (see paragraph 57 above), provides that the County Administrative Court may, on application by the Social Council, impose a prohibition on removal for a certain time or until further notice. The condition for such a prohibition is that there must be

> "an apparent risk (påtaglig risk) that the young person's health and development will be harmed if he is separated from the home".

Although this wording differs from that of section 28 of the 1980 Act, it was not intended, according to the preparatory work

(Prop. 1989/90:28, p. 83), to introduce a new standard.

66. According to section 26 of the 1990 Act, the Social Council shall, at least once every three months, consider whether a prohibition on removal is still necessary. If it is not, it shall lift the prohibition.

67. Pursuant to section 31, the Social Council may decide to regulate the parents' access to the child if it is necessary in view of the purposes of the prohibition on removal. Such decisions may, under section 41, be appealed against to the administrative courts.

C. The Parental Code

68. Chapter 21 of the Parental Code deals with the enforcement of judgments or decisions regarding custody and other related matters.

69. Section 1 specifies that actions for the enforcement of judgments or decisions by the ordinary courts concerning the custody or surrender of children or access to them are to be instituted before the County Administrative Court.

70. According to section 5, enforcement may not take place against the will of a child who has reached the age of 12 unless the County Administrative Court finds enforcement to be necessary in the child's best interests.

71. Under section 7, if the child is staying with someone other than the person entitled to custody, the child's custodian may, even when no judgment or decision as described in section 1 exists, seek from the County Administrative Court an order for the transfer of the child to him. Such an order may be refused if the best interests of the child require that the question of custody be examined by the ordinary courts.

When taking decisions under this section, the County Administrative Court shall also observe the requirements laid down in section 5 (see paragraph 70 above).

PROCEEDINGS BEFORE THE COMMISSION

72. In their application of 23 October 1987 to the Commission (no. 13441/87), Mr and Mrs Olsson alleged a series of violations of Article 8 (art. 8) of the Convention on the ground, inter alia, that the Swedish social welfare authorities had hindered their reunion with Helena and Thomas and had prevented the applicants from having access to them. They also complained of a number of breaches of Article 6 (art. 6) and, in addition, invoked Articles 13 and 53 (art. 13, art. 53).

73. On 7 May 1990 the Commission declared the application admissible.

In its report dated 17 April 1991 (Article 31) (art. 31), the Commission expressed the opinion:

(a) unanimously, that there had been a violation of Article 8 (art. 8) on the ground that the restrictions on access were not "in accordance with the law";

(b) by seventeen votes to three, that there had been a violation of Article 8 (art. 8) with regard to the prohibition on removal;

(c) unanimously, that there had been a violation of Article 6 para. 1 (art. 6-1) on the ground that the applicants did not have access to court to challenge the restrictions on access to the children;

(d) by fourteen votes to six, that there had been no violation of Article 6 para. 1 (art. 6-1) as a result of the duration of the proceedings concerning the termination of the public care of Stefan, Helena and Thomas;

(e) by nineteen votes to one, that there had been no violation of Article 6 para. 1 (art. 6-1) with regard to the duration of the proceedings under Chapter 21 of the Parental Code;

(f) by nineteen votes to one, that there had been no violation of Article 6 para. 1 (art. 6-1) on the ground that the Supreme Administrative Court did not hold a hearing on the applicants' appeal concerning the prohibition on removal;

(g) unanimously, that there had been no violation of Article 6 para. 1 (art. 6-1) in relation to the first appointment of a guardian ad litem;

(h) unanimously, that there had been no violation of Article 6 para. 1 (art. 6-1) as a result of the duration of the proceedings relating to the second appointment of a guardian ad litem;

(i) unanimously, that it was not necessary to examine whether there had been a violation of Article 13 (art. 13) in respect of the restrictions on access;

(j) unanimously, that there had been no violation of Article 13 (art. 13) in respect of the first appointment of a guardian ad litem.

The full text of the Commission's opinion and the dissenting opinion contained in the report is reproduced as an annex to the present judgment*.

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* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 250 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

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FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

74. At the hearing on 22 April 1992, the Government confirmed the final submission in their memorial admitting violations of the Convention in that, for a certain period, the restrictions on access decided by the Social Council were not "in accordance with the law"

and that the applicants had not had a court remedy in respect of those restrictions. On the other hand, they invited the Court to hold that there had been no violation of the Convention in the present case other than those admitted by them.

AS TO THE LAW

I. SCOPE OF THE CASE BEFORE THE COURT

75. The present application of 23 October 1987, as declared admissible by the Commission, raised a series of complaints as to (1) the prohibition on removal, its maintenance in force and the restrictions on the applicants' access to the children while the prohibition was in force; (2) the length of certain specific domestic proceedings and the lack of a hearing on appeal; and (3) alleged violations of the right of access to a court or to an effective remedy with respect to certain decisions (see the Commission's decision on admissibility, under the heading "Complaints", and paragraphs 95 and 176-185 of its report).

In their subsequent pleadings, the applicants appeared to raise a number of further complaints relating to (a) the decision to transfer custody of Helena and Thomas to their respective foster parents (see paragraphs 53-54 above); (b) the independence and impartiality of the courts which made or upheld this decision; and (c) the total length of the national proceedings (which had started in 1980 and were not yet terminated).

These new complaints were, however, not covered by the Commission's decision on admissibility. It is true that, on certain conditions, the rule that the scope of the Court's jurisdiction is determined by the Commission's admissibility decision may be subject to qualifications (see, inter alia, the Olsson I judgment, p. 28, para. 56), but the complaints in question do not meet those conditions. The Court therefore has no jurisdiction to entertain them.

Accordingly, it will not go into the applicants' circumstantial allegations before the Court to the effect that the foster parents of Helena and Thomas were for various reasons unsuited as carers. The Court presumes, as the Government evidently did, that these allegations were made solely in support of the complaints made by the applicants in respect of the transfer of custody proceedings. The Court notes, however, that the allegations were rejected after careful examination by the Court of Appeal for Western Sweden in those proceedings (see paragraph 54 above).

II. ALLEGED VIOLATIONS OF ARTICLE 8 (art. 8) OF THE CONVENTION

A. Introduction

76. The applicants' complaints under Article 8 (art. 8) of the Convention concerned the period from 18 June 1987, when the public care of Helena and Thomas was terminated (see paragraph 10 above), to 24 January 1991, when the custody of these children was transferred to their respective foster parents (see paragraphs 53-54 above). The applicants contended that the prohibition on removal, its maintenance in force and the restrictions on access had given rise to breaches of Article 8 (art. 8) of the Convention, which provides as follows:

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

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

The Government admitted that there had been a violation of Article 8 (art. 8) in that until 1 July 1990 the restrictions on access had no basis in domestic law, but otherwise contested the applicants' allegations. The Commission reached a corresponding conclusion with respect to the restrictions on access, but also expressed the opinion that the maintenance in force of the prohibition on removal, without any meaningful contact between the applicants and their children being established and without any other effective measure to resolve the existing problems, constituted a violation of Article 8 (art. 8).

B. Was there an interference with the applicants' right to respect for family life?

77. The prohibition on removal and its maintenance in force, as well as the restrictions on access, clearly constituted, and this was not disputed, interferences with the applicants' right to respect for family life (see, amongst other authorities, the above-mentioned Eriksson judgment, Series A no. 156, p. 24, para. 58).

Such interference entails a violation of Article 8 (art. 8) unless it is "in accordance with the law", has an aim or aims that is or are legitimate under Article 8 para. 2 (art. 8-2) and is "necessary in a democratic society" for the aforesaid aim or aims (ibid.).

C. Were the interferences justified?

1. "In accordance with the law"

78. In the applicants' submission, the measures taken by the Swedish authorities had, contrary to Swedish law, been intended to prevent them from being reunited with Helena and Thomas and from having appropriate access to them. On the other hand, the applicants did not seem to question the lawfulness of access restrictions imposed after the entry into force of the 1990 Act on 1 July 1990 (see paragraph 67 above).

(a) Prohibition on removal

79. The Court observes that the prohibition on removal and its maintenance in force were based until July 1990 on section 28 of the Social Services Act 1980 and then on section 24 of the 1990 Act, which replaced section 28. Furthermore, it does not appear from the material before the Court that these measures were motivated by any considerations other than those mentioned in the relevant provisions, namely the protection of the children's health. There

is no evidence for the contention that they were taken in order to prevent the reunion of Helena and Thomas with their parents.

Moreover, the measures had been upheld on appeals to, or been renewed by, the administrative courts, albeit in some instances subject to certain time-limits (see paragraphs 14-17, 22-23 and 25-27 above). In this connection, it is to be recalled that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, inter alia, the Margareta and Roger Andersson v. Sweden judgment of 25 February 1992, Series A no. 226-A, pp. 27-28, para. 82).

80. Having regard to the foregoing, the Court, like the Commission and the Government, considers that the prohibition on removal and its maintenance in force were "in accordance with the law".

(b) Restrictions on access

81. On the other hand, according to an authoritative interpretation of Swedish law by the Supreme Administrative Court in the present case, the imposition of restrictions on access while a prohibition on removal under the Social Services Act 1980 was in force lacked any legal effect, as there was then no legal provision on which such restrictions could be based (see paragraph 33 above and the above-mentioned Eriksson judgment, Series A no. 156, p. 25, para. 65). This situation lasted from 23 June 1987 to 1 July 1990, when the 1990 Act entered into force. During this period, the impugned restrictions - as conceded by the Government - were not "in accordance with the law" for the purposes of Article 8 (art. 8).

82. There has accordingly been a violation of Article 8 (art. 8) of the Convention in so far as concerns the restrictions on access between 23 June 1987 and 1 July 1990.

2. Legitimate aim

83. According to the applicants, the aim of the contested measures was to prevent their reunion with Helena and Thomas. Moreover, they claimed that they had not been allowed to meet them on their own because the social welfare authorities and the foster parents had been afraid that the children might disclose information about unsatisfactory living conditions in the foster homes.

84. However, as already stated above (see paragraph 79), there is no evidence that the purpose of the prohibition on removal and its maintenance in force was to hinder reunion; the Court shares the view of the Commission and the Government that this measure was aimed at protecting the children's "health" and "rights and freedoms".

85. The Court considers that on this occasion it should examine the aims of all the restrictions on access, irrespective of their periods of application. It does not find it established that any of them was aimed at preventing the family's reunion or the disclosure of information of the kind indicated by the applicants. On the contrary, it is convinced that they pursued the same legitimate aims as the measures referred to in paragraph 84 above.

3. "Necessary in a democratic society"

86. According to the applicants, the interferences were not "necessary in a democratic society". The Government contested this allegation but the Commission accepted it.

87. In exercising its supervisory jurisdiction the Court must determine whether the reasons given for the prohibition on removal, its maintenance in force until the transfer of custody and the restrictions on access which were in operation throughout this period were "relevant and sufficient" in the light of the case as a whole (see the Olsson I judgment, p. 32, para. 68). This determination must start with the Social Council's decision of 23 June 1987 - immediately after the Supreme Administrative Court's judgment of 18 June 1987 terminating the public care - to prohibit removal of Helena and Thomas from their respective foster homes.

That decision - which was unanimously upheld, at three levels, by administrative courts which had the benefit of reports from child psychiatrists and a psychologist as well as from specialised agencies was essentially based on the consideration that separating the children from their foster homes would, in the circumstances obtaining at the time, involve a serious risk of harm to the children's physical and mental health (see paragraphs 12-17 above).

The prohibition on removal order must be evaluated against the following background which appears from the file.

Helena and Thomas had been cared for in the foster homes for a long period that had begun at the end of 1980, in fact for most of their lives. Their contacts with their natural parents had been very sparse indeed: they had not met their mother since 1984, they had since seen their father only once and there had been no other contacts with their parents. They had become strongly attached to their respective foster families and environment, in which they had developed in a positive and harmonious manner. Both children had expressed a strong wish to remain in the foster homes, had shown anxiety about the possibility of being forced to return to their natural parents and had indicated that they would run away were they to be so returned. Helena was in an important phase of her personal development, which might be impaired if she were to be returned against her own wishes. Thomas had suffered from certain childhood disturbances and was still psychologically very vulnerable as well as emotionally dependent upon his foster parents. Separating him from the latter was likely to cause him considerable and long-lasting psychological harm.

Against this background the reasons for ordering the prohibition on removal were, in the Court's opinion, both relevant and sufficient.

88. The prohibition on removal lasted until the transfer of custody, that is, for a total of three and a half years (June 1987 - January 1991). The original order was upheld in three sets of proceedings and was twice renewed, in 1989 by the Social Council and in 1990, under the 1990 Act, by the County Administrative Court. The applicants appealed each time, but these appeals were unanimously dismissed (see paragraphs 14-17 and 21-27 above).

In all of these decisions the national courts found that

there remained a serious risk that separating the children from their foster homes would harm them; they pointed out in particular that there had been insufficient preparatory contacts between them and the applicants.

Given that the factors indicated in paragraph 87 above did not essentially change during the period under review, the Court finds that the reasons for the maintenance in force of the prohibition on removal were in any case "relevant". Whether they were also "sufficient" cannot be ascertained without inquiring why, despite the fact that as early as the first set of proceedings relating to the prohibition on removal the Swedish courts had time and again stressed the crucial importance of adequate preparatory contacts, these contacts remained insufficient during the whole period. It is in this context that the restrictions on access have to be assessed.

89. The restrictions on access which applied throughout this period amounted to the following: while the applicants were free to visit the children in their foster homes as often as they wished, meetings outside those homes would be organised or allowed only under such conditions as would dispel the children's apprehensions.

These restrictions - which were supported by opinions of two psychiatrists and a psychologist (see paragraphs 40, 43 and 49 above) and, above all, were in accordance with the repeated wishes of the children - were based on reasons similar to those underlying the prohibition on removal. The authorities took the view that not only the children's interests but also their rights under Article 8 (art. 8) of the Convention prevented the authorities from allowing requests for access under conditions which were unacceptable to the children.

In view of the situation which obtained, the Court finds that the restrictions on access were based on reasons which were "relevant" when it comes to ascertaining whether these restrictions were "necessary in a democratic society". It remains to be seen whether they also were "sufficient": for this purpose they must be assessed in the context indicated at the end of paragraph 88 above.

90. In doing so, the Court notes firstly that, both under Swedish law and under Article 8 (art. 8) of the Convention, the lifting of the care order implied that the children should, in principle, be reunited with their natural parents. In cases like the present, Article 8 (art. 8) includes a right for the natural parents to have measures taken with a view to their being reunited with their children (see, as the most recent authority, the Rieme v. Sweden judgment of 22 April 1992, Series A no. 226-B, p. 71, para. 69) and an obligation for the national authorities to take such measures.

However, neither the right of the parents nor its counterpart, the obligation of the national authorities, is absolute, since the reunion of natural parents with children who have lived for some time in a foster family needs preparation. The nature and extent of such preparation may depend on the circumstances of each case, but it always requires the active and understanding co-operation of all concerned. Whilst national authorities must do their utmost to bring about such co-operation, their possibilities of applying coercion in this respect are limited

since the interests as well as the rights and freedoms of all concerned must be taken into account, notably the children's interests and their rights under Article 8 (art. 8) of the Convention. Where contacts with the natural parents would harm those interests or interfere with those rights, it is for the national authorities to strike a fair balance (see, mutatis mutandis, the Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, p. 18, para. 41).

In sum, what will be decisive is whether the national authorities have made such efforts to arrange the necessary preparations for reunion as can reasonably be demanded under the special circumstances of each case.

It is for the Court to review whether the national authorities have fulfilled this obligation. In doing so, it will leave room for a margin of appreciation, if only because it has to base itself on the case-file, whereas the domestic authorities had the benefit of direct contact with all those concerned.

91. In this connection the Court notes in the first place that the judgments rendered by the Swedish courts during the period under consideration contain some passages which might be understood as criticising the social welfare authorities for deficiencies in the making of appropriate preparations for reunion, but equally as urging them not to let themselves be influenced by the antagonistic course taken by the applicants and their counsel. However, the judgments which were given afterwards, in the transfer of custody proceedings, clearly take the view that the main responsibility for the necessary preparations not having been made lay with the applicants.

Indeed, the Swedish courts repeatedly stressed that in order to arrange adequate preparatory contacts, good co-operation between the social welfare authorities and the foster parents on the one hand and the applicants on the other hand was essential. Nevertheless, the applicants, although they knew that the access restrictions corresponded to the children's wishes, refused to accept them. They visited the children at the foster homes only twice (see paragraph 29 above) and also neglected other possible forms of contact, such as contact by telephone. Rather than follow the course of co-operation recommended by the courts, the applicants instead chose that of continuous hostility: again and again they demanded access at their home without the foster parents' presence, which, as they were well aware, was unacceptable not only to the social welfare authorities but also to the children. In addition, they responded to the failure to comply with their demands by lodging complaints with the police and numerous appeals (see paragraphs 32-34, 46 and 50-52 above).

The social welfare authorities, for their part, tried to persuade the applicants to visit the children in their foster homes, offering to make the necessary arrangements and reimburse their travel costs and subsistence expenses. Furthermore, they organised a meeting in Gothenburg and, after consultation with two experts, drew up an access plan which cannot be said to have been unduly restrictive and seems to have satisfied the exigencies of the situation. Although this plan was rejected by the applicants, the social welfare authorities tried, with partial success, to put it into effect (see paragraphs 29 and 41 above).

In the light of the foregoing, the Court, having regard to the margin of appreciation to be left to the national authorities, has come to the conclusion that it has not been established that the social welfare authorities failed to fulfil their obligation to take measures with a view to the applicants being reunited with Helena and Thomas.

Accordingly, the maintenance in force of the prohibition on removal and the restrictions on access were based on reasons that were not only "relevant" but also, in the circumstances, "sufficient" (see paragraph 88 above).

92. The question whether the interferences with the applicants' right to respect for family life were "necessary" must therefore be answered in the affirmative. Consequently, their complaint under Article 8 (art. 8) fails on this point.

III. ALLEGED VIOLATION OF ARTICLE 53 (art. 53) OF THE CONVENTION

93. The applicants complained that, despite the Court's Olsson I judgment, the Swedish authorities had continued to prevent their reunion with Helena and Thomas; the applicants had still not been allowed to meet the children under circumstances which would have enabled them to re-establish parent-child relationships. In their view, Sweden had continued to act in breach of Article 8 (art. 8) and had thereby failed to comply with its obligations under Article 53 (art. 53) of the Convention, which reads as follows:

> "The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties."

This allegation was disputed by the Government, whereas the Commission did not express an opinion on the matter.

By Resolution DH (88)18, adopted on 26 October 1988, concerning the execution of the Olsson I judgment, the Committee of Ministers, "having satisfied itself that the Government of Sweden has paid to the applicants the sums provided for in the judgment", declared that it had "exercised its functions under Article 54 (art. 54) of the Convention".

94. The Court further notes that the facts and circumstances underlying the applicants' complaint under Article 53 (art. 53) raised a new issue which was not determined by the Olsson I judgment (p. 29, para. 57) and are essentially the same as those which were considered above under Article 8 (art. 8), in respect of which no violation was found (see paragraphs 87-92 above).

In these circumstances, no separate issue arises under Article 53 (art. 53).

IV. ALLEGED VIOLATIONS OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

95. Mr and Mrs Olsson also complained of several violations of Article 6 para. 1 (art. 6-1), which provides:

> "In the determination of his civil rights and obligations

... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

A. Judicial review of restrictions on access

96. The Government, like the Commission, accepted the applicants' contention that there had been a violation of Article 6 para. 1 (art. 6-1) on the ground that it was not possible for them, until the entry into force of the 1990 Act on 1 July 1990, to have the restrictions on their access to Helena and Thomas reviewed by a court (see paragraphs 33, 34, 51, 62, 73 and 74 above).

97. For the reasons set out in the above-mentioned Eriksson judgment (Series A no. 156, p. 29, paras. 80-81), the Court agrees. Accordingly, there has been a violation of Article 6 para. 1 (art. 6-1) on this point.

B. Length of certain proceedings

98. The applicants alleged that the duration of several of the domestic proceedings in their case had, contrary to Article 6 para. 1 (art. 6-1), exceeded a reasonable time.

The Government contested this allegation, which was rejected by the Commission.

99. The reasonableness of the length of proceedings is to be assessed in the light of the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and that of the relevant authorities. On the latter point, what is at stake for the applicant in the litigation has to be taken into account in certain cases (see, for instance, the X v. France judgment of 31 March 1992, Series A no. 236, pp. 89-90, para. 32).

1. The proceedings relating to one of the requests made by the applicants for termination of the public care

100. The applicants maintained that the examination of one of their requests for termination of the public care of Helena, Thomas and Stefan (see paragraph 10 above) had not been concluded within a "reasonable time".

101. The Court considers - and this was not in dispute before it - that the starting-point for the relevant periods was 16 August 1984, when the applicants submitted their request to the Social Council. The periods in question ran until 16 February 1987, when the public care of Stefan was revoked by the Administrative Court of Appeal, and 18 June 1987, when that of Helena and Thomas was terminated by the Supreme Administrative Court, thus lasting approximately two years and six months and two years and ten months, respectively.

102. The proceedings concerning Stefan lasted approximately thirteen months before the Social Council, four and a half months before the County Administrative Court and twelve months before the Administrative Court of Appeal; those in respect of Helena and Thomas took approximately two and a half months before the Social Council, eleven months before the County Administrative Court,

sixteen and a half months before the Administrative Court of Appeal and four months before the Supreme Administrative Court.

The proceedings were of a complex nature, involving difficult assessments and requiring extensive investigations. Hearings were held before the County Administrative Court in the case of Helena and Thomas and before the Administrative Court of Appeal in the case of all three children.

103. There are only two instances in which it is questionable whether the competent authorities proceeded with proper diligence.

Firstly, it took the Social Council thirteen months to decide on the request concerning Stefan. However, the Government explained that this had been due to certain investigations deemed to be necessary and the Court accepts this argument.

Secondly, the Administrative Court of Appeal had initially scheduled a hearing for 21 August 1986, but postponed it until 4 February 1987. Whilst indicating that they could not state with any certainty the reasons for this delay, the Government drew attention to the fact that, between 17 July and 20 November 1986, the case-file had not been with the Administrative Court of Appeal, but with the Supreme Administrative Court, which had had before it another appeal by the applicants. However, this does not sufficiently explain why the hearing was postponed for six months. In view of the nature of the interests at stake, it was of great importance, as the Commission also noted, that such matters be dealt with swiftly.

Nevertheless, having regard to the complexity of the case, the delay was not so long as to warrant the conclusion that the total duration of the proceedings was excessive.

2. The proceedings relating to the applicants' request under Chapter 21 of the Parental Code

104. Mr and Mrs Olsson further claimed that the proceedings concerning their request to have Helena and Thomas returned to them, in accordance with section 7 of Chapter 21 of the Parental Code (see paragraph 18 above), had exceeded a reasonable time.

Both the Government and the Commission disagreed.

In their main submission the Government disputed the applicability of Article 6 para. 1 (art. 6-1), on the ground that the proceedings in issue had been concerned only with the enforcement of existing rights and not with the determination of the existence or the content of such rights.

The Court has come to a different conclusion. There is no doubt that the outcome of the proceedings in issue affected, in a decisive manner, the exercise by the applicants of an essential aspect of their rights in respect of the custody of the children (see, amongst many authorities, the Skärby v. Sweden judgment of 28 June 1990, Series A no. 180-B, p. 36, para. 27). Their application to the County Administrative Court for the transfer of the children thus gave rise to a "contestation" (dispute) over one of their "civil rights" for the purposes of Article 6 para. 1 (art. 6-1). Consequently, this provision is applicable to the

proceedings in question.

105. As to whether the proceedings complied with the requirement of reasonable time, the Court observes that they lasted for a period of thirteen and a half months and comprised three levels of jurisdiction. Like the Commission, it does not find this to be excessive for the purposes of Article 6 para. 1 (art. 6-1).

3. The proceedings relating to the second appointment of a guardian ad litem

106. The applicants further contended that the proceedings concerning the second appointment of a guardian ad litem (see paragraph 20 above) had exceeded a "reasonable time".

These proceedings lasted a little more than a year and included three levels of jurisdiction. The Court agrees with the Commission that they were concluded within a reasonable time.

4. Conclusion

107. There has accordingly been no breach of Article 6 para. 1 (art. 6-1) on the three above-mentioned points.

V. MISCELLANEOUS ALLEGATIONS OF VIOLATIONS OF ARTICLES 6 PARA.1 AND 13 (art. 6-1, art. 13)

108. Before the Commission the applicants submitted that, in the first set of proceedings challenging the prohibition on removal, there had been a breach of Article 6 para. 1 (art. 6-1), in that the Supreme Administrative Court had refused to hold a hearing (see paragraph 17 above). They also alleged that, contrary to this provision, they had not been able to challenge the District Court's first appointment, on 17 July 1987, of a guardian ad litem for Helena and Thomas, since they had not been informed of this decision (see paragraph 19 above). In addition, they complained that they did not have an effective remedy within the meaning of Article 13 (art. 13) in respect of the restrictions on access and the decision of 17 July 1987 to appoint a guardian ad litem.

These complaints, which in the Commission's opinion were unfounded or did not need examination, were not mentioned by the applicants before the Court, which does not consider it necessary to examine them of its own motion.

VI. APPLICATION OF ARTICLE 50 (art. 50)

109. Mr and Mrs Olsson sought just satisfaction under Article 50 (art. 50), according to which:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

110. Under this provision the applicants sought 5,000,000 Swedish kronor for damage. In support of their claim they maintained, inter alia, that, despite the Olsson I judgment, the Swedish authorities had continued to deal with them in the same way. The compensation awarded by the Court in that judgment had had no impact; a significantly higher sum was therefore called for in the present case.

The Government considered the claim to be "out of proportion". They submitted that, should the Court uphold their contentions on the merits, only a symbolic amount should be granted.

111. The present judgment has found only violations of Article 8 (art. 8), on account of the restrictions on the applicants' access to Helena and Thomas imposed, for a certain period, without a proper basis in Swedish law, and of Article 6 para. 1 (art. 6-1), owing to the absence of a court remedy against the restrictions (see paragraphs 81-82 and 97 above). The Court considers that the applicants must, as a result, have suffered some non-pecuniary damage which has not been compensated solely by the findings of violation. Deciding on an equitable basis, it awards 50,000 Swedish kronor to the applicants jointly under this head.

B. Legal fees and expenses

112. The applicants claimed reimbursement of fees and expenses, totalling 1,286,000 Swedish kronor, in respect of the following items:

(a) 1,269,000 kronor for 625 hours' work by their lawyer in respect of the domestic and the Strasbourg proceedings and for 80 hours for the preparation of her oral pleadings and her appearance before the Court as well as for her journey to Strasbourg (in each case at 1,800 kronor per hour);

(b) expenses relating to journeys by the lawyer to meet a former foster daughter of the Larsson family in Northern Sweden (7,000 kronor) and to attend a court hearing in Gävle (2,000 kronor);

(c) 3,000 kronor in respect of a further journey to see the applicants and an appearance before the District Court in Alingsås as well as photocopying and telephone calls;

(d) 5,000 kronor to cover work by a translator checking the manuscript of the lawyer's oral pleadings before the Court.

With regard to item (a), the Government submitted that costs referable to the domestic proceedings did not warrant compensation under Article 50 (art. 50); such costs could have been paid under the Swedish legal aid scheme had the applicants applied for legal aid. Furthermore, in their view, the way in which the lawyer for the applicants conducted the proceedings before the Commission should be taken into consideration. The Government questioned whether the time which she claimed to have spent on the case was necessary and considered the hourly rate charged too high.

Items (b) and (c), the Government pointed out, seemed to be related, at least partly, to the domestic proceedings. They were

prepared to pay reasonable compensation for item (d).

113. As regards item (a), the Court notes that the applicants' lawyer agreed to act on the basis that she would not ask for fees under the Swedish legal aid scheme. Her clients have therefore incurred liability to pay fees to her. Legal fees referable to steps taken, in both the domestic and the Strasbourg proceedings, with a view to preventing or obtaining redress for the matters found by the Court to constitute violations of Articles 6 para. 1 and 8 (art. 6-1, art. 8) of the Convention, were necessarily incurred and should be reimbursed in so far as they were reasonable (see, for instance, the Olsson I judgment, Series A no. 130, p. 43, para. 104).

Bearing in mind that the applicants have succeeded only on the points mentioned in paragraph 111 above and making an assessment on an equitable basis, the Court considers that the applicants should be awarded under this head 50,000 kronor, from which must be deducted the 6,900 French francs already received from the Council of Europe in respect of legal costs.

114. Items (b) and (c) must be rejected as there is no evidence that they were necessarily incurred. On the other hand, the Court is satisfied that item (d) - translation costs - was necessarily incurred and was reasonable as to quantum.

FOR THESE REASONS, THE COURT

1. Holds by six votes to three that there has been no violation of Article 8 (art. 8) of the Convention in respect of the prohibition on removal;

2. Holds unanimously that there has been a violation of Article 8 (art. 8) on account of the restrictions on access imposed between 23 June 1987 and 1 July 1990;

3. Holds by six votes to three that there has been no violation of Article 8 (art. 8) on account of the restrictions on access imposed after 1 July 1990;

4. Holds unanimously that there has been a violation of Article 6 para. 1 (art. 6-1) in that no court remedy was available to challenge the restrictions on access imposed between 23 June 1987 and 1 July 1990;

5. Holds unanimously that there has been no violation of Article 6 para. 1 (art. 6-1) as regards any of the other points raised by the applicants before the Commission and the Court;

6. Holds by seven votes to two that no separate issue arises under Article 53 (art. 53);

7. Holds unanimously that it is not necessary to examine the other complaints, under Articles 6 para. 1 and 13 (art. 6-1, art. 13), which the applicants made before the Commission but did not reiterate before the Court;

8. Holds unanimously that Sweden is to pay to the applicants jointly, within three months, 50,000 (fifty thousand)

Swedish kronor for non-pecuniary damage, and, for legal fees and expenses, 55,000 (fifty-five thousand) Swedish kronor less 6,900 (six thousand nine hundred) French francs to be converted into Swedish kronor at the rate applicable on the date of delivery of the present judgment;

9. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 November 1992.

Signed: Rolv RYSSDAL
President

Signed: Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the partly dissenting opinion of Mr Pettiti, joined by Mr Matscher and Mr Russo, is annexed to this judgment.

Initialled: R.R.

Initialled: M.-A.E

PARTLY DISSENTING OPINION OF JUDGE PETTITI, JOINED BY JUDGES MATSCHER* AND RUSSO

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* Except as regards the penultimate paragraph on page 46.

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(Translation)

I did not vote with the majority of the Chamber for the non-violation of Article 8 (art. 8) of the European Convention on Human Rights as regards the prohibition on removal and restrictions on access (points 1 and 3 of the operative provisions). I consider, on the contrary, that there has been a serious violation of that Article (art. 8) in respect both of the prohibition on removal and of the restrictions on access after 1 July 1990, on the same lines as the findings in the Olsson I judgment (see particularly paragraph 81 which set out the reasons for concluding that Sweden had failed to comply with Article 8 in that case) (art. 8).

It appears clear that the social welfare officials did not take all the steps that they should have done in the light of that judgment with a view to promoting the exercise of the right of access and the right to have the children to stay which would have prepared the way for returning custody of the children to their parents.

Where the child has been separated from his parents over a long period (as was the case here and this was a situation for which the social welfare authorities bore some responsibility in respect of the period covered by the Olsson I judgment), flexible and sensitive measures must be taken.

In order to put reflection on the Olsson II judgment more clearly in context, it is helpful to recall the principal reasoning of the Olsson I judgment (in which a violation was found by twelve votes to three):

> "82. There is nothing to suggest that the Swedish authorities did not act in good faith in implementing the care decision. However, this does not suffice to render a measure 'necessary' in Convention terms ...: an objective standard has to be applied in this connection. Examination of the Government's arguments suggests that it was partly administrative difficulties that prompted the authorities' decisions; yet, in so fundamental an area as respect for family life, such considerations cannot be allowed to play more than a secondary role.
>
> 83. In conclusion, in the respects indicated above and despite the applicants' unco-operative attitude ..., the measures taken in implementation of the care decision were not supported by 'sufficient' reasons justifying them as proportionate to the legitimate aim pursued. They were therefore, notwithstanding the domestic authorities' margin of appreciation, not 'necessary in a domestic society'."

The Committee of Ministers confined itself to declaring that the pecuniary awards made under Article 50 (art. 50) of the Convention had been duly paid by the Government.

For all the periods considered, the authorities should have taken steps to ensure: the psychological preparation of the children and the progressive organisation repeated at least each month of meetings, at first short ones, if necessary even in the presence of a psychologist; these meetings could subsequently have been extended to a day, a weekend, a part of the holidays, under different conditions to those obtaining for the five series of meetings referred to in the judgment. The aim would be to avoid a situation in which the child, being conditioned by the foster family, adopted a deliberately obstructive attitude to these visits, which evidently posed a problem. It would also have been helpful to make a greater effort to prepare the parents for the progressive stages, making allowance for their frustration, for a degree of maladroit resistance on their part as well as for the difficulties arising from the need to travel because of the unfortunate choice of the foster families in terms of the geographical location of their home. The most important thing was to take account of the parents' persistent efforts to secure the return of their children, despite all the obstacles, which confirmed their parental attachment and their legitimate and consistent claim. In my view, neither the social welfare authorities nor the majority of the European Court sitting as a Chamber gave sufficient weight to the strength and extent of this attachment. From 23 June 1987 to 16 June 1989, there were only five actual meetings (see paragraph 29 of the judgment), and then no more during the relevant period.

It is true that since the Olsson I judgment these five attempts at meetings have taken place; the results were unsatisfactory but that could have been a temporary situation.

However, in view of the large number of misunderstandings

which had built up over the years, these attempts had no chance of succeeding without an adequate psychological preparation of the parties concerned. It is the duty of the social welfare authorities, and this is one of the most elementary principles of the methods of educative assistance practised in Europe, where this type of conflict is frequent, to make specific arrangements.

It is impossible to overcome in a matter of a few hours years of mutual incomprehension. Thousands of learned works by judges, lawyers, doctors, psychiatrists or psychologists, have been written on this subject. The technique of using neutral ground for meetings and progressive contacts is common, under judicial supervision. In any event it is always counterproductive for the parents to have to meet their children on the home ground of the foster family or in the latter's presence, because that often leads to the failure of the attempt.

The social welfare authorities displayed what was almost contempt both for the national courts and the European Court. It is somewhat surprising that neither the courts nor the governmental authorities managed to force the "imperialism" of the social services to give ground.

At no time did the social welfare authorities take the least account of the love for their children that the parents sought to express, a love that was demonstrated by the years of struggle in proceedings to seek to obtain the return of the children and the respect of their most sacred rights.

Clearly, the Olsson parents' attitude was not always helpful, particularly after 1989, and they must therefore bear a part of the responsibility. Yet one must not forget their despair after the repeated failures with which they met even after the favourable decisions of the European Court and the national courts (see paragraph 53 et seq. of the present judgment).

Adopting the tactics employed by their lawyers, which were perhaps too extreme, they hardened their position, but legally they had a number of valid reasons for doing so. In any case, the authorities were under a duty to exert a positive influence, by showing understanding and making repeated interventions, instead of reinforcing the differences.

In this type of situation it is necessary to seek to organise more and more meetings, to educate the children and the parents, to defuse conflicts. It is unfair to give priority to the obstinacy of the children and the foster families.

In the same connection, the long delays between each proceedings or intervention made the situation worse, whereas in other States and in other jurisdictions, hearings would have been held at shorter intervals by means of an urgent procedure before a children's judge. One is left with the impression that the authorities were content to allow the intransigence of the parents to strengthen the position of the social welfare authorities, despite the fact that the latter had never disguised their preference for the foster families, as if they sought to accord greater weight to material comfort than to paternal and maternal ties.

Viewed from the outside this attitude towards the parents may seem somewhat "inhuman".

It is to be regretted that reference was not made to the United Nations Convention on the Rights of the Child so as to permit the intervention of the children assisted by their lawyers, who could have played a useful role as mediators.

Whatever the case may be, the general and overall conduct of the authorities was such that the parents are permanently separated from their children, and this situation is now irreparable as a result of the refusal to allow access, a right which is not even refused to criminal parents in other countries. The Olsson parents have been definitively cut off from any family relationship. It is difficult to think of a more serious case of a violation of the fundamental rights protected by Article 8 (art. 8).

As I voted for the violation of the prohibition on removal and the restriction on access before and after 1990, I also consider that the Court should have examined the case under Article 53 (art. 53) and analysed the decision of the Committee of Ministers in the light of the European Court's judgment in the first Olsson case.

It is paradoxical that in the year of the implementation of the United Nations Convention on the Rights of the Child, which stresses the importance of parent-child relations, there should have been such a failure in the application of Article 8 (art. 8) of the European Convention.

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

COURT (PLENARY)

CASE OF OLSSON v. SWEDEN (No. 1)

(Application no. 10465/83)

JUDGMENT

STRASBOURG

24 March 1988

In the Olsson case[*],

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. J. CREMONA,
Mr. Thór VILHJÁLMSSON,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. A. SPIELMANN,
Mr. J. DE MEYER,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 23 September 1987 and 25 February 1988,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 13 March 1987 and by the Government of the Kingdom of Sweden ("the Government") on 13 April 1987, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in an application (no. 10465/83) against the Kingdom of Sweden lodged with the

[*] Note by the Registrar: The case is numbered 2/1987/125/176. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

Commission on 10 June 1983 under Article 25 (art. 25) by two Swedish citizens, Mr. Stig and Mrs. Gun Olsson.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Sweden recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); its purpose was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 3, 6, 8, 13 and 14 (art. 3, art. 6, art. 8, art. 13, art. 14) of the Convention and Article 2 of Protocol No. 1 (P1-2). The Government's application sought the Court's ruling on the interpretation of Article 8 (art. 8) of the Convention in relation to those facts.

2. In response to the inquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings pending before the Court and designated the lawyer who would represent them (Rule 30).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. G. Lagergren, the elected judge of Swedish nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 23 April 1987, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. Thór Vilhjálmsson, Mrs. D. Bindschedler-Robert, Mr. R. Macdonald, Mr. R. Bernhardt and Mr. J.A. Carrillo Salcedo (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. On 25 June 1987, the Chamber decided under Rule 50 to relinquish jurisdiction forthwith in favour of the plenary Court.

5. Having consulted, through the Registrar, the Agent of the Government, the Commission's Delegate and the applicants' lawyer regarding the need for a written procedure, the President of the Court decided, on 2 July 1987, that it was not necessary for memorials to be filed (Rule 37 § 1) and directed that the oral proceedings should open on 21 September 1987 (Rule 38).

6. The hearing was held in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mr. H. CORELL, Ambassador,
Under-Secretary for Legal and Consular Affairs, Ministry for Foreign Affairs, *Agent*,
Mr. K. RUNDQVIST, Under-Secretary for Legal Affairs,
Ministry of Health and Social Affairs,
Mr. P. BOQVIST, Legal Adviser,
Ministry for Foreign Affairs,
Mrs. A.-M. HOLMSTEDT, Legal Adviser,

Gothenburg Municipality, *Advisers*;

- for the Commission

Mrs. G.H. THUNE, *Delegate*;

- for the applicants

Mrs. S. WESTERBERG, lawyer, *Counsel*.

The Court heard addresses by Mr. Corell for the Government, by Mrs. Thune for the Commission and by Mrs. Westerberg for the applicants, as well as their replies to the questions put by the Court and its President.

7. On 27 July 1987, the applicants had lodged their claims for just satisfaction under Article 50 (Rule 49), which they supplemented with further particulars on 19 October. Written comments on those claims were received from the Government on 7 September and 23 November 1987 and from the Commission on 15 December 1987.

On 3 September and 16 November 1987, the Government, either on their own initiative or at the Court's request, filed various documents.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Background

8. The applicants, Mr. Stig and Mrs. Gun Olsson, who are husband and wife, were born in 1941 and 1944 respectively. They are Swedish citizens and live in Gothenburg in Sweden. The case concerns three children of the marriage, namely Stefan, born in June 1971, Helena, born in December 1976, and Thomas, born in January 1979 (hereinafter together referred to as "the children"). The applicants and the children belong to the Church of Sweden; the applicants' membership is purely nominal, as they describe themselves as atheists.

9. In their youth, both Mr. and Mrs. Olsson had spent some time at Stretered, a home for the mentally retarded. However, an examination by a psychologist in 1982 revealed that they then had an average level of intelligence. Other children of theirs had been in social care and Stefan has been subject to various forms of special education since 1975, when he was registered with the Social Welfare Administration for the Handicapped by reason of his being mentally retarded.

Prior to the events giving rise to the present case, a number of different social authorities had been individually involved with the family; they co-ordinated their activities from 1979 onwards. Mr. Olsson - who is in receipt

of a disability pension - and Mrs. Olsson were both given certain additional social assistance between 1971 and 1976. They stated that they lived apart on two occasions, the first time for three months and the second for eight months. From May 1977 to December 1979, they were provided with the support of a home-therapist, and a psychiatric team was in touch with the family as from 1979. It appears that the applicants had difficulty in co-operating with the social authorities.

B. Taking of the children into public care and related judicial proceedings

10. The family's situation was discussed by representatives of the various social authorities concerned at case conferences held on 26 October 1979, 29 November 1979 and 10 January 1980. The applicants were present on the last occasion, when different preventive measures for the children were agreed upon. According to the Government, nothing came of this agreement because the applicants abandoned it.

On 22 January 1980, Social District Council No. 6 in Gothenburg ("the Council") decided, pursuant to sections 25(a) and 26(4) of the Child Welfare Act 1960 (barnavårdslagen 1960:97 - "the 1960 Act"; see paragraphs 35 and 43 below), that the children should be placed under supervision in view of their parents' inability to satisfy their need for care and supervision.

11. Further case conferences, at which the applicants were present, were held on 13 March and 29 May 1980. On 22 August, at which time the parents were living apart, the Chairman of the Council decided, pursuant to section 30 of the 1960 Act (see paragraph 43 below), that the children should be provisionally taken into care so that their situation could be investigated. This decision, which had been prompted by the fact that Stefan and Helena had been found cycling around and unable to make their way home, was confirmed on 26 August by the Council after a meeting on the same day at which the applicants were present and made oral submissions.

12. On 16 September 1980, the Council decided, at a meeting at which the applicants were present and had an opportunity to submit their views, that the children should be taken into care, pursuant to sections 25(a) and 29 of the 1960 Act (see paragraphs 35 and 43 below). This decision was based, inter alia, on a report compiled by the social administration and dated 11 September 1980, which was produced at the meeting. The report reviewed the family history and background; recorded the applicants' opposition to the children's being taken into care; concluded that the latter's development was in danger since they were living in an environment which was unsatisfactory due to their parents' inability to satisfy their need for care, stimulation and supervision; noted that preventive measures had been taken, but with no result; and recommended the taking into care. Appended to the

report were statements from Stefan's former teacher, from Child Welfare Clinic No. 60 (concerning Helena and Thomas) and from the home where the children had been placed for investigation, together with a medical report dated 12 September 1980 and issued by Children's Psychiatric Clinic 2B at a hospital ("Östra sjukhuset") in Gothenburg. The medical report was signed by chief doctor Elisabeth Bosaeus, a consultant at the above-mentioned home, and by Helena Fagerberg-Moss, a psychologist, both of whom were members of the team that was in touch with the family. It read as follows (translation from the Swedish):

> "The above-mentioned children have been assessed at the children's psychiatric clinic at Östra sjukhuset on 10 September 1980. Both parents have been summoned to separate doctor's discussions but have not appeared. The family has been known at the children's psychiatric clinic since October 1979, when the social worker requested observation and an assessment of the development of Thomas following his admittance to that clinic for pneumonia and an investigation for urinary infection. After referral from the doctor responsible, the assessment of Thomas' development was made on 5 October 1979 by a psychologist, Helena Fagerberg-Moss. This psychologist and welfare officer (kurator) Birgitta Stéen thereafter participated in conferences at social welfare office no. 6 on 26 October and 29 November 1979 with all those involved in the case, concerning the supportive measures the family had received previously and for the planning of further measures. Social welfare office conferences, together with the parents, also took place on 10 January 1980, at which an application for a day-centre placement for Thomas and Helena was decided upon, and on 13 March and 29 May 1980, at which a holiday in a summer home or camp was planned for Helena and Stefan. During a home visit on 25 March 1980, Helena was also the subject of an assessment of her development by the psychologist Helena Fagerberg-Moss. Thomas was also the subject of a new assessment of his development on 11 September 1980. During Thomas' stay at the hospital, welfare officer Birgitta Stéen had contact with the parents. I have taken note of the investigation report of 18 January 1980, with proposals concerning supervision, and the report of 26 August 1980, with proposals concerning a care order. I have also taken note of the children's medical files. On 10 September 1980, Kerstin Lindsten, welfare officer at the school for retarded children, provided certain information by telephone concerning Stefan.
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> It appears from the medical file that at the age of four months Stefan was admitted to the Gothenburg children's hospital for assessment of his development and already at that stage he was found to be considerably retarded. At the age of six months he was retarded by two months. During a new test at the age of three years he was found to be at the developmental level of a 15 to 20 month old child. The psychologist Barbro Wikman considered him at that time to be passive, afraid and cautious. He was withdrawn and was most significantly retarded as regards his linguistic development. He was considered to be in great need of stimulation and the psychologist questioned whether there were sufficient opportunities for this in his home environment. He could not feed himself, could not run properly and he was not accustomed to playing with other children. According to the file, the parents were 'not interested in taking him to a special play-centre'. On 4 May 1976, it was noted that he never had cooked food, could not construct sentences, did not play outside, cried easily, could feed himself but did it rarely, and seemed pale and lethargic. Stefan now attends the third year in a school for the retarded. It appears that he is one of the weakest pupils. At the beginning of his time at this school, the home conditions appeared to be acceptable

since the family had a home-therapist. Subsequently, however, there were alarming reports that Stefan ran around outside and was often taken care of by the police. He could not control his urine and bowels, was teased by his friends because he smelled badly, and he was even undressed by them, according to the school welfare officer Kerstin Lindsten. Food problems have also occurred, according to the school nurse. Stefan mostly ate only sandwiches. The boy is short-sighted and needs to wear glasses, but he does not do so. Since the parents have also had difficulties in supervising and caring for Stefan, different ways of placing him have been discussed. A placement in an educational home appeared to be a good solution, but the parents withdrew at the last moment. Placement in a foster home has also been proposed, but the father reacted with depressive symptoms and kept the boy at home and away from school.

During a medical assessment on 10 September 1980 Stefan gave the impression of being very retarded in his development but, in addition, he was cut off in his personal contacts, did not hear questions, did not treat play material in an adequate manner and seemed to have a limited concentration and attention span. His behaviour was clumsy. He could not write his own name and, when drawing with a pencil, he folded the paper at an angle of 90^{o}. He did not wear his glasses.

During a development assessment in her home on 25 March 1980, carried out by Helena Fagerberg-Moss, Helena Olsson attained a level comparable to that expected of her age. During a visit to the children's welfare clinic, however, Helena was considered passive, looked afraid and had an undeveloped use of language. She has been going to a clinic since September 1979 for stomach problems, but this has not led to any measure being taken. During an assessment on 10 September 1980 she was shy when there were several persons in the same room, did not say anything and behaved as a mother towards Thomas, giving him toys and embracing him now and then. The same behaviour has been noted at the children's home.

Thomas' development has been assessed on 5 October 1979 and 11 September 1980 by Helena Fagerberg-Moss. During the first assessment he was somewhat below the level of development which was expected and was also somewhat passive and withdrawn in his contacts. During the second assessment he was seriously quiet, cautious and his face was without expression. His development was four to six months behind. His language (at the age of 20 months) corresponded to a degree of development of a six to eight month old child. He became clearly stimulated by play and test material and seemed to have development potential. He gave a clear impression that he had not received sufficient stimulation at home. In the medical file it has been noted in August 1979 that the mother's way of feeding Thomas was clearly abnormal. She held the feeding bottle at a distance and, even after having been asked to pick him up, there was no natural close contact. At the children's home it has been observed that the father still treats Thomas as a baby.

In summary, Stefan, Helena and Thomas are three children whose parents have been registered as being retarded. The father has retired early. In addition, the parents' inter-relations are bad. They have separated for a long period and are now separated again. The family has moved four times in two and a half years. Stefan and Thomas show clear signs of backwardness, probably of different origins. Furthermore, there is a lack of care for the children on the part of the parents, and the children's behaviour is disturbed. Stefan has had enuresis and encopresis, feeding difficulties, social difficulties with other children and has shown vagrancy tendencies. His special need of clean clothes, glasses (he is myopic), and extra care and stimulation because of his

backwardness, has not been met by his parents. The linguistic development of all the children is retarded. Such backwardness is the most frequent sign of under-stimulation. Helena, who is of average intelligence, is inclined to take too great a responsibility for her brother Thomas. Thomas has not had any opportunity of adequate training either physically or psychologically.

Since measures taken up to now in the form of a home-therapist, day-care nursery-home placement, supervision, etc. have not improved the situation, we recommend that Stefan, Helena and Thomas be taken into care and be given foster homes."

The applicants alleged that, before this medical report was prepared, Dr. Bosaeus had never met them and had never visited their home. They also complained of the fact that she did not herself examine the children until 10 September 1980, after they had been placed in care for investigation on 22 August 1980; at that time they were in a state of shock as a result of violent police action on their removal from their home and of their completely new environment. It appears, however, that the psychologist Helena Fagerberg-Moss assessed Thomas on 5 October 1979 and had visited the parents' home on 25 March 1980, when she assessed the development of Helena.

13. Since the applicants did not consent to the Council's decision of 16 September 1980, the matter was submitted, pursuant to section 24 of the 1960 Act (see paragraph 44 below), to the County Administrative Court (länsrätten) at Gothenburg. It held a hearing on 18 December 1980, at which Mrs. Olsson was represented by a lawyer under the Legal Aid Act (rättshjälpslagen) and the children by official counsel (offentligt biträde); Dr. Bosaeus was heard as an expert.

By judgment of 30 December 1980, the County Administrative Court confirmed the Council's decision. It stated (translation from the Swedish):

"It appears from the investigation of the case that the children, Stefan, Helena and Thomas, who all place specially high demands on those who care for them, have for several years been living in an unsatisfactory home environment as a result of the parents' inability to satisfy the children's need of care, stimulation and supervision.

Stefan and Thomas disclose a clear retardation in their development and all three children are backward in language development.

According to Dr. Bosaeus, who issued a medical report on 12 September 1980 and was heard as an expert in the oral proceedings, there is a great risk that Helena will develop negatively if she stays in the parents' home. It is therefore as important to place her in a foster home as it is for Stefan and Thomas. Dr. Bosaeus has accordingly recommended taking the three children into care.

Preventive measures with a home-therapist have been tried for several years and supervision has been arranged without any resulting improvement.

It must therefore be considered as proved that the health and development of the children are jeopardised as a result of the parents' present inability to give them satisfactory care and education.

The decision submitted is therefore compatible with the provisions in section 25(a) and section 29 of the 1960 Act."

14. Mrs. Olsson appealed to the Administrative Court of Appeal in Gothenburg (kammarrätten; see paragraph 50 below); her husband concurred in the appeal. The Council and official counsel for the children moved that the appeal be rejected. The Administrative Court of Appeal held a hearing and then, on 8 July 1981, confirmed the judgment of the County Administrative Court. However, one of the three judges and one of the two laymen sitting in the Court of Appeal, whilst agreeing with the taking of Helena into care, dissented as regards Stefan and Thomas.

15. Mrs. Olsson sought to appeal to the Supreme Administrative Court (regeringsrätten; see paragraph 50 below), but on 27 August 1981 it refused her leave to appeal.

C. Implementation of the care decisions

1. Placement of the children

16. On 22 August 1980, following the decision of the Chairman of the Council (see paragraph 11 above), the children were placed in a children's home in Gothenburg for an investigation of their situation. They remained there until their subsequent placement in separate homes, as described below.

(a) Stefan

17. Around 1 October 1980, the applicants removed Stefan from the children's home and hid him for approximately one month. He was then placed in an educational home in Gothenburg run by the Board for the Retarded, but his parents again took him away and hid him for about two months.

As from 28 February 1981, Stefan was placed, with the assistance of the police, with a foster family of the name of Ek - where he had previously spent some summers - at Tibro, approximately 100 kilometers from the applicants' home.

By decision of 28 June 1983, prompted by conflicts between the natural and the foster parents, the Council moved Stefan to a children's home, Viggen, at Vänersborg, which was run by the Board for the Retarded and situated about 80 kilometers to the north of Gothenburg.

(b) Helena and Thomas

18. Helena and Thomas were placed in separate foster homes - Helena with the Larsson family at Näsåker, in the vicinity of the town of Hudiksvall, on 21 October 1980 and Thomas with the Bäckius family at

Maråker, south of Söderhamn, on 10 November 1980. These localities, which lie to the north-east of Gothenburg, are about 100 kilometers from each other. The distances by road from Hudiksvall and Söderhamn to Gothenburg are 637 and 590 kilometers, respectively (see M·KAK, Bilatlas, Sverige, 1981).

19. The Government stated that the original intention had been to place Helena and Thomas with separate families in the same village, but that this had proved impossible at the last minute. They added that the Larsson and Bäckius families were in continuous contact, gave each other much support and met, together with Helena and Thomas, approximately every six weeks.

20. Thomas' foster parents and their own children are members of the Church of Sweden and attended church with him - regularly, according to the applicants, or two or three times a year, according to the foster parents.

2. Restrictions on the applicants' access to the children

21. Since the children were taken into care, their parents' access to them has been the subject of various decisions, including the following.

(a) Stefan

22. Stefan spent some three to four weeks with his parents in the summer of 1982. However, on 10 August 1982 the Council decided, pursuant to section 16(1) of the 1980 Act (see paragraph 48 below), to limit their access to him to one visit every six weeks. They appealed to the County Administrative Court, but on 17 November 1982 it confirmed the restrictions (see paragraph 28 below).

23. After 22 April 1984, Mr. and Mrs. Olsson were allowed to see Stefan every week, mostly at their home. He spent some weeks with them in the summer of 1986.

(b) Helena and Thomas

24. On 21 October 1980, the Council decided to ban access by the applicants to Helena and Thomas at their foster homes, in accordance with section 41 of the 1960 Act (see paragraph 48 below), and to prohibit disclosure of their whereabouts. However, the applicants were allowed to meet the children elsewhere, every second month. The decision was designed to protect the children's chances of settling down and was prompted by the fact that Stefan had previously been removed from his home and hidden by his parents (see paragraph 17 above).

The foregoing restriction was lifted in September 1981, but in February 1983 the Council decided, having regard to the attitude of confrontation adopted by the applicants towards the foster parents, to confine the former's contacts with Helena and Thomas to one visit at the foster homes every third month. This new restriction was confirmed by the County

Administrative Court, on appeal, on 25 March 1983 and again by the Council in decisions of 2 August 1983, 6 December 1983 and 30 October 1984. On 3 October 1985, the County Administrative Court dismissed an appeal by the applicants against the last-mentioned decision; they withdrew their appeal on this point in subsequent proceedings before the Administrative Court of Appeal (see paragraph 31 below) and the restriction therefore continued in force for the remainder of the period during which these children were in public care.

25. According to Mr. and Mrs. Olsson, Helena and Thomas were permitted to visit the family home only once - in 1982 - whilst they were in care, for a few hours and under the strict supervision of the foster mothers and one or two social workers. The applicants added that they were allowed to visit these children only a couple of times a year, under the supervision of social workers, teachers or foster parents; it appears that as time went by they tended to avoid such visits, which they considered humiliating, notably on account of the visiting conditions.

The material before the Court reveals that Mr. and/or Mrs. Olsson saw Helena and Thomas in March 1981 at a neutral place in Gothenburg; in September 1981 at their foster homes; in December 1981 at Stefan's foster home; and just before Easter 1982 at Helena's foster home. The Commission's report contains a more general statement to the effect that the applicants met the two younger children "three times a year during the first years". The applicants do not appear to have paid any visits to them between June 1984 and the spring of 1987.

3. Attitude of the applicants

26. Before the Commission, the Government referred to problems that had arisen as regards co-operation between the applicants on the one hand and the children's foster parents and the social authorities on the other (see paragraphs 100, 101, 109, 110 and 111 of the Commission's report). The applicants' submissions to the Commission on this point are summarised as follows:

> "That the applicants would co-operate with the social workers is completely unthinkable. The action of these social workers is completely in conflict with the applicants' own understanding of how children and adults and family members and others ought to show respect and consideration. ... It must be added that if the applicants were to co-operate with the foster parents and the social workers they would risk passing on to their children the totally wrong impression that the separation of children and parents and the placement of the children in foster homes had occurred with the consent of the applicants. This would be completely disastrous to the self-respect of the applicants' children if they had the wrong impression that their natural parents did not wish them to be at home with them." (ibid., paragraph 80 in fine)

D. Requests for termination of care

27. Following a request by the applicants for termination of the care of the children, a meeting was held on 1 June 1982 at the Council's office, at which the applicants, their lawyer and official counsel for the children were present.

On the same day, the Council rejected the request. It based its decision on reports compiled by the social administration and dated 24, 25 and 26 May 1982, which concluded that the parents were then incapable of giving the children the necessary support and encouragement. Annexed to the reports were statements from the psychologist Helena Fagerberg-Moss, social workers and a school teacher, indicating that the children had made satisfactory progress since being taken into care.

28. The applicants thereupon appealed to the County Administrative Court. It held a hearing on 4 November 1982, at which the applicants were present and assisted by a lawyer; the Council was represented by a lawyer and two social workers and the children by official counsel. Dr. Bosaeus and a social expert from the County Administrative Board (länsstyrelsen; see paragraph 41 below) gave evidence - the former at the request of the applicants' lawyer - and various written opinions from a psychologist, a welfare officer, a school teacher of Stefan and his school doctor were read out. The President of the Court also summarised the documents on which the Council's decision had been based.

The applicants submitted that the medical report of 12 September 1980 (see paragraph 12 above) contained clearly false information, by affirming that they were mentally retarded, and did not indicate any concrete facts showing that the children would have been in danger if they had continued to live with their parents. The Council, for its part, asserted that its refusal to terminate care had been based not on the applicants' being mentally retarded but on their inability to satisfy the children's need for care, stimulation and supervision.

In its judgment of 17 November 1982, the County Administrative Court, in addition to confirming the restrictions on parental access to Stefan (see paragraph 22 above), held as follows (translation from the Swedish):

> "The facts of the case show that the children suffered to a greater or lesser extent from different types of disturbance when they were taken into care. Stefan was disturbed in his development at a level comparable to special lower class. Following the placement in a foster home, his social abilities have improved and his language development has accelerated. His incontinence has to a large extent disappeared. In the special lower school Stefan has developed favourably having regard to his abilities. As regards Helena and Thomas, they have developed favourably in the foster homes. The assessment of these two children's psychological development undertaken in the spring of 1982 shows that the previous delays and disturbances have now been caught up or have disappeared, and that their development is now completely at the same level as that to be expected for their age.

As far as the applicants are concerned, their circumstances seem to have stabilised in recent times. Thus, the couple moved from Angered in January 1981 and since then have been living in a more child-adapted environment in the community of Ale. The dispute which prevailed in the marriage at the time when the children were taken into care has been overcome, and it seems now as if the relations between the applicants are better. Following a request from their representative, the applicants have been examined by psychologist Gudrun Olsson from Gothenburg. This investigation shows that both applicants have an average level of intelligence.

Under section 5 of the 1980 Act [see paragraph 49 below], the decisive issue in determining whether care under the Act in question should be terminated is whether it is no longer necessary. Facts such as the apparent improvement and stabilising of the applicants' situation and the children's favourable development in their foster homes are an argument in favour of the termination of care. However, there are several circumstances militating in the opposite direction. Stefan, who during 1982 has had several permissions to visit the parents' home, has been disturbed in various ways upon his return to the foster home and has relapsed into his previous negative behaviour. Stefan's return trip to the foster home on 28 June 1982 does not seem to have been well planned and it developed in an unfortunate way for him. In addition, the applicants have so far had difficulties in co-operating in a satisfactory manner with Stefan's foster home and the Social Council. In making an assessment of all the facts of the case, the Court finds that the applicants still show a lack of comprehension and ability to give the children satisfactory care and education. It must therefore be feared that a termination of care under the Act can at present involve great risks for the health and development of the children. Care is therefore to continue and the appeal is rejected."

29. The applicants then appealed to the Administrative Court of Appeal. After a hearing on 20 December 1982, at which they were present and assisted by counsel, the appeal was dismissed on 28 December 1982. The applicants had unsuccessfully requested that Dr. Bosaeus be called as a witness at the hearing.

Mr. and Mrs. Olsson sought to appeal to the Supreme Administrative Court, but on 11 March 1983 it refused them leave to appeal.

30. A fresh request by the applicants to the Council for termination of the care of the children was refused on 6 December 1983.

31. On 30 October 1984 and 17 September 1985, the Council rejected further requests by the applicants for termination of the care of Helena and Thomas and of Stefan, respectively; on the first of these dates it also declined to lift the restriction on visits to Helena and Thomas (see paragraph 24 above). Appeals by the parents against these decisions were dismissed by the County Administrative Court on 3 October 1985 and 3 February 1986, respectively.

The applicants thereupon appealed to the Administrative Court of Appeal, which joined the two cases. After holding a hearing at which Mr. and Mrs. Olsson were present and gave evidence, the Administrative Court of Appeal, by judgment of 16 February 1987, directed that the public care of Stefan be terminated: it took into consideration his recent positive development, his parents' increased understanding of his needs and their

agreement that he should complete his current term of schooling at Vänersborg (see paragraph 17 above). However, the appeal concerning Helena and Thomas - the scope of which was confined by Mr. and Mrs. Olsson themselves at the hearing to the care issue, to the exclusion of the access issue - was dismissed. The Administrative Court of Appeal's opinion that the public care of these two children should continue was based primarily on the fact that the applicants were unable to understand and satisfy the special needs arising in connection with re-uniting parents and children after so long a period of separation.

Following an appeal by the parents, the Supreme Administrative Court, by judgment of 18 June 1987, directed that the public care of Helena and Thomas should terminate, there being no sufficiently serious circumstances to warrant its continuation. The Supreme Administrative Court pointed out that the question to be determined in deciding whether care should be discontinued pursuant to section 5 of the 1980 Act (see paragraph 49 below) was whether there was still a need for care. The problems associated with the removal of a child from a foster home and its possible detrimental effects on him and with his reunification with his natural parents - on which the Administrative Court of Appeal had relied - were matters to be considered not under section 5 but in separate proceedings, namely an investigation under section 28 of the Social Services Act 1980 (socialtjänstlagen 1980:620). The latter section empowers a Social District Council to prohibit, for a certain period of time or until further notice, the removal from a foster home of a minor who is not or is no longer in public care, if there is thereby a risk, which is not of a minor nature, of harming his physical or mental health.

32. Stefan is now reunited with his parents.

However, on 23 June 1987 the Council, acting pursuant to section 28 of the Social Services Act 1980, prohibited them until further notice from removing Helena and Thomas from their respective foster homes. An application by Mr. and Mrs. Olsson for the interim suspension of this prohibition was refused by the County Administrative Court on 25 June 1987; this decision was confirmed by the Administrative Court of Appeal on 2 July 1987 and, on 17 August 1987, the Supreme Administrative Court refused leave to appeal. On 3 November 1987, the County Administrative Court rejected on the merits the applicants' appeal against the prohibition; it expressed the opinion that "a prohibition against removal should not be valid for too long a period" and that "a precondition for the rescission of the prohibition ... is that efforts should be made to improve contacts between the parents and children, both through Mr. and Mrs. Olsson and through the Social District Council". According to information supplied to the European Court by the Government on 16 November 1987, an appeal by the applicants to the Administrative Court of Appeal against this judgment was

then pending; in the meantime, they remained free to visit Helena and Thomas at the foster homes.

II. RELEVANT DOMESTIC LAW

A. Introduction

33. According to Swedish child-welfare legislation, each municipality is responsible for promoting the favourable development of children and young persons by taking, if necessary, supportive or preventive measures (see paragraph 43 below). It may also take a child into care and place him in a foster home, a children's home or another suitable institution.

The legislation divides measures of the latter kind into two categories: the first concerns "voluntary care", enabling a parent to place his child into the care of a local authority; the second provides for "compulsory care", by establishing machinery whereby a local authority can obtain a court decision or order committing a child to its care. It was recourse to this machinery that was in issue in the present case.

34. Decisions concerning the applicants' children were taken under the 1960 Act and under the Act containing Special Provisions on the Care of Young Persons 1980 (lag 1980: 621 med särskilda bestämmelser om vård av unga - "the 1980 Act"). The 1980 Act complements the Social Services Act 1980, which deals with voluntary care; on entering into force on 1 January 1982, they together replaced the 1960 Act. In general, decisions taken under the 1960 Act which were still in force on 31 December 1981 were considered to be decisions taken under the 1980 Act.

B. Conditions for compulsory care

1. Under the 1960 Act

35. Under section 25(a) of the 1960 Act, the competent local authority in child-care matters - the Child Welfare Board (barnavårdsnämnden) or, in Stockholm and Gothenburg, the Social District Council - was obliged to intervene (translation from the Swedish):

> "[if] a person, not yet eighteen years of age, is maltreated in his home or otherwise treated there in a manner endangering his bodily or mental health, or if his development is jeopardised by the unfitness of his parents or other guardians responsible for his upbringing, or by their inability to raise the child."

Section 25(b) of the 1960 Act (which was not applied in the present case) provided that the local authority also had to intervene if a minor needed

corrective measures because of his criminal, immoral or otherwise asocial behaviour.

36. As regards section 25(a), the preparatory work to the 1960 Act stated, inter alia, the following (translation from the Swedish):

> "In the future too, an important reason for intervention must be that a minor is exposed to physical maltreatment. The specific reference to this in the text of the statute seems to some extent to obscure the importance of the fact that children and young persons must also be protected from other kinds of treatment which may be harmful to their bodily or mental health. For this reason, the Bill instead makes it a prerequisite for intervention that the minor is being maltreated in his home or that he is otherwise treated there in such a way as to endanger his bodily or mental health. This amendment in relation to the law now in force does not aim at bringing about any material change. Reasons for intervention, except for physical maltreatment, may be such as are given as examples in the preparatory work to the legislation now in force: for instance, that a child, who is perhaps being cared for with great tenderness, is all the same continuously exposed to mortal danger owing to his mother's mental illness, or that an infant is being cared for by a mother who is suffering from tuberculosis in a contagious state. Further examples may be that the minor is obliged to do work that is unreasonably hard considering his age or his strength, that he does not get enough to eat and is for that reason clearly undernourished, or that his home environment is marked by a considerable lack of hygiene. According to the practice that has been applied hitherto, it should also be possible to intervene in those instances where the parents - perhaps because of their religious convictions - omit to give the child the medical care and treatment that he needs. Among the cases where children are exposed to mental injury or danger may be mentioned the one where parents - with evident symptoms of mental abnormalities or of pathological attitudes - bring up their children in a way, as the committee puts it, that includes a kind of spiritual error and which often in the end causes their personality to develop in an undesirable way. When such upbringing has the result that the child's mental health is endangered, it comes under the section now dealt with.
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> For an intervention under section [25(a)] of the 1960 Act to be permitted, there must be a danger of the child's becoming a misfit because of his parents' vicious way of life or their negligence or inability to educate the child. The provision in question thus concerns abnormalities in the parents or in their capacity to educate; it lays down that those abnormalities should be such as to endanger the child's social development. Parents and other custodians should be treated on equal terms in this respect. Otherwise only amendments of a formal nature seem to be required. Thus, it is suggested that the words 'vicious' and 'negligence' be replaced by the expression 'unsuitability as custodians', which seems more appropriate in this context. Obviously, the scope of this expression is somewhat wider than the one currently in use. Apart from 'vicious' and 'negligent' custodians, it thus also covers those suffering from serious mental abnormalities. There seems to be no reason to object to this enlargement of the field of application of this rule. Society should be entitled to intervene as soon as there is a danger of a young person's unfavourable social development owing to shortcomings in the custodian. Since the notion of 'misfit', as the committee has found, should be excluded from this legislation, the intervention of the Child Welfare Board has instead been made subject to the prerequisite that the development of the young person is in jeopardy. This means that intervention shall take place whenever needed to prevent such abnormalities of behaviour as are indicated under section [25(a)]. It should be pointed out that, just as is the case under the law now in force, an intervention does not require that there have so far been any

signs of maladaptation in the young person in question." (Reproduced in NJA II - Nytt Juridiskt Arkiv, "Journal for Legislation" - 1960, pp. 456 et seq.)

2. Under the 1980 Act

37. Conditions for compulsory care under the 1980 Act are set out in section 1, which reads (translation from the Swedish):

"Care is to be provided pursuant to this Act for persons under eighteen years of age if it may be presumed that the necessary care cannot be given to the young person with the consent of the person or persons having custody of him and, in the case of a young person aged fifteen or more, with the consent of the young person.

Care is to be provided for a young person if:

1. lack of care for him or any other condition in the home entails a danger to his health or development; or

2. the young person is seriously endangering his health or development by abuse of habit-forming agents, criminal behaviour or any other comparable behaviour.

..."

38. The following are extracts from the preparatory work to the 1980 Act, as reproduced in NJA II 1980, pp. 545 et seq. (translation from the Swedish).

The Parliamentary Standing Committee on Social Questions stated:

"An important point of departure for the reform of the social services is that salient features in the handling of individual cases should be respect for liberty and the right of the individual to decide about his own life. The aim of the social services should be to co-operate with the client as far as possible, in order to make him take part in decisions as to the planning of treatment and make him co-operate actively in carrying it out. The social services should offer help and support, but not take over the individual's responsibility for his own life. Personal initiative and responsibility must be made part of care and treatment. In this manner the social services may work more actively in a preventive way, and the opportunity to achieve more long-lasting results will be improved.

This fundamental principle of the new legislation has been laid down in section 9 of the Social Services Bill, which stipulates that the measures taken by the Social Council in regard to any individual person should be conceived and carried out in co-operation with the person concerned. Consequently, all social services' opportunities to use coercive measures on adults have been abolished. It is true that, regarding young people and children, the possibility of providing care outside their home contrary to the wishes of the young person or his parents is retained. In this field too, the reform means, however, that the right of the individual to be a party to those decisions that concern his own fate is more strongly stressed. The individual should be able to turn to the social services confidently and ask for help, without risking undesired effects in the form of various coercive measures.

At the same time there is unanimity in considering that in certain cases society must be able to use coercive measures against an individual, whenever this is needed to avoid an immediate risk to somebody's life or health."

The Minister of Health and Social Affairs stated:

"Section 1, second paragraph, point 1, indicates that one ground for measures on the part of society is that lack of care for a young person in his home or some other situation in his home constitutes a danger to his health or development. This rule refers to situations where the young person does not receive sufficient care in his home or is exposed to treatment in his home that means there is a danger to his mental or physical health or to his social development. By the word 'home' is to be understood the home of the parents, as well as any other home where the young person is residing permanently. Under this description come, inter alia, cases where the young person is subject to maltreatment in his home. Even a slight degree of maltreatment must be supposed to cause danger to the health or development of the young person. If, in such a case, the parents oppose such measures as the Social Council may consider necessary to assure the protection of the young person, application of the law may come into focus. In case there has been maltreatment of a more serious kind, the young person should as a matter of course be provided with care outside his home, at least for some time.

As with the 1960 Act, this provision may also be applied in those instances where the parents intend to place the young person in an environment that will endanger his health or his development, or where they do not prevent him from being in such an environment.

This section thus embraces all those situations where the child is being exposed to physical maltreatment or negligent care. This legislation may also be applicable if parents endanger the mental health of a child by their personal characteristics. If the child's mental health or development is being endangered because of parental behaviour - for instance, by way of continuously recurring scenes at home owing to abuse of alcohol or narcotics - or because of the mental abnormality or state of the parents, it should be possible to provide care for the child under this Act.

...

The Act is primarily aimed at enabling the social services to provide for the young person's need of care. It is the current need of care, and what can be done at the moment and in the future to see to it that this need is met, that will govern the measures taken by the Social Council. As I have pointed out in my general statement concerning this Bill, this legislation can, however, not be used to provide for society's need for protection. It is a different matter that, in those instances where a young person needs to be taken into care according to this Act, this measure will also have the effect of protecting society.

The Social Council is to take appropriate measures as soon as it considers that a situation such as has been indicated in the second paragraph under points 1 and 2 arises. It may, for instance, have come to the knowledge of the Council that a child is being exposed to unsuitable treatment or even to actual danger at home. During an inquiry the situation may appear to be such that the child ought to be provided with care outside his home. The Council should then in the first place try to meet the need for care by reaching an understanding with the parents. In case the parents and the

Council cannot reach an agreement as to the question of how the child should be cared for, the Council must turn to the County Administrative Court to obtain a decision on care under the Act, with an inherent authorisation permitting the Council to make decisions regarding the way in which the care should be implemented."

C. Organisation and administration of child care

39. The Child Welfare Board was empowered to exercise functions and make decisions in child-welfare matters within a municipality (sections 1 and 2 of the 1960 Act). In doing so, it had to give particular attention to minors who were exposed to the risk of unfavourable development due to their physical and mental health, home and family conditions and other circumstances (section 3). The Board was composed of lay members who were assisted by social workers.

40. Since the 1980 social-services legislation entered into force, the functions of the Child Welfare Boards have been taken over by Social Councils, which are composed in the same way as the former Boards but are responsible for social welfare in general.

The tasks of the Social Council may, as is the case in Gothenburg, be performed by two or more Social District Councils, each being responsible for a designated area. In child-care matters, a District Council has the same powers and duties as a Social Council.

41. As were the Child Welfare Boards, the Social Councils are under the supervision and control of the County Administrative Board and the National Board of Health and Welfare (socialstyrelsen).

D. Care decisions

42. Child Welfare Boards sought and received information about ill-treatment of children or their unsatisfactory living conditions through various officials having frequent contacts with children, such as social workers, doctors, nurses and teachers. Matters of this kind could also be reported to the Boards by private citizens. Upon receipt of such information, a Board had to undertake, without delay, a comprehensive investigation, including interviews, medical examinations and visits to the child's home.

43. If the Board found that the child's situation corresponded to that described in section 25 of the 1960 Act (see paragraph 35 above), it had, before resorting to care, to endeavour to remedy the matter by preventive measures (förebyggande åtgärder). These could consist of one or more of the following steps: advice, material support, admonition or warning, orders pertaining to the child's living conditions, or supervision (section 26). If such measures proved insufficient or were considered pointless, the Board had to place the child in care (section 29).

However, a child had to be taken provisionally into care for investigation (without the need for prior preventive measures) if there was a probable cause for intervention under section 25 and if there would otherwise be a risk of deterioration in his situation. Such a decision was valid for a maximum period of four weeks (section 30).

In urgent situations where the decision of the Board under section 29 or 30 could not be awaited, section 11 of the 1960 Act empowered the Chairman of the Board to take interim action alone. If he did so, he had to convene a meeting of the Board within ten days in order that a decision be taken in the matter.

44. Further procedural requirements for placing a child in care under section 29 or 30 of the 1960 Act were set out in section 24; in particular, the decision had to be notified without delay to the parents concerned. If they disagreed, the matter had to be referred for review to the County Administrative Court within ten days.

45. Under the 1980 Act, if a Social Council considers that certain action is necessary, it has to apply to the County Administrative Court for a decision; unlike Child Welfare Boards under the 1960 Act, it cannot take the decision itself.

In urgent cases, however, the Council or its Chairman may place a child in care as a provisional measure; such a step must be referred within a week to the County Administrative Court, for decision within the following week.

E. Implementation of care decisions

46. When a care decision has been taken, the Social Council (formerly the Child Welfare Board) has to implement it, by attending to the practical details of such matters as where to place the child and what education and other treatment to give him (sections 35-36 and 38-41 of the 1960 Act and sections 11-16 of the 1980 Act).

1. Requirements as to placement

47. The 1960 Act provided that a child who had been taken into care was entitled to good care and upbringing as well as the education that was necessary in the light of his personal capacity and other circumstances. The child had preferably to be placed in a foster home or, if that was not possible, in a suitable institution, such as a children's home or school (sections 35 and 36). The Child Welfare Board had to supervise the care and the development of the child and, if necessary, take decisions concerning his or her personal affairs (sections 39 and 41).

During the course of the preparatory work to the 1980 Act, the Parliamentary Standing Committee on Social Questions stressed that it was essential for the development of the child that the parents had regular contacts with him; this was also of decisive importance so as to ensure that

his return to his original home could be effected smoothly. In fact, section 11 of the 1980 Act provides that he may be allowed, after a period, to return to live there, if it appears that such a course is the best in order to further the aims of the care decision.

2. Regulation of the parents' right of access

48. The 1960 Act provided that the Child Welfare Board could regulate a parent's right of access to his child in care to the extent that it found this reasonable in the light of the aims of the care decision, the upbringing of the child or other circumstances (section 41).

Under the 1980 Act, restrictions on access can be imposed by the Social Council, in so far as this is necessary for the purposes of the care decision (section 16). Unlike the 1960 Act, the 1980 Act expressly empowers the authority concerned to refuse to disclose the child's whereabouts.

F. Reconsideration and termination of compulsory care

49. Under section 42(1) of the 1960 Act, compulsory care had to be discontinued as soon as the aims of the care decision had been achieved. The corresponding rule in the 1980 Act provides that the Social Council shall terminate care when it is no longer necessary (section 5, first paragraph). The preparatory work to this provision, as reproduced in the Government's Bill (1979/80:1, p. 587), stated (translation from the Swedish):

> "It follows that an important task of the Council is to see to it that ... care does not continue for longer than is necessary in the circumstances. Care is to be discontinued as soon as there is no longer any need for the special prerogatives granted to the Council by the Act. It is true that it is part of the custodian's responsibility resting with the Council to pay close attention to the care provided by other people on the Council's behalf. However, against the background of, inter alia, the way the 1960 Act is today applied, it has been considered important that the supervisory duties of the Council are clearly laid down in the text of the [new] Act."

Section 41 of the Social Services Ordinance 1981 (socialtjänst-förordningen 1981:750) lays down that a care decision based on unsatisfactory conditions in the child's home must be reconsidered by the Social Council regularly and at least once a year.

Both before and after the entry into force of the 1980 Act, a parent could, under the general principles of Swedish administrative law, at any time request that the compulsory care of his child be terminated.

G. Appeals

50. Decisions of the County Administrative Court that a child be taken into care might (under the 1960 Act) or may (under the 1980 Act) be the

subject of an appeal to the Administrative Court of Appeal and, with leave, to the Supreme Administrative Court.

A parent could or can also appeal to the County Administrative Court (and then to the Administrative Court of Appeal and, with leave, to the Supreme Administrative Court) against:

(a) refusals by a Child Welfare Board or a Social Council to terminate care ordered under the 1960 or the 1980 Act (see paragraph 49 in fine above);

(b) decisions taken by a Child Welfare Board under the 1960 Act relating, inter alia, to the visiting rights of the parents;

(c) decisions taken by a Social Council under the 1980 Act as to where the care should commence; to change a placement decision; regulating the parents' right of access; and not to disclose the child's whereabouts to them (section 20 of the 1980 Act).

According to the Government, the 1960 Act did not entitle a parent to appeal to the County Administrative Court against a placement decision as such, but the 1980 Act does. The Government maintained, however, that the applicants could at any time have raised before the County Administrative Board (see paragraph 41 above) - with the possibility of a subsequent appeal to the Administrative Court of Appeal and thence to the Supreme Administrative Court - a plea that, as a result of their placement and contrary to the requirements of the 1960 Act, the children were not receiving proper care and education.

PROCEEDINGS BEFORE THE COMMISSION

51. In their application of 10 June 1983 to the Commission (no. 10465/83), Mr. and Mrs. Olsson alleged that the care decision and the subsequent placement of the children constituted a breach of Article 8 (art. 8) of the Convention. They also invoked Articles 3, 6, 13 and 14 (art. 3, art. 6, art. 13, art. 14), as well as Article 2 of Protocol No. 1 (P1-2), and complained that, contrary to Article 25 (art. 25) of the Convention, the exercise of their right to petition the Commission had been hindered.

52. On 15 May 1985, the Commission declared the application admissible, but decided to take no action with respect to the complaint under Article 25 (art. 25).

In its report adopted on 2 December 1986 (Article 31) (art. 31), the Commission expressed the opinion that:

(a) the care decisions concerning the applicants' children in combination with their placement in separate foster homes and far away from the applicants constituted a violation of Article 8 (art. 8) of the Convention (eight votes to five);

(b) there had been no violation of Articles 3, 6, 13 or 14 (art. 3, art. 6, art. 13, art. 14) of the Convention or of Article 2 of Protocol No. 1 (P1-2) (unanimous).

The full text of the Commission's opinion and of the partly dissenting opinion contained in the report is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

53. At the hearing on 21 September 1987, the Government requested the Court to hold "that there has been no violation of the Convention in the present case".

AS TO THE LAW

I. SCOPE OF THE ISSUES BEFORE THE COURT

54. In the course of their submissions, the applicants made a number of general complaints concerning the alleged incompatibility with the Convention of, firstly, Swedish child-care law and, secondly, the practice of the Swedish courts.

The Court recalls that in proceedings originating in an application lodged under Article 25 (art. 25) of the Convention it has to confine itself, as far as possible, to an examination of the concrete case before it (see, as the most recent authority, the F v. Switzerland judgment of 18 December 1987, Series A no. 128, p. 16, § 31). Its task is accordingly not to review the aforesaid law and practice in abstracto, but to determine whether the manner in which they were applied to or affected Mr. and Mrs. Olsson gave rise to a violation of the Convention.

55. At the Court's hearing, the Government contended that in its report the Commission had gone beyond the limits of its admissibility decision of 15 May 1985 by considering a number of decisions not examined therein or in respect of which domestic remedies had not been exhausted at that date. In their submission, the Court should not deal with the decisions in question, which were: firstly, those taken by the Council on 21 October 1980, 10 August 1982, 2 August 1983, 6 December 1983 and 30 October 1984 and by the County Administrative Court on 17 November 1982, in so far as they related to visits by the applicants to the children (see paragraphs

22 and 24 above); and secondly, those taken by the Council on 6 December 1983 and 30 October 1984, refusing the applicants' requests for termination of care (see paragraphs 30-31 above).

The Commission replied that it had followed its constant practice of considering the facts of the case as they stood at the time of the establishment of its report and that, during the course of its proceedings, the Government had not pleaded a failure to exhaust domestic remedies in respect of any of the said decisions.

56. The Court observes that all those decisions pre-dated the Commission's hearing on the admissibility and merits of the case (15 May 1985) and that in the circumstances there was nothing to prevent the Government from raising a plea of non-exhaustion at that time (see, as the most recent authority, the Bozano judgment of 18 December 1986, Series A no. 111, p. 19, § 44). Furthermore, the questions of the applicants' visiting rights and of the requests for discontinuance of care were referred to during that hearing.

In addition, Rule 47 of the Rules of Court provides that "a Party wishing to raise a preliminary objection must file a statement setting out the objection and the grounds therefor not later than the time when that Party informs the President of its intention not to submit a memorial ...". In the present case - where no memorials on the merits were lodged (see paragraph 5 above) - the Government filed no such statement and raised their plea solely at the Court's hearing. It must therefore be rejected as out of time.

Furthermore, whilst the Court's jurisdiction in contentious matters is determined by the Commission's decision declaring the originating application admissible, it is competent, in the interests of the economy of the procedure, to take into account facts occurring during the course of the proceedings in so far as they constitute a continuation of the facts underlying the complaints declared admissible (see, as the most recent authority, the Weeks judgment of 2 March 1987, Series A no. 114, p. 21, § 37). In the Court's view, the decisions in question can be regarded as falling into this category and the Commission acted properly in taking them into account.

57. On the other hand, the 1987 decisions concerning the prohibition on the removal of Helena and Thomas from their respective foster homes (see paragraph 32 above) are the subject of a further application which Mr. and Mrs. Olsson lodged with the Commission on 23 October 1987. Any new question raised therein cannot be settled by the Court in the present judgment (see the Swedish Engine Drivers' Union judgment of 6 February 1976, Series A no. 20, p. 13, § 34, and the above-mentioned Weeks judgment, loc. cit.).

II. ALLEGED VIOLATION OF ARTICLE 8 (art. 8) OF THE CONVENTION

A. Introduction

58. The applicants asserted that the decision to take the children into care, the manner in which it had been implemented and the refusals to terminate care had given rise to violations of Article 8 (art. 8) of the Convention, which reads as follows:

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

This allegation was contested by the Government, but accepted by a majority of the Commission.

59. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life; furthermore, the natural family relationship is not terminated by reason of the fact that the child is taken into public care (see the W v. the United Kingdom judgment of 8 July 1987, Series A no. 121, p. 27, § 59). It follows - and this was not contested by the Government - that the measures at issue amounted to interferences with the applicants' right to respect for their family life.

Such an interference entails a violation of Article 8 (art. 8) unless it was "in accordance with the law", had an aim or aims that is or are legitimate under Article 8 § 2 (art. 8-2) and was "necessary in a democratic society" for the aforesaid aim or aims (ibid., p. 27, § 60 (a)).

B. "In accordance with the law"

60. The applicants did not deny that the authorities had acted in accordance with Swedish law. However, they alleged that the measures taken were not "in accordance with the law" within the meaning of Article 8 (art. 8), notably because the relevant legislation set no limits on the discretion which it conferred and was drafted in terms so vague that its results were unforeseeable.

The Government contested this claim, which was not accepted by the Commission.

61. Requirements which the Court has identified as flowing from the phrase "in accordance with the law" include the following.

(a) A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail; however, experience shows that absolute precision is unattainable and the need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague (see, for example, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 31, § 49).

(b) The phrase "in accordance with the law" does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law; it thus implies that there must be a measure of protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by, inter alia, paragraph 1 of Article 8 (art. 8-1) (see the Malone judgment of 2 August 1984, Series A no. 82, p. 32, § 67).

(c) A law which confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see the Gillow judgment of 24 November 1986, Series A no. 109, p. 21, § 51).

62. The Swedish legislation applied in the present case is admittedly rather general in terms and confers a wide measure of discretion, especially as regards the implementation of care decisions. In particular, it provides for intervention by the authorities where a child’s health or development is jeopardised or in danger, without requiring proof of actual harm to him (see paragraphs 35 and 37 above).

On the other hand, the circumstances in which it may be necessary to take a child into public care and in which a care decision may fall to be implemented are so variable that it would scarcely be possible to formulate a law to cover every eventuality. To confine the authorities’ entitlement to act to cases where actual harm to the child has already occurred might well unduly reduce the effectiveness of the protection which he requires. Moreover, in interpreting and applying the legislation, the relevant preparatory work (see paragraphs 36 and 38 above) provides guidance as to the exercise of the discretion it confers. Again, safeguards against arbitrary interference are provided by the fact that the exercise of nearly all the statutory powers is either entrusted to or is subject to review by the administrative courts at several levels; this is true of the taking of a child into care, a refusal to terminate care and most steps taken in the implementation of care decisions (see paragraphs 44, 45 and 50 above). Taking these safeguards into consideration, the scope of the discretion

conferred on the authorities by the laws in question appears to the Court to be reasonable and acceptable for the purposes of Article 8 (art. 8).

63. The Court thus concludes that the interferences in question were "in accordance with the law".

C. Legitimate aim

64. The applicants submitted that, of the aims listed in paragraph 2 of Article 8 (art. 8-2), only the "protection of health or morals" could have justified the decision to take the children into care, but that their health or morals were not in fact endangered when it was adopted.

The Commission, on the other hand, considered that the decisions concerning the care and the placement of the children were taken in their interests and had the legitimate aims of protecting health or morals and protecting the "rights and freedoms of others".

65. In the Court's view, the relevant Swedish legislation is clearly designed to protect children and there is nothing to suggest that it was applied in the present case for any other purpose. The interferences in question - intended as they were to safeguard the development of Stefan, Helena and Thomas - therefore had, for the purposes of paragraph 2 of Article 8 (art. 8-2), the legitimate aims attributed to them by the Commission.

D. "Necessary in a democratic society"

66. The applicants maintained that the measures at issue could not be regarded as "necessary in a democratic society". This submission was contested by the Government, but accepted by a majority of the Commission.

1. Introduction

67. According to the Court's established case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued; in determining whether an interference is "necessary in a democratic society", the Court will take into account that a margin of appreciation is left to the Contracting States (see, amongst many authorities, the above-mentioned W v. the United Kingdom judgment, Series A no. 121, p. 27, § 60 (b) and (d)).

68. There was considerable discussion during the hearing before the Court as to the approach to be adopted by the Convention institutions in resolving the necessity issue.

The Commission's Delegate summarised the approach taken by the majority of the Commission as being: "to stay ... within the judgments of the

domestic courts and, after making a detailed study of the relevant judgments, conclude whether or not [their] contents ... reveal sufficient reasons for taking a child into public care." She summarised the minority's approach as being: "to stay within the judgments of the domestic courts and to examine whether the reasons [therein] seem to indicate that [they] have based themselves on irrelevant circumstances or that they have applied unacceptable criteria or standards for the justification of a public-care order. In essence the question is whether the national court has misjudged the necessity." The Government favoured the minority's approach, adding that a wide margin of appreciation should be afforded to the national authorities so long as there was no reason to believe that the decisions were not taken in good faith, with due care and in a reasonable manner.

The approach which the Court has consistently adopted - and from which it sees no reason to depart on the present occasion - differs somewhat from those described above. In the first place, its review is not limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith (see, inter alia, the above-mentioned Sunday Times judgment, Series A no. 30, p. 36, § 59). In the second place, in exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned decisions in isolation, but must look at them in the light of the case as a whole; it must determine whether the reasons adduced to justify the interferences at issue are "relevant and sufficient" (see, amongst other authorities, mutatis mutandis, the Lingens judgment of 8 July 1986, Series A no. 103, pp. 25-26, § 40).

69. In concluding that there had been a violation of Article 8 (art. 8), the majority of the Commission based itself on the care decisions concerning the applicants' children in combination with the placement of the children in separate foster homes and far away from the applicants.

In this respect, the Court shares the view of the Government that these are matters which should be examined separately: the factors and considerations which are relevant to an assessment of their necessity may not be the same.

2. The taking of the children into care and the refusals to terminate care

70. The applicants contended that it was not necessary to take the children into and maintain them in care; they alleged, inter alia, that no concrete facts had been established showing that the children were in danger, that there were no substantiated reasons justifying the taking into care and that there were no valid motives for refusing the requests for termination of care.

The Government contested this allegation. The majority of the Commission, on the other hand, was not convinced that the factual basis

was so grave as to justify the taking into care, although it did observe that it was "understandable that the care order was not lifted".

71. Before turning to the substance of this issue, it is convenient to deal with an initial point. In its above-mentioned W v. the United Kingdom judgment, the Court held that certain procedural requirements were implicit in Article 8 (art. 8): as regards decisions in child-care matters, the parents must "have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests" (Series A no. 121, p. 29, § 64).

The Court agrees with the Commission that this requirement was satisfied as regards the care decisions themselves. Mr. and Mrs. Olsson attended a number of case conferences and were present at the meetings which preceded the Council's decision of 16 September 1980 to take the children into care and its decision of 1 June 1982 not to terminate care (see paragraphs 10, 11, 12 and 27 above). They also attended hearings before the County Administrative Court and the Administrative Court of Appeal. Furthermore, they were legally represented during all the relevant judicial proceedings.

(a) The taking into care

72. In its judgment of 30 December 1980 (see paragraph 13 above), the County Administrative Court set out the following reasons for confirming the Council's decision of 16 September 1980 to take the children into care:

(a) the children had for several years been living in an unsatisfactory home environment as a result of the parents' inability to satisfy the children's need of care, stimulation and supervision;

(b) Stefan and Thomas disclosed a clear retardation in their development and all three children were backward in language development;

(c) there was a great risk that Helena would develop negatively if she stayed in the parents' home;

(d) preventive measures had been tried for several years, but without any resulting improvement;

(e) the health and development of the children were jeopardised as a result of the parents' present inability to give them satisfactory care and education.

These reasons are clearly "relevant" to a decision to take a child into public care. However, it is an interference of a very serious order to split up a family. Such a step must be supported by sufficiently sound and weighty considerations in the interests of the child; as the Commission rightly observed, it is not enough that the child would be better off if placed in care. In order to determine whether the foregoing reasons can be considered "sufficient" for the purposes of Article 8 (art. 8), the Court must have regard to the case as a whole (see paragraph 68 above) and notably to the circumstances in which the decision was taken.

73. Prior to the Council's care decision of 16 September 1980, a number of different social authorities had been individually involved with the Olsson family; they had co-ordinated their activities in 1979, from which time a psychiatric team had followed the case (see paragraph 9 above). Various measures had been taken with a view to assisting the family and a number of case conferences had been held (see paragraphs 9, 10 and 11 above). It cannot therefore be said that the authorities intervened without adequate knowledge of the background.

The Council's decision was based on a substantial report, compiled by the social administration after the children had been placed in care for investigation, which concluded that their development was in danger since they were living in an environment which was unsatisfactory due to their parents' inability to satisfy their need for care, stimulation and supervision (see paragraph 12 above). That report was in turn supported by a number of statements from persons well acquainted with the case, including a medical report signed not only by Dr. Bosaeus but also by a psychologist, Helena Fagerberg-Moss; both were members of a team which was in touch with the family and the latter had, before the decision to place the children in care for investigation was taken, seen Helena and Thomas in order to assess their development and also visited the applicants' home (ibid.).

It is true that the medical report referred to the applicants' having been registered as retarded, whereas a subsequent examination revealed that they were of average intelligence (see paragraphs 9 and 12 above). However, as the Administrative Court of Appeal stated in its judgment of 16 February 1987 (see paragraph 31 above):

> "As far as can be ascertained from the decision to take the Olsson children into care, the primary reason for this action was not any alleged mental retardation on the part of Mr. and Mrs. Olsson. The main reason cited in support of forced intervention was instead the parents' 'inability to give the children satisfactory care and upbringing' - in view of Stefan's obviously retarded development, for instance, and the retarded linguistic development of all the children."

In addition, as the minority of the Commission pointed out, the County Administrative Court's judgment of 30 December 1980 was not founded solely on the documentation that had been before the Council. It had previously held a hearing, at which Mrs. Olsson and the children were represented and Dr. Bosaeus was heard as an expert (see paragraph 13 above), and it thus had the benefit of its own personal impression of the case. This was, moreover, a judgment which was referred on appeal to both the Administrative Court of Appeal and the Supreme Administrative Court, without being reversed (see paragraphs 14 and 15 above).

74. In the light of the foregoing, the Court has come to the conclusion that the impugned decision was supported by "sufficient" reasons and that, having regard to their margin of appreciation, the Swedish authorities were

reasonably entitled to think that it was necessary to take the children into care, especially since preventive measures had proved unsuccessful.

(b) The refusals to terminate care

75. In its judgment of 17 November 1982 (see paragraph 28 above), the County Administrative Court set out the following reasons for confirming the Council's decision of 1 June 1982 to refuse the applicants' request for termination of the care of the children:

(a) on returning to his foster home after visits to his parents, Stefan had been disturbed in various ways and had relapsed into his previous negative behaviour; his return trip on 28 June 1982 had developed in an unfortunate way for him;

(b) the applicants had had difficulties in co-operating with Stefan's foster home and the Council;

(c) the applicants still showed a lack of comprehension and ability to give the children satisfactory care and education, so that it had to be feared that termination of care could at that time involve great risks for their health and development.

Here again, these reasons are clearly "relevant" to a decision to maintain a child in care. However, whether they were "sufficient" in the present case calls for further scrutiny.

76. It has to be recalled that the Council's refusal to terminate care was based on reports compiled by the social administration which concluded that the parents were at the time incapable of giving the children the necessary support and encouragement (see paragraph 27 above). These reports were in turn supported by statements from persons well acquainted with the case, including the psychologist, Helena Fagerberg-Moss (ibid.). Above all, on this occasion as well, the County Administrative Court's judgment - like that of the Administrative Court of Appeal which confirmed it - was founded not only on written material but also on a hearing in the presence of the applicants (see paragraphs 28 and 29 above). And again, the judgment of the Administrative Court of Appeal was not reversed (see paragraph 29 above).

It could be thought that the children's favourable development whilst in care and especially the apparent improvement and stabilising by 1982 of the applicants' situation - both of which were recorded in the County Administrative Court's judgment - militated against continuation of care. However, the Court considers that it is justifiable not to terminate public care unless the improvement in the circumstances that occasioned it appears with reasonable certainty to be stable; it would clearly be contrary to the interests of the child concerned to be restored to his parents, only to be taken into care again shortly afterwards.

77. In the light of the foregoing, the Court has come to the conclusion that in 1982 the Swedish authorities had "sufficient" reasons for thinking

that it was necessary for the care decision to remain in force. Neither has it been established that a different situation obtained when they subsequently maintained the care decision until its final reversal on different dates in the first half of 1987 (see paragraphs 30 and 31 above).

3. The implementation of the care decision

78. According to the applicants, the implementation of the care decision also gave rise to a violation of Article 8 (art. 8). They relied, inter alia, on the placement of the children separately and at a long distance from each other and their parents, on the restrictions on and the conditions of visits and on the conditions in the homes where the children were placed.

79. In contesting this claim, the Government argued that the measures relating to the placement of the children had been taken in good faith, were not unreasonable and were justified by the special circumstances. They adverted in particular to the following matters: the fear that the parents might remove the children, as they had previously done with Stefan (see paragraph 17 above); the desire to avoid keeping the children in institutions for too long, coupled with the limited supply of suitable foster homes; the special needs of Stefan, which led to his being placed with the Ek family whom he already knew, his subsequent move having been motivated solely by conflicts between the natural and the foster parents (see paragraph 17 above); the view that, having regard to Helena's inclination "to take too great a responsibility for her brother Thomas" (see paragraph 12 above) and to the special needs of these two children, it would not have been realistic or "psychologically appropriate" to place them in the same foster home; and the last-minute impossibility of fulfilling the original intention to place these two children in the same village (see paragraph 19 above).

The Government further submitted that the applicants' previous removal of Stefan from his home and their attitude of confrontation towards the foster parents, respectively, justified the initial and the later restrictions on their access to Helena and Thomas (see paragraph 24 above). They added that Mr. and Mrs. Olsson had in any event not made full use of their entitlement to visit all three children.

80. The Court finds, like the Commission, that it is not established that the quality of the care given to the children in the homes where they were placed was not satisfactory. The applicants' complaint on this score must therefore be rejected.

81. As for the remaining aspects of the implementation of the care decision, the Court would first observe that there appears to have been no question of the children's being adopted. The care decision should therefore have been regarded as a temporary measure, to be discontinued as soon as circumstances permitted, and any measures of implementation should have been consistent with the ultimate aim of reuniting the Olsson family.

In point of fact, the steps taken by the Swedish authorities ran counter to such an aim. The ties between members of a family and the prospects of their successful reunification will perforce be weakened if impediments are placed in the way of their having easy and regular access to each other. Yet the very placement of Helena and Thomas at so great a distance from their parents and from Stefan (see paragraph 18 above) must have adversely affected the possibility of contacts between them. This situation was compounded by the restrictions imposed by the authorities on parental access; whilst those restrictions may to a certain extent have been warranted by the applicants' attitude towards the foster families (see paragraph 26 above), it is not to be excluded that the failure to establish a harmonious relationship was partly due to the distances involved. It is true that regular contacts were maintained between Helena and Thomas, but the reasons given by the Government for not placing them together (see paragraph 79 above) are not convincing. It is also true that Stefan had special needs, but this is not sufficient to justify the distance that separated him from the other two children.

The Administrative Court of Appeal, in its judgment of 16 February 1987 (see paragraph 31 above), itself commented as follows on the applicants' access to Helena and Thomas:

> "Of course, the extremely bad relations between Mr. and Mrs. Olsson on the one hand and Helena and Thomas and their respective foster parents on the other hand are not due only to the Olssons. However, the Administrative Court of Appeal considers it strange that the parents' negative attitude to the foster parents resulted in their not meeting the youngest children for over two years, nor even showing any particular interest in talking to the children on the telephone, for instance. Even if there has been some difficulty for the social council to assist in establishing better relations - due to the action of the parents' representative, for instance, and the children's own attitude - it would have been desirable for the social council to have been more active and not, for instance, to have limited the right of access to once every three months."

82. There is nothing to suggest that the Swedish authorities did not act in good faith in implementing the care decision. However, this does not suffice to render a measure "necessary" in Convention terms (see paragraph 68 above): an objective standard has to be applied in this connection. Examination of the Government's arguments suggests that it was partly administrative difficulties that prompted the authorities' decisions; yet, in so fundamental an area as respect for family life, such considerations cannot be allowed to play more than a secondary role.

83. In conclusion, in the respects indicated above and despite the applicants' unco-operative attitude (see paragraph 26 above), the measures taken in implementation of the care decision were not supported by "sufficient" reasons justifying them as proportionate to the legitimate aim pursued. They were therefore, notwithstanding the domestic authorities' margin of appreciation, not "necessary in a democratic society".

E. Overall conclusion

84. To sum up, the implementation of the care decision, but not that decision itself or its maintenance in force, gave rise to a breach of Article 8 (art. 8).

III. ALLEGED VIOLATION OF ARTICLE 3 (art. 3) OF THE CONVENTION

85. The applicants alleged that they had been victims of a violation of Article 3 (art. 3) of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

In their view, there had been "inhuman treatment" as a result of:

(a) the taking away of the children without sufficient reason;

(b) the frequent moving of Stefan from one home to another, his ill-treatment at the hands of the Ek family and his placement in an institution run by the Board for the Retarded (see paragraph 17 above);

(c) the manner in which, on one occasion, Stefan and Thomas had been removed, with police assistance, from the applicants' home.

The Government contested these claims.

86. The Commission considered that it had already dealt in its report, in the context of Article 8 (art. 8), with the essential issues raised by point (a) and that no separate issue arose under Article 3 (art. 3). The Court is of the same opinion.

The Court has also already endorsed, in paragraph 80 above, the Commission's finding that the allegation of ill-treatment of Stefan was not substantiated. As regards the other matters relied on by Mr. and Mrs. Olsson in points (b) and (c), these did not, in the Court's view, constitute "inhuman treatment".

87. There has therefore been no breach of Article 3 (art. 3).

IV. ALLEGED VIOLATION OF ARTICLE 6 (art. 6) OF THE CONVENTION

88. The applicants submitted that they had not received a "fair hearing" in the domestic judicial proceedings and had accordingly been victims of a breach of Article 6 (art. 6) of the Convention, which, so far as is relevant, provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

Apart from the complaints as to the practice of the Swedish courts (see paragraph 54 above), reliance was placed on their having heard Dr. Bosaeus

as an expert although she had been the Council's expert, the manner in which they took her evidence and, more generally, their alleged failure to make proper enquiries about the applicants' mental health and ability to care for the children.

These claims were contested by the Government and rejected by the Commission.

89. Dr. Bosaeus was heard by the County Administrative Court on two occasions: firstly, on 18 December 1980, as an expert (see paragraph 13 above); secondly, on 4 November 1982, as a witness called at the request of the applicants' lawyer (see paragraph 28 above).

This doctor was one of the co-signatories of the medical report on which the Council's care decision of 16 September 1980 had been partly based (see paragraph 12 above). In a case of this kind, it was reasonable that, with her extensive knowledge of the background, she should have been heard as an expert in 1980. This could have rendered the proceedings unfair only if it were established - which is not the case - that the applicants had been prevented from cross-examining her or calling a counter-expert to rebut her testimony.

The complaint concerning the manner in which Dr. Bosaeus' evidence was taken relates to the 1982 hearing. However, the Court is not satisfied that the matters cited by the applicants - her presence in the court-room before she gave evidence and the County Administrative Court's alleged failure both to remind her of her obligation to tell the truth and to insist that she answered certain questions - are sufficient to show that the proceedings were not fair.

90. As for the applicants' more general allegation, they were at all times represented by a lawyer and were able to submit such material and arguments as they saw fit. The only exception was the Administrative Court of Appeal's refusal to accept their request that Dr. Bosaeus be heard as a witness at its hearing in 1982 (see paragraph 29 above); however, she had already been heard in the County Administrative Court.

Viewing the domestic judicial proceedings as a whole, the Court finds no material to support a conclusion that they were not fair or that the Swedish courts failed to make due and proper enquiries.

91. There was therefore no breach of Article 6 (art. 6).

V. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, TAKEN TOGETHER WITH ARTICLE 8 (art. 14+8)

92. The applicants asserted that the interferences with their rights had been based not on objective grounds but on their "social origin" and that they had therefore been victims of discrimination contrary to Article 14 of the Convention, taken together with Article 8 (art. 14+8). The former provision reads as follows:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Commission found nothing in the case-file to substantiate this allegation, which was contested by the Government.

93. The Court shares the view of the Commission and therefore rejects this claim.

VI. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL NO. 1 (P1-2)

94. The applicants submitted that there had been a violation of the second sentence of Article 2 of Protocol No. 1 (P1-2) to the Convention, which reads:

"In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

They argued that the violation had arisen because:

(a) Thomas had been placed in a family who belonged to a religious denomination and attended church with him (see paragraph 20 above), whereas they did not wish their children to receive a religious upbringing;

(b) the placement of the children so far away from the parents and without consultation as to the choice of foster home deprived the latter of the possibility of influencing the former's education.

The Government contested these claims. The Commission rejected the first and expressed no view on the second.

95. The Court agrees with the Commission that the fact that the children were taken into public care did not cause the applicants to lose all their rights under Article 2 of Protocol No. 1 (P1-2).

It notes, however, as did the Commission, that Mr. and Mrs. Olsson, though describing themselves as atheists, have not left the Church of Sweden (see paragraph 8 above) and that there is no serious indication of their being particularly concerned, except at a rather late stage, with giving the children a non-religious upbringing.

Neither have Mr. and Mrs. Olsson shown that in practice the general education of the children whilst in public care diverged from what they would have wished.

96. In these circumstances, no violation of Article 2 of Protocol No. 1 (P1-2) has been established.

VII. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION, TAKEN TOGETHER WITH ARTICLE 2 OF PROTOCOL NO. 1 (art. 13+P1-2)

97. The applicants contended that, since no remedy was available to them in respect of the breach of Article 2 of Protocol No. 1 (P1-2) allegedly resulting from Thomas' being given a religious upbringing, they were victims of a breach of Article 13 (art. 13) of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

98. The Court agrees with the Commission and the Government that this claim has to be rejected. Leaving aside the possibility of seeking redress before the County Administrative Board, a parent could, after the entry into force of the 1980 Act, appeal to the County Administrative Court against a placement decision taken by a Social Council (see paragraph 50 in fine above). Both before and after that time, the question of a child's religious upbringing could have been raised and examined in a request for termination of care (see paragraph 49 in fine above). There is nothing to suggest that these remedies, which were apparently not utilised by the applicants as regards Thomas' upbringing, would not have been "effective", within the meaning of Article 13 (art. 13).

VIII. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

99. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicants claimed under this provision 30,000,000 Swedish crowns (SEK) for non-pecuniary damage, together with reimbursement of legal fees and expenses in the sum of 884,500 SEK. The first-mentioned amount was, unless the Court could order payment to the applicants only, to be paid to them and the children in five equal shares.

A. Damage

100. At the Court's hearing, the Government, whilst reserving their position, indicated that they considered the claim for damage to be excessive. The Commission's Delegate also found the amount claimed to be

out of proportion; she suggested that a figure of 300,000 SEK would be reasonable and equitable.

101. The Court considers that, notwithstanding the Government's reservation, this question is ready for decision (Rule 53 § 1 of the Rules of Court). It would first observe that it cannot accept the request, contained in the claims filed by the applicants on 27 July 1987, for an award of just satisfaction to the children: it is only Mr. and Mrs. Olsson who are applicants in the present proceedings.

102. The violation of Article 8 (art. 8) of the Convention found by the Court in the instant case arose solely from the manner in which the care decision was implemented (see paragraph 84 above). It follows that the applicants are not entitled to just satisfaction for that decision and the taking away of the children as such, but only for the prejudice which they may have suffered on account of the separation of the children from each other, the placement of Helena and Thomas at a long distance from the applicants' home and the restrictions on visits.

There can be no doubt, in the Court's view, that these matters caused Mr. and Mrs. Olsson considerable inconvenience and, above all, substantial anxiety and distress. Regular and frequent contacts with the children were greatly impeded and the possibilities for the whole family to meet together were minimal. And this situation, with its deleterious effects on the applicants' family life, endured for some seven years.

These various factors do not readily lend themselves to precise quantification. Making an assessment on an equitable basis, as is required by Article 50 (art. 50), the Court awards Mr. and Mrs. Olsson together the sum of 200,000 SEK under this head.

B. Legal fees and expenses

103. The applicants' claim for legal fees and expenses, totalling 884,500 SEK, was made up of the following items:

(a) 630,700 SEK for 901 hours' work by their lawyer (at 700 SEK per hour) in the domestic proceedings and 14,600 SEK for related expenses;

(b) 234,500 SEK for 335 hours' work (at the same rate) in the proceedings before the Commission and the Court and 4,700 SEK for related expenses.

The Government contested this claim in several respects, arguing in particular that: the applicants' statement of the fees and expenses they had incurred in the domestic proceedings was insufficiently precise to permit of anything other than an equitable assessment; the amounts sought in respect of those proceedings related partly to work on questions that were not material to the case before the Strasbourg institutions and partly to work that was unnecessary; the hourly rate charged, though acceptable for the Strasbourg proceedings, was excessive for the domestic proceedings; and

the time spent by the applicants' lawyer on the Strasbourg proceedings exceeded what was reasonable. The Government were willing to pay total sums of 290,000 SEK for fees and 12,800 SEK for expenses, subject to a pro rata reduction in respect of such allegations pursued by Mr. and Mrs. Olsson before the Court as it might not sustain.

The Commission's Delegate found the amounts claimed to be very high; she shared many of the observations made by the Government and considered that the sums they proposed constituted a reasonable basis for the Court's assessment.

104. An award may be made under Article 50 (art. 50) in respect of costs and expenses that (a) were actually and necessarily incurred by the injured party in order to seek, through the domestic legal system, prevention or rectification of a violation, to have the same established by the Commission and later by the Court and to obtain redress therefor; and (b) are reasonable as to quantum (see, amongst many authorities, the Feldbrugge judgment of 27 July 1987, Series A no. 124-A, p. 9, § 14).

105. (a) The Court has found that neither the care decision itself nor its maintenance in force gave rise to a breach of Article 8 (art. 8) (see paragraph 84 above). Accordingly, to the extent - which was considerable - that the steps taken by the applicants in the domestic proceedings related to these matters, as distinct from the implementation of the care decision, no award can be made under Article 50 (art. 50) in respect of the fees and expenses involved. Furthermore, some of the costs claimed - for example, those relating to contacts by the applicants' lawyer with journalists for publicity in Sweden and abroad and to her investigation of a murder allegedly committed in the children's home where Stefan was placed - cannot be regarded as "necessarily incurred". Again, others concerned issues falling outside the scope of the case before the Court, such as the prohibition on the removal of Helena and Thomas from their foster homes (see paragraph 57 above).

(b) As regards the fees and expenses referable to the Strasbourg proceedings, the Government did not contest that the applicants had incurred liability to pay sums additional to those covered by the legal aid which they had received from the Council of Europe (see, inter alia, the Inze judgment of 28 October 1987, Series A no. 126, p. 22, § 56). The Court, however, shares the Government's view that the amount claimed is excessive. It also agrees that the sum to be awarded should reflect the fact that some substantial complaints by the applicants remained unsuccessful (see, as the most recent authority, the Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 33, § 86).

106. Taking into account the above factors and also the relevant legal aid payments made by the Council of Europe and making an assessment on an equitable basis, the Court considers that Mr. and Mrs. Olsson are

together entitled to be reimbursed, for legal fees and expenses, the sum of 150,000 SEK.

FOR THESE REASONS, THE COURT

1. Rejects unanimously the Government's plea concerning the scope of the case;

2. Holds by ten votes to five that the decision to take the children into care and its maintenance in force did not give rise to a violation of Article 8 (art. 8) of the Convention;

3. Holds by twelve votes to three that there has been a violation of Article 8 (art. 8) on account of the manner in which the said decision was implemented;

4. Holds unanimously that there has been no violation of Article 6 (art. 6) of the Convention;

5. Holds unanimously that there has been no violation of Article 3 (art. 3) of the Convention, of Article 14 of the Convention, taken together with Article 8 (art. 14+8), of Article 2 of Protocol No. 1 (P1-2), or of Article 13 of the Convention, taken together with the said Article 2 (art. 13+P1-2);

6. Holds unanimously that Sweden is to pay to the applicants together, for non-pecuniary damage, 200,000 (two hundred thousand) Swedish crowns and, for legal fees and expenses, 150,000 (one hundred and fifty thousand) Swedish crowns;

7. Rejects unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 March 1988.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the following separate opinions are annexed to the present judgment:

(a) joint partly dissenting opinion of Mr. Ryssdal, Mr. Thór Vilhjálmsson and Mr. Gölcüklü;

(b) opinion of Mr. Pinheiro Farinha, Mr. Pettiti, Mr. Walsh, Mr. Russo and Mr. De Meyer.

R.R.
M.-A.E.

JOINT PARTLY DISSENTING OPINION OF JUDGES RYSSDAL, THÓR VILHJÁLMSSON, AND GÖLCÜKLÜ

As to the alleged violation of Article 8 (art. 8) of the Convention, we can subscribe only in part to the finding of the Court.

I. Introduction

The separation of children from their parents through a care decision taken by a State authority is certainly a serious interference with family life. In this respect it is important to protect parents and children against arbitrary intervention. The State concerned must be able to demonstrate that the views and interests of the parents have been duly taken into account and that the whole decision-making process is such as to ensure that the measures adopted are necessary to safeguard the children's interests.

An important feature of the relevant Swedish legislation is the possibility of judicial proceedings before the administrative courts and the competence of those courts to examine fully whether children should be taken into care and how a care decision should be implemented.

It is established that different social authorities had been involved with the Olsson family to a considerable extent prior to the events giving rise to the present case. There had been continuing and intensive contacts, including contacts with Mr. and Mrs. Olsson. Home-therapy had been tried without success. According to the examination of the facts and evidence conducted by the Social District Council and the competent domestic courts, the parents were not able to deal satisfactorily with the children, and in August-September 1980 the latter's needs created some kind of an emergency situation with the result that the Council considered it necessary to take them into care.

II. The care decision

We agree with the Court that the decision to take the children into care and its maintenance in force until 1987 did not give rise to a violation of Article 8 (art. 8) of the Convention, for the reasons given in paragraphs 71-74 and 75-77, respectively, of the judgment. In this context we would emphasise two facts: firstly, the Council's decision of 16 September 1980 was confirmed by adequately reasoned judgments of the County Administrative Court (30 December 1980) and of the Administrative Court of Appeal (8 July 1981); secondly, the Council's subsequent refusal to terminate care was confirmed by adequately reasoned judgments of the County Administrative Court (17 November 1982) and of the Administrative Court of Appeal (28 December 1982).

III. The implementation of the care decision

Paragraph 78 of the Court's judgment states that the applicants complained of (i) the placement of the children separately and at a long distance from each other and their parents; (ii) the restrictions on and the conditions of visits; and (iii) the conditions in the homes where the children were placed.

First of all we would like to stress - as the Court has also done - that there is nothing to suggest that the Swedish authorities did not act in good faith in implementing the care decision.

As to the last of the complaints listed above, we agree with the Court that it is not established that the quality of the care given to the children in the homes where they were placed was not satisfactory. This complaint must accordingly be rejected.

As to the complaint about the placement, which mainly concerns the placement of Helena and Thomas far away from Gothenburg, we would first say that when a care decision - as in the present case - is to be regarded as a temporary measure, it is generally desirable to place the children in foster homes that are not far away from their parents' home. However, in view of Mr. and Mrs. Olsson's conduct in the autumn of 1980 - their removal and hiding of Stefan -, it was quite reasonable for the Council to consider that Helena and Thomas could not be placed in foster homes in the Gothenburg region. It seems unfortunate that they were placed at so great a distance from Gothenburg, but it may have been difficult to find foster parents able and willing to satisfy the special needs of these two children. In our opinion, the Council's view that it was not appropriate to place both of them in the same foster home has to be accepted. Moreover, we are satisfied that the Council did really try to place them in the same village, but that this became impossible because one of the chosen families in the end declined to receive the child. In any event, the national authorities must enjoy a considerable discretion in this respect, since the decision on such a matter has to be based on an overall appraisal of a number of facts, including the availability of suitable foster homes and the needs of the children taken into care.

As to the restrictions on visits, it should be mentioned that the County Administrative Court confirmed them on two occasions and that, after its decision of 3 October 1985, Mr. and Mrs. Olsson withdrew their appeal on this point in subsequent proceedings before the Administrative Court of Appeal (see paragraph 24 of the European Court's judgment). Moreover, they did not make full use of their entitlement to visit in accordance with the decisions taken and, on the subject of contacts with the children, their whole attitude seems to have been rather negative as regards co-operation with the foster parents and the social authorities (see paragraphs 25 and 26 of the judgment).

In the particular circumstances of the case and taking into account the domestic authorities' margin of appreciation, we have come to the conclusion that the measures taken in implementation of the care decision could reasonably be considered necessary and proportionate to the legitimate aim pursued, and that they accordingly did not give rise to a violation of Article 8 (art. 8) of the Convention.

SEPARATE OPINION OF JUDGES PINHEIRO FARINHA, PETTITI, WALSH, RUSSO AND DE MEYER

We take the view that the decisions at issue themselves, as well as their implementation, unjustifiably interfered with the right of the applicants to respect for their family life.

We feel that it cannot be accepted that children can be taken away from their parents without a prior judicial decision, save in cases of emergency.

Moreover, we believe that it has not been shown that in the present case such a measure was really "necessary in a democratic society".

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

COURT (PLENARY)

CASE OF REES v. THE UNITED KINGDOM

(Application no. 9532/81)

JUDGMENT

STRASBOURG

17 October 1986

In the Rees case[*],

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. Thór VILHJÁLMSSON,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. J. GERSING,
Mr. A. SPIELMANN,
Mr. A.M. DONNER,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 20 March and on 23 and 25 September 1986,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 14 March 1985, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in an application (no. 9532/81) against the United Kingdom of Great Britain and Northern Ireland, lodged with the Commission in 1979 by a British citizen, Mr. Mark Rees, under Article 25 (art. 25) of the Convention.

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[*] Note by the Registrar: The case is numbered 2/1985/88/135. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision by the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 8 and 12 (art. 8, art. 12) of the Convention.

3. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings pending before the Court and designated the lawyers who would represent him (Rule 30).

4. The Chamber of seven judges to be constituted included, as ex officio members, Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the then President of the Court (Rule 21 para. 3 (b) of the Rules of Court). On 27 March 1985, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mrs. D. Bindschedler-Robert, Mr. G. Lagergren, Mr. R. Ryssdal, Mr. C. Russo and Mr. R. Bernhardt (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

5. Mr. Wiarda assumed the office of President of the Chamber (Rule 21 para. 5). He ascertained, through the Registrar, the views of the Agent of the United Kingdom Government ("the Government"), the Delegate of the Commission and the lawyers for the applicant regarding the need for a written procedure (Rule 37 para. 1). Thereafter, in accordance with the Orders and directions of the President of the Chamber, the following documents were lodged at the registry:

- on 19 August 1985, the memorial of the Government;
- on 26 August 1985, the memorial of the applicant;
- on 10 March 1986, various documents requested from the Commission.

By letter received on 13 November 1985, the Secretary to the Commission informed the Registrar that the Delegate did not wish to reply in writing to these memorials.

6. After consulting, through the Registrar, the Agent of the Government, the Commission's Delegate and the applicant's representatives, the President of the Chamber directed on 6 January 1986 that the oral proceedings should open on 18 March 1986 (Rule 38).

7. On 24 January 1986, the Chamber decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 50), under the presidency of Mr. Wiarda's successor, Mr. Ryssdal.

8. On 21 February and on 13 March 1986, respectively, the Government and the applicant submitted, of their own motion, a number of further documents.

9. The hearings were held in public at the Human Rights Building, Strasbourg, on 18 March 1986. Immediately before they opened, the Court had held a preparatory meeting.

There appeared before the Court:
- for the Government
Mr. M. EATON, Legal Counsellor,
Foreign and Commonwealth Office, *Agent*,
Mr. N. BRATZA, Barrister-at-Law, *Counsel*,
Mr. J. NURSAW, Home Office,
Mr. P. LUCAS, Department of Health and Social Security,
Mr. W. JENKINS, Central Register Office, *Advisers*;
- for the Commission
Mr. B. KIERNAN, *Delegate*;
- for the applicant
Mr. N. BLAKE, *Counsel*,
Mr. D. Burgess, *Solicitor*.

10. The Court heard addresses by Mr. Bratza for the Government, by Mr. Kiernan for the Commission and by Mr. Blake for the applicant, as well as their replies to its questions. At the hearing the Government and the applicant filed a number of other documents.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

11. The applicant, a British citizen born in 1942, lives at Tunbridge Wells in England.

12. At birth the applicant possessed all the physical and biological characteristics of a child of the female sex, and was consequently recorded in the register of births as a female, under the name Brenda Margaret Rees. However, already from a tender age the child started to exhibit masculine behaviour and was ambiguous in appearance. In 1970, after learning that the transsexual state was a medically recognised condition, she sought treatment. She was prescribed methyl testosterone (a hormonal treatment) and started to develop secondary male characteristics.

13. In September 1971, the applicant - who will henceforth be referred to in the masculine - changed his name to Brendan Mark Rees and subsequently, in September 1977, to Mark Nicholas Alban Rees. He has been living as a male ever since. After the change of name, the applicant requested and received a new passport containing his new names. The prefix "Mr." was, however, at that time denied to him.

14. Surgical treatment for physical sexual conversion began in May 1974 with a bilateral masectomy and led to the removal of feminine external

characteristics. The costs of the medical treatment, including the surgical procedures, were borne by the National Health Service.

15. The applicant made several unsuccessful efforts from 1973 onwards to persuade Members of Parliament to introduce a Private Member's Bill to resolve the problems of transsexuals. Representations were also made by him, and by a number of Members of Parliament on his behalf, to the Registrar General to secure the alteration of his birth certificate to show his sex as male, but to no avail.

16. On 10 November 1980 his solicitor wrote to the Registrar General making a formal request under Section 29(3) of the Births and Deaths Registration Act 1953, on the ground that there had been "a mistake in completing the Register". In support of his request, the applicant submitted a medical report by Dr. C.N. Armstrong. The report stated that, in Dr. Armstrong's opinion, of the four criteria of sex - namely chromosomal sex, gonadal sex, apparent sex (external genitalia and body form) and psychological sex, the last was the most important as it determined the individual's social activities and role in adult life, and it was also, in his view, pre-determined at birth, though not evident until later in life. Dr. Armstrong considered that as the applicant's psychological sex was male, he should be assigned male.

On 25 November the Registrar General refused the application to alter the Register. He stated that the report on the applicant's psychological sex was not decisive and that, "in the absence of any medical report on the other agreed criteria (chromosomal sex, gonadal sex and apparent sex)", he was "unable to consider whether an error (had been) made at birth registration in that the child was not of the sex recorded". No further evidence in support of the applicant's request was subsequently submitted.

17. The applicant considers himself a man and is socially accepted as such. Except for the birth certificate, all official documents today refer to him by his new name and the prefix "Mr.", where such prefix is used. The prefix was added to his name in his passport in 1984.

II. DOMESTIC LAW AND PRACTICE

A. Medical treatment

18. In the United Kingdom sexual reassignment operations are permitted without legal formalities. The operations and treatment may, as in the case of Mr. Rees, be carried out under the National Health Service.

B. Change of name

19. Under English law a person is entitled to adopt such first names or surname as he or she wishes and to use these new names without any restrictions or formalities, except in connection with the practice of some professions where the use of the new names may be subject to certain formalities (see, inter alia, Halsbury's Laws of England, 4th ed., vol. 35, para. 1176). For the purposes of record and to obviate the doubt and confusion which a change of name is likely to involve, the person concerned very frequently makes, as did Mr. Rees, a declaration in the form of a "deed poll" which may be enrolled with the Central Office of the Supreme Court.

The new names are valid for purposes of legal identification (see Halsbury's Laws of England, loc. cit., para. 1174) and may be used in documents such as passports, driving licences, car registration books, national insurance cards, medical cards, tax codings and social security papers. The new names are also entered on the electoral roll.

C. Identity documents

20. Civil status certificates or equivalent current identity documents are not in use or required in the United Kingdom. Where some form of identification is needed, this is normally met by the production of a driving licence or a passport. These and other identity documents may, according to the prevailing practice, be issued in the adopted names of the person in question with a minimum of formality. In the case of transsexuals, the documents are also issued so as to be in all respects consistent with the new identity. Thus, the practice is to allow the transsexual to have a current photograph in his or her passport and the prefix "Mr.", "Mrs.", "Ms." or "Miss", as appropriate, before his or her adopted names.

D. The Register of Births

21. The system of civil registration of births, deaths and marriages was established by statute in England and Wales in 1837. Registration of births is at present governed by the Births and Deaths Registration Act 1953 ("the 1953 Act"). The entry into force of this Act entailed no material change to the law in force in 1942, the date of the applicant's birth. The 1953 Act requires that the birth of every child be registered by the Registrar of Births and Deaths for the area in which the child is born. The particulars to be entered are prescribed in regulations made under the 1953 Act.

A birth certificate takes the form either of an authenticated copy of the entry in the register of births or of an extract from the register. A certificate of the latter kind, known as a "short certificate of birth", is in a form prescribed and contains such particulars as are prescribed by regulations

made under the 1953 Act. The particulars so prescribed are the name and surname, sex, date of birth and place of birth of the individual.

An entry in a birth register and the certificate derived therefrom are records of facts at the time of the birth. Thus, in England and Wales the birth certificate constitutes a document revealing not current identity, but historical facts. The system is intended to provide accurate and authenticated evidence of the events themselves and also to enable the establishment of the connections of families for purposes related to succession, legitimate descent and distribution of property. The registration records also form the basis for a comprehensive range of vital statistics and constitute an integral and essential part of the statistical study of population and its growth, medical and fertility research and the like.

22. The 1953 Act provides for the correction of clerical errors, such as the incorrect statement or omission of the year of the birth, and for the correction of factual errors; however, in the latter case, an amendment can be made only if the error occurred when the birth was registered. The birth register may also, within twelve months from the date of registration, be altered to give or change the name of a child and re-registration of a birth is permitted where the child has been legitimated. In addition, under the Adoption Act 1958, where a child is adopted, the register of births is to be marked with the word "adopted"; the adoption is also registered in the Adopted Children Register and a short certificate of birth may be obtained which contains no reference to parentage or adoption.

23. The criteria for determining the sex of the person to be registered are not laid down in the 1953 Act nor in any of the regulations made under it. However, the practice of the Registrar General is to use exclusively the biological criteria: chromosomal, gonadal and genital sex. The fact that it becomes evident later in life that the person’s "psychological sex" is at variance with these biological criteria is not considered to imply that the initial entry was a factual error and, accordingly, any request to have the initial entry changed on this ground will be refused. Only in cases of a clerical error, or where the apparent and genital sex of the child was wrongly identified or in case of biological intersex, i.e. cases in which the biological criteria are not congruent, will a change of the initial entry be contemplated and it is necessary to adduce medical evidence that the initial entry was incorrect. However, no error is accepted to exist in the birth entry of a person who undergoes medical and surgical treatment to enable that person to assume the role of the opposite sex.

24. The birth registers and the indexes of all the entries are public. However, the registers themselves are not readily accessible to the general public as identification of the index reference would require prior knowledge not only of the name under which the person concerned was registered, but also of the approximate date and place of birth and the Registration District.

25. The law does not require that the birth certificate be produced for any particular purpose, although it may in practice be requested by certain institutions and employers.

In particular, a birth certificate has in general to accompany a first application for a passport, although not for its renewal or replacement. A birth certificate is also generally (though not invariably) required by insurance companies when issuing pension or annuity policies, but not for the issue of motor or household policies nor, as a rule, for the issue of a life insurance policy. It may also be required when enrolling at a university and when applying for employment, inter alia, with the Government.

E. Marriage

26. In English law, marriage is defined as a voluntary union for life of one man and one woman to the exclusion of all others (per Lord Penzance in Hyde v. Hyde (1868) Law Reports 1 Probate and Divorce 130, 133). Section 11 of the Matrimonial Causes Act 1973 gives statutory effect to the common-law provision that a marriage is void ab initio if the parties are not respectively male and female.

27. According to the decision of the High Court in Corbett v. Corbett (1971) Probate Reports 83, sex, for the purpose of contracting a valid marriage, is to be determined by the chromosomal, gonadal and genital tests where these are congruent. The relevance of a birth certificate to the question whether a marriage is void only arises as a matter of evidence which goes to the proof of the identity and sex of the person whose birth it certifies. The entry in the birth register is prima facie evidence of the person's sex. It may, however, be rebutted if evidence of sufficient weight to the contrary is adduced.

28. If, for the purpose of procuring a marriage or a certificate or licence for marriage, any person knowingly and wilfully makes a false oath or makes or signs a false declaration, notice or certificate required under any Act relating to marriage, he is guilty of an offence under Section 3 (1) of the Perjury Act 1911. However, a person contracting a marriage abroad is not liable to prosecution under this Act.

F. The legal definition of sex for other purposes

29. The biological definition of sex laid down in Corbett v. Corbett has been followed by English courts and tribunals on a number of occasions and for purposes other than marriage.

The applicant has drawn the Court's attention to the following cases. In one case concerning prostitution, a male to female transsexual, who had undergone both hormone and surgical treatment, was nevertheless treated as a male by the Court of Appeal for the purposes of Section 30 of the Sexual

Offences Act 1956 and Section 5 of the Sexual Offences Act 1967 (Regina v. Tan and Others 1983, [1983] 2 All England Law Reports 12). In two cases concerning social security legislation, male to female transsexuals were considered by the National Insurance Commissioner as males for the purposes of retirement age; in the first case the person in question had only received hormone therapy, in the second he had involuntarily begun to develop female secondary characteristics at the age of 46, which developments were followed by surgery and adoption of a female social role some 13 years later (cases R (P) 1 and R (P) 2 in the 1980 Volume of National Insurance Commissioner Decisions). Lastly, in a case before an Industrial Tribunal a female to male transsexual, who had not undergone any sex change treatment, was treated as a female by the Tribunal for the purposes of the Sex Discrimination Act 1975; the person in question had sought and received employment in a position reserved for men under the Factories Act, but was dismissed after discovery of her biological sex (White v. British Sugar Corporation Ltd. [1977] Industrial Relations Law Reports p. 121).

PROCEEDINGS BEFORE THE COMMISSION

30. In his application (no. 9532/81) lodged with the Commission on 18 April 1979, Mr. Rees complained that United Kingdom law did not confer on him a legal status corresponding to his actual condition. He invoked Articles 3, 8 and 12 (art. 3, art. 8, art. 12) of the Convention.

31. On 15 March 1984, the Commission declared admissible the complaints under Articles 8 and 12 (art. 8, art. 12). In its report of 12 December 1984, it expressed the unanimous opinion that there had been a breach of Article 8 (art. 8), but not of Article 12 (art. 12). The full text of the Commission's opinion is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS MADE TO THE COURT

32. At the hearing on 18 March 1986, the Government formally invited the Court to reach the conclusion and make the findings (1) that there has been no breach of the right to respect for the private life of the applicant under Article 8 para. 1 (art. 8-1) of the Convention and (2) that there has been no breach of the applicant's right to marry and found a family under Article 12 (art. 12) of the Convention.

The applicant, for his part, asked the Court to find that there had been a breach of both Articles (art. 8, art. 12).

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

33. The applicant claimed to be the victim of national legislation and practices contrary to his right to respect for his private life, enshrined in Article 8 (art. 8), which provides:

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

34. The applicant complained primarily of the constraints upon his full integration into social life which were a result of the failure of the Government to provide measures that would legally constitute him as a male for the purposes of the exhaustive classification of all citizens into male or female.

In particular, he complained of the practice of issuing him with a birth certificate on which his sex continued to be recorded as "female". Such a certificate, he alleged, was effectively an irrebuttable description of his sex, wherever sex was a relevant issue and, revealing as it did the discrepancy between his apparent and his legal sex, it caused him embarrassment and humiliation whenever social practices required its production.

The Government contested the applicant's claim; the Commission, on the other hand, agreed with it in its essentials.

A. Interpretation of Article 8 (art. 8) in the context of the present case

35. The Court has already held on a number of occasions that, although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective respect for private life, albeit subject to the State's margin of appreciation (see, as the most recent authority, the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, pp. 33-34, para. 67).

In the present case it is the existence and scope of such "positive" obligations which have to be determined. The mere refusal to alter the register of births or to issue birth certificates whose contents and nature differ from those of the birth register cannot be considered as interferences.

36. The Commission and the applicant submitted that the applicant has been socially accepted as a man (see paragraph 17 above) and that, consistently with this, the change in his sexual identity should be given full legal recognition by the United Kingdom. It was only with regard to the choice of the necessary measures that there could be any room for a margin of appreciation, or for any balancing with countervailing public interests.

The Government, on the other hand, maintained that the whole matter depended on the balance that had to be struck between the competing interests of the individual and of society as a whole.

37. As the Court pointed out in its above-mentioned Abdulaziz, Cabales and Balkandali judgment the notion of "respect" is not clear-cut, especially as far as those positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion’s requirements will vary considerably from case to case.

These observations are particularly relevant here. Several States have, through legislation or by means of legal interpretation or by administrative practice, given transsexuals the option of changing their personal status to fit their newly-gained identity. They have, however, made this option subject to conditions of varying strictness and retained a number of express reservations (for example, as to previously incurred obligations). In other States, such an option does not - or does not yet - exist. It would therefore be true to say that there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation.

In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention (see, mutatis mutandis, amongst others, the James and Others judgment of 21 February 1986, Series A no. 98, p. 34, para. 50, and the Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p. 26, para. 69). In striking this balance the aims mentioned in the second paragraph of Article 8 (art. 8-2) may be of a certain relevance, although this provision refers in terms only to "interferences" with the right protected by the first paragraph - in other words is concerned with the negative obligations flowing therefrom (see, mutatis mutandis, the Marckx judgment of 13 June 1979, Series A no. 31, p. 15, para. 31).

B. Compliance with Article 8 (art. 8)

38. Transsexualism is not a new condition, but its particular features have been identified and examined only fairly recently. The developments

that have taken place in consequence of these studies have been largely promoted by experts in the medical and scientific fields who have drawn attention to the considerable problems experienced by the individuals concerned and found it possible to alleviate them by means of medical and surgical treatment. The term "transsexual" is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group.

39. In the United Kingdom no uniform, general decision has been adopted either by the legislature or by the courts as to the civil status of post-operative transsexuals. Moreover, there is no integrated system of civil status registration, but only separate registers for births, marriages, deaths and adoption. These record the relevant events in the manner they occurred without, except in special circumstances (see paragraph 22 above), mentioning changes (of name, address, etc.) which in other States are registered.

40. However, transsexuals, like anyone else in the United Kingdom, are free to change their first names and surnames at will (see paragraph 19 above). Similarly, they can be issued with official documents bearing their chosen first names and surnames and indicating, if their sex is mentioned at all, their preferred sex by the relevant prefix (Mr., Mrs., Ms. or Miss) (see paragraph 20 above). This freedom gives them a considerable advantage in comparison with States where all official documents have to conform with the records held by the registry office.

Conversely, the drawback - emphasised by the applicant - is that, as the country’s legal system makes no provision for legally valid civil-status certificates, such persons have on occasion to establish their identity by means of a birth certificate which is either an authenticated copy of or an extract from the birth register. The nature of this register, which furthermore is public, is that the certificates mention the biological sex which the individuals had at the time of their birth (see paragraphs 21 and 24 above). The production of such a birth certificate is not a strict legal requirement, but may on occasion be required in practice for some purposes (see paragraph 25 above).

It is also clear that the United Kingdom does not recognise the applicant as a man for all social purposes. Thus, it would appear that, at the present stage of the development of United Kingdom law, he would be regarded as a woman, inter alia, as far as marriage, pension rights and certain employments are concerned (see paragraphs 27 and 29 above). The existence of the unamended birth certificate might also prevent him from

entering into certain types of private agreements as a man (see paragraph 25 above).

41. For the applicant and the Commission this situation was incompatible with Article 8 (art. 8), there being in their opinion no justification for it on any ground of public interest. They submitted that the refusal of the Government to amend or annotate the register of births to record the individual's change of sexual identity and to enable him to be given a birth certificate showing his new identity cannot be justified on any such ground. Such a system of annotation would, according to the applicant, be similar to that existing in the case of adoptions. The applicant and the Commission pointed to the example of certain other Contracting States which have recently made provision for the possibility of having the original indication of sex altered from a given date. The Commission additionally relied on the fact that the United Kingdom, through its free national health service, had borne the costs of the surgical operations and other medical treatment which the applicant had been enabled to undergo. They considered that this medical recognition of the necessity to assist him to realise his identity must be regarded as a further argument for the legal recognition of the change in his sexual identity; failure to do so had the effect that the applicant was treated as an ambiguous being.

42. The Court is not persuaded by this reasoning.

(a) To require the United Kingdom to follow the example of other Contracting States is from one perspective tantamount to asking that it should adopt a system in principle the same as theirs for determining and recording civil status.

Albeit with delay and some misgivings on the part of the authorities, the United Kingdom has endeavoured to meet the applicant's demands to the fullest extent that its system allowed. The alleged lack of respect therefore seems to come down to a refusal to establish a type of documentation showing, and constituting proof of, current civil status. The introduction of such a system has not hitherto been considered necessary in the United Kingdom. It would have important administrative consequences and would impose new duties on the rest of the population. The governing authorities in the United Kingdom are fully entitled, in the exercise of their margin of appreciation, to take account of the requirements of the situation pertaining there in determining what measures to adopt. While the requirement of striking a fair balance, as developed in paragraph 37 above, may possibly, in the interests of persons in the applicant's situation, call for incidental adjustments to the existing system, it cannot give rise to any direct obligation on the United Kingdom to alter the very basis thereof.

(b) Interpreted somewhat more narrowly, the applicant's complaint might be seen as a request to have such an incidental adjustment in the form of an annotation to the present birth register.

Whilst conceding that additions can be made to the entries in the birth register in order to record, for example, subsequent adoption or legitimation (see paragraphs 22-23 above), the Government disputed that the proposed annotation was comparable to additions of this kind. They submitted that, in the absence of any error or omission at the time of birth, the making of an alteration to the register as to the sex of the individual would constitute a falsification of the facts contained therein and would be misleading to other persons with a legitimate interest in being informed of the true situation. They contended that the demands of the public interest weighed strongly against any such alteration.

The Court notes that the additions at present permitted as regards adoption and legitimation also concern events occurring after birth and that, in this respect, they are not different from the annotation sought by the applicant. However, they record facts of legal significance and are designed to ensure that the register fulfils its purpose of providing an authoritative record for the establishment of family ties in connection with succession, legitimate descent and the distribution of property. The annotation now being requested would, on the other hand, establish only that the person concerned henceforth belonged to the other sex. Furthermore, the change so recorded could not mean the acquisition of all the biological characteristics of the other sex. In any event, the annotation could not, without more, constitute an effective safeguard for ensuring the integrity of the applicant's private life, as it would reveal his change of sexual identity.

43. The applicant has accordingly also asked that the change, and the corresponding annotation, be kept secret from third parties.

However, such secrecy could not be achieved without first modifying fundamentally the present system for keeping the register of births, so as to prohibit public access to entries made before the annotation. Secrecy could also have considerable unintended results and could prejudice the purpose and function of the birth register by complicating factual issues arising in, inter alia, the fields of family and succession law. Furthermore, no account would be taken of the position of third parties, including public authorities (e.g. the armed services) or private bodies (e.g. life insurance companies) in that they would be deprived of information which they had a legitimate interest to receive.

44. In order to overcome these difficulties there would have to be detailed legislation as to the effects of the change in various contexts and as to the circumstances in which secrecy should yield to the public interest. Having regard to the wide margin of appreciation to be afforded the State in this area and to the relevance of protecting the interests of others in striking the requisite balance, the positive obligations arising from Article 8 (art. 8) cannot be held to extend that far.

45. This conclusion is not affected by the fact, on which both the Commission and the applicant put a certain emphasis, that the United Kingdom cooperated in the applicant's medical treatment.

If such arguments were adopted too widely, the result might be that Government departments would become over-cautious in the exercise of their functions and the helpfulness necessary in their relations with the public could be impaired. In the instant case, the fact that the medical services did not delay the giving of medical and surgical treatment until all legal aspects of persons in the applicant's situation had been fully investigated and resolved, obviously benefited him and contributed to his freedom of choice.

46. Accordingly, there is no breach of Article 8 (art. 8) in the circumstances of the present case.

47. That being so, it must for the time being be left to the respondent State to determine to what extent it can meet the remaining demands of transsexuals. However, the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances (see, mutatis mutandis, amongst others, the Dudgeon judgment of 22 October 1981, Series A no. 45, pp. 23-24, paragraph 60). The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.

II. ALLEGED VIOLATION OF ARTICLE 12 (art. 12)

48. The applicant complained of the undisputed fact that, according to the law currently in force in the United Kingdom, he cannot marry a woman. He alleged a violation of Article 12 (art. 12), which provides:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

The Government contested this; the Commission was divided between two conflicting views.

49. In the Court's opinion, the right to marry guaranteed by Article 12 (art. 12) refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 (art. 12) is mainly concerned to protect marriage as the basis of the family.

50. Furthermore, Article 12 (art. 12) lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired. However, the legal impediment in the United Kingdom on the marriage of

persons who are not of the opposite biological sex cannot be said to have an effect of this kind.

51. There is accordingly no violation in the instant case of Article 12 (art. 12) of the Convention.

FOR THESE REASONS, THE COURT

1. Holds by twelve votes to three that there is no violation of Article 8 (art. 8);

2. Holds unanimously that there is no violation of Article 12 (art. 12).

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 17 October 1986.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

The dissenting opinion of Judges Bindschedler-Robert, Russo and Gersing is annexed to the present judgment in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court.

R. R.
M.-A. E.

DISSENTING OPINION OF JUDGES BINDSCHEDLER-ROBERT, RUSSO AND GERSING

(Translation)

1. With regard to Article 8 (art. 8), the applicant complained that the Government had not taken the necessary measures to ensure recognition of his sexual identity in all the circumstances in which this could be of importance. In particular, he criticised the Government for continuing to issue him with a birth certificate showing that he was of the female sex, without any further explanation. The Commission considered that the United Kingdom had failed to respect the applicant's private life as required under Article 8 para. 1 (art. 8-1) of the Convention, because it had not made any provision for measures which would make it possible to take account, in the applicant's civil status, of any legitimate changes. In what follows, it seems to us that we can accordingly concentrate on the question whether respect for Mr. Rees's private life entails certain measures being taken by the State with respect to the way in which civil-status documents concerning him are drawn up.

2. The operations Mr. Rees underwent and the concomitant anguish and suffering show how real and intense was his desire to adopt a new sexual identity as far as possible. We agree with the majority, moreover, that the United Kingdom endeavoured to go a considerable way towards meeting the applicants's demands, for example by giving him - like everyone else - the opportunity of changing his name, by giving him a passport which showed his new sexual identity and by allowing him to a large extent to adopt socially the male role corresponding to his innermost inclinations and to his new sexual appearance.

3. With regard to one thing - his birth certificate - however, the British authorities did not feel bound or able to take Mr. Rees's new identity into account. In practice, though, it appears necessary to produce a birth certificate in connection with a number of formalities, such as applying for a passport for the first time or enrolling at university. This has resulted - and may again result - in the applicant's having to face distressing situations which amount to an interference with his private life and thus to a breach of Article 8 (art. 8). We are of the view that this could be avoided by means of an annotation in the birth register to the effect that there had been a change in Mr. Rees's sexual identity; at the same time, it could be made possible for the applicant to obtain a short certificate which would indicate only his new sexual identity and thus make it easier to safeguard the inviolability of his private life. We recognise, moreover, that in this sphere the State has a wide margin of appreciation as regards the method to be used in order to remedy the situation in question and we do not in any way rule out the possibility that other measures might achieve the same aim. It will be

remembered, for instance, that on 5 October 1982 the Commission endorsed a friendly settlement between a group of applicants and Italy (application no. 9420/81) whereby as a result of an Act recently passed in Italy, the applicants can henceforth secure rectification of their civil status.

4. We do not, on the other hand, consider that Article 8 (art. 8) requires that Mr. Rees be guaranteed secrecy in the sense that only his new sexual identity should appear in all official documents: the birth register is public and there is certainly a public interest in its remaining so.

5. A variety of objections, which seem to us unconvincing, have been made to this conclusion that it is necessary to reflect Mr. Rees's change of sexual identity in official documents concerning him.

(a) There is obviously no question of correcting the registers by concealing the historical truth or of claiming that Mr. Rees has changed sex in the biological sense of the term. The idea is merely (as already happens in the United Kingdom in other cases - for example, with adoption) to mention a development in the person's status due to changes in his apparent sex - what we have called his sexual identity - and to give him the opportunity to obtain a short certificate which does not disclose his previous status. This would better reflect the real situation and to that extent would even be in the public interest.

(b) The arrangement we envisage would certainly not solve all Mr. Rees's problems and would not entirely fulfil his hopes, but it would lessen his difficulties. At all events it would remove the current discrepancy, firstly, between the various identity documents he has to use and, secondly, between his current appearance and the entry relating to his sex in his birth certificate.

(c) Nor does it seem to us that an annotation in the birth register would entail any kind of change in the British system of recording civil status; the practice in other States has shown that this was not an inevitable consequence.

(d) In rejecting the arrangement we recommend, the majority of the Court also relies on the fact that the aforementioned annotation would not relate to facts of legal significance, unlike the case with adoption and legitimation. It may be said against this argument that the annotation in question would also certainly have legal significance even if it was not expressly provided for in law, in that it would imply that in all situations where the apparent sex was decisive (work, retirement, etc.), Mr. Rees should be treated as an individual of the male sex.

6. As regards the alleged breach of Article 12 (art. 12), we share the view of the majority.

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

REKVÉNYI v. HUNGARY

(Application no. 25390/94)

JUDGMENT

STRASBOURG

20 May 1999

In the case of Rekvényi v. Hungary,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Sir Nicolas BRATZA,
Mr A. PASTOR RIDRUEJO,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mrs S. BOTOUCHAROVA,

and also of Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 28 January, 1 February and 21 April 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") on 15 September 1998, by a Hungarian national, Mr László Rekvényi ("the applicant"), on 21 September 1998 and by the Hungarian Government ("the Government") on 5 October 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the

Notes by the Registry
1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.
3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

Convention. It originated in an application (no. 25390/94) against the Republic of Hungary lodged with the Commission under former Article 25 by Mr Rekvényi on 20 April 1994.

The Commission's request referred to former Articles 44 and 48 of the Convention and to the declaration whereby Hungary recognised the compulsory jurisdiction of the Court (former Article 46); the applicant's application referred to former Article 48 as amended by Protocol 9[1], which Hungary had ratified; the Government's application referred to former Article 48. The object of the request and of the applications was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 10 and 11 of the Convention taken either alone or together with Article 14.

2. The applicant designated the lawyer who would represent him (Rule 31 of former Rules of Court B[2]).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal in particular with procedural matters that might arise before the entry into force of Protocol No. 11, Mr R. Bernhardt, the President of the Court at the time, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 30 November 1998. The Government replied on 9 December 1998.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mr A.B. Baka, the judge elected in respect of Hungary (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, Sir Nicolas Bratza, President of Section, and Mr M. Fischbach, Vice-President of Section (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mr R. Türmen, Mrs F. Tulkens, Mrs V. Strážnická, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr R. Maruste and Mrs S. Botoucharova (Rules 24 § 3 and 100 § 4).

Notes by the Registry

1. Protocol No. 9 came into force on 1 October 1994 and was repealed by Protocol No. 11.
2. Rules of Court B, which came into force on 2 October 1994, applied until 31 October 1998 to all cases concerning States bound by Protocol No. 9.

5. At the Court's invitation (Rule 99), the Commission delegated one of its members, Mrs M. Hion, to take part in the proceedings before the Grand Chamber.

6. In accordance with the President's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 28 January 1999.

There appeared before the Court:

(a) *for the Government*
Mr L. HÖLTZL, Deputy Secretary of State, *Agent*,
Mr T. BÁN, *Co-Agent*,
Mr Z. TALLÓDI,
Ms M. WELLER, *Advisers*;

(b) *for the applicant*
Mr V. MASENKO-MAVI, of the Budapest Bar, *Counsel*;

(c) *for the Commission*
Ms M. HION, *Delegate*,
Ms M.-T. SCHOEPFER, *Secretary to the Commission*.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. At the material time, the applicant was a police officer and the Secretary General of the Police Independent Trade Union.

8. On 24 December 1993 Law no. 107 of 1993 on certain amendments to the Constitution (*az Alkotmány módosításáról szóló 1993. évi CVII. törvény*) was published in the Hungarian Official Gazette. This Law amended, *inter alia*, Article 40/B § 4 of the Constitution to the effect that, as from 1 January 1994, members of the armed forces, the police and security services were prohibited from joining any political party and from engaging in any political activity (see paragraph 13 below for the text of the Article).

9. In a circular letter dated 28 January 1994, the Head of the National Police requested, in view of the forthcoming parliamentary elections, that police officers refrain from political activities. He referred to Article 40/B § 4 of the Constitution as amended by Law no. 107 of 1993. He indicated that those who wished to pursue political activities would have to leave the police.

10. In a second circular letter dated 16 February 1994, the Head of the National Police declared that no exemption could be given from the prohibition contained in Article 40/B § 4 of the Constitution.

11. On 9 March 1994 the Police Independent Trade Union filed a constitutional complaint with the Constitutional Court claiming that Article 40/B § 4 of the Constitution, as amended by Law no. 107 of 1993, infringed constitutional rights of career members of the police, was contrary to the generally recognised rules of international law and had been adopted by Parliament unconstitutionally.

12. On 11 April 1994 the Constitutional Court dismissed the constitutional complaint, holding that it had no competence to annul a provision of the Constitution itself.

II. RELEVANT DOMESTIC LAW

13. The relevant Articles of the Constitution of the Republic of Hungary (Law no. 20 of 1949, as amended on several occasions) provide:

Article 40/B § 4 (as in force since 1 January 1994)

"Career members of the armed forces, the police and the civil national security services shall not join any political party and shall not engage in any political activity."

"A fegyveres erők, a rendőrség és a polgári nemzetbiztonsági szolgálatok hivatásos állományú tagjai nem lehetnek tagjai pártnak és politikai tevékenységet nem folytathatnak."

Article 61 § 1 (as in force since 23 October 1989)

"In the Republic of Hungary everyone shall have the right to freedom of expression and to receive and impart information of public interest."

"A Magyar Köztársaságban mindenkinek joga van a szabad véleménynyilvánításra, továbbá arra, hogy a közérdekű adatokat megismerje, illetőleg terjessze."

Article 78 § 1

"… [T]he Government shall ensure that the provisions of the Constitution of the Republic of Hungary are implemented."

"A Magyar Köztársaság alkotmánya … végrehajtásáról a Kormány gondoskodik."

Article 78 § 2

"The Government shall submit to Parliament such bills as are necessary to implement the Constitution."

"A Kormány köteles az alkotmány végrehajtásához szükséges törvényjavaslatokat az Országgyűlés elé terjeszteni."

14. Law no. 17 of 1989 on referenda, as in force at the material time, provided:

Section 1(4)

"No signatures may be collected … from persons serving in the armed forces or armed bodies on station or while such persons are discharging their duties …"

"Nem gyűjthető aláírás … fegyveres erőknél és fegyveres testületeknél szolgálati viszonyban levő személyektől, a szolgálati helyen vagy szolgálati feladat teljesítése közben …"

Section 2(1)

"Citizens eligible to vote or stand in elections … shall have the right to participate in referenda …"

"A népszavazásban … való részvételre választójoggal rendelkező állampolgárok … jogosultak."

15. Law no. 34 of 1989 (as amended on several occasions) on parliamentary elections, as in force at the material time, provided:

Section 2(1)

"In the Republic of Hungary every Hungarian citizen … who has attained his [or her] majority (hereinafter: "constituent") shall have the right to vote in parliamentary elections."

"A Magyar Köztársaságban az országgyűlési képviselők választásán választójoga van … minden nagykorú magyar állampolgárnak (a továbbiakban: választópolgár)."

Section 2(3)

"Everyone who is entitled to vote and has a permanent residence in Hungary shall be entitled to stand for election."

"Mindenki választható, aki választójoggal rendelkezik és állandó lakóhelye Magyarországon van."

Section 5(1)

"Constituents … of each individual constituency shall be entitled to nominate candidates [in relation to that constituency] …"

"Az egyéni választókerületben a választópolgárok … jelölhetnek.…"

Section 10(1)

"Constituents shall be entitled to collect nomination coupons, expound election programmes, promote candidates and organise election campaign meetings …"

"Bármely választópolgár gyűjthet jelöltet ajánló szelvényeket, ismertethet választási programot, népszerűsíthet jelöltet, szervezhet választási gyűlést …"

Section 10(3)

"Nomination coupons may not be collected … from persons serving in the armed forces or armed bodies … on station or while such persons are discharging their duties …"

"Nem gyűjthető jelöltet ajánló szelvény … a fegyveres erőknél, a rendőrségnél … szolgálati viszonyban lévő személytől, a szolgálati helyen vagy szolgálati feladat teljesítése közben …"

16. Law no. 55 of 1990 on the legal status of members of Parliament, as in force at the material time, provided:

Section 1(1)

"Employers of employees who are candidates in parliamentary elections … shall grant them unpaid leave on request from the moment of their registration as candidates until the end of the elections or, where they are elected, until they take up their seat."

"Az országgyűlési képviselő … jelöltet jelöltségének nyilvántartásba vételétől a választásának befejezéséig, illetve megválasztása esetén a mandátuma igazolásáig a munkáltató – kérésére – köteles fizetés nélküli szabadságban részesíteni."

Section 1(4) (as in force until 30 September 1994)

"Paragraph 1 … [of Section 1] shall apply as appropriate to candidates … serving … in the … police …"

"A … rendőrségnél … szolgálati viszonyban … álló képviselőjelöltre az [1.§] (1) … bekezdés rendelkezéseit kell megfelelően alkalmazni."

Section 8(1) (as in force until 3 April 1997)

"A member of Parliament … shall put an end to any situation incompatible with his office within a period of thirty days from the moment he takes up his seat …"

"A képviselő a mandátuma érvényességének megállapításától … számított harminc napon belül köteles a vele szemben fennálló összeférhetetlenségi okot megszüntetni …"

17. Law no. 64 of 1990 on the election of members of local authorities and mayors, as in force at the material time, provided:

Section 23(1)

"Constituents shall be entitled to expound election programmes, canvass on behalf of candidates or organise election campaign meetings … from the thirty-fifth day prior to the date of the elections."

"Bármely választópolgár – a szavazást megelőző 35. naptól – ismertethet választási programot, népszerűsíthet jelöltet, szervezhet választási gyűlést …"

Section 25(1)

"A constituent who exercises his right to vote in an individual constituency shall be entitled to nominate candidates [in relation to that constituency] …"

"Jelöltet ajánlhat az a választópolgár, aki a választókerületben választójogát gyakorolhatja …"

18. Law no. 34 of 1994 on the police ("the 1994 Police Act"), which entered into force on 1 October 1994, provides:

Section 2(3)

"The police shall discharge their duties in a manner free from any party influence."

"A Rendőrség a feladatának ellátása során pártbefolyástól mentesen jár el."

Section 7(9)

"If a police officer wishes to stand as a candidate in elections to Parliament, to a local authority or to the office of mayor, he shall in advance notify the head of the police department [concerned] of his intention to do so. In such cases his service shall be suspended from the sixtieth day preceding the elections until the day on which the results of the elections are published."

"Ha a rendőr országgyűlési vagy helyi önkormányzati képviselői, illetőleg polgármesteri választáson jelöltként indul, köteles e szándékát a rendőri szerv vezetőjének előzetesen bejelenteni. A választás napját megelőző 60. naptól kezdődően a választás eredményének közzétételéig a szolgálati jogviszonya szünetel."

Section 7(10)

"Police officers shall have the right to join professional or other organisations which are aimed at protecting or representing their interests and are related to their professional duties, and to hold office therein; they shall not suffer any disadvantage in their careers on account of their membership and activity. Police officers shall inform the head of the police department [concerned] of their existing or intended membership of organisations unrelated to their professional duties. The head of the police department [concerned] may prohibit the police officer in question from becoming or remaining a member of such organisation if it is incompatible with the profession or duties of a police officer, or if it interferes with or endangers the interests of the force. Such a prohibition shall take the form of a decision. An appeal against such a decision lies to the head of the superior police authority. The decision of the superior authority on the appeal may be challenged in the courts."

"A rendőr a hivatásával összefüggő szakmai, érdekvédelmi, érdekképviseleti szervezetnek tagja lehet, abban tisztséget vállalhat, e tagsági viszonya és tevékenysége miatt szolgálati jogviszonya körében hátrányt nem szenvedhet. A rendőr köteles a hivatásával össze nem függő társadalmi szervezettel fennálló, illetőleg az újonnan létesülő tagsági viszonyt előzetesen a rendőri szerv vezetőjéhez bejelenteni. A rendőri szerv vezetője a tagsági viszony fenntartását vagy létesítését megtilthatja, ha az a rendőri hivatással vagy szolgálati beosztással nem egyeztethető össze, illetőleg a szolgálat érdekeit sérti vagy veszélyezteti. E döntést határozatba kell foglalni. A határozat ellen a felettes szerv vezetőjénél panasszal lehet élni. A felettes szervnek a panasz kivizsgálása eredményeként hozott határozata a bíróság előtt megtámadható."

19. Decree no. 1/1990 of 10 January 1990 of the Minister of the Interior ("the 1990 Regulations"), which laid down service regulations for the police, was in force until 30 March 1995 and provided:

Regulation 430

"… No party political activity may be carried out on police premises; no questions related to party politics shall be discussed during staff meetings."

"… A rendőrségen pártpolitikai tevékenység nem folytatható, munkahelyi értekezleteken pártpolitikai kérdések nem tárgyalhatók."

Regulation 432

"With the exception of political parties, police officers shall … be entitled to form and maintain social organisations [*társadalmi szervezet*] (trade unions, mass movements, organisations protecting their interests, associations, etc.) provided that their aims are not contrary to the legal provisions and rules regulating police service."

"Rendőrök önmagukból – párt kivételével – … a szolgálati viszonyra vonatkozó jogszabályokkal, rendelkezésekkel nem ellentétes célú társadalmi szervezetet létrehozhatnak és működtethetnek (szakszervezet, tömegmozgalom, érdekképviseleti szervezet, egyesület stb.)."

Regulation 433

"Police officers shall be entitled to join any social organisation [*társadalmi szervezet*], including a political party, which has been lawfully founded and registered by a court. Police officers shall not enjoy any advantage or suffer any detriment in their career on account of their membership of an organisation or their party affiliation."

"A rendőr bármely törvényesen megalakult, illetve bíróság által nyilvántartásba vett társadalmi szervezetnek – beleértve a politikai pártot is – tagja lehet. Szervezeti hovatartozása, pártállása miatt szolgálati viszonya keretében semmiféle előnyben vagy hátrányban nem részesíthető."

Regulation 434

"Party badges and symbols shall not be displayed on police premises. While on duty, police officers shall refrain from wearing badges showing their political preference."

"A rendőrség hivatali helyiségeiben, körleteiben pártok jelvényei, jelképei nem helyezhetők el. A rendőr szolgálatban politikai hovatartozására utaló jelvényt nem viselhet."

Regulation 435

"Police officers shall not engage in activities as experts or advisers in relation to questions of police service upon request from political parties unless authorised to do so by the Minister of the Interior."

"A rendőr pártok részére a rendőri szolgálattal összefüggő kérdésekben szakértői, szaktanácsadó feladatokat csak a belügyminiszter engedélyével végezhet."

Regulation 437

"On police premises the exercise of the right to freedom of assembly is subject to the approval of the common superior of all the organisers [of any assembly]."

"A rendőrség objektumaiban a gyülekezési jog csak a szervezők közös elöljáróinak engedélyével gyakorolható."

Regulation 438

"Police officers shall have the right to participate in lawfully organised … gatherings (such as peaceful assemblies, processions and demonstrations) in their leisure time. On such occasions they shall refrain from wearing uniform unless the aim

of the gathering is the representation or protection of interests related to [police] service. They shall refrain from carrying their service gun or other firearms lawfully in their possession. Where the gathering is ordered to be dissolved, they shall immediately leave."

"A rendőr szabad idejében részt vehet a … jogszerűen tartott rendezvényen (békés összejövetelen, felvonuláson, tüntetésen). Ilyen esetben egyenruhát csak akkor viselhet, ha a rendezvény célja a szolgálati viszonnyal összefüggő érdekek képviselete, védelme. Szolgálati vagy más jogszerűen tartott lőfegyverét nem tarthatja magánál. Ha a rendezvény feloszlatására kerül sor, köteles a helyszínt azonnal önként elhagyni."

Regulation 470

"Police officers shall … be entitled to make statements upon request from the press or radio or television stations on questions related to road safety, public safety or certain offences provided that, [in so doing,] they maintain the confidentiality of service secrets, observe the principle of the presumption of innocence, respect personality rights [*személyiséghez fűződő jogok*] and do not prejudice the examination and investigation of cases …"

"A rendőr, a sajtó, a rádió és a televízió megkeresése alapján a közlekedés-, a közbiztonság kérdéseiről, egyes bűncselekményekről, a szolgálati titok megőrzésével, az ügyek vizsgálatának és felderítésének veszélyeztetése nélkül, valamint az ártatlanság vélelmének figyelembe vételével és a személyiséghez fűződő jogok tiszteletben tartásával … nyilatkozhat …"

Regulation 472

"… [Police officers] shall be entitled to give lectures on – or to participate in radio or television programmes concerning – politics, science, literature or sport without prior authorisation but on condition that no reference is made to their police service."

"… [A rendőr] politikai, tudományos, szépirodalmi és sport témájú előadásokat, szereplést (a rádióban és a televízióban is) engedély nélkül vállalhat rendőri állására való utalás nélkül."

Regulation 473

"Police officers shall have the right to make statements and publish articles in Ministry of the Interior publications without permission, while observing the rules on service and official secrets."

"A Belügyminisztérium lapjaiban a szolgálati- és az államtitokra vonatkozó szabályok betartásával a rendőr engedély nélkül nyilatkozhat és publikálhat."

Regulation 474

"Police officers shall not be entitled to publish textbooks and documentary literature related to police activities save with prior authorisation …"

"A rendőri vonatkozású kérdéseket tárgyaló szak- és tényirodalmi művet a rendőr csak előzetes engedéllyel jelentetheti meg …"

Regulation 477

"Police officers shall be entitled to publish works of fiction … and works on science, politics or sport … that are unrelated to police activities without permission but on condition that no reference is made to their police service."

"A rendőr – a rendőri állásra való utalás nélkül – szabadon közölheti, illetve kiadhatja a nem rendőri vonatkozású szépirodalmi …, tudományos, politikai kérdéseket tárgyaló, sporttal foglalkozó műveit …"

20. Decree no. 3/1995 of 1 March 1995 of the Minister of the Interior ("the 1995 Regulations"), which was adopted under the 1994 Police Act in order to implement its provisions and which laid down service regulations for the police, entered into force on 31 March 1995. It provides:

Section 106(5)

"Police officers, in their capacity as representatives of the police or experts, shall not give statements to the press or participate in radio or television programmes or in films, unless permitted to do so by the Head of the National Police or one of his deputies. No permission is needed for giving scientific or cultural lectures or for other public appearances of a similar nature (including participation in radio or television programmes) if no reference is made to police service."

"A rendőr a rendőrség képviselőjeként, szakértőjeként a sajtóban, a rádió és televízió műsoraiban, filmekben csak az országos rendőrfőkapitány, illetve helyettesei előzetes hozzájárulásával szerepelhet. A rendőri állásra utalás nélkül tartott tudományos, kulturális előadások megtartásához, ilyen irányú egyéb közszerepléshez beleértve a rádióban és televízióban történő szereplést is) engedély nem kell."

Section 106(6)

"Police officers shall have the right to make statements and publish articles in police publications without permission, while observing the rules on service and official secrets."

"A rendőrség lapjaiban a szolgálati és az államtitokra vonatkozó szabályok betartásával a rendőr engedély nélkül nyilatkozhat és publikálhat."

Section 106(9)

"Members of the police force, in their capacity as police officers, shall not make public appearances unless authorised to do so by the head of the police department. On such occasions police officers shall refrain from making political statements and shall evince a neutral attitude towards any social organisation [*társadalmi szervezetek*]."

"*Nyilvános szerepléshez (ha az rendőrként történik) engedélyt kell kérni a rendőrfőkapitánytól. A rendőr ilyen közéleti szereplése során tartózkodjék a politikai nyilatkozatoktól, magatartása a társadalmi szervezeteket illetően semleges legyen.*"

Section 106(10)

"Police officers shall have the right to participate in lawfully organised … gatherings in their leisure time. On such occasions they shall refrain from wearing uniform and carrying their service gun or other firearms lawfully in their possession. Where the gathering is ordered to be dissolved, they shall immediately leave ."

"*A rendőr szabad idejében részt vehet a … jogszerűen tartott rendezvényen. Ilyen esetben egyenruhát nem viselhet. Szolgálati vagy más jogszerűen tartott lőfegyverét nem tarthatja magánál. Ha a rendezvény feloszlatására kerül sor, köteles a helyszínt azonnal önként elhagyni.*"

PROCEEDINGS BEFORE THE COMMISSION

21. Mr László Rekvényi applied to the Commission on 20 April 1994. He alleged that the prohibitions contained in Article 40/B § 4 of the Hungarian Constitution infringed his rights under Articles 10 and 11 of the Convention taken either alone or together with Article 14.

22. The Commission declared the application (no. 25390/94) admissible on 11 April 1997. In its report of 9 July 1998 (former Article 31 of the Convention), it expressed the opinion that there had been a violation of Article 10 (twenty-one votes to nine); that there had been no violation of Article 11 (twenty-one votes to nine); that it was not necessary to examine the applicant's complaint under Article 14 read in conjunction with Article 10 (twenty-five votes to five) and that there had been no violation of Article 14 read in conjunction with Article 11 (twenty-two votes to eight). The full text of the Commission's opinion and of the four partly dissenting opinions contained in the report is reproduced as an annex to this judgment[1].

1. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

FINAL SUBMISSIONS TO THE COURT

23. The applicant requested the Court in his memorial to find the respondent State in breach of its obligations under Articles 10 and 11 of the Convention taken either alone or together with Article 14 and to award him just satisfaction under Article 41.

The Government, for their part, invited the Court to reject the applicant's complaints under Articles 10 and 11 of the Convention both taken alone and together with Article 14.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

24. The applicant maintained that the prohibition on engaging in "political activities" contained in Article 40/B § 4 of the Hungarian Constitution amounted to an unjustified interference with his right to freedom of expression, in violation of Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

25. The Commission arrived at the same conclusion, finding that the impugned prohibition was vague and sweeping, and could not, therefore, be regarded as being "prescribed by law" as required by paragraph 2 of Article 10.

The Government did not dispute that the applicant could rely on the guarantees contained in Article 10; nor did they deny that the prohibition interfered with the exercise of his rights under that Article. They contended, however, that the interference was justified under the second paragraph of Article 10.

A. As to the applicability of Article 10 and the existence of an interference

26. The Court takes it for granted that the pursuit of activities of a political nature comes within the ambit of Article 10 in so far as freedom of political debate constitutes a particular aspect of freedom of expression. Indeed, freedom of political debate is at the very core of the concept of a democratic society (see the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, p. 26, § 42). Furthermore, the guarantees contained in Article 10 of the Convention extend to military personnel and civil servants (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, pp. 41-42, § 100; and the Vogt v. Germany judgment of 26 September 1995, Series A no. 323, pp. 22-23, § 43). The Court sees no reason to come to a different conclusion in respect of police officers and this has not been disputed by those appearing before the Court.

Nor has it been contested that the prohibition, by curtailing the applicant's involvement in political activities, interfered with the exercise of his right to freedom of expression. The Court for its part also finds that there has been an interference with the applicant's right to freedom of expression.

B. As to whether the interference was justified

27. Such an interference gives rise to a breach of Article 10 unless it can be shown that it was "prescribed by law", pursued one or more legitimate aim or aims as defined in paragraph 2 and was "necessary in a democratic society" to attain them.

1. "Prescribed by law"

(a) Submissions of those appearing before the Court

(i) The applicant

28. The applicant submitted that the prohibition at issue was of an unacceptably general character and was open to arbitrary interpretations. A general constitutional ban on political activities contradicted any legislation of a lower level permitting certain activities of a political nature. Since the notion of "political activities" was not defined in any Hungarian law, it was not foreseeable whether or not a certain activity fell under the prohibition. This legal situation had prevailed without interruption since 1 January 1994 and had not been rectified by any subsequent legislation, including the 1994 Police Act.

(ii) The Government

29. In the proceedings before the Commission, the Government argued that the 1994 Police Act and the 1995 Regulations had provided a legal framework detailed enough to define the restrictions on political activities by police officers in a manner compatible with Article 10 § 2.

30. In their pleadings before the Court, the Government relied on Article 78 of the Hungarian Constitution (see paragraph 13 above) as regards the alleged contradiction between the constitutional restriction and the permissive legislation of a lower level and explained that the two were not in conflict but complemented each other. They maintained that in the Hungarian legal system it was the practice that certain provisions of the Constitution could properly be interpreted only if read together with legislation of a lower level completing and explaining their precise content. Contemporary legislative techniques often left it to laws lower in the hierarchy to define general notions used in higher laws – a law-making method not uncommon at least in continental legal systems and never in principle disapproved by the Convention organs. In any event, the Constitutional Court had the competence to rule on any potential contradiction between the Constitution and other legislation.

31. Furthermore, the legislation in force both prior and subsequent to the adoption of the 1994 Police Act and the 1995 Regulations met the requirements of foreseeability, the latter two instruments having merely recodified provisions already in force. Therefore, the constitutional restriction in question was "prescribed by law" at all times subsequent to its entry into force. Prior to 1 October 1994, the conditions governing various activities of a political nature, whereby police officers have always been permitted to exercise certain rights relating to freedom of expression, were laid down, *inter alia*, in Law no. 34 of 1989 on parliamentary elections, Law no. 55 of 1990 on the legal status of members of Parliament, Law no. 64 of 1990 on the election of members of local authorities and mayors, and Law no. 17 of 1989 on referenda (the right to collect "nomination coupons", expound election programmes, promote candidates, organise election campaign meetings, nominate candidates, vote in and stand for elections to Parliament, local authorities and the office of mayor and to participate in referenda) and also in the 1990 Regulations (the right to join trade unions, associations and other organisations representing and protecting police officers' interests, to participate in peaceful assemblies, make statements to the press, participate in radio or television programmes or publish works on politics, etc.) (see paragraphs 14 to 17 and 19 above).

(iii) The Commission

32. In its report the Commission, after examining the relevant domestic law as presented by the Government in the proceedings before it, observed that the 1994 Police Act and the 1995 Regulations had entered into force only in October 1994 and March 1995 respectively. The Commission, therefore, came to the conclusion that in the relevant period the impugned restriction had been based solely on Article 40/B § 4 of the Constitution. Moreover, it considered that the notion of "political activities" was vague and sweeping and that the Government had not adduced any case-law interpreting this term. The constitutional restriction itself was not, therefore, precise enough to enable the applicant to regulate his conduct in the matter. The Commission concluded that, the requirement of foreseeability thus not having been met, the interference was not "prescribed by law".

33. In her submissions to the Court, the Commission's Delegate explained that the various laws referred to by the Government in their memorial and, in particular, the 1990 Regulations, had been adopted prior to the impugned amendment to the Constitution. The only legal provisions which could be regarded as having further defined the constitutional restriction on political activities by police officers were to be found in the 1994 Police Act and the 1995 Regulations. Consequently, it was not until the 1994 Police Act and the 1995 Regulations came into force that the legal situation had met the requirement of foreseeability.

(b) The Court's assessment

34. According to the Court's well-established case-law, one of the requirements flowing from the expression "prescribed by law" is foreseeability. Thus, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see the *Sunday Times* v. the United Kingdom (no. 1) judgment of 26 April 1979, Series A no. 30, p. 31, § 49, and the Kokkinakis v. Greece judgment of 25 May 1993, Series A no. 260-A, p. 19, § 40). The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see, *mutatis mutandis*, the Cantoni v. France judgment of 15 November 1996, *Reports of Judgments and*

Decisions 1996-V, p. 1628, § 32). The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see the previously cited Vogt judgment, p. 24, § 48). Because of the general nature of constitutional provisions, the level of precision required of them may be lower than for other legislation.

35. The Court notes the Government's submission that Article 40/B § 4 of the Constitution, which contains the generic term "political activities", is subject to interpretation and is to be read in conjunction with complementary provisions contained in the various laws cited and the 1990 Regulations (see paragraphs 14 to 17, 19 and 31 above). As has been recalled many times in the Court's case-law, it is primarily for the national authorities to interpret and apply domestic law (see, for example, the Chorherr v. Austria judgment of 25 August 1993, Series A no. 266-B, pp. 35-36, § 25). In the absence of any domestic precedents to the opposite effect adduced by the applicant, the Court considers that the detailed provisions invoked by the Government cannot be held to be in contradiction with the general wording of the Constitution. Further, the adoption of the constitutional amendment in question did not result in the annulment of the 1990 Regulations, which were therefore in force when the impugned circular letters were issued. As a consequence, there appears to have existed at the relevant time a framework of provisions partly permitting – occasionally subject to authorisation – and partly restricting the participation of police officers in certain kinds of political activity.

36. As to the wording of these provisions, it is inevitable, in the Court's opinion, that conduct which may entail involvement in political activities cannot be defined with absolute precision. It seems, therefore, acceptable for the 1990 Regulations (see paragraph 19 above) – as for the 1994 Police Act and the 1995 Regulations (see paragraphs 18 and 20 above) – to lay down the conditions for undertaking types of conduct and activities with potential political aspects, such as participation in peaceful assemblies, making statements to the press, participating in radio or television programmes, publications or joining trade unions, associations or other organisations representing and protecting police officers' interests.

37. The Court is satisfied that in the circumstances these provisions were clear enough to enable the applicant to regulate his conduct accordingly. Even accepting that it might not be possible on occasions for police officers to determine with certainty whether a given action would or would not – against the background of the 1990 Regulations – fall foul of Article 40/B § 4 of the Constitution, it was nevertheless open to them to seek advice beforehand from their superior or clarification of the law by means of a court judgment.

38. Having regard to these considerations, the Court finds that the interference was "prescribed by law" for the purposes of paragraph 2 of Article 10.

2. Legitimate aim

39. The Government submitted that the constitutional provision in question was aimed at depoliticising the police, and this during a period when Hungary was being transformed from a totalitarian regime to a pluralistic democracy. In view of the police's past commitment to the ruling political party, the restriction served the purpose of protecting national security and public safety as well as preventing disorder.

40. Neither the applicant nor the Commission expressed an opinion on this point.

41. In the present case the obligation imposed on certain categories of public officials including police officers to refrain from political activities is intended to depoliticise the services concerned and thereby to contribute to the consolidation and maintenance of pluralistic democracy in the country. The Court notes that Hungary is not alone, in that a number of Contracting States restrict certain political activities on the part of their police. Police officers are invested with coercive powers to regulate the conduct of citizens, in some countries being authorised to carry arms in the discharge of their duties. Ultimately the police force is at the service of the State. Members of the public are therefore entitled to expect that in their dealings with the police they are confronted with politically neutral officers who are detached from the political fray, to paraphrase the language of the recent judgment in the case of Ahmed and Others v. the United Kingdom (judgment of 2 September 1998, *Reports* 1998-VI, pp. 2376-77, § 53, which judgment concerned the compatibility with Article 10 of restrictions on the involvement of senior local government officers in certain types of political activity). In the Court's view, the desire to ensure that the crucial role of the police in society is not compromised through the corrosion of the political neutrality of its officers is one that is compatible with democratic principles.

This objective takes on a special historical significance in Hungary because of that country's experience of a totalitarian regime which relied to a great extent on its police's direct commitment to the ruling party (see, *mutatis mutandis*, the previously cited Vogt judgment, p. 25, § 51).

Accordingly, the Court concludes that the restriction in question pursued legitimate aims within the meaning of paragraph 2 of Article 10, namely the protection of national security and public safety and the prevention of disorder.

3. "Necessary in a democratic society"

(a) General principles

42. In its above-mentioned Vogt judgment (pp. 25-26, § 52) the Court summarised as follows the basic principles concerning Article 10 as laid down in its case-law:

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.

(ii) The adjective "necessary", within the meaning of Article 10 § 2 implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.

43. In the same judgment the Court declared that "these principles apply also to civil servants. Although it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention. It therefore falls to the Court, having regard to the circumstances of each case, to determine whether a fair balance has been

struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10 § 2. In carrying out this review, the Court will bear in mind that whenever civil servants' right to freedom of expression is in issue the 'duties and responsibilities' referred to in Article 10 § 2 assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate" to the legitimate aim in question (p. 26, § 53). Such considerations apply equally to military personnel (see the previously cited Engel and Others judgment, pp. 23 and 41-42, §§ 54 and 100) and police officers (see paragraph 26 above).

(b) Application of the above principles to the instant case

44. The Government contended that for decades preceding Hungary's return to democracy in 1989 to 1990, the police had been a self-avowed tool of the ruling party and had taken an active part in the implementation of the party policies. Career members of the police were expected to be politically committed to the ruling party. Given Hungary's peaceful and gradual transformation towards pluralism without a general purge in the public administration, it was necessary to depoliticise, *inter alia*, the police and restrict the political activities of its members so that the public should no longer regard the police as a supporter of the totalitarian regime but rather as a guardian of democratic institutions.

45. Neither the applicant nor the Commission expressed an opinion on this point.

46. Bearing in mind the role of the police in society, the Court has recognised that it is a legitimate aim in any democratic society to have a politically neutral police force (see paragraph 41 above). In view of the particular history of some Contracting States, the national authorities of these States may, so as to ensure the consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve this aim by restricting the freedom of police officers to engage in political activities and, in particular, political debate.

What remains to be determined is whether the particular restrictions imposed in the present case can be regarded as "necessary in a democratic society".

47. The Court observes that between 1949 and 1989 Hungary was ruled by one political party. Membership of that party was, in many social spheres, expected as a manifestation of the individual's commitment to the regime. This expectation was even more pronounced within the military and the police, where party membership on the part of the vast majority of serving staff guaranteed that the ruling party's political will was directly implemented. This is precisely the vice that rules on the political neutrality of the police are designed to prevent. It was not until 1989 that Hungarian society succeeded in building up the institutions of a pluralistic democracy,

leading to the first multi-party parliamentary elections in more than forty years being held in 1990. The impugned amendment to the Constitution was adopted some months prior to the second democratic parliamentary elections in 1994.

48. Regard being had to the margin of appreciation left to the national authorities in this area, the Court finds that, especially against this historical background, the relevant measures taken in Hungary in order to protect the police force from the direct influence of party politics can be seen as answering a "pressing social need" in a democratic society.

49. As to the extent of the restriction on the applicant's freedom of expression, although the wording of Article 40/B § 4 might prima facie suggest that what is in issue is an absolute ban on political activities, an examination of the relevant laws shows that police officers have in fact remained entitled to undertake some activities enabling them to articulate their political opinions and preferences. Notably, whilst sometimes subject to restrictions imposed in the interest of the service, police officers have had the right to expound election programmes, promote and nominate candidates, organise election campaign meetings, vote in and stand for elections to Parliament, local authorities and the office of mayor, participate in referenda, join trade unions, associations and other organisations, participate in peaceful assemblies, make statements to the press, participate in radio or television programmes or publish works on politics (see paragraphs 14 to 20 above). In these circumstances the scope and the effect of the impugned restrictions on the applicant's exercise of his freedom of expression do not appear excessive.

50. In the light of the foregoing considerations, the Court concludes that the means employed in order to achieve the legitimate aims pursued were not disproportionate. Accordingly, the impugned interference with the applicant's freedom of expression is not in violation of Article 10.

II. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

51. The applicant submitted that the prohibition on joining a party, prescribed by Article 40/B § 4 of the Constitution, violated his right to freedom of association guaranteed under Article 11 of the Convention which provides:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of

> others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

52. Both the Commission and the Government accepted that the facts complained of by the applicant attracted the application of the safeguard set forth in Article 11 and that the prohibition interfered with the exercise of his right under that Article. They took the view, however, that the interference was justified under the last sentence of paragraph 2 of Article 11.

A. Submissions of those appearing before the Court as to whether the interference was justified

1. The applicant

53. The applicant argued that while Regulation 433 of the 1990 Regulations, which remained in force until March 1995, permitted police officers to be members of a party, Article 40/B § 4 of the Constitution expressly prohibited this as from 1 January 1994. This situation, which lasted fifteen months, was contradictory and unconstitutional.

Moreover, the aims of the impugned prohibition were not indicated in Hungarian law. In fact, the prohibition could only be seen as serving political interests, and thus as not pursuing a "legitimate aim" for the purposes of Article 11 § 2.

54. Furthermore, although the last sentence of paragraph 2 of Article 11 did not expressly refer to the requirement of "necessity", the restriction in issue nevertheless had to be "necessary in a democratic society" in order to be justified under this paragraph, a condition not met in the present case. The fact that Hungary had recently become a pluralistic democracy and a member State of the Council of Europe should not give rise to any leniency when examining the criteria for justification of the interference. Neither could the interference be regarded as "proportionate" to the aims pursued, given that the restriction in fact amounted to a complete ban on police officers' exercise of their right to freedom of association.

2. The Government

55. The Government expressed the view that, in any event, the last sentence of Article 11 § 2 provided sufficient justification for the impugned restriction on freedom of association, should it not be justified under the first sentence of that paragraph. In their opinion, the justification provided for in the last sentence was entirely independent of that in the first sentence; otherwise the provision would be superfluous.

56. As to the requirement under the last sentence of Article 11 § 2 that a restriction be "lawful", the Government first pointed out that what was in issue was a provision of the Hungarian Constitution. In reply to the

applicant's argument that between January 1994 and March 1995 Regulation 433 of the 1990 Regulations had been in contradiction with the contested constitutional provision, they explained that such ambiguities in the law were to be resolved by the Constitutional Court.

They submitted that the wish to depoliticise the police could not be regarded as "unlawful" in the sense of being arbitrary. In this respect they mainly reiterated their arguments concerning Article 10 (see paragraphs 39 and 44 above) and maintained in particular that the prohibition on party membership on the part of police officers had been intended to contribute to the elimination of any direct party political influence on the police by severing the institutional links which had previously existed between the armed forces and the police on the one hand and political circles on the other. Furthermore, the restriction in question could not be regarded as disproportionate to the legitimate aims pursued, since police officers' right to freedom of association had been restricted exclusively in respect of political parties within the meaning of Law no. 33 of 1989 on political parties.

3. The Commission

57. The Commission was of the view that the prohibition in question fell to be examined under the last sentence of paragraph 2 of Article 11. To be "lawful" for the purposes of that sentence, a restriction must be in accordance with the national law and devoid of arbitrariness. Having been prescribed by the Constitution, the restriction was to be considered as being in accordance with the national law. As regards arbitrariness, the Commission recalled that States must be given a wide discretion when ensuring the protection of their national security (see the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, p. 25, § 59 *in fine*). Against the background of Hungary's recent history and the repercussions of a politically committed police force exploited for decades by a totalitarian regime, the Commission considered that the efforts to depoliticise the police could not be regarded as arbitrary. The prohibition was, therefore, also "lawful" within the wider meaning of that term in the second sentence of Article 11 § 2.

B. The Court's assessment

58. Notwithstanding its autonomous role and particular sphere of application, Article 11 must in the present case also be considered in the light of Article 10. As the Court has explained in previous judgments, "the protection of personal opinions, secured by Article 10, is one of the objectives of the freedoms of assembly and association as enshrined in Article 11" (see the Vogt judgment cited above, p. 30, § 64).

59. The last sentence of paragraph 2 of Article 11 – which is undoubtedly applicable in the present case – entitles States to impose "lawful restrictions" on the exercise of the right to freedom of association by members of the police.

Like the Commission, the Court considers that the term "lawful" in this sentence alludes to the very same concept of lawfulness as that to which the Convention refers elsewhere when using the same or similar expressions, notably the expressions "in accordance with the law" and "prescribed by law" found in the second paragraph of Articles 9 to 11. As recalled above in relation to Article 10, the concept of lawfulness in the Convention, apart from positing conformity with domestic law, also implies qualitative requirements in the domestic law such as foreseeability and, generally, an absence of arbitrariness (see paragraph 34 above).

60. In so far as the applicant criticises the basis in domestic law of the impugned restriction (see paragraph 53 above), the Court reiterates that it is primarily for the national authorities to interpret and apply domestic law, especially if there is a need to elucidate doubtful points (see the S.W. v. the United Kingdom judgment of 22 November 1995, Series A no. 335-B, p. 42, § 36, and also the previously cited Chorherr and Cantoni judgments). In the present case, however, the prohibition on membership of a political party by police officers as contained in Article 40/B § 4 of the Constitution is in fact unambiguous (see paragraph 13 above) and it would not appear to be arguable that subordinate legislation introduced some four years earlier (Regulation 433 of Decree no. 1/1990 of 10 January 1990 – see paragraph 19 above) was capable of affecting the scope of this prohibition. In the circumstances the Court concludes that the legal position was sufficiently clear to enable the applicant to regulate his conduct and that the requirement of foreseeability was accordingly satisfied. Further, the Court finds no ground for holding the restriction imposed on the applicant's exercise of his freedom of association to be arbitrary. The contested restriction was consequently "lawful" within the meaning of Article 11 § 2.

61. Finally, it is not necessary in the present case to settle the disputed issue of the extent to which the interference in question is, by virtue of the second sentence of Article 11 § 2, excluded from being subject to the conditions other than lawfulness enumerated in the first sentence of that paragraph. For the reasons previously given in relation to Article 10 (see paragraphs 41 and 46 to 48 above), the Court considers that, in any event, the interference with the applicant's freedom of association satisfied those conditions (see, *mutatis mutandis*, the previously cited Vogt judgment, p. 31, § 68).

62. In sum, the interference can be regarded as justified under paragraph 2 of Article 11. Accordingly, there has been no violation of Article 11 either.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLES 10 OR 11

63. The applicant further alleged that the impugned prohibition on engaging in political activities and on joining a party was discriminatory. He relied on Article 14 of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

64. In his memorial, the applicant did not address the issue under Article 14 taken in conjunction with Article 10.

As to Article 14 taken in conjunction with Article 11, he argued that there was no objective and reasonable justification for the prohibition on party membership, either in respect of police officers or other groups of public servants. The issue of party affiliation had in fact only very limited connection to the duties and responsibilities peculiar to members of the armed forces and the police. Any difference in treatment as to the possibility of joining a party should not be based on a prohibition of an unacceptably general character.

65. The Government submitted that the restrictions in issue had been imposed not only on police officers but members of the armed forces, judges, Constitutional Court judges and public prosecutors as well. They maintained that any distinction between police officers and other groups of citizens as to the exercise of the right to freedom of expression – and, *mutatis mutandis*, freedom of association – could be justified on the ground of differences between the conditions of military and of civil life and, more specifically, by the duties and responsibilities peculiar to members of the armed forces and the police. They referred in this respect to the Engel and Others judgment (judgment cited above, p. 42, § 103).

66. The Commission did not find it necessary to examine the applicant's complaint under Article 14 taken in conjunction with Article 10.

As to Article 14 taken in conjunction with Article 11, the Commission observed that the specific status of the applicant had already been taken into account when it had examined the justification for the prohibition in question under Article 11 § 2. The Commission found that those considerations were equally valid in the context of Article 14 and concluded that there was no appearance of any discrimination in breach of that Article taken in conjunction with Article 11.

67. The Court's conclusions that the contested restrictions do not amount to a violation of Articles 10 and 11 (see paragraphs 50 and 62 above) do not preclude the finding of a violation of Article 14 of the Convention. While it is true that the guarantee laid down in Article 14 has no independent existence

in the sense that under the terms of that Article it relates solely to "rights and freedoms set forth in [the] Convention", a measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature (see the case "relating to certain aspects of the laws on the use of languages in education in Belgium" (*merits*), judgment of 23 July 1968, Series A no. 6, pp. 33-34, § 9).

68. The considerations underlying the Court's conclusions that the interferences with the applicant's freedoms of expression and association were justified under Articles 10 § 2 and 11 § 2 have already taken into account the applicant's special status as a police officer (see paragraphs 41, 46 to 49 and 61 above). These considerations are equally valid in the context of Article 14 and, even assuming that police officers can be taken to be in a comparable position to ordinary citizens, justify the difference of treatment complained of. There has accordingly been no violation of Article 14 taken in conjunction with Articles 10 or 11.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been no violation of Article 10 of the Convention;

2. *Holds* by sixteen votes to one that there has been no violation of Article 11 of the Convention;

3. *Holds* unanimously that there has been no violation of Article 14 of the Convention taken in conjunction with Articles 10 or 11.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 May 1999.

Luzius WILDHABER
President

Paul MAHONEY
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Fischbach is annexed to this judgment.

L.W.
P.J.M.

PARTLY DISSENTING OPINION OF JUDGE FISCHBACH

(*Translation*)

While I agree with the majority that there has been no violation of Article 10, I regret that I am unable to share its view that there has been no breach of Article 11 of the Convention.

As I read the *travaux préparatoires* on Article 11 of the Convention (see paragraph IX, pages 18 and 19), restrictions on freedom of association must not only be lawful, as required by the second sentence of Article 11 § 2, they must also be necessary in a democratic society.

I can see no convincing argument which, in a pluralist, democratic society, could justify a ban on joining a political party.

On the contrary, I consider that the unhappy experiences suffered under the communist regime ought to encourage political leaders to advocate a fresh approach so that the democratic process can be consolidated and the future prepared for in a spirit of open-mindedness and tolerance.

As the police are now no longer at the service of the communist party, but of democracy, it is essential that change be accompanied by an approach fostering awareness of democratic pluralism through divergent political views that fuel debate over ideas.

Banning the police from joining a political party amounts to depriving them of a right, if not the democratic duty, which all citizens have to hold opinions and political convictions, to take a close interest in public affairs and to participate in the fashioning of the will of the people and of the State.

Admittedly, the right to state one's personal convictions by belonging to a party should not be confused with either freedom to express opinions and political convictions irrespective of time or place or, above all, with freedom to comment in public on the actions of political leaders. Those are freedoms that have always to be reconciled with the obligation of discretion to which all public servants and, *a fortiori*, members of the police are subject by virtue of their duties to the executive of impartiality and loyalty.

It is for that reason that I share the majority's view that there has been no violation of Article 10.

However, the total ban on belonging to a political party and, consequently, the legislature's refusal to allow policemen to take part in the internal workings of a party is, to my mind, disproportionate and made yet more unjust by the fact that the selfsame legislature affords all members of the police the right to stand for elections at national, local or

municipal level on condition that they inform the head of police of their intention to do so and remain off duty from the sixtieth day preceding the election until publication of the results.

I very much doubt the effectiveness of such a right to stand for election since its exercise is highly dependent on the person concerned being given the freedom to familiarise himself with a party's ideas, working methods and machinery and, hence, enough time to acquire a taste for politics and to begin a political career.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

AFFAIRE SCHÖPFER c. SUISSE

CASE OF SCHÖPFER v. SWITZERLAND

(56/1997/840/1046)

ARRÊT/JUDGMENT

STRASBOURG

20 mai/20 May 1998

Liste des agents de vente/List of Agents

Belgique/Belgium: Etablissements Emile Bruylant (rue de la Régence 67, B-1000 Bruxelles)

Luxembourg: Librairie Promoculture (14, rue Duchscher (place de Paris), B.P. 1142, L-1011 Luxembourg-Gare)

Pays-Bas/The Netherlands: B.V. Juridische Boekhandel & Antiquariaat A. Jongbloed & Zoon (Noordeinde 39, NL-2514 GC La Haye/'s-Gravenhage)

SUMMARY[1]

Judgment delivered by a Chamber

Switzerland – disciplinary penalty imposed on lawyer following criticisms of the judiciary made at a press conference (Articles 12 and 13 of the Statute of the Bar of the Canton of Lucerne)

ARTICLE 10 OF THE CONVENTION

Special status of lawyers gives them central position in administration of justice as intermediaries between public and courts – legitimate to expect them to contribute to proper administration of justice, and thus to maintain public confidence therein.

Applicant first publicly criticised administration of justice in Hochdorf and then exercised a legal remedy which proved effective – conduct scarcely compatible with contribution it is legitimate to expect lawyers to make to maintaining public confidence in judicial authorities.

Freedom of expression secured to lawyers too, who are entitled to comment in public on administration of justice, but their criticism must not overstep certain bounds – balance to be struck between various interests involved, which include public's right to receive information about questions arising from judicial decisions, requirements of proper administration of justice and dignity of legal profession.

General nature, seriousness and tone of complaints raised in public – applicant was lawyer – criminal proceedings still pending – competent authorities not first applied to via legal channels – modest amount of fine – margin of appreciation not exceeded.

Conclusion: no violation (seven votes to two).

COURT'S CASE-LAW REFERRED TO

24.2.1994, Casado Coca v. Spain; 24.2.1997, De Haes and Gijsels v. Belgium

1. This summary by the registry does not bind the Court.

In the case of Schöpfer v. Switzerland[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B[2], as a Chamber composed of the following judges:

Mr THÓR VILHJÁLMSSON, *President*,
Mr J. DE MEYER,
Mr R. PEKKANEN,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr J. MAKARCZYK,
Mr P. JAMBREK,
Mr M. VOICU,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 24 February and 24 April 1998,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by a Swiss national, Mr Alois Schöpfer ("the applicant"), and by the European Commission of Human Rights ("the Commission") on 28 May and 3 June 1997 respectively, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 25405/94) against the Swiss Confederation lodged by the applicant with the Commission under Article 25 on 11 August 1994.

Mr Schöpfer's application to the Court and the Commission's request referred to Article 48 of the Convention as amended by Protocol No. 9 which Switzerland has ratified. The object of the application and of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention.

Notes by the Registrar

1. The case is numbered 56/1997/840/1046. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning States bound by Protocol No. 9.

2. On 3 September 1997 the President of the Court gave the applicant leave to present his own case (Rule 31 of Rules of Court B) and on 30 September he gave him leave to use the German language (Rule 28 § 3).

3. The Chamber to be constituted included *ex officio* Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 3 July 1997, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr R. Pekkanen, Mr A.B. Baka, Mr M.A. Lopes Rocha, Mr J. Makarczyk, Mr P. Jambrek and Mr M. Voicu (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently, Mr Ryssdal being unable to take part in the further consideration of the case, Mr Thór Vilhjálmsson took his place as President of the Chamber and Mr J. De Meyer, substitute judge, was called upon to sit as a full member (Rules 21 § 6 and 24 § 1).

4. As President of the Chamber, Mr Ryssdal, acting through the Registrar, had consulted Mr P. Boillat, the Agent of the Swiss Government ("the Government"), the applicant and Mr E. Alkema, the Delegate of the Commission, on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's and the applicant's memorials on 25 November and 1 December 1997 respectively and their replies on 19 December 1997 and 8 January 1998 respectively. On 2 February 1998 the Secretary to the Commission produced a number of documents requested by the Registrar on the President's instructions.

5. On 24 February 1998 the Chamber decided to dispense with a hearing in the case, having satisfied itself that the condition for this derogation from its usual procedure had been met (Rules 27 and 40).

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant, who is a lawyer and former member of the Cantonal Council (*Großrat*), lives in Root (Canton of Lucerne). At the material time he was an advocate acting as defence counsel for a Mr S., who had been placed in detention pending trial (*Untersuchungshaft*) on suspicion of committing a number of thefts.

7. On 6 November 1992 Mr S.'s wife informed Mr Schöpfer that the two district clerks (*Amtsschreiber*) of the Hochdorf district authority (*Amtsstatthalteramt*) had urged her to instruct a different lawyer to defend her husband if he wished to be released.

A. The applicant's public statements

8. On 9 November 1992 the applicant then held a press conference in his office in Lucerne at which he declared that at the Hochdorf district authority offices both the laws of the Canton of Lucerne and human rights were flagrantly disregarded, and had been for years (*werden sowohl die Luzerner Gesetze als auch die Menschenrechte in höchstem Grade verletzt, und zwar schon seit Jahren*). He pointed out that he was speaking to the press because it was his last resort (*deshalb bleibt mir nur noch der Weg über die Presse*).

9. The following day the daily newspaper *Luzerner Neueste Nachrichten* ("the *LNN*") published the following article (at page 25):

> "Former Christian Democratic Party (CDP) councillor demands investigation into Hochdorf district authority
>
> 'I won't let those gentlemen make a fool of me any longer'
>
> Former CDP councillor Alois Schöpfer makes serious accusations against the Hochdorf district authority.
>
> 'I've had enough of letting those gentlemen at the Hochdorf district authority make a fool of me' thundered Alois Schöpfer. 'So the only recourse left to me is to take the matter to the press.' The former CDP councillor was prompted to take the unusual step of approaching the public during pending proceedings on account of a case entrusted to him as a lawyer in mid-October. At that time his client had already been in pre-trial detention at the Hochdorf district authority prison for a month.
>
> **Detained without an arrest warrant**
>
> The 20 year-old father of a one and a half year-old daughter was arrested on 18 August with his brother for the theft of car radios and clothes, and released after admitting the offences. When, on 15 September, he went to the Lucerne cantonal police to ask how his brother was, he was again immediately arrested.
>
> 'When I enquired at the Hochdorf district authority about the arrest warrant, I was told that the order had been issued to him orally' said Alois Schöpfer, who sees the conduct of the police as a clear breach of the cantonal Code of Criminal Procedure, Article 82 of which provides: 'The arrest shall be carried out by the police, duly authorised by a written warrant of arrest.'

When these accusations were put to him, the Hochdorf prefect [Mr H. B.] was giving nothing away. 'Where I'm in charge nobody is arrested without a written arrest warrant', he said. 'I cannot say any more about a pending case.' On the other hand, Alois Schöpfer, who was asked by the accused's wife to defend her husband, will not remain silent any longer: 'The wife came to me because the lawyer appointed under the legal aid scheme had still not contacted his client even though he had been in pre-trial detention for six weeks.'

Schöpfer immediately contacted the officially appointed counsel who handed the case over to him. However, the Hochdorf district authority did not want Schöpfer to take over as defence counsel under the legal aid scheme and refused his request on 29 October on the ground that there were no reasons to dismiss the lawyer to whom the case had been assigned until then. He was, however, free to represent his client on a private basis.

Schöpfer as the ground for detention?

The last straw for Alois Schöpfer came when the accused's wife informed him last Friday that [T.B.] and [B.B.], the two district clerks, had advised her not to keep him on the case. 'They told me' she confirmed for the *LNN*, 'that my husband would not be released as long as Alois Schöpfer remained his defence counsel.' But [T.B.] denied any involvement: 'That's ridiculous. I never said anything like that. [B.B.] can confirm that. He was present when I spoke with the man's wife.'

Alois Schöpfer will not let the matter drop: 'I demand the immediate resignation of the prefect and the district clerks and a thorough investigation of the case by an impartial commission of inquiry from outside the canton.'"

In a box inside the article was the following text:

"**Accusations**

It is not the first time that serious charges have been levelled against the Hochdorf district authority. Prefect [H.B.] was previously prosecuted in connection with the conviction of [H.S.], the Rothenburg debt collection officer [*Betreibungsbeamter*]. He was fined 400 francs by the Lucerne District Court for disclosure of official secrets. Although the Court of Appeal also found that the objective elements of the offence had been made out, [H.B.] was acquitted on appeal."

The article was illustrated by two photographs, one showing the Hochdorf district authority building and the other Prefect H.B. with the caption: "Where I'm in charge nobody is arrested without a written arrest warrant (*Bei mir wird niemand ohne schriftlichen Haftbefehl festgehalten*)."

10. Another daily newspaper, the *Luzerner Zeitung*, also published, on 10 November 1992, an article on the press conference under the title: "Young man arrested without a warrant? Lucerne lawyer accuses Hochdorf district authority of breaking the law (*Junger Mann ohne Haftbefehl verhaftet? Luzerner Anwalt wirft Amtsstatthalteramt Hochdorf Rechtsverletzungen vor*)."

11. On 10 November 1992 the public prosecutor's office (*Staatsanwaltschaft*) of the Canton of Lucerne issued a reply to the effect that the accused person concerned had been arrested in accordance with the law, and that the applicant had not filed an appeal against the refusal to allow him to take over as the officially appointed defence counsel. This reply was published in the press on 11 November 1992.

12. On 13 November 1992 the *Luzerner Zeitung* published a summary of a press communiqué issued by the applicant in reply to the public prosecutor's statement. According to Mr Schöpfer, S.'s arrest had breached both the Convention and – "in a crude and unacceptable manner (*in absolut grober und nicht mehr zu verantwortender Weise*)" – the cantonal Code of Criminal Procedure. The applicant also quoted the following passage from a letter he had received from another lawyer: "The situation in Hochdorf is far from satisfactory... What makes it even worse is the fact that the judicial authorities know what is going on in Hochdorf and even make indirect allusions to the situation." In conclusion, Mr Schöpfer called on the Court of Appeal and the Cantonal Council to look into the case.

13. On 15 October, 3 November and 13 November 1992 the applicant had lodged applications for the release of Mr S. (*Haftentlassungsgesuch*), which the Hochdorf prefect refused on 19 October, 5 November and 16 November 1992 respectively.

Mr Schöpfer lodged an appeal (*Rekurs*) against the last of these decisions. This was dismissed by the Court of Appeal (*Obergericht*) of the Canton of Lucerne on 30 November 1992, on the ground, among others, that the prefect had subsequently validly extended Mr S.'s pre-trial detention, so that Mr S. no longer had standing to bring an action challenging the conditions of his arrest. It noted, however, that after his arrest Mr S. should have been brought, not before a district clerk, but before the prefect himself, the only person who could be considered a judge or other officer for the purposes of Article 5 § 3 of the Convention. It therefore ordered that its decision should be brought to the attention of the public prosecutor's office, which was the prefect's supervisory authority (*Aufsichtsbehörde*).

B. The disciplinary proceedings against the applicant

14. On 16 November 1992 the Lucerne Bar's Supervisory Board (*Aufsichtsbehörde über die Rechtsanwälte*) informed Mr Schöpfer that his conduct raised certain ethical questions, relating in particular to the need for discretion (*Zurückhaltung*) with regard to pending proceedings and to covert publicity, and asked him what he had to say on the matter.

In a letter of 18 November which he communicated to the press, the applicant replied that he had acted only in the general interest and in that of his client.

15. On 16 November 1992 the Hochdorf prefect had lodged a complaint (*Anzeige*) with the Supervisory Board and asked for disciplinary proceedings to be brought against Mr Schöpfer. He asserted that by his statements the latter had not only slandered the prefect and his two district clerks but had also been guilty of a serious breach of lawyers' professional ethics (*Standesregeln*) by spreading false accusations through the media rather than making use of the available legal remedies.

16. On 21 December 1992 the Supervisory Board brought disciplinary proceedings against the applicant.

On 15 March 1993, pursuant to Article 13 of the Statute of the Bar (*Anwaltsgesetz*) of the Canton of Lucerne (see paragraph 18 below), it fined him 500 Swiss francs (CHF) for a breach of professional ethics (*Verletzung von Berufs- und Standespflichten*).

In its decision the Supervisory Board observed in particular that the applicant had omitted to refer his complaints – which were serious – in the first place to the public prosecutor's office or the Court of Appeal, which were the relevant supervisory bodies for the district authority. He had therefore failed to observe the discretion which lawyers were required to maintain, in public, with regard to pending proceedings. In addition, he had engaged in covert publicity (*versteckte Reklame*) and cheap showmanship (*Effekthascherei*), thus demonstrating that he was more concerned about his own public profile than about the merits of the case. In any event, lawyers' statements to the press always had to be not only of real public interest (*reelles öffentliches Interesse*) but also objective and moderate in tone (*objektiv in der Darstellung und sachlich im Ton*).

But the tone of a number of passages in Mr Schöpfer's statements to the press left something to be desired. For example he had said: "I won't let those gentlemen make a fool of me any longer" and "I demand … a thorough investigation of the case by an impartial commission of inquiry from outside the canton" and also "So the only recourse left to me is to take the matter to the press." This last statement was not even true, since at that time Mr Schöpfer had not even applied to the relevant supervisory bodies for the district authority, nor had he tried exercising the ordinary legal remedies. He had thus disparaged not only the Hochdorf district authority but all the canton's judicial authorities, which was incompatible with a lawyer's professional ethics.

17. The applicant lodged a public-law appeal against the above decision. This was dismissed by the Federal Court on 21 April 1994.

It observed that lawyers enjoyed considerable freedom to criticise the judicial authorities, provided that this was done according to the correct procedures, and in the first place in the course of representing and defending their clients. When, however, a lawyer appealed to public opinion, he was under a duty, like any other person employed in the service of justice, to refrain from any conduct inconducive to the proper administration thereof. Article 10 § 2 of the Convention also enunciated the principle that interference could be justified if its purpose was to maintain the authority and impartiality of the judiciary. Admittedly, there might be circumstances in which the public interest required alleged violations of constitutional or human rights to be made public. In order to determine whether that was the case, it was necessary to ascertain how obvious the alleged violations were, whether pending proceedings were likely to be influenced, whether the available remedies had been exercised and in what form the criticism had been made.

In the instant case Mr Schöpfer had been punished not so much for denouncing human rights violations as for the way in which he had done so. When considering the case the Supervisory Board had indeed taken into account the fact that one of the complaints raised by the applicant, concerning the fact that Mr S. had been brought before a district clerk rather than the prefect, had subsequently been upheld by the Court of Appeal. However, Mr Schöpfer's other criticisms – which were likely to influence pending proceedings – had been found by the Supervisory Board to be unjustified. Furthermore, the Board had ruled that the applicant had not employed the right tone in his criticism and that he had made untrue allegations. It had given sufficient grounds for its decision and the applicant had not adduced any convincing counter-arguments.

II. RELEVANT DOMESTIC LAW

18. Article 10 of the Statute of the Bar (*Anwaltsgesetz*) of the Canton of Lucerne establishes a Lawyers' Supervisory Board (*Aufsichtsbehörde über die Anwälte*) whose members – two judges of the Court of Appeal, one administrative court judge and two lawyers – are appointed by the Court of Appeal for four years. Under Article 12 § 1 of the Statute the Board has jurisdiction to investigate lawyers' breaches of professional ethics (*Berufs- und Standespflichten*) and may impose disciplinary penalties. Under Article 13 these range from a reprimand (*Verweis*) to temporary or permanent disbarment, with fines of up to CHF 5,000 as intermediate penalties.

PROCEEDINGS BEFORE THE COMMISSION

19. Mr Schöpfer applied to the Commission on 11 August 1994, alleging that the disciplinary penalty imposed on him had breached Article 10 of the Convention.

20. The Commission (Second Chamber) declared the application (no. 25405/94) admissible on 4 September 1996. In its report of 9 April 1997 (Article 31), it expressed the opinion by nine votes to six that there had been no violation of that provision. The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

21. In their memorial the Government requested the Court "to declare that there [had] been no violation of Article 10 of the Convention in the present case".

22. In his memorial the applicant asked the Court to hold that there had been a breach of Article 10 and to order Switzerland to pay him compensation for the damage he had sustained.

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

23. Mr Schöpfer alleged that the penalty imposed on him by the Lawyers' Supervisory Board had breached Article 10 of the Convention, which provides:

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

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

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

24. The penalty in issue incontestably amounted to "interference" with the applicant's exercise of his freedom of expression. The participants in the proceedings agreed that it was "prescribed by law" and pursued a legitimate aim for the purposes of Article 10 § 2, namely maintaining the authority and impartiality of the judiciary. It is apparent from the Supervisory Board's decision of 15 March 1993 that the penalty in question was imposed on the applicant because, *inter alia*, he had disparaged all the canton's judicial authorities (see paragraph 16 above).

The Court, which agrees with the participants on this point, must now determine, therefore, whether the interference was "necessary in a democratic society" in order to achieve that aim.

25. The applicant explained that the reason why he had chosen to make his criticisms through the press was that it was not only his client's case which gave him cause for concern but an intolerable situation that had persisted for years at the Hochdorf district authority. He had already exercised remedies against this state of affairs in connection with previous cases, but to no avail.

Mr Schöpfer asserted that he had deliberately refrained from appealing against the Hochdorf district authority's refusal of his application to take over as his client's officially appointed counsel so as not to make that issue the central theme of the case. In any event, such appeals were usually unsuccessful. It was only when his client's wife had come to tell him that, according to district authority officials, her husband would remain incarcerated for as long as he, Schöpfer, was defending him that he had decided to speak to the press. He could, admittedly, have complained to the public prosecutor's office, which was the district authority's supervisory authority, but the statements the public prosecutor's office had made to the newspapers after the press conference were enough to show that such a step would also have been bound to fail.

Moreover, in his statements he had not criticised the judiciary as such but only the conduct of the Hochdorf prefect and, indirectly, that of the public prosecutor's office, as the supervisory authority. His criticisms had been justified, since they had been aimed not at an isolated case but at a long-standing practice contrary to the Convention. A lawyer who noted that such a practice had been followed to the detriment of a number of his clients

had the right to begin a public debate on the subject. Furthermore, he had expressed his opinion not only as a lawyer but also as a politician.

26. The Government submitted that a distinction had to be drawn in the first place, according to the case-law of the Federal Court, between a lawyer's statements in the context of judicial proceedings and statements made outside the context of such proceedings, inasmuch as there might be stricter requirements for a lawyer who expressed an opinion in public. Only in special circumstances would he be justified in doing so and he should be objective in the way he presented the facts and moderate in tone.

Further, the criticisms of the Hochdorf district authority were not only formulated in totally exaggerated terms, they were also without foundation. The only substantiated complaint, the one concerning the fact that Mr Schöpfer's client had been brought before a district clerk, had been upheld by the Court of Appeal and had then been taken into account during the disciplinary proceedings, by the Lawyers' Supervisory Board and the Federal Court. But even that complaint, which, according to the applicant, concerned an extremely serious violation of human rights, had been formulated in unacceptably exaggerated terms for a lawyer, given the fact that it related to pending judicial proceedings.

Not content with making very serious allegations, Mr Schöpfer had in addition done so in a spiteful and aggressive tone, thus failing to observe the discretion, integrity and dignity that a lawyer should maintain. When seen against all that, the fine of CHF 500 imposed on the applicant appeared moderate in the light of the scale of penalties provided for in the Statute of the Bar of the Canton of Lucerne.

27. In the Commission's view, the applicant had exaggerated his grievances, by asserting for instance that for years the Hochdorf district authority had been flagrantly violating the laws of the Canton of Lucerne and human rights. In addition, he had omitted to exercise first of all the ordinary remedies at his disposal to raise the complaints he had made at the press conference. Moreover, he had made his allegations while the criminal proceedings against his client were still pending, which could be regarded as an attempt to exert pressure on the Hochdorf authorities dealing with the investigation and, more generally, to impair the independence of the judiciary. Lastly, the fine of CHF 500 was at the lower end of the scale of penalties provided for in the Statute of the Bar of the Canton of Lucerne. There had accordingly been no violation of Article 10.

28. The Court notes that at his press conference on 9 November 1992 Mr Schöpfer complained, essentially, of the fact that his client had been arrested at the Hochdorf district authority offices without an arrest warrant and then brought before a district clerk, and that the district authority had refused his application to take over the case as his client's defence counsel under the legal aid scheme (see paragraph 9 above). The Lawyers' Supervisory Board, when it imposed the penalty on the applicant, attached great importance to the fact that he had preferred to speak to the press before exercising the available legal remedies (see paragraph 16 above).

29. The Court reiterates that the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar (see the Casado Coca v. Spain judgment of 24 February 1994, Series A no. 285-A, p. 21, § 54).

Moreover, the Court has already held that the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence (see the De Haes and Gijsels v. Belgium judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 234, § 37). Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein.

30. In the present case Mr Schöpfer held his press conference on 9 November 1992, stating on that occasion, *inter alia*, that the journalists were his last resort (see paragraph 8 above). On 18 November 1992 he appealed to the Lucerne Court of Appeal against the Hochdorf prefect's refusal of the application for his client's release. The Court of Appeal dismissed the appeal for lack of standing, but upheld the complaint that bringing Mr Schöpfer's client before one of the district clerks had been unlawful. It accordingly ordered its decision to be brought to the attention of the public prosecutor's office, as the prefect's supervisory authority (see paragraph 13 above).

31. Thus Mr Schöpfer first publicly criticised the administration of justice in Hochdorf and then exercised a legal remedy which proved effective with regard to the complaint in question. In so doing his conduct was scarcely compatible with the contribution it is legitimate to expect lawyers to make to maintaining public confidence in the judicial authorities.

32. The above finding is reinforced by the seriousness and general nature of the criticisms made by the applicant and the tone in which he chose to make them. For example, he said at the press conference that he was speaking to the journalists because they were his last resort and because at the Hochdorf district authority offices the laws of the Canton of Lucerne

and human rights had for years been flagrantly disregarded (see paragraph 8 above). On 13 November 1992 a daily newspaper published a summary of a press release in which Mr Schöpfer had stated that his client's arrest had breached the Convention and – "in a crude and unacceptable manner" – the cantonal Code of Criminal Procedure (see paragraph 12 above).

33. It is true that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (see the De Haes and Gijsels judgment cited above, p. 236, § 48). It also goes without saying that freedom of expression is secured to lawyers too, who are certainly entitled to comment in public on the administration of justice, but their criticism must not overstep certain bounds. In that connection, account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession (see the Casado Coca judgment cited above, p. 21, § 55, and the De Haes and Gijsels judgment cited above, pp. 233–34, § 37). Because of their direct, continuous contact with their members, the Bar authorities and a country's courts are in a better position than an international court to determine how, at a given time, the right balance can be struck. That is why they have a certain margin of appreciation in assessing the necessity of an interference in this area, but this margin is subject to European supervision as regards both the relevant rules and the decisions applying them (see the Casado Coca judgment cited above, pp. 20–21, §§ 50 and 55).

34. The Court notes that Mr Schöpfer – who was a lawyer – had raised in public his complaints on the subject of criminal proceedings which were at that time pending before a criminal court. In addition to the general nature, the seriousness and the tone of the applicant's assertions, the Court notes that he first held a press conference, claiming that this was his last resort, and only afterwards lodged an appeal before the Lucerne Court of Appeal, which was partly successful. He also omitted to apply to the other supervisory body for the district authority, the public prosecutor's office, whose ineffectiveness he did not attempt to establish except by means of mere assertions. Having regard also to the modest amount of the fine imposed on the applicant, the Court considers that the authorities did not go beyond their margin of appreciation in punishing Mr Schöpfer. There has accordingly been no breach of Article 10.

FOR THESE REASONS, THE COURT

Holds by seven votes to two that there has been no breach of Article 10 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 May 1998.

Signed: THÓR VILHJÁLMSSON
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 55 § 2 of Rules of Court B, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr De Meyer;

(b) dissenting opinion of Mr Jambrek.

Initialled: T. V.
Initialled: H. P.

DISSENTING OPINION OF JUDGE DE MEYER

(*Translation*)

The applicant took exception to the arrest of one of his clients, which he considered unlawful. He was annoyed to learn from the man's wife that two district clerks had told her that she would have to instruct a different lawyer if she wanted to obtain her husband's release. In order to express his dissatisfaction he held a press conference at which he apparently stated, among other assertions, that at the Hochdorf district authority offices the laws of the canton and human rights had been flagrantly breached for years. When articles on the case then appeared in two Lucerne newspapers, together with a press release issued by the public prosecutor's office, the applicant also issued a press release, repeating his criticisms and stating in particular that his client's arrest had breached the Convention and the Code of Criminal Procedure in a crude and unacceptable manner[1].

The Lucerne Court of Appeal upheld, at least in part, the applicant's complaints about the lawfulness of the procedure followed at the time of his client's arrest[2].

Was it, in those circumstances, "necessary in a democratic society" to fine him 500 Swiss francs? I have not been convinced that it was.

I find the criticisms made of him – that he had failed to observe discretion, engaged in covert publicity, indulged in cheap showmanship and used an immoderate tone[3] – rather artificial and strained. I do not think they were sufficient to justify the interference in the present case with his freedom of expression on matters of public interest which particularly concerned him as a lawyer[4], namely the administration of justice and respect for human rights[5].

1. See paragraphs 6 to 12 of the judgment.
2. See paragraph 13 of the judgment.
3. See paragraph 16 of the judgment.
4. And no doubt also to some extent as a former member of the Cantonal Council, although that was not necessarily relevant as regards the Bar's code of conduct.
5. See, *mutatis mutandis*, the Ezelin v. France judgment of 26 April 1991, Series A no. 202, pp. 20–23, §§ 48–53, the Barthold v. Germany judgment of 25 March 1985, Series A no. 90, pp. 24–26, §§ 55–59, and the De Haes and Gijsels v. Belgium judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 233–37, §§ 37–49.

DISSENTING OPINION OF JUDGE JAMBREK

This case concerns a lawyer's freedom of expression. The situation in the Lucerne judicial system as relevant for the present case was exceptional. Both Mr Schöpfer and the authorities engaged in a long-standing polemic. The applicant's role was not that of a politician but a legal expert promoting changes in criminal law, who got involved in conflict with local civil servants. Furthermore, he was involved in a concrete case and on top of that he was influenced by the wife of his client. In such a situation he might have had grounds to believe her although her allegations were denied by civil servants. Thus the applicant found himself in exceptional circumstances and his reaction might have been improper due to such circumstances, which however could also be considered to justify his behaviour. At the same time he was engaged in a legislative fight for his principles. The applicant considered that he could not rely on the remedies available in his efforts to get appointed as an *ex officio* lawyer for his client. Therefore he did not act on purpose in a political way. His statements to the press seem partly right and partly wrong. Furthermore, those originating from the press were authored by the press and the applicant therefore cannot be held responsible for everything that was included in them.

Although the penalty of 500 Swiss francs represents a relatively small sum it nevertheless degraded his personal esteem and professional status in a symbolic way. In this light the penalty may be considered rather harsh and not necessary in a democratic society.

I also wish to refer to the kind of points raised in public by the applicant. It transpires from paragraph 56 of the Worm v. Austria judgment of 29 August 1997 (*Reports of Judgments and Decisions* 1997-V, p. 1554) that matters of general concern relating to a trial may be reported and commented upon without necessarily interfering with the independent judicial process.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

COURT (CHAMBER)

CASE OF SILVER AND OTHERS v. THE UNITED KINGDOM

(Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75)

JUDGMENT

STRASBOURG

25 March 1983

In the case of Silver and others,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court*, as a Chamber composed of the following judges:

Mr. G. WIARDA, *President,*
Mr. Thór VILHJÁLMSSON,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. L.-E. PETTITI,
Sir Vincent EVANS,
Mr. C. RUSSO,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 23 and 24 September 1982 and 24 and 25 February 1983,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case of Silver and others was referred to the Court by the European Commission of Human Rights ("the Commission"). The case originated in seven applications (nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission on various dates between 1972 and 1975 by Mr. Reuben Silver, Mr. Clifford Dixon Noe, Mrs. Judith Colne, Mr. James Henry Tuttle, Mr. Gary Cooper, Mr. Michael McMahon and Mr. Desmond Roy Carne under Article 25 (art. 25) of the Convention. The Commission ordered the joinder of the applications on 11 March 1977.

2. The Commission's request was lodged with the registry of the Court on 18 March 1981, within the period of three months laid down by Articles 32 § 1 and 47 (art. 32-1, art. 47). The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 § 1, 8 and 13 (art. 6-1, art. 8, art. 13).

* Note by the registry: In the version of the Rules applicable when proceedings were instituted. A revised version of the Rules of Court entered into force on 1 January 1983, but only in respect of cases referred to the Court after that date.

3. The Chamber of seven judges to be constituted included, as ex officio members, Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 § 3 (b) of the Rules of Court). On 25 April 1981, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mrs. D. Bindschedler-Robert, Mr. F. Matscher, Mr. L.-E. Pettiti, Mr. C. Russo and Mr. R. Bernhardt (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

Subsequently, Mr. F. Gölcüklü and Mr. Thór Vilhjálmsson, substitute judges, took the respective places of Mrs. Bindschedler-Robert, whom the President had exempted from sitting on the case, and Mr. Bernhardt, who was prevented from taking part in the further consideration of the case (Rules 22 § 1 and 24 §§ 1 and 4).

4. Mr. Wiarda, who had assumed the office of President of the Chamber (Rule 21 § 5), ascertained, through the Registrar, the views of the Agent of the Government of the United Kingdom ("the Government") and the Delegates of the Commission regarding the procedure to be followed. He decided on 4 May that the Agent should have until 4 September 1981 to file a memorial and that the Delegates should be entitled to file a memorial in reply within two months from the date of the transmission of the Government's memorial to them by the Registrar. The President agreed on 13 August to extend the first of these time-limits until 2 October 1981.

The Government's memorial was received at the registry on 2 October 1981. On 4 December, the Secretary to the Commission, who had informed the Registrar on 14 October that the Delegates did not themselves wish to reply in writing, transmitted to the Court observations on the memorial, which had been submitted to the Delegates by the applicants' lawyers.

5. The Court held a preparatory meeting on 27 January 1982 when it formulated certain proposals with a view to the limitation of the scope of the hearings to be held before it. On the same occasion, the Court drew up a list of questions and requests which were communicated by the Registrar on 10 February to the Government and the Commission; replies thereto were received from the Government on 14 June and, as regards one question, from the Commission on 6 August.

6. After consulting, through the Registrar, the Agent of the Government and the Delegates of the Commission, the President directed, on 17 May, that the hearings should open on 22 September 1982 and, on 22 July that their scope should be limited in the manner set out in his Order of the last-mentioned date.

7. The hearings were held in public at the Human Rights Building, Strasbourg, on 22 September 1982.

There appeared before the Court:

- for the Government:

Mrs. A. GLOVER, Legal Adviser,

Foreign and Commonwealth Office, *Agent*,
Mr. S. BROWN,
Mr. N. BRATZA, Barristers-at-Law, *Counsel*,
Mrs. S. EVANS,
Mr. C. OSBORNE,
Miss V. DEWS, Home Office,
Mr. R. PHILLIPS, Treasury Solicitor's Office, *Advisers*;

- for the Commission:
Mr. J. FAWCETT,
Mr. F. ERMACORA, *Delegates*,
Mr. A. LESTER, Q.C.,
Mr. M. BELOFF, Q.C.,
Mr. B. RAYMOND,
Mr. S. GROSZ, Solicitors,
assisting the Delegates (Rule 29 § 1, second sentence, of the Rules of Court).

The Court heard addresses by Mr. Brown for the Government and by Mr. Fawcett, Mr. Ermacora and Mr. Lester for the Commission, and also replies to questions put by two of its members.

8. On 22 September, the Commission filed a number of documents, including a memorial which they had received from the applicants regarding the application of Article 50 (art. 50) of the Convention in the event that the Court should find a violation to have occurred.

On the same date, the President directed that the Government should have until 22 November to reply in writing to the said memorial, a time-limit which he subsequently extended at the Government's request to 14 January 1983. The reply was received at the registry on the last-mentioned date.

On 25 January 1983, the President directed that the Delegates of the Commission should have until 14 March 1983 to file any observations which they or the applicants might wish to make on the aforesaid reply.

AS TO THE FACTS

9. The principal complaint of all seven applicants was that the control of their mail by the prison authorities constituted a breach of their right to respect for correspondence and of their freedom of expression, guaranteed by Articles 8 and 10 (art. 8, art. 10) of the Convention, respectively. They also alleged that, contrary to Article 13 (art. 13), no effective domestic remedy existed for the aforesaid breaches. In addition, Mr. Silver claimed that he had been denied access to the courts, in violation of Article 6 § 1

(art. 6-1), on account of the refusal of two petitions for permission to seek legal advice.

I. FACTS PARTICULAR TO THE INDIVIDUAL APPLICANTS

A. Mr. Silver

10. The first applicant, Mr. Reuben Silver, was born in 1915 and was a United Kingdom citizen. When he lodged his application with the Commission (20 November 1972), he was detained in prison in England. He was released from prison in February 1974 and died in March 1979.

11. In the period from January 1972 to March 1973, 7 of Mr. Silver's letters were stopped by the prison authorities for the reasons indicated in paragraphs 59, 62, 63, 66, 68 and 69 below.

This applicant did not complain through the internal prison channels (see paragraphs 51-53 below) of the stopping of his correspondence; he claimed that the prison governor prevented him from raising each incident by way of petition to the Home Secretary because he, Mr. Silver, already had petitions outstanding at the material times.

12. On 20 November 1972, Mr. Silver petitioned the Home Secretary for permission to seek legal advice concerning allegedly negligent treatment in prison and also complained, inter alia, about his medical and dental treatment. Permission was refused on 18 April 1973. On 30 July 1973, he submitted another petition in which he referred to his earlier petition and requested leave to seek legal advice about his dental treatment. The second petition was apparently granted on 1 October 1973, but Mr. Silver claimed that he was never so informed. At the time of both petitions, prisoners could not seek legal advice about prospective civil proceedings without the Home Secretary's leave (see paragraph 32 below).

B. Mr. Noe

13. The second applicant, Mr. Clifford Dixon Noe, is a citizen of the United States of America, born in 1930. When he lodged his application with the Commission (1 February 1973), he was serving a sentence of imprisonment in England after being convicted of fraud. He was released from prison on 31 January 1977 and subsequently deported from the United Kingdom.

14. In the period from May 1972 to April 1975 and for the reasons indicated in paragraphs 6O, 61, 67 and 71 below, 4 of Mr. Noe's letters were stopped by the prison authorities and the posting of a further letter was delayed for three weeks.

This applicant apparently complained through the internal prison channels of this action, other than the stopping of his letter no. 9, but without success.

C. Mrs. Colne

15. The third applicant, Mrs. Judith Colne, is an Australian citizen, born in 1927. She is a schoolteacher and resides in London.

16. Around May 1974, Mrs. Colne began correspondence with a Mr. Michael Williams, the brother of an imprisoned friend of hers. Mr. Williams was then detained in H.M. Prison Albany and was a "category A" prisoner, this being the security category reserved for persons who, if they escaped, would be highly dangerous to the public or the police or to the security of the State. Following his transfer in July 1974 to H.M. Prison Hull, their correspondence was noticed and stopped for the reason indicated in paragraph 59 below. It resumed, unnoticed, following his further transfer to H.M. Prison Wakefield in August 1974 but was discovered during the following month; thereafter, and for the same reason, all correspondence between them was prevented.

This applicant raised the matter, both directly and through a Member of Parliament, with the Home Secretary, but without success.

D. Mr. Tuttle

17. The fourth applicant, Mr. James Henry Tuttle, is a United Kingdom citizen, born in 1914. When he lodged his application with the Commission (20 March 1975), he was detained in prison in England. He was released on licence on 5 January 1981.

18. In March 1975, 2 of Mr. Tuttle’s letters were stopped by the prison authorities for the reasons indicated in paragraphs 62, 64 and 68 below.

This applicant apparently complained, in a petition to the Home Secretary, of the stopping of his correspondence, but without success.

E. Mr. Cooper

19. The fifth applicant, Mr. Gary Cooper, is a United Kingdom citizen, born in 1946. When he lodged his application with the Commission (28 October 1974), he was serving a sentence of imprisonment in England. He was released on 14 December 1981, but was later imprisoned again.

20. In the period from April 1974 to March 1976, 14 of Mr. Cooper’s letters were stopped by the prison authorities for the reasons or in the circumstances indicated in paragraphs 60, 65, 67 and 71 below.

This applicant apparently complained unsuccessfully through the internal prison channels of the stopping of 6 of the 14 letters, namely nos. 20, 22, 23, 24, 26 and 27.

F. Mr. McMahon

21. The sixth applicant, Mr. Michael McMahon, is a United Kingdom citizen, born in 1944. When he lodged his application with the Commission (8 July 1975), he was serving a sentence of imprisonment in England, as a "category A" prisoner, after being convicted of murder. He was released on 18 July 1980.

22. In the period from March 1975 to February 1976, 11 of Mr. McMahon's outgoing letters were stopped by the prison authorities and one letter to him was withheld.

This applicant submitted three petitions to the Home Secretary, of which one was successful: it was admitted that a letter to the Archbishop of Canterbury (no. 33) should not have been stopped as the addressee was a Member of Parliament; the letter was accordingly sent and Mr. McMahon withdrew his complaint in this respect. The reasons for the stopping or withholding of the remaining 11 letters are indicated in paragraphs 59, 61, 66 and 70 below.

G. Mr. Carne

23. The seventh applicant, Mr. Desmond Roy Carne, is a United Kingdom citizen, born in 1945. When he lodged his application with the Commission (5 April 1975), he was serving a sentence of imprisonment in England after being convicted of theft. He was released on 30 August 1977.

24. In the period from November 1974 to May 1976, 22 of Mr. Carne's letters were stopped by the prison authorities for the reasons indicated in paragraphs 59, 60, 64, 66, 67 and 68 below.

This applicant apparently complained, either through the internal prison channels or by having the matter raised with the Parliamentary Commissioner for Administration, of the stopping of each of these letters, but to no avail.

II. DOMESTIC LAW AND PRACTICE

25. The control over and responsibility for prisons and prisoners in England and Wales is vested by the Prison Act 1952 in the Home Secretary. He is empowered by section 47(1) of that Act to make rules "for the regulation and management of prisons ... and for the classification, treatment, employment, discipline and control of persons required to be detained therein". Such rules are contained in statutory instruments laid

before Parliament and made in accordance with the negative resolution procedure, that is, they come into operation unless Parliament otherwise resolves.

The rules made by the Home Secretary currently in force, a number of which relate to prisoners' correspondence, are the Prison Rules 1964, as amended ("the Rules").

26. With a view to securing uniformity of practice throughout prison establishments, the Home Secretary also issues to prison governors management guides or directives in the form of Standing Orders ("Orders") and Circular Instructions ("Instructions"). Unless otherwise authorised, governors are required to comply with these directives, but they do not have, or purport to have, the force of law.

At the time of the events giving rise to this case and until 30 November 1981, both Orders and Instructions contained, in addition to directives on the control of prisoners' correspondence, internal rules and guidance of a general nature concerning the day to day administration of the prison. The Orders and Instructions were made available to Members of both Houses of Parliament for reference but not to the public or prisoners, although the latter received, by means of cell cards, information about certain aspects of the control of correspondence.

With effect from 1 December 1981, the directives on prisoners' correspondence were substantially revised. In addition, revised Orders relating to correspondence have been published in their entirety, matters of a management or administrative nature which do not concern a prisoner's entitlement to correspond and were considered inappropriate for publication having been eliminated from the Orders and embodied in Instructions. The Rules themselves have not been amended, although the Government indicated at the hearing before the Court that as soon as practicable Rule 34(8) (see paragraph 29 below) would be repealed in so far as it affected correspondence.

27. As far as prisoners' correspondence is concerned, the Home Secretary's directives to governors were and are intended to serve a dual function: on the one hand, to circumscribe the discretion conferred on governors by the Rules, and, on the other, to state the manner in which the Home Secretary has decided in certain respects to exercise his own discretionary powers thereunder. The principal provisions which the Rules contain on the subject are set out below, accompanied by a summary of:

(a) the relevant Orders and Instructions in force until 30 November 1981; and

(b) the changes that took effect after that date.

A. General provisions

28. The following Rules, containing general provisions on the control of correspondence, came into operation on 25 March 1964 and are still in force:

> "33(1) The Secretary of State may, with a view to securing discipline and good order or the prevention of crime or in the interests of any persons, impose restrictions, either generally or in a particular case, upon the communications to be permitted between a prisoner and other persons.
>
> ...
>
> (3) Except as provided by these Rules, every letter or communication to or from a prisoner shall" (or, with effect from 1 June 1974, "may") "be read or examined by the governor or an officer deputed by him, and the governor may, at his discretion, stop any letter or communication on the ground that its contents are objectionable or that it is of inordinate length."

B. Provisions concerning the identity of correspondents

29. The following basic Rules, both concerning the identity of persons with whom a prisoner may correspond, came into effect on 25 March 1964 and are still in force:

> "33(2) Except as provided by statute or these Rules, a prisoner shall not be permitted to communicate with any outside person, or that person with him, without the leave of the Secretary of State.
>
> 34(8) A prisoner shall not be entitled under Rule 34" - which regulates the quantity of correspondence - "to communicate with any person in connection with any legal or other business, or with any person other than a relative or friend, except with the leave of the Secretary of State."

1. Position prior to 1 December 1981

30. Under Rule 34(8), as supplemented by Orders 5A 22, 5A 23 and 5A 30, prisoners had to seek the Home Secretary’s leave to correspond with any person other than a close relation; they were, however, also normally allowed, without the necessity to seek such leave, to correspond with other relatives or existing friends, but the governor had discretion to forbid such correspondence on grounds of security or good order and discipline or in the interests of the prevention or discouragement of crime. Governors had a discretion - which they would have been unlikely to exercise in favour of a "category A" prisoner, such as Mr. Williams or Mr. McMahon - to allow communications with other persons not personally known to the prisoner before he came into custody, but generally he could not write to other

prisoners, ex-prisoners, marriage bureaux, "Monomark addresses" or specified categories of pen friends.

In addition, standing leave had been granted for correspondence falling into certain special categories, as explained in paragraphs 31-36 below.

(a) Correspondence with legal advisers

31. With effect from 1 January 1973, uncensored correspondence relating to civil or criminal proceedings to which the prisoner was already a party was permitted under Rule 37A(1), which is still in force and reads:

> "A prisoner who is a party to any legal proceedings may correspond with his legal adviser in connection with the proceedings and unless the Governor has reason to suppose that any such correspondence contains matter not relating to the proceedings it shall not be read or stopped under Rule 33(3) of these Rules."

32. Until 6 August 1975, inmates had to petition the Home Secretary for permission to seek advice about, or give instructions for, the institution of civil proceedings (with the exception of certain divorce cases). On that date, Instruction 45/1975 introduced changes which were subsequently reflected in Rule 37A(4) and directions made by the Secretary of State thereunder, in the shape of Order 17A. Rule 37A(4), which came into operation on 26 April 1976 and is still in force, reads:

> "Subject to any directions of the Secretary of State, a prisoner may correspond with a solicitor for the purpose of obtaining legal advice concerning any cause of action in relation to which the prisoner may become a party to civil proceedings or for the purpose of instructing the solicitor to issue such proceedings."

Order 17A provided, inter alia, that:

(i) the inmate had to have sought a solicitor’s advice before he would be permitted to institute proceedings;

(ii) at each stage a written application, with reasons, had first to be made to the prison governor for the necessary facilities; they had to grant immediately, except that, in the case of prospective civil proceedings against the Home Office "arising out of or in connexion with" the imprisonment, the "prior ventilation rule" (see paragraph 47 below) generally applied.

Correspondence in this category was otherwise subject to the restrictions on contents mentioned at paragraphs 41-47 below.

(b) Correspondence with Members of Parliament

33. Prisoners were free to communicate with their Members of Parliament, subject to the restrictions on contents mentioned at paragraphs 41-47 below.

(c) Correspondence with Consular and Commonwealth officials

34. Prisoners who were foreign nationals or citizens of the Irish Republic or a Commonwealth country were free to communicate with the accredited representatives of their countries in the United Kingdom, subject to the restrictions on contents mentioned at paragraphs 41-47 below.

(d) Correspondence with certain organisations

35. Under Order 5A 31(2) b., a prisoner could, without first seeking leave from the Home Secretary or the prison governor, write to the National Council for Civil Liberties, "Justice", "Release" or the Howard League for Penal Reform to seek legal advice about his conviction and sentence, or about general matters. He could, in addition, write to these organisations to ask for legal proceedings to be instituted and, although originally he could not seek legal advice from them about any matter relating to his prison treatment, this was subsequently allowed by Instruction 38/1977, subject however to the "prior ventilation rule" (see paragraph 47 below). In the two latter cases, however, the prisoner had first to follow the procedures introduced by Instruction 45/1975 and then enshrined in Order 17A (application to the governor for facilities; see paragraph 32 above).

Correspondence in this category was otherwise subject to the restrictions on contents mentioned at paragraphs 41-47 below.

(e) Applications to the European Commission of Human Rights

36. Special provisions applied to applications to the Commission; in particular, the Home Secretary's leave was required neither for their submission nor for correspondence with legal advisers relative thereto, and the "prior ventilation rule" did not apply.

2. Position with effect from 1 December 1981

37. Most of the restrictions which the earlier Orders and Instructions contained on the identity of correspondents have now been abolished. Although the relevant Rules have not themselves been amended, the revised Orders (nos. 5B23-5B30) state that, provided the provisions concerning the contents of correspondence (see paragraph 48 below) are observed, a prisoner may communicate with any person or organisation, subject to certain exceptions of which the principal are:

(a) recipients of correspondence (other than spouses) who have requested that no further letters be sent;

(b) other prisoners, who are not relatives, where there is reason to believe that correspondence would seriously impede rehabilitation or where the prevention of communication is desirable in the interests of security or good order or discipline;

(c) ex-prisoners, where there is reason to believe that correspondence would seriously impede rehabilitation;

(d) a person (other than a close relative) or organisation believed to be planning or engaged in activities that seriously threaten the security or good order of a prison establishment.

C. Provisions concerning the quantity of correspondence

38. The following basic Rules concerning the amount of correspondence which a prisoner may conduct came into operation on 25 March 1964 and are still in force:

> "34(1) An unconvicted prisoner may send and receive as many letters ... as he wishes within such limits and subject to such conditions as the Secretary of State may direct, either generally or in a particular case.
>
> (2) A convicted prisoner shall be entitled
>
> (a) to send and to receive a letter on his reception into a prison and thereafter once a week;
>
> ...
>
> (3) The governor may allow a prisoner an additional letter ... where necessary for his welfare or that of his family.
>
> (4) The governor may allow a prisoner entitled to a visit to send and to receive a letter instead.
>
> ...
>
> (6) The visiting committee or board of visitors" (or, with effect from 1 January 1972, "The board of visitors") "may allow a prisoner an additional letter ... in special circumstances ...
>
> (7) The Secretary of State may allow additional letters ... in relation to any prisoner or class of prisoners."

1. Position prior to 1 December 1981

39. In addition to his entitlement under Rule 34(2) to send - at public expense - and to receive one letter per week, a convicted prisoner was allowed to send at his own expense at least one extra letter per week, and to receive a reply (Order 5A 3(8) and Instruction 155/1968).

The prison authorities' discretion under Rules 34(3), (6) and (7) to allow further letters was exercised where possible.

These quantitative restrictions did not apply to remand prisoners (Rule 34(1)), but they were in most other respects subject to the same regulations on correspondence as convicted prisoners.

2. Position with effect from 1 December 1981

40. The revised Orders (nos. 5B7 and 5B14) do not alter the basic entitlement but specify that additional extra letters should be allowed as far as practicable.

D. Provisions concerning the contents of correspondence

41. In addition to Rule 33(3), the text whereof appears at paragraph 28 above, the following basic Rule concerning the contents of prisoners' correspondence came into operation on 25 March 1964 and is still in force:

> "34(8) A prisoner shall not be entitled under Rule 34" - which regulates the quantity of correspondence - "to communicate with any person in connection with any legal or other business ... except with the leave of the Secretary of State."

1. Position prior to 1 December 1981

42. Rules 33(3) and 34(8) were supplemented as follows by various Orders and Instructions.

43. Under Order 5A 31, a convicted prisoner was specifically prohibited from making representations on matters connected with his trial, conviction or sentence to any judge, public authority, representative of any Commonwealth or foreign government (subject to certain exceptions for prisoners who were foreign nationals or citizens of another Commonwealth country) or unofficial organisation (subject again to certain specific exceptions). Such representations could, however, be made to the Home Secretary.

44. Under Order 5A 24, prisoners were not allowed to send letters requesting anyone to make on their behalf a communication which they would not be permitted to make directly, or certain other letters which would circumvent the regulations.

45. (a) Orders 5A 26(4) a. and b. and 5A 29 prohibited the inclusion in outgoing letters (other than those to Members of Parliament or Consular or Commonwealth officials, to which special rules applied) of any of the following matters:

(i) objectionable references to persons in public life;

(ii) discussion of crime and criminal methods or of the offences of others;

(iii) any complaint about the courts, the police and the prison authorities that was a deliberate and calculated attempt to hold them up to contempt;

(iv) threats of or incitement to violence;

(v) material intended for publication or for use on wireless or television (this rule was relaxed as regards certain specialised publications);

(vi) grossly improper language;

(vii) statements about private individuals which were patently scandalous or libellous or otherwise deliberately calculated to do them harm;

(viii) begging requests for money or valuable property;

(ix) complaints about prison treatment;

(x) allegations against prison officers;

(xi) attempts to stimulate public agitation or petition.

Similar regulations applied to incoming letters (Order 5A 26(4) d.).

As recorded in paragraphs 32 and 35 above, the prohibition on the inclusion of complaints about prison treatment or allegations against prison officers did not apply to certain correspondence with legal advisers (after 6 August 1975) and with specified organisations (after 26 August 1977), provided always that the "prior ventilation rule" (see paragraph 47 below) had been satisfied.

(b) Until 28 November 1975, a broadly similar list of prohibited contents applied to letters to Members of Parliament, except that they could contain complaints about prison treatment or against prison staff in respect of which the "prior ventilation rule" had been observed. Thereafter, a letter to a Member of Parliament would have been stopped only if it included an unventilated complaint of that kind (Order 5C, as amended by Instruction 62/1975). At the time of the change of practice, a notice summarising the regulations concerning letters to Members of Parliament was issued for the information of prisoners. It contained the following passage:

> "A complaint or request about prison treatment should be made to the Governor, Board of Visitors or visiting officer, or by petition to the Home Secretary .... A complaint against a member of staff should be made to the Governor. A complaint on these matters may not be made to a Member of Parliament before official action is complete."

(c) Letters from convicted prisoners who were foreign nationals or citizens of the Irish Republic or a Commonwealth country to Consular or Commonwealth officials were subject to the same rules as to contents as letters to Members of Parliament until 3 September 1975. On that date this restriction was abolished (Order 5A 20, as amended by the Instruction of 3 September 1975).

46. With the exception of certain correspondence in connection with legal business for which standing leave had been granted as explained in paragraphs 31, 32 and 35 above, Rule 34(8) prohibited any communications on any legal or other business without the prior leave of the Home Secretary. The conduct of business by prisoners was further dealt with by Orders 1C 4-6, the basic provision being that "an inmate" - whether convicted or not - "may not conduct any business activity in prison, but should be allowed reasonable facilities for arranging its conduct on his behalf". However, subject to this general rule, governors had discretion to allow an inmate to deal with certain limited personal business matters, in

particular to dispose of private property, to sign a cheque or to make or sign a will or other document. The broad effect of the regulations was that, although a prisoner could not participate personally on a continuing basis in a business concern, he was allowed to make arrangements to protect the value, for his own and his family's benefit, of his personal property and any business interests.

47. A complaint about prison treatment or an allegation against a prison officer could be contained or referred to only in correspondence with legal advisers, specified organisations, Members of Parliament or Consular or Commonwealth officials, as indicated in paragraph 45 above. Moreover, under the "prior ventilation rule" - set out, in particular, in Order 17A - a letter in any of these categories which alluded to such a matter would, with certain exceptions, be stopped unless and until the prisoner had ventilated his complaint through the normal internal channels (petition to the Home Secretary, or application to the Board of Visitors, a visiting officer of the Home Secretary or the prison governor) and been given a definitive reply. Thereafter, and in general irrespective of the outcome, the correspondence could proceed.

2. Position with effect from 1 December 1981

48. Rules 33(3) and 34(8) are now supplemented by the new Orders 5B34 and 5B40. The current position is as follows.

(a) The prohibition on representations about trial, conviction or sentence (see paragraph 43 above) is abolished.

(b) Provisions similar to the earlier Order 5A 24 (designed to prevent the evasion or circumvention of the regulations - see paragraph 44 above) remain in force.

(c) The list of prohibited contents (see paragraph 45 (a) above) has been revised; the main items which may now not be included in incoming or outgoing letters may be summarised as follows:

(i) material which would jeopardise prison security;

(ii) material which would assist or encourage the commission of a disciplinary or criminal offence;

(iii) material which could jeopardise national security;

(iv) descriptions of the making of certain destructive devices;

(v) certain obscure or coded messages;

(vi) threats of violence or damage to property likely to induce fear in the recipient;

(vii) blackmail or extortion;

(viii) certain indecent or obscene material;

(ix) information which would create a clear threat or present danger of violence or physical harm to any person;

(x) complaints about prison treatment, in respect of which the "simultaneous ventilation rule" (see paragraph 49 below) has not been observed;

(xi) material initiating a private prosecution;

(xii) certain specified material intended for publication or for use by radio or television;

(xiii) in the case of a convicted prisoner, material constituting the conduct of a business activity, which expression is defined so as to exclude certain specified personal transactions.

The foregoing list does not apply to correspondence with Consular and Commonwealth officials or, with the exception of item (x), to correspondence with Members of the United Kingdom Parliament (new Orders 5D5 and 5E6).

As regards item (xiii) above, it remains the basic rule that inmates may not conduct any business activity from prison, but this no longer applies to unconvicted prisoners who may correspond without restriction about such matters (revised Orders 1C 4 and 1C 5).

49. The "prior ventilation rule" (see paragraph 47 above) has now been replaced by the "simultaneous ventilation rule", set out in Order 5B34 j. A complaint about prison treatment may be referred to in correspondence as soon as it has been raised through the prescribed procedures and without the prisoner’s having to await the outcome of the internal enquiry. The rule does not apply to complaints not requiring investigation or to general complaints in respect of which no corrective or remedial action is possible (for example, regarding overcrowding): these may be mentioned in correspondence without any internal ventilation. Moreover, the effect of the new Orders is that, in contrast to the earlier position, a duly ventilated complaint may now be referred to in any letter, irrespective of the identity of the correspondent.

E. Censorship practice (before and after 1 December 1981)

50. Except as otherwise provided by the Rules (for example, Rule 37A(1); see paragraph 31 above) and until 1 June 1974, all communications to or from a prisoner had, according to Rule 33(3), to be read and examined, although Order 5A 26 gave prison governors a discretion to subject specified domestic correspondence to no more than a cursory examination. With effect from that date, Rule 33(3) was amended to make reading and examination optional, but governors remained and remain subject to the Home Secretary’s directives in this respect. Thus, at the present time, outgoing domestic correspondence is normally not to be read or examined at open establishments; elsewhere, all correspondence is to be examined but not necessarily read (new Order 5B32).

A prisoner whose letter is stopped on account of its contents will be given the opportunity of rewriting it. Where the cause of the stoppage is the addressee's identity, the prisoner may use his entitlement to that letter to write to another person.

F. Complaints concerning censorship (before and after 1 December 1981)

1. Internal channels of complaint

51. An inmate who is aggrieved by a decision to stop or censor his correspondence may complain to the prison governor, the Board of Visitors or a visiting officer of the Home Secretary or he may petition the Home Secretary himself. A prisoner may ventilate his complaint through any or all of these channels and, if more than one is utilised, in such sequence as he wishes.

(a) The Board of Visitors

52. As far as the Board of Visitors is concerned, it may examine the compatibility of the decision complained of with the Rules and the Home Secretary's directives. It will draw the governor's attention to any irregularity, or report to the Home Secretary; although its powers are advisory in character, its advice will be implemented save in exceptional circumstances.

(b) Petitions to the Home Secretary

53. Inmates have the right to submit petitions to the Home Secretary about any matter, for example to seek a permission which the local prison management is not empowered to grant or has refused, or to complain of prison treatment.

On a petition being made by a prisoner, complaining of a decision of the prison authorities to stop or censor his correspondence, the Home Secretary would, if he concluded that the relevant Orders had not been properly interpreted or applied by the prison authorities, issue directions to them to secure compliance. Although it is possible for him to depart from the Orders in particular cases, this is likely to occur only rarely, if at all, since their very purpose is to ensure uniformity of practice and to avoid arbitrary interference with correspondence.

Prior to 1 December 1981, directives concerning the submission of petitions were contained in Orders 5B 1-16. It was, in particular, provided that, with certain exceptions, a prisoner could not petition if and so long as he was awaiting a reply to an earlier petition (Order 5B 12(2)).

With effect from 1 December 1981, the provisions of Order 5B 12(2) have been relaxed by new Orders 5C9 and 5C10. A further petition may now be submitted if a month has elapsed since the submission of the previous petition. Moreover, even though an earlier petition be outstanding, a prisoner may petition forthwith on certain specified matters, including interference with his correspondence.

2. The Parliamentary Commissioner for Administration

54. Complaints concerning the control of correspondence may also be raised with the Parliamentary Commissioner for Administration (the Ombudsman). Under section 5 of the Parliamentary Commissioner Act 1967, this officer, who is appointed by the Crown, may, if so requested by a member of the House of Commons, investigate any action taken in the exercise of administrative functions by specified authorities (including the Home Office) where a complaint has been made by a member of the public who claims to have sustained injustice in consequence of "maladministration". Such an investigation may generally not be conducted where court proceedings are available. Section 12 of the Act expressly provides that the Ombudsman may not question the merits of a discretionary decision taken without maladministration; accordingly, his jurisdiction does not extend to interferences with a prisoner's correspondence effected pursuant to a correct exercise of a discretion conferred by the Rules or the Home Secretary's directives. Moreover, he cannot grant direct relief for maladministration since he is limited to reporting the results of his investigation to the Member of Parliament who requested it, the authority concerned and, in certain circumstances, each House of Parliament (section 10).

Until 23 August 1979, prisoners could communicate with the Ombudsman only through a Member of Parliament who was willing to assist. Although this remains the normal method of approach, they may now write directly; however, their letters to the Ombudsman are subject to the same restriction with regard to the simultaneous ventilation of complaints about prison treatment as correspondence with Members of Parliament (see paragraphs 48 and 49 above) and he still cannot proceed with an investigation unless the prisoner's constituency Member so requests.

3. Application to the domestic courts

55. The exercise by the prison authorities of their powers under the Rules to control correspondence is subject to the supervisory control of the English courts by way of proceedings for judicial review. In the exercise of this jurisdiction the courts will intervene to secure compliance by the prison authorities with the Rules in so far as they confer on prisoners an entitlement to send or receive correspondence (for example, Rule 37(A)1;

see paragraph 31 above), and to ensure that the discretion to restrict correspondence, conferred on the authorities by the Rules, is not exercised arbitrarily, in bad faith, for an improper motive or in an ultra vires manner.

The Court notes in this context that in Raymond v. Honey 1982 1 All England Law Reports 759, Lord Wilberforce pointed out that it was a principle of English law that "a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication".

4. Malicious or groundless complaints

56. Sanctions may be imposed on prisoners who commit disciplinary offences. Under Rule 47, the latter include making "any false and malicious allegation against an officer" and repeatedly making "groundless complaints", be it in a petition, correspondence or otherwise. An inmate who makes an allegation against a member of the prison staff is to be warned accordingly (Instruction 88/1961, now replaced by unpublished Instruction 14/1980).

III. THE APPLICATION IN THE PRESENT CASE OF DOMESTIC LAW AND PRACTICE ON THE CONTROL OF CORRESPONDENCE

57. The present case arises from the stopping of 62 letters written by the applicants, that is to say 7 by Mr. Silver, 4 by Mr. Noe, 3 by Mrs. Colne, 2 by Mr. Tuttle, 14 by Mr. Cooper, 10 by Mr. McMahon and 22 by Mr. Carne; in the case of Mrs. Colne, the 3 letters are examples of the correspondence which she was prevented from continuing with Mr. Williams. In addition, Mr. Noe complained of delay in posting one of his outgoing letters and Mr. McMahon of the withholding of one of his incoming letters.

The Government informed the Court that the total number of letters sent and received by prisoners in England and Wales in a year was of the order of ten million. An indication of the total volume of the correspondence of the applicants in this case who were in prison is given by the fact that, in the under-mentioned periods (being periods for which records are most readily available), the number of letters written by them and posted by the prison authorities in the form in which they were written was: Mr. Silver - 419 (20 March 1968 to 2 August 1973); Mr. Noe - 149 (14 November 1972 to 15 April 1975, during which time he was at liberty for almost two years); Mr. Tuttle - 94 (2 January to 29 December 1975); Mr. Cooper - 299 (8 August 1974 to 24 June 1976); Mr. McMahon - 492 (5 December 1974 to 9 February 1977); Mr. Carne - 480 (14 October 1974 to 16 June 1976).

58. The provisions under which, pursuant to the law and practice applicable before 1 December 1981, the 64 letters in question were stopped

or delayed are indicated below. In those cases where a letter was stopped for more than one reason, the subsidiary ground or grounds are also stated.

The texts of 59 of these letters are set out in Appendix III to the Commission's report, copies of the remaining 5 not being available. The available letters are those hereinafter referred to by number, the others those referred to solely by date.

A. Provisions concerning the identity of correspondents

Restriction on correspondence other than with a relative or friend (see paragraphs 29-30 above)

59. The following letters were stopped on the ground that they were not sent by or addressed to a relative or existing friend:

(a) Mrs. Colne's letters nos. 13, 14 and 15 to Mr. Williams (see also paragraph 16 above);

(b) Mr. McMahon's letters nos. 35, 36, 37, 38, 39, 40 and 41 (addressed respectively to a broadcasting association, a barrister, the presenter of a television programme, a journalist, the police officer who had been in charge of the investigation of Mr. McMahon's case, a professor of law and the Mayor of Islington) and a letter of 31 December 1975 from the same journalist to Mr. McMahon. The applicant had previously exchanged three letters with the barrister in question, who was not known to him, but their correspondence was prohibited when it appeared that it would go further than a general enquiry. Although letter no. 41 was stopped, Mr. McMahon was apparently allowed to write to a local borough councillor.

This restriction was also a subsidiary ground for stopping Mr. Silver's letter no. 4 and Mr. Carne's letter no. 48 (see paragraph 68 below).

B. Provisions concerning the contents of correspondence

1. Restriction on communications in connection with any legal or other business (see paragraphs 32, 35, 41 and 46 above)

60. (a) Mr. Carne's letter no. 57 to a solicitor and his letter of 15 September 1975 to the National Council for Civil Liberties were stopped as he had not previously applied to the prison governor for facilities to seek legal advice. Both of these letters were written after the entry into force of Instruction 45/1975 (see paragraph 32 above).

(b) Mr. Cooper's letter no. 27 to a solicitor concerning a pending prosecution, which letter also post-dated Instruction 45/1975, was stopped as it was considered that he had already had sufficient facilities to seek legal advice.

(c) The following letters were stopped on the ground of failure to seek the Home Secretary's prior leave:

(i) Mr. Noe's letter no. 10 to a solicitor, which included the following passage: "... the property is going to be lost if you don't come quickly - It is worth 100 to £125,000 - the equity - after refinancing and allowing good solicitor's fees - will be £50 to £75,000 - of which you will have a piece also";

(ii) Mr. Carne's letter no. 49 to the Devon Crown Court, which contained a request that medical reports produced at his trial be sent to his Member of Parliament.

2. Prohibition on representations connected with the prisoner's trial, conviction or sentence (see paragraph 43 above)

61. This prohibition led to the stopping of Mr. Noe's letter no. 8, which was addressed to the Lord Chancellor but actually concerned legal representation at the applicant's appeal. Permission to send the letter was later granted by the Home Office, apparently after the appeal had been heard.

It was also a subsidiary ground for the stopping of Mr. McMahon's letters nos. 35 and 37 (see paragraph 59 above).

3. Prohibition on letters evading or circumventing the regulations (see paragraph 44 above)

62. Mr. Silver's letter no. 1 and Mr. Tuttle's letter no. 18 (see paragraph 68 below), which pre-dated Instruction 45/1975 and Instruction 38/1977 respectively (see paragraphs 32 and 35 above), were also stopped on the subsidiary ground that they therein asked their wives to do what they were not allowed to do themselves: in the first case, to contact a solicitor concerning an injunction against the Home Office in respect of prison treatment and, in the second, to seek legal advice from the National Council for Civil Liberties concerning control of correspondence.

4. Prohibition on discussion of the offences of others (see paragraph 45 (a), item (ii), above)

63. Mr. Silver's letter no. 7, to his wife, was stopped as it contained the following passage: "... one of my close neighbours in the prison is one of the train robbers ... Another one who arrived here last Wednesday is one of the two Asian brothers who reputedly killed .... McKay ..."

5. Prohibition on complaints calculated to hold the authorities up to contempt (see paragraph 45 (a), item (iii), above)

64. Mr. Tuttle's letter no. 17, addressed to his wife, was stopped on the ground that it contained material deliberately calculated to hold the prison authorities up to contempt.

This was also a subsidiary ground for stopping Mr. Carne's letter no. 51 (see paragraph 68 below).

6. Prohibition on threats of violence and grossly improper language (see paragraph 45 (a), items (iv) and (vi), above)

65. Mr. Cooper's letters nos. 28, 29, 30 and 31, all addressed to his parents were stopped on two grounds: that they contained threats of violence and that they employed grossly improper language.

7. Prohibition on material intended for publication (see paragraph 45 (a), item (v), above)

66. The following letters were stopped on the ground that they contained material intended for publication:

(a) Mr. Silver's letter no. 5, addressed to the Advisory Rabbi, The Jewish Chronicle, and seeking dietary advice. The letter was stopped although it was marked "Not for publication" and contained an express request that, because of the rules of the prison, no part of it be published;

(b) Mr. McMahon's letters nos. 32, 34 and 42, the first two being addressed to the producer of a television programme and the third to a newspaper.

This was also a subsidiary ground for stopping Mr. McMahon's letter no. 37 (see paragraph 59 above) and Mr. Carne's letters nos. 60 and 61 (see paragraph 68 below).

8. Prohibition on the inclusion in letters to legal advisers and Members of Parliament of unventilated complaints about prison treatment (see paragraphs 45 (a) and (b) and 47 above)

67. The following letters, all addressed to Members of Parliament, were stopped on the ground that they contained complaints about prison treatment, in respect of which the "prior ventilation rule" had not been observed:

(a) Mr. Noe's letters nos. 9 and 11;

(b) Mr. Cooper's letters nos. 20, 22, 23, 24 and 26, and a further letter of 3 April 1974;

(c) Mr. Carne's letters nos. 43, 45, 53, 54, 58 and 59, and further letters of 27 December 1974 and 11 January 1975.

The stopping of letter no. 43, written whilst Mr. Carne was detained on remand, was the subject of an unsuccessful petition to the Home Secretary; the Government subsequently conceded before the Commission that the

censorship was erroneous, as the letter could not be said to contain a complaint.

The same prohibition also led to the stopping of Mr. Carne's letter no. 56, to a solicitor.

Mr. Noe's letters nos. 9 and 11 were stopped under this rule for the additional reason that the addressee was a barrister as well as a Member of Parliament.

9. Prohibition on the inclusion in general correspondence of complaints about prison treatment (see paragraph 45 (a), item (ix), above)

68. The following letters were stopped because they included complaints about prison treatment:

(a) Mr. Silver's letters nos. 1, 2, 3, 4 and 6, no. 4 being addressed to the Chief Rabbi and the remainder to the applicant's wife. It appears that, one week after the stopping of letter no. 4, which concerned dietary grievances, Mr. Silver was allowed to send a similar letter to the Rabbi;

(b) Mr. Tuttle's letter no. 18, to his wife;

(c) Mr. Carne's letters nos. 44, 46, 47, 48, 50, 51, 52, 55, 60 and 61, addressed respectively to a Mr. McAndrew (nos. 44 and 50), the National Council for Civil Liberties (nos. 46 and 55), the Howard League for Penal Reform (no. 47), a medical practitioner (no. 48), the Health Service Commissioner (no. 51), the Secretary of the National Association for Mental Health (no. 52) and journalists (nos. 60 and 61). Letters nos. 46, 55 and 47 all pre-dated Instruction 38/1977 (see paragraph 35 above).

10. Prohibition on allegations against prison officers (see paragraph 45 (a), item (x), above)

69. This prohibition was a subsidiary ground for stopping Mr. Silver's letter no. 6 (see paragraph 68 above).

11. Prohibition on attempts to stimulate public agitation or petition (see paragraph 45 (a), item (xi), above)

70. A subsidiary ground for stopping Mr. McMahon's letters nos. 32 and 34 (see paragraph 66 above) was that they attempted to stimulate public petition.

12. Miscellaneous

71. The posting of Mr. Noe's letter no. 12, addressed to the United States Consul and containing complaints about the control of correspondence, was delayed for three weeks as it was referred to the Home Office for instructions. The letter was written before the abolition of

restrictions on the contents of letters to Consular officials (see paragraph 45 (c) above).

Mr. Cooper's letters nos. 19, 21 and 25, all addressed to relatives, were stopped on grounds of the general control of "objectionable" letters under Rule 33(3) but without an official explanation being given. The Commission observed that the authority for this action was not clear, beyond the general discretion under the said Rule.

PROCEEDINGS BEFORE THE COMMISSION

72. Mr. Silver, Mr. Noe, Mrs. Colne, Mr. Tuttle, Mr. Cooper, Mr. McMahon and Mr. Carne applied to the Commission on 20 November 1972, 1 February 1973, 2 June 1975, 20 March 1975, 28 October 1974, 8 July 1975 and 5 April 1975, respectively. They alleged that the control of their correspondence by the prison authorities had given rise to violations of Articles 8 and 10 (art. 8, art. 10) of the Convention. Mr. Silver also asserted that the refusal of two petitions to the Home Secretary seeking permission to obtain legal advice constituted a denial of his right of access to the courts, guaranteed by Article 6 § 1 (art. 6-1).

On 5 March 1976, 19 December 1975 and 4 October 1977, respectively, the Commission declared inadmissible the applications of Mr. Silver, Mr. Noe and Mr. Cooper in so far as they contained certain additional complaints. On the last-mentioned date, it declared admissible the remainder of those applications and the whole of the other four; previously, on 11 March 1977, it had ordered the joinder of the seven applications in pursuance of Rule 29 of its Rules of Procedure. Subsequently, each applicant also contended that there had been breach of Article 13 (art. 13) on account of the absence of an effective remedy before a national authority in respect of the alleged violations of his or her Convention rights.

73. On 3 April 1979, Mr. Silver's legal representative notified the Commission of his client's death. In view of the wishes, expressed by Mr. Silver's next of kin, to continue the case and of the issues of general interest raised, the Commission decided on 8 May 1979 to retain the application.
Although the next of kin are today to be regarded as having the status of "applicants" (see the Deweer judgment of 27 February 1980, Series A no. 35, pp. 19-20, § 37), for the sake of convenience the present judgment will continue to refer to Mr. Silver as an "applicant".

74. In its report of 11 October 1980 (Article 31 of the Convention) (art. 31), the Commission expressed the opinion:

- by a series of votes (with one exception unanimous), that, save in respect of six letters (namely, Mr. Silver's letter no. 7, Mr. Cooper's letters nos. 28-31 and Mr. Noe's letter no. 12), the censorship of the applicants'

mail by the prison authorities constituted a violation of their right to respect for correspondence, ensured by Article 8 (art. 8) of the Convention;

- that it was not necessary to pursue a further examination of the matter in the light of Article 10 (art. 10);

- unanimously, that there had been a violation of Mr. Silver's right of access to the civil courts, ensured by Article 6 § 1 (art. 6-1);

- by fourteen votes to one, that the absence of effective domestic remedies for the applicants' claims under Article 8 (art. 8) constituted a violation of Article 13 (art. 13).

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

75. At the hearings on 22 September 1982, the Government maintained in substance the submissions set out in their memorial of 2 October 1981, whereby they had requested the Court:

"(1) With regard to Article 8 (art. 8)

(i) in so far as the Commission concluded that the facts found disclosed no breach by the United Kingdom of its obligations under Article 8 (art. 8) of the Convention, to confirm and uphold the Commission's conclusions;

(ii) in so far as the Commission's conclusions in respect of the issues under Article 8 (art. 8) of the Convention are contested by the United Kingdom Government, to make findings in accordance with the submissions set out in the Government's memorial;

(iii) in so far as the Commission's findings of breaches of the Convention are not contested by the United Kingdom Government on the grounds of the changes made by the revised Standing Orders to the practice in the United Kingdom relating to prisoners' correspondence:

(a) to decide and declare that the facts found disclose no breaches otherwise than as set forth in the report of the Commission;

(b) to take express note in its judgment of the changes made by the revised Standing Orders as remedying the breaches so found by the Commission;

(2) With regard to Article 6 (art. 6)

(i) to take express note in its judgment of the changes made to the law and practice in the United Kingdom relating to the control of correspondence between prisoners and their legal advisers since the judgment of the Court in the Golder case;

(a) in light of such changes to decline to examine further the claims of breaches of Article 6 (art. 6) of the Convention;

alternatively

(b) to decide and declare that the facts found disclose no breaches by the United Kingdom of its obligations under Article 6 (art. 6) of the Convention otherwise than as set forth in the report of the Commission;

(3) With regard to Article 13 (art. 13)

to decide and declare that the facts found do not disclose a breach by the United Kingdom of its obligations under Article 13 (art. 13) of the Convention, alternatively that such facts would not disclose any such breach after the coming into effect of the revised Standing Orders relating to prisoners' correspondence."

AS TO THE LAW

I. THE SCOPE OF THE PRESENT CASE

76. The applicants complained principally of the stopping or delaying of particular letters, but they also alleged that in this area practices in breach of the Convention continued to exist.

77. The Court does not have to examine this additional allegation. This is because the Commission's decision declaring an application admissible determines the object of the case brought before the Court (see, inter alia, the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 63, § 157). And, in the present case, the Commission, in its decisions on the admissibility of the applications, stated that the questions which necessitated an examination on the merits were whether the interference constituted by the censorship of correspondence in a number of instances was justified under Article 8 § 2 (art. 8-2) and whether it involved other issues under the Convention. The Commission's subsequent consideration of the case did not extend beyond those questions.

78. As is recorded in paragraphs 25-56 above, the practice in England and Wales on the control of prisoners' correspondence has undergone substantial modification since the date of the Commission's report. For this reason, the Government did not contest many of the Commission's findings; they emphasised that the revised Orders had now been published and that the majority of the letters involved in this case would not have been stopped under the new regime. These circumstances enabled the President to make his Order of 22 July 1982 limiting the scope of the hearings to the issues still in dispute (see paragraph 6 above).

The applicants criticised the new control system in various respects. The Government, for their part, asked the Court to take note of the changes effected in 1981 and also in 1975 (see paragraph 32 above); although their

submissions suggested that the Court should at least take the new regime into account as remedying breaches of the Convention which had previously existed, they stated at the hearings that they were not seeking a ruling on its compatibility with the Convention.

79. In general, it is not the Court's task to rule on legislation in abstracto; indeed, at the time of the events giving rise to this case, the new regime was not yet in force. Its compatibility with the Convention therefore cannot be examined by the Court (see notably, mutatis mutandis, the National Union of Belgian Police judgment of 27 October 1975, Series A no. 19, p. 17, § 36, and the above-mentioned Ireland v. the United Kingdom judgment, Series A no. 25, p. 72, § 189). However, the Court notes with satisfaction that, following its Golder judgment of 21 February 1975 (Series A no. 18) on the one hand and as a result of the applications in which this case originated on the other, substantial changes have been made by the United Kingdom with a view to ensuring the observance of the engagements undertaken by it in the Convention.

II. THE ALLEGED VIOLATION OF ARTICLE 6 § 1 (art. 6-1)

80. Mr. Silver claimed that the refusal of his 1972 and 1973 petitions to the Home Secretary for permission to seek legal advice (see paragraph 12 above) constituted a denial of access to the courts, in violation of Article 6 § 1 (art. 6-1) of the Convention, as interpreted by the Court in its above-mentioned Golder judgment. The Article (art. 6-1), so far as is relevant, reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The Court will confine itself to the 1972 petition: the Commission found it not to have been established that the 1973 petition had been refused and the point was not pursued before the Court.

81. The Government's principal plea was that the Court should decline to rule on the matter in light of the changes made to the law and practice since the Golder judgment (see, inter alia, paragraph 32 above).

The Court is unable to accept this plea. The changes in question were introduced, firstly, to give effect to the terms of that judgment and, secondly, as a result of the proceedings before the Commission in the present case. Nevertheless, dating as they do from 1975 and 1981, they clearly could not have restored the right claimed by Mr. Silver under Article 6 § 1 (art. 6-1); it is therefore not possible to speak of a "solution", even partial, "of the matter" (see, mutatis mutandis, Rule 47 § 2 of the Rules of Court and the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, p. 27, § 64). In addition, the memorial of 22 September

1982 (see paragraph 8 above) contains a claim in the name of this applicant for just satisfaction under Article 50 (art. 50) and a determination by the Court of the Article 6 § 1 (art. 6-1) issue may be of relevance in this connection.

82. The Government, in the alternative, stated that in light of the Golder judgment they did not contest the Commission's finding that there had been a violation of Article 6 § 1 (art. 6-1). There being no material difference between the facts of Mr. Silver's case and those of Mr. Golder's, the Court confirms that finding.

III. THE ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

83. In the applicants' submission, the stopping or delaying of the 64 letters in question constituted a violation of Article 8 (art. 8), which reads as follows:

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

84. It is clear - and indeed this was not disputed - that there were "interferences by a public authority" with the exercise of the applicants' right to respect for their correspondence, which is guaranteed by paragraph 1 of Article 8 (art. 8-1). Such interferences entail a violation of that Article if they do not fall within one of the exceptions provided for in paragraph 2 (art. 8-2). The Court therefore has to examine in turn whether the interferences in the present case were "in accordance with the law", whether they had an aim or aims that is or are legitimate under Article 8 § 2 (art. 8-2) and whether they were "necessary in a democratic society" for the aforesaid aim or aims (see notably, mutatis mutandis, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 29, § 45).

A. Were the interferences "in accordance with the law"?

1. General principles

85. In its Sunday Times judgment of 26 April 1979, the Court examined the meaning of the expression "prescribed by law", noting in this connection certain differences which exist between the French and English versions of Articles 8, 9, 10 and 11 (art. 8, art. 9, art. 10, art. 11) of the Convention,

Article 1 of Protocol No. 1 (P1-1) and Article 2 of Protocol No. 4 (P4-2) (ibid., p. 30, § 48).

The Government accepted that the principles enounced in the said judgment concerning the expression "prescribed by law/prévues par la loi" in Article 10 (art. 10) were also applicable to the expression "in accordance with the law/ prévue par la loi" in Article 8 (art. 8). Indeed, this must be so, particularly because the two provisions overlap as regards freedom of expression through correspondence and not to give them an identical interpretation could lead to different conclusions in respect of the same interference.

86. A first principle that emerges from the Sunday Times judgment is that the interference in question must have some basis in domestic law (ibid., p. 30, § 47). In the present case, it was common ground between Government, Commission and applicants that a basis for the interferences was to be found in the Prison Act and the Rules, but not in the Orders and Instructions which lacked the force of law (see paragraph 26 above). There was also no dispute that the measures complained of were in conformity with English law.

87. A second principle is that "the law must be adequately accessible: the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case" (ibid., p. 31, § 49). Clearly, the Prison Act and the Rules met this criterion, but the Orders and Instructions were not published.

88. A third principle is that "a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail" (ibid.).

A law which confers a discretion must indicate the scope of that discretion. However, the Court has already recognised the impossibility of attaining absolute certainty in the framing of laws and the risk that the search for certainty may entail excessive rigidity (ibid.). These observations are of particular weight in the "circumstances" of the present case, involving as it does, in the special context of imprisonment, the screening of approximately ten million items of correspondence in a year (see paragraph 57 above). It would scarcely be possible to formulate a law to cover every eventuality. Indeed, the applicants themselves did not deny that some discretion should be left to the authorities.

In view of these considerations, the Court points out once more that "many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice" (ibid.). And in the present case the operation of the correspondence control system was not merely a question of practice that varied in each individual instance: the Orders and Instructions established a

practice which had to be followed save in exceptional circumstances (see paragraphs 26 and 27 above). In these conditions, the Court considers that although those directives did not themselves have the force of law, they may - to the admittedly limited extent to which those concerned were made sufficiently aware of their contents - be taken into account in assessing whether the criterion of foreseeability was satisfied in the application of the Rules.

89. For this reason, the Court cannot accept the applicants' additional contention that the conditions and procedures governing interferences with correspondence - and in particular the directives set out in the Orders and Instructions - should be contained in the substantive law itself.

90. The applicants further contended that the law itself must provide safeguards against abuse.

The Government recognised that the correspondence control system must itself be subject to control and the Court finds it evident that some form of safeguards must exist. One of the principles underlying the Convention is the rule of law, which implies that an interference by the authorities with an individual's rights should be subject to effective control (see, inter alia, the Klass and others judgment of 6 September 1978, Series A no. 28, pp. 25-26, § 55). This is especially so where, as in the present case, the law bestows on the executive wide discretionary powers, the application whereof is a matter of practice which is susceptible to modification but not to any Parliamentary scrutiny (see paragraph 26 above).

However, the Court does not interpret the expression "in accordance with the law" as meaning that the safeguards must be enshrined in the very text which authorises the imposition of restrictions. In fact, the question of safeguards against abuse is closely linked with the question of effective remedies and the Court finds it preferable to take this issue into account in the wider context of Article 13 (art. 13) (see paragraphs 111-119 below).

2. Application in the present case of the above-mentioned principles

(a) Non-contested items

91. The Commission expressed the opinion that the stopping on the following principal or subsidiary grounds of the following letters was not foreseeable and, hence, was not "in accordance with the law":

(a) restriction on correspondence with legal adviser, on the ground that the applicant had already had sufficient facilities to seek legal advice (see paragraphs 32 and 60 above): Mr. Cooper's letter no. 27;

(b) prohibition on representations connected with the prisoner's trial, conviction or sentence (see paragraphs 43 and 61 above): Mr. Noe's letter no. 8 and Mr. McMahon's letters nos. 35 and 37;

(c) prohibition of grossly improper language (see paragraphs 45 (a), item (vi), and 65 above): Mr. Cooper's letters nos. 28-31;

(d) prohibition on material intended for publication (see paragraphs 45 (a), item (v), and 66 above): Mr. Silver's letter no. 5, Mr. McMahon's letters nos. 32, 34, 37 and 42 and Mr. Carne's letters nos. 60 and 61;

(e) prohibition on the inclusion in letters to legal advisers and Members of Parliament of unventilated complaints about prison treatment (see paragraphs 45 (a) and (b), 47 and 67 above): Mr. Noe's letters nos. 9 and 11, Mr. Cooper's letters nos. 20, 22, 23, 24 and 26 and his further letter of 3 April 1974, and Mr. Carne's letters nos. 43, 45, 53, 54 and 56 and his further letters of 27 December 1974 and 11 January 1975;

(f) prohibition on the inclusion in general correspondence of complaints about prison treatment (see paragraphs 45 (a), item (ix), and 68 above): Mr. Silver's letters nos. 1, 2, 3, 4 and 6, Mr. Tuttle's letter no. 18 and Mr. Carne's letters nos. 44, 46, 47, 48, 50, 51, 52, 55, 60 and 61;

(g) prohibition on allegations against prison officers (see paragraphs 45 (a), item (x), and 69 above): Mr. Silver's letter no. 6;

(h) the petition aspect of the prohibition on attempts to stimulate public agitation or petition (see paragraphs 45 (a), item (xi), and 70 above): Mr. McMahon's letters nos. 32 and 34;

(i) the general control of "objectionable" letters (no official explanation having been given - see paragraph 71 above): Mr. Cooper's letters nos. 19, 21 and 25.

As regards items (a) and (i), the Commission considered that the actual measure of interference complained of was not foreseeable; in the remaining cases, it considered that the rule under which the stopping was effected could not itself be foreseen.

The Government did not contest these findings on the part of the Commission, and the Court sees no reason to disagree. It therefore holds that the stopping of these letters on the grounds indicated above was not "in accordance with the law".

(b) Contested items

92. The Government or the applicants contested the Commission's findings on the "in accordance with the law" issue as regards three separate groups of letters. In accordance with the President's Order of 22 July 1982 (see paragraph 6 above), argument was presented to the Court at the hearings on these items, which will be considered in turn.

93. The first group comprises Mrs. Colne's letters nos. 13-15, Mr. McMahon's letters nos. 35-41 and a letter of 31 December 1975 to him from a journalist, all of which were stopped on the ground that they were not sent by or addressed to a relative or existing friend (see paragraphs 29-30 and 59 above). The Government contested the Commission's view that the relevant practice, by excluding correspondence with persons of good character, went further than could reasonably be deduced from Rule 34(8) in

conjunction with Rule 33(1) and that the stopping of these letters was accordingly not "in accordance with the law".

In determining whether the foreseeability criterion was satisfied in this instance, account cannot be taken of the Orders which supplemented Rule 34(8): they were not available to prisoners nor do their contents appear to have been explained in cell cards (see paragraphs 26, 30 and 88 above). However, the wording of Rule 34(8) (see paragraph 29 above) is itself quite explicit: a reader would see not that correspondence with persons other than friends or relatives is allowed subject to certain exceptions but rather that it is prohibited save where the Secretary of State gives leave. Moreover, the Court considers that account should also be taken of Rule 33(2) - which contains a prohibition similar to that found in Rule 34(8) - and of Rule 34(2), from which it would be apparent that there were limits on the quantity of the correspondence of convicted prisoners (see paragraphs 29 and 38 above).

For these reasons, the Court concludes that the interferences in question were "in accordance with the law".

94. The second group comprises Mr. Carne’s letters nos. 58 and 59, dated 12 December 1975 and 2 January 1976 and addressed to a Member of Parliament, which were stopped on the ground that they contained complaints about prison treatment, in respect of which the "prior ventilation rule" had not been observed (see paragraphs 45 (b), 47 and 67 above). Whilst not contesting the Commission’s view that the stopping of certain other letters in the same category was not foreseeable since the "prior ventilation rule" was not contained in the Rules themselves, the Government submitted that the position was otherwise as regards these two items. They relied on the explanatory notice which was issued for the information of prisoners in November 1975, that is before the two letters were written (see paragraph 45 (b) above).

The Court considers that the terms of the notice in question were such as to make those concerned sufficiently aware of the practice in the matter (see paragraph 88 above). The stopping of these letters was therefore a foreseeable application of the Rules and, hence, "in accordance with the law".

95. The third group comprises the following letters which were stopped or delayed on the principal or subsidiary grounds indicated:

(a) restrictions on communications in connection with any legal or other business (see paragraphs 32, 35, 41, 46 and 60 above): Mr. Noe’s letter no. 10, and Mr. Carne’s letters nos. 49 and 57 and his letter of 15 September 1975 to the National Council for Civil Liberties;

(b) prohibition on letters evading or circumventing the regulations (see paragraphs 44 and 62 above): Mr. Silver’s letter no. 1 and Mr. Tuttle’s letter no. 18;

(c) prohibition on discussion of the offences of others (see paragraphs 45 (a), item (ii), and 63 above): Mr. Silver's letter no. 7;

(d) prohibition on complaints calculated to hold the authorities up to contempt (see paragraphs 45 (a), item (iii), and 64 above): Mr. Tuttle's letter no. 17;

(e) prohibition on threats of violence (see paragraphs 45 (a), item (iv), and 65 above): Mr. Cooper's letters nos. 28-31;

(f) Mr. Noe's letter no. 12, which was delayed pending receipt of instructions from the Home Office (see paragraph 71 above).

The Commission found that each of the above interferences was foreseeable from the text of the Rules and was therefore "in accordance with the law". The applicants disputed this on the ground that the two further requirements which, in their submission, flowed from that expression (see paragraphs 89 and 90 above) had not been satisfied.

In view of the position which the Court has taken in those paragraphs on the applicants' said submission, it concurs with the Commission's finding.

B. Did the interferences have aims that are legitimate under Article 8 § 2 (art. 8-2)?

96. The applicants did not allege that the restrictions at issue in the present case were designed or applied for a purpose other than those listed in paragraph 2 of Article 8 (art. 8-2). The Government pleaded before the Commission that the aim pursued was "the prevention of disorder", "the prevention of crime", "the protection of morals" and/or "the protection of the rights and freedoms of others", and the Commission considered whether each interference was "necessary" for one or more of those purposes.

This matter was not discussed or questioned before the Court. It sees no reason to doubt that each interference had an aim that was legitimate under Article 8 (art. 8).

C. Were the interferences "necessary in a democratic society"?

1. General principles

97. On a number of occasions, the Court has stated its understanding of the phrase "necessary in a democratic society", the nature of its functions in the examination of issues turning on that phrase and the manner in which it will perform those functions. It suffices here to summarise certain principles:

(a) the adjective "necessary" is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary",

"useful", "reasonable" or "desirable" (see the Handyside judgment of 7 December 1976, Series A no. 24, p. 22, § 48);

(b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention (ibid., p. 23, § 49);

(c) the phrase "necessary in a democratic society" means that, to be compatible with the Convention, the interference must, inter alia, correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued" (ibid., pp. 22-23, §§ 48-49);

(d) those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted (see the above-mentioned Klass and others judgment, Series A no. 28, p. 21, § 42).

98. The Court has also held that, in assessing whether an interference with the exercise of the right of a convicted prisoner to respect for his correspondence was "necessary" for one of the aims set out in Article 8 § 2 (art. 8-2), regard has to be paid to the ordinary and reasonable requirements of imprisonment (see the above-mentioned Golder judgment, Series A no. 18, p. 21, § 45). Indeed, the Court recognises that some measure of control over prisoners' correspondence is called for and is not of itself incompatible with the Convention.

2. Application in the present case of the above-mentioned principles

(a) Non-contested items

99. The Commission expressed the opinion that the stopping on the following principal or subsidiary grounds of the following letters was not "necessary in a democratic society":

(a) restriction on correspondence other than with a relative or friend (see paragraphs 29-30 and 59 above): Mrs. Colne's letters nos. 13-15, Mr. McMahon's letters nos. 35-41 and a letter of 31 December 1975 to him from a journalist, Mr. Silver's letter no. 4 and Mr. Carne's letter no. 48;

(b) restriction on communications in connection with any legal or other business (see paragraphs 32, 35, 41, 46 and 6O above): Mr. Cooper's letter no. 27, and Mr. Carne's letters nos. 49 and 57 and his letter of 15 September 1975 to the National Council for Civil Liberties;

(c) prohibition on complaints calculated to hold the authorities up to contempt (see paragraphs 45 (a), item (iii), and 64 above): Mr. Tuttle's letter no. 17 and Mr. Carne's letter no. 51;

(d) prohibition on the inclusion in letters to legal advisers and Members of Parliament of unventilated complaints about prison treatment (see paragraphs 45 (a) and (b), 47 and 67 above): Mr. Noe's letters nos. 9 and ll, Mr. Cooper's letters nos. 20, 22, 23, 24 and 26 and his further letter of 3

April 1974, and Mr. Carne's letters nos. 43, 45, 53, 54, 56, 58 and 59 and his further letters of 27 December 1974 and 11 January 1975;

(e) the petition aspect of the prohibition on attempts to stimulate public agitation or petition (see paragraphs 45 (a), item (xi), and 70 above): Mr. McMahon's letters nos. 32 and 34;

(f) prohibition on letters evading or circumventing the regulations (see paragraphs 44 and 62 above): Mr. Silver's letter no. 1 and Mr. Tuttle's letter no. 18.

As regards item (f), the Commission considered that the measure, although taken on an intrinsically legitimate ground, was excessive. In the remaining cases, on the other hand, it was the ground itself as well as the measure which did not correspond to a necessity, within the meaning of Article 8 § 2 (art. 8-2); the Commission expressed the same opinion as regards the stopping, on the principal or subsidiary grounds indicated in sub-paragraphs (b), (c), (d), (f) and (g) of paragraph 91 above, of the letters listed in those sub-paragraphs. Finally, the Commission considered that the stopping of Mr. Cooper's letters nos. 19, 21 and 25 (see paragraph 71 above) was not "necessary".

The Government did not contest these findings on the part of the Commission, and the Court sees no reason to disagree. It therefore holds that the stopping of the letters in question was not "necessary in a democratic society".

(b) Contested items

100. As regards certain letters, the Government or the applicants contested the Commission's findings on the "necessity" issue. In accordance with the President's Order of 22 July 1982 (see paragraph 6 above), argument was presented to the Court at the hearings on these items, which will be considered in turn.

101. Mr. Noe's letter no. 10 to a solicitor was stopped as it contained a reference to a business transaction (see paragraphs 41, 46 and 60 above). The Commission found it not to be established that the interference was "necessary in a democratic society", notably because there was no supporting evidence to that effect. The Government contested this conclusion.

The Court notes that this letter - written by a prisoner convicted of fraud (see paragraph 13 above) - did not simply concern legal problems but interpretations (see paragraph 60 above). Without expressing any opinion on the restrictions in force at the relevant time on the conduct by prisoners of business activities in general, the Court considers, making due allowance for the United Kingdom's margin of appreciation, that the authorities were entitled to think that the stopping of this particular letter was necessary "for the prevention of disorder or crime", within the meaning of Article 8 § 2 (art. 8-2) of the Convention.

102. Mr. Silver’s letter no.7 was stopped because it alluded to the presence in his prison of certain other criminals (see paragraphs 45 (a), item (ii), and 63 above). The Commission considered that the interference could be regarded as "necessary", notably since Mr. Silver could have rewritten the letter without the offending passage. His counsel claimed that the Government had not established that the opportunity to rewrite had been provided and that their statement that the letter would not be stopped under the regime in force since December 1981 demonstrated that the measure taken in 1973 was not "necessary".

In the absence of evidence to the contrary, the Court must assume that Mr. Silver was given the aforesaid opportunity, in accordance with the usual procedure (see paragraph 50 above). Bearing in mind that the other criminals referred to were "category A" prisoners (see paragraph 16 above), the Court finds that the authorities were entitled to think that the stopping of this particular letter was necessary "in the interests of public safety" and "for the prevention of disorder or crime", within the meaning of Article 8 § 2 (art. 8-)2).

103. Mr. Cooper’s letters nos. 28-31 were stopped not only for employing grossly improper language but also for containing threats of violence (see paragraphs 45 (a),item (iv), and 65 above). His counsel contested the Commission’s view that the interference was "necessary" on the second ground.

The Court agrees with the Commission. Letters nos. 28-30 contained clear threats and letter no. 31 can be regarded as a continuation thereof. In the Court’s judgment, the authorities had sufficient reason for concluding that the stopping of these letters was necessary "for the prevention of disorder or crime", within the meaning of Article 8 § 2 (art. 8-2).

104. Finally, Mr. Noe’s letter no. 12, to the United States Consul, was delayed for three weeks before being posted (see paragraph 71 above). His counsel questioned the necessity for this interference, whereas the Commission, in arriving at its conclusion that there had here been no violation of Article 8 (art. 8), found that there was no evidence that the interference was not justified as being "necessary" for one or more of the aims set out in paragraph 2 (art. 8-2) thereof.

The Court is of the view that when in any particular instance subordinate prison authorities are in doubt as to how they should exercise their supervisory functions regarding prisoners’ correspondence, they must be able to seek instructions from higher authority. In the case of Mr. Noe’s letter no. 12, the prison authorities found it necessary in the light of the law and practice applicable at the time to refer the letter to the Home Secretary for instructions; he decided that it should not be stopped. In these circumstances and bearing in mind that the subject-matter of the letter was not really urgent, the Court does not consider that the resultant delay of

three weeks in despatching the letter was so serious as to constitute a violation of Article 8 (art. 8).

D. Conclusions on Article 8 (art. 8)

105. To sum up, the stopping of Mr. Silver's letter no. 7, Mr. Noe's letter no. 10 and Mr. Cooper's letters nos. 28-31 was both "in accordance with the law" and justifiable as "necessary in a democratic society" (see paragraphs 95, 102, 101 and 103 above). These interferences therefore did not constitute a violation of Article 8 (art. 8). The same conclusion applies as regards the delaying of Mr. Noe's letter no. 12 (see paragraphs 95 and 104 above).

On the other hand, the stopping of the 57 remaining letters was not "necessary in a democratic society" (see paragraph 99 above); there has therefore been a violation of Article 8 (art. 8) in each case.

IV. THE ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

106. The applicants also submitted that the control of their mail by the prison authorities constituted a breach of their right to freedom of expression, guaranteed by Article 10 (art. 10) of the Convention.

107. The Commission concluded that since, in the context of correspondence, the right to free expression was guaranteed by Article 8 (art. 8), it was not necessary to pursue a further examination of the matter in the light of Article 10 (art. 10).

Neither Government nor applicants dissented from this opinion, with which the Court concurs.

V. THE ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

108. The applicants alleged that there existed in the United Kingdom no effective remedy in respect of their claims under Articles 6 § 1, 8 and 10 (art. 6-1, art. 8, art. 10) and that they were therefore victims of a violation of Article 13 (art. 13), which provides as follows:

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

A. Article 13 taken in conjunction with Article 6 § 1 and Article 10 (art. 13+6-1, art. 13+10)

109. The Commission expressed the opinion, which was not contested by the applicants before the Court, that:

- as regards Mr. Silver's complaint under Article 6 § 1 (art. 6-1) concerning the refusal of his 1972 petition (see paragraph 12 above), no separate issue arose under Article 13 (art. 13);

- its opinion concerning Article 10 (art. 10) (see paragraph 107 above) rendered it unnecessary to examine under Article 13 (art. 13) the Article 10 (art. 10) aspects of the applicants' complaints.

110. The Court shares the Commission's opinion. Having regard to its decision on Article 6 § 1 (art. 6-1) (see paragraphs 8O-82 above), there is no need to examine Mr. Silver's complaint under Article 13 (art. 13); this is because the requirements of the latter Article (art. 13) are less strict than, and are here absorbed by, those of the former (see, inter alia, the Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p.32, § 88). Again, there is no call to examine under Article 13 (art. 13) the Article 10 (art. 10) aspects of the complaints, since Articles 8 and 10 (art. 8, art. 10) overlap in this case (see paragraph 107 above).

B. Article 13 taken in conjunction with Article 8 (art. 13+8)

111. The same does not apply to the Article 8 (art. 8) aspects of the applicants' complaints, especially as the Court has decided to consider in the context of Article 13 (art. 13) the question of safeguards against abuse of the powers to control prisoners' correspondence (see paragraph 90 above).

The Commission, having examined various possible channels of complaint, came to the conclusion that there was no effective domestic remedy and, hence, a violation of Article 13 (art. 13). The Government requested the Court to hold that the facts of the case disclosed no breach of that provision or, alternatively, that they would disclose no such breach after the coming into effect of the revised Orders.

l12. Having held that the scope of the present case does not extend to the correspondence control system in force since December 1981 (see paragraph 79 above), the Court is unable to examine the Government's alternative plea.

113. The principles that emerge from the Court's jurisprudence on the interpretation of Article 13 (art. 13) include the following:

(a) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (see the above-mentioned Klass and others judgment, Series A no. 28, p. 29, § 64);

(b) the authority referred to in Article 13 (art. 13) may not necessarily be a judicial authority but, if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective (ibid., p. 30, § 67);

(c) although no single remedy may itself entirely satisfy the requirements of Article 13 (art. 13), the aggregate of remedies provided for under domestic law may do so (see, mutatis mutandis, the above-mentioned X v. the United Kingdom judgment, Series A no. 46, p. 26, § 60, and the Van Droogenbroeck judgment of 24 June 1982, Series A no. 50, p. 32, § 56);

(d) neither Article 13 (art. 13) nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention - for example, by incorporating the Convention into domestic law (see the Swedish Engine Drivers' Union judgment of 6 February 1976, Series A no. 2O, p. 18, § 50).

It follows from the last-mentioned principle that the application of Article 13 (art. 13) in a given case will depend upon the manner in which the Contracting State concerned has chosen to discharge its obligation under Article 1 (art. 1) directly to secure to anyone within its jurisdiction the rights and freedoms set out in section I (see the above-mentioned Ireland v. the United Kingdom judgment, Series A no. 25, p. 91, § 239).

114. In the present case, it was not suggested that any remedies were available to the applicants other than the four channels of complaint examined by the Commission, namely an application to the Board of Visitors, an application to the Parliamentary Commissioner for Administration, a petition to the Home Secretary and the institution of proceedings before the English courts.

115. As regards the first two channels, the Court, like the Commission, considers that they do not constitute an "effective remedy" for the present purposes.

The Board of Visitors cannot enforce its conclusions (see paragraph 52 above) nor can it entertain applications from individuals like Mrs. Colne who are not in prison.

As regards the Parliamentary Commissioner, it suffices to note that he has himself no power to render a binding decision granting redress (see paragraph 54 above).

116. As for the Home Secretary, if there were a complaint to him as to the validity of an Order or Instruction under which a measure of control over correspondence had been carried out, he could not be considered to have a sufficiently independent standpoint to satisfy the requirements of Article 13 (art. 13) (see, mutatis mutandis, the above-mentioned Klass and others judgment, Series A no. 28, p. 26, § 56): as the author of the directives in question, he would in reality be judge in his own cause. The position, however, would be otherwise if the complainant alleged that a measure of control resulted from a misapplication of one of those directives. The Court is satisfied that in such cases a petition to the Home Secretary would in general be effective to secure compliance with the directive, if the complaint was well-founded. The Court notes, however, that even in these cases, at

least prior to 1 December 1981, the conditions for the submission of such petitions imposed limitations on the availability of this remedy in some circumstances (see paragraph 53 above).

117. The English courts, for their part, are endowed with a certain supervisory jurisdiction over the exercise of the powers conferred on the Home Secretary and the prison authorities by the Prison Act and the Rules (see paragraph 55 above). However, their jurisdiction is limited to determining whether or not those powers have been exercised arbitrarily, in bad faith, for an improper motive or in an ultra vires manner.

In this connection, the applicants stressed that the Convention, not being incorporated into domestic law, could not be directly invoked before the English courts; however, they acknowledged that it was relevant for the interpretation of ambiguous legislation, according to the presumption of the latter's conformity with the treaty obligations of the United Kingdom.

118. The applicants made no allegation that the interferences with their correspondence were contrary to English law (see paragraph 86 above). Like the Commission, the Court has found that the majority of the measures complained of in the present proceedings were incompatible with the Convention (see paragraph 105 above). In most of the cases, the Government did not contest the Commission's findings. Neither did they maintain that the English courts could have found the measures to have been taken arbitrarily, in bad faith, for an improper motive or in an ultra vires manner.

In the Court's view, to the extent that the applicable norms, whether contained in the Rules or in the relevant Orders or Instructions, were incompatible with the Convention there could be no effective remedy as required by Article 13 (art. 13) and consequently there has been a violation of that Article (art. 13).

To the extent, however, that the said norms were compatible with Article 8 (art. 8), the aggregate of the remedies available satisfied the requirements of Article 13 (art. 13), at least in those cases in which it was possible for a petition to be submitted to the Home Secretary (see paragraph 116 above): a petition to the Home Secretary was available to secure compliance with the directives issued by him and, as regards compliance with the Rules, the English courts had the supervisory jurisdiction described in paragraph 117 above.

119. To sum up, in those instances where the norms in question were incompatible with the Convention and where the Court has found a violation of Article 8 (art. 8) to have occurred there was no effective remedy and Article 13 (art. 13) has therefore also been violated. In the remaining cases, there is no reason to assume that the applicants' complaints could not have been duly examined by the Home Secretary and/or the English courts and Article 13 (art. 13) has therefore not been violated; this, however, is subject to the exception of Mr. Silver's letter no. 7, in respect of which the

remedy of petition to the Home Secretary was not available (see paragraphs 11 and 53 above).

VI. THE APPLICATION OF ARTICLE 50 (art. 50)

120. Article 50 (art. 50) of the Convention reads as follows:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

121. In the memorial filed on 22 September 1982 (see paragraph 8 above), the applicants claimed "general" damages for violation of their rights and reimbursement of specified legal costs and expenses; a claim for "special" damages was also put forward in the name of Mr. Silver, Mr. McMahon and Mr. Carne.

122. The written procedure on this issue has not yet been concluded (see paragraph 8 above). In these circumstances, the question of the application of Article 50 (art. 50) is not ready for decision and must therefore be reserved. The Court delegates to the President power to fix the further procedure in this respect.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that the refusal of Mr. Silver's petition of 20 November 1972 to the Home Secretary gave rise to a violation of Article 6 § 1 (art. 6-1) of the Convention;

2. Holds that, with the exception of Mr. Silver's letter no. 7, Mr. Noe's letters nos. 10 and 12 and Mr. Cooper's letters nos. 28 to 31, the stopping or delaying of all the letters written by or addressed to each applicant which are at issue in the present case constituted a violation of Article 8 (art. 8);

3. Holds that it is not necessary also to examine the case under Article 10 (art. 10);

4. Holds that it is also not necessary to examine under Article 13 (art. 13) the article 6 § 1 and Article 10 (art. 6-1, art. 10) aspects of the applicants' complaints;

5. Holds that there has been a violation of Article 13 (art. 13) to the extent specified in paragraph 119 of the judgment;

6. Holds that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) delegates to the President of the Chamber power to fix the further procedure.

Done in English and in French, the English text being authentic, at the Human Rights Building, Strasbourg, this twenty-fifth day of March, one thousand nine hundred and eighty-three.

Gérard WIARDA
President

Marc-André EISSEN
Registrar

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

COURT (CHAMBER)

CASE OF SILVER AND OTHERS v. THE UNITED KINGDOM (ARTICLE 50)

(Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75)

JUDGMENT

STRASBOURG

24 October 1983

In the case of Silver and others,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court*, as a Chamber composed of the following judges:

Mr. G. WIARDA, *President*,
Mr. Thór VILHJÁLMSSON,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. L.-E. PETTITI,
Sir Vincent EVANS,
Mr. C. RUSSO,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 23 September 1983,

Delivers the following judgment, which was adopted on that date, on the application in the present case of Article 50 (art. 50) of the Convention:

PROCEDURE AND FACTS

1. The present case was referred to the Court in March 1981 by the European Commission of Human Rights ("the Commission"). The case originated in seven applications (nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission on various dates between 1972 and 1975 by Mr. Reuben Silver, Mr. Clifford Dixon Noe, Mrs. Judith Colne, Mr. James Henry Tuttle, Mr. Gary Cooper, Mr. Michael McMahon and Mr. Desmond Roy Carne.

2. By judgment of 25 March 1983, the Court held that the stopping by the prison authorities of a number of letters written by or addressed to the applicants had given rise to violations of Articles 8 and 13 (art. 8, art. 13) of the Convention. It also held that the refusal of a petition by Mr. Silver for permission to seek legal advice had constituted a breach of Article 6 § 1 (art. 6-1) (Series A no. 61, paragraphs 80-105 and 111-119 of the reasons and points 1, 2 and 5 of the operative provisions, pp. 31-45).

The only outstanding matter to be settled is the question of the application of Article 50 (art. 50) in the present case. Accordingly, as regards the facts, the Court will confine itself here to giving the pertinent

* Note by the registry: In the version of the Rules applicable when proceedings were instituted. A revised version of the Rules entered into force on 1 January 1983, but only in respect of cases referred to the Court after that date.

details; for further particulars, reference should be made to paragraphs 9-71 of the above-mentioned judgment (ibid., pp. 9-28).

3. In a memorial filed on 22 September 1982, the applicants had claimed, as just satisfaction under Article 50 (art. 50), "general" damages for violation of their rights and reimbursement of specified costs and expenses; a claim for "special" damages had also been put forward in the names of Mr. Silver, Mr. McMahon and Mr. Carne.

The Government of the United Kingdom ("the Government") had replied in writing to the said memorial on 14 January 1983.

In its judgment of 25 March 1983, the Court reserved the question of the application of Article 50 (art. 50), the written procedure on that issue not then having been concluded (paragraphs 120-122 of the reasons and point 6 of the operative provisions, pp. 44-45).

4. In accordance with the Orders and directions of the President of the Chamber, the registry subsequently received the following documents:

(a) on 9 March 1983, letter of 8 March from the Secretary to the Commission, with which was enclosed a further memorial of the applicants;

(b) on 10 May 1983, comments of the Government on the last-mentioned memorial;

(c) on 17 May and 1 June 1983, from the Secretary to the Commission, copies of letters of 18 April and 25 May which he had received from the applicants' lawyers.

In his letter of 8 March, the Secretary to the Commission indicated that its Delegates had no observations on the issues arising under Article 50 (art. 50), considering them to be matters to be left to the Court's judgment. Further particulars of the applicants' claims and of the Government's position relative thereto are set out below in the section "As to the law".

5. Having consulted, through the Registrar, the Agent of the Government and the Delegates of the Commission, the Court decided on 23 September 1983 that there was no call to hold hearings.

AS TO THE LAW

I. INTRODUCTION

6. Article 50 (art. 50) of the Convention, the applicability of which was not contested in the present case, reads as follows:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision

or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

7. The applicants sought just satisfaction under a number of different heads. Their various claims will be considered in turn.

II. "GENERAL" DAMAGES

8. The applicants claimed in the first place "general" damages for the violation of their Convention rights, alleging that they had been caused very great distress. They emphasised such factors as the scale of the breaches that had occurred - amounting in their view to a practice in breach of the Convention - and the absence of any domestic remedy, their complaints about censorship having themselves been censored. They submitted that in general a finding of violation contained in a judgment of the Court could not, of itself, be considered to amount to just satisfaction, and did not do so in the present case.

The Government's principal plea was that here an award of "general" damages was neither necessary nor appropriate, the Court's judgment of 25 March 1983 itself constituting just satisfaction. They pointed out that only a small proportion of the applicants' mail had been stopped and stressed the significant changes that had been made, in the light of the Commission's report in this case, to the practice in England and Wales on the control of prisoners' correspondence.

9. The Court would recall that under Article 50 (art. 50) just satisfaction will be afforded only "if necessary" (see, inter alia, the Dudgeon judgment of 24 February 1983, Series A no. 59, p. 7, § 11). In exercising the discretion thus conferred on it, the Court will have regard to what is equitable in all the circumstances of the case.

10. It is true that those applicants who were in custody may have experienced some annoyance and sense of frustration as a result of the restrictions that were imposed on particular letters. It does not appear, however, that this was of such intensity that it would in itself justify an award of compensation for non-pecuniary damage. As the figures supplied by the Government reveal (see the above-mentioned judgment of 25 March 1983, p. 24, § 57), the number of letters in respect of which the Court found a violation as regards each of the applicants was very small compared with the number of letters which they were allowed to send. Furthermore, although the Court held that it could not examine the compatibility with the Convention of the correspondence control regime in force since 1981 (ibid., p. 31, § 9), substantial changes were introduced as a result of the applications in which this case originated and do appear in principle to have led to a significant improvement.

In these circumstances, the Court considers that in relation to this head of claim the judgment of 25 March 1983 constitutes in itself adequate just

satisfaction for the applicants concerned, without it being necessary to afford financial compensation (see, as the most recent authority, the Zimmermann and Steiner judgment of 13 July 1983, Series A no. 66, p. 14, § 35). The same applies a fortiori to Mrs. Colne, who was not in custody and was thus not subject to the constraints of prison life.

III. "SPECIAL" DAMAGES

A. Mr. Silver

11. An unquantified claim for "special" damages was put forward in the name of Mr. Silver. It was maintained that the stopping of his letters, which dealt with matters of intimate concern such as medical treatment and diet, had caused him great distress and adversely affected his health.

The Government contended on various grounds that there was no basis for this claim and that, in any event, the absence of evidence of material loss rendered an award inappropriate.

12. Mr. Silver died in March 1979, while his case was pending before the Commission. The injury alleged under this head was of a purely personal nature, involved no element of material damage and did not affect his estate. His next of kin are not seeking compensation, as "injured parties" in their own right, for any mental suffering caused to them. In the particular circumstances, the Court considers that the cause of justice does not require an award of a sum of money to be received by them in compensation for any mental distress that Mr. Silver might have suffered by reason of the breaches of Articles 6 § 1, 8 and 13 (art. 6-1, art. 8, art. 13) (see, mutatis mutandis, the X v. the United Kingdom judgment of 18 October 1982, Series A no. 55, p. 16, § 19).

B. Mr. McMahon

13. Throughout his detention Mr. McMahon protested that he was innocent of the crime for which he had been imprisoned, and a campaign was mounted on his behalf. The remainder of his sentence was remitted and he was released in 1980 after the publication in that year of a book concerning his case.

According to the applicant, the book contained material written by him and smuggled out of his prison in 1977. It was alleged that his eleven letters which had been stopped (see the above-mentioned judgment of 25 March 1983, p. 12, § 22) were all directed to enlisting support or obtaining fresh evidence for his campaign and that, had he been able to correspond freely, he might have secured earlier reconsideration of his case and earlier release;

he claimed "special" damages of £4,500 for wrongful imprisonment for a period estimated at one year.

The Government contended that there was no basis for the claim. They did not accept that the outcome of the proceedings to obtain Mr. McMahon's release would have been any different had the letters been allowed to be sent.

14. The Court notes that the applicant himself did not attribute his release solely to the appearance of the book but rather to a combination of its publication and of outside pressures. Furthermore, perusal of those of the eleven letters whose text is available reveals that they did not contain new material but were in the main designed to seek further support for an already existing campaign.

In these circumstances, the Court is not persuaded that the stopping of the letters in question did in fact delay Mr. McMahon's release. It therefore rejects this claim.

C. Mr. Carne

15. In 1976, Mr. Carne had been subjected to prison disciplinary penalties in respect of two clandestine letters, addressed respectively to Dr. Owen and the National Council for Civil Liberties, purporting to come from other persons but in fact written by him. He alleged that had his letters nos. 54 and 55, to the same respective addressees, not been stopped by the prison authorities (see the above-mentioned judgment of 25 March 1983, pp. 27-28, §§ 67 and 68), the clandestine communications - which concerned the same subjects as the stopped letters - would not have been written, in which event he would not have incurred the penalties. He claimed £750 in respect of the "special" damages thereby occasioned.

The Government denied that the various letters dealt with the same matters and contended that there was no basis for this claim; in any event, an award would not be appropriate as no material loss had been shown.

16. The Court observes that whilst the subject-matter of the letters in question was not identical, there were certain common features: censorship of correspondence and medical treatment were mentioned in both letters addressed to Dr. Owen and the former matter was referred to in both communications to the National Council for Civil Liberties. The fact that Mr. Carne was unable to write without restriction on these subjects may have been one reason for the fabrication of the clandestine letters. However, whatever Mr. Carne's motives may have been, the subterfuge to which he resorted nevertheless constituted a transgression of the prison regulations which, in this respect, have not been found by the Court to be incompatible with the Convention.

Having regard to all the circumstances, the Court considers that it is not necessary to make an award in respect of this claim.

IV. COSTS AND EXPENSES

17. The applicants claimed in respect of costs and expenses which they were liable to pay in connection with the proceedings before the Convention institutions the following sums (in each case exclusive of value added tax):

(a) £17,093.63 - including £750 for services rendered in connection with the Article 50 (art. 50) claim - for the fees and disbursements of Messrs. Bindman & Partners, solicitors, who initially acted for Mrs. Colne, Mr. McMahon and Mr. Carne before the Commission and subsequently had primary responsibility for the conduct of the seven joined applications before the Commission and the Court;

(b) £16,250 for the fees of Mr. Anthony Lester, Q.C., and Mr. Michael Beloff, Q.C., who also represented the applicants before the Commission and the Court;

(c) £780 for the fees and disbursements of Messrs. Friedman, Fredman & Co., solicitors, who represented Mr. Tuttle before the Commission and the Court;

(d) £1,540 for the fees and disbursements of Messrs. Hughmans, solicitors, who represented Mr. Silver (or his next of kin), Mr. Noe and Mr. Cooper before the Commission and the Court.

Items (a) and (b) were subject to deduction of the amounts which the applicants had received by way of free legal aid before the Commission and, after reference of the case to the Court, in their relations with the Commission's Delegates; items (c) and (d), on the other hand, represented costs and expenses that were not covered by that legal aid.

18. The Court will apply the various criteria which emerge from its case-law on the subject, as regards the purpose for which the costs in question were incurred and the requirements that they be actually incurred, necessarily incurred and reasonable as to quantum (see, as the most recent authority, the above-mentioned Zimmermann and Steiner judgment, Series A no. 66, p. 14, § 36). In this connection the Court wishes to reiterate the comments made in its Young, James and Webster judgment of 18 October 1982 (Series A no. 55, p. 8, § 15), where it observed:

> "... high costs of litigation may themselves constitute a serious impediment to the effective protection of human rights. It would be wrong for the Court to give encouragement to such a situation in its decisions awarding costs under Article 50 (art. 50). It is important that applicants should not encounter undue financial difficulties in bringing complaints under the Convention and the Court considers that it may expect that lawyers in Contracting States will co-operate to this end in the fixing of their fees."

19. The Government indicated that they were prepared to pay the reasonable and necessary costs actually incurred by the applicants which were not covered by the Commission's legal aid. With the exception of the points mentioned in paragraph 20 below, the Government did not contest

that the applicants had incurred liability for costs additional to those covered by their legal aid (cf., inter alia, the Airey judgment of 6 February 1981, Series A no. 41, p. 9, § 13) and that their claim satisfied the criteria referred to in paragraph 18 above. Subject to an examination of those points, the Court therefore retains the whole of the claim.

20. (a) The Government drew attention to an error in the calculation of the fees of Messrs. Bindman & Partners in respect of certain letters. That firm having admitted the error, the fees in question are to be reduced by £40.

(b) The Government claimed that Messrs. Bindman & Partners had charged fees for an excessive number of hours of work.

These solicitors have charged for a total of 294 hours of work, up to 1982. Bearing in mind that they had the primary responsibility for the conduct of a complex case which involved seven joined applications and by 1982 had lasted, as far as they were concerned, for some seven years, the Court does not consider this figure excessive.

(c) The Government contended that the same firm had charged at an excessive hourly rate (£40) and that a figure of £35 would be more appropriate. They referred in particular to the heavy reliance that had been placed on counsel and the fact that, in the early stages, the case had been handled by persons who were not partners in the firm. The applicants cited in support of their claim advice which they had received from professional law costs draftsmen.

The Court sees no reason to conclude that on this occasion greater reliance was placed on counsel than is customarily done when solicitors and barristers are instructed in contentious business. With regard to the hourly rate charged, the Court considers that £35 is the maximum which it should allow.

(d) The Government maintained that the sum of £62.06, for certain travel expenses in London, should be deducted from the amount claimed in respect of the disbursements of Messrs. Bindman & Partners, since in England such items would not be allowed under the relevant Supreme Court Taxing Office Practice Direction.

Although the Court is not bound by this Direction (see, mutatis mutandis, the Eckle judgment of 21 June 1983, Series A no. 65, p. 15, § 35), it agrees that these local travel expenses should not be allowed.

(e) The Government submitted that the fees charged by counsel were excessive and should be reduced by a total of £5,100. Domestic practice was referred to by the Government to support, and by the applicants to contest, this submission. The applicants also cited the award of £10,000 in respect of counsel's fees contained in the Court's Sunday Times judgment of 6 November 1980 (Series A no. 38, p. 15, § 30).

Here again, parallels drawn with domestic practice do not bind the Court, although they may assist it. Having regard to all the circumstances of the

case - which, as the applicants rightly pointed out, was a test case raising issues of major importance for all prisoners and generating substantial documentation -, the fees in question, with the exception of the brief fees for appearance before the Court, cannot be regarded as out of proportion or excessive for the work involved. As regards the brief fees, the Court considers that £2,000 for Mr. Lester and £1,000 for Mr. Beloff would be reasonable.

(f) The Government contended that in any event there should be excluded Mr. Lester's fees referable to the friendly settlement negotiations, on the ground that this work could have been done by the solicitors alone. The applicants stressed that the negotiations, at which the Government were very fully represented, covered consideration of far-reaching modifications to the system of control of prisoners' correspondence.

During the proceedings before the Court, the Government themselves emphasised the significance of the changes made as a result of the applications in which the present case originated. The scale of those changes can be gauged from paragraphs 25 to 56 of the Court's above-mentioned judgment of 25 March 1983 (pages 12-23). The Court entertains no doubt that in the circumstances the participation of counsel with experience in the matter was of great importance. It therefore rejects the Government's plea.

(g) Finally, the Government maintained that the sum of £180 claimed in respect of the disbursements of Messrs. Friedman, Fredman & Co. should be disallowed as it had not been particularised. The applicants stated that this sum related to travel and accommodation expenses in connection with the hearing before the Commission in 1978, the exact breakdown of which was no longer available.

In the absence of further particulars, the Court disallows this item.

21. The costs and expenses accepted by the Court total £31,661.57, from which has to be deducted the sum of 34,692.64 FF (to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment) which the applicants have received from the Commission by way of legal aid in respect of the fees and disbursements of Messrs. Bindman & Partners and the fees of Mr. Lester and Mr. Beloff. The resulting figure is to be increased by any value added tax that may be due.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that the United Kingdom is to pay, in respect of the applicants' costs and expenses referable to the proceedings before the Commission and the Court, the sum resulting from the calculations to be made in accordance with paragraph 21 of the judgment;

2. Rejects the remainder of the applicants' claims.

Done in English and in French, the English text being authentic, at the Human Rights Building, Strasbourg, this twenty-fourth day of October, one thousand nine hundred and eighty-three.

Gérard WIARDA
President

Marc-André EISSEN
Registrar

A declaration by Mr. Thór Vilhjálmsson is annexed to the present judgment.

G.W.
M.-A.E.

DECLARATION OF JUDGE THÓR VILHJÁLMSSON

In a judgment delivered on 18 October 1982 in the case of X v. the United Kingdom (Article 50) (art. 50), the majority of the Court rejected a claim put forward on behalf of the estate of the deceased applicant. I was then in a minority of one. In my opinion the estate was, in the circumstances of that particular case, entitled to compensation.

One of the points decided in the present case concerns a claim made on behalf of the next of kin of Mr. Silver, who died in 1979, for "special" damages (see paragraphs 11-12 of the judgment). My vote on this particular point reflects a change from my vote in the case of X v. the United Kingdom (Article 50) (art. 50). This change is prompted by the majority vote in that case.

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

CASE OF SLIVENKO v. LATVIA

(Application no. 48321/99)

JUDGMENT

STRASBOURG

9 October 2003

In the case of Slivenko v. Latvia,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr J. MAKARCZYK,
Mr I. CABRAL BARRETO,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr P. LORENZEN,
Mrs M. TSATSA-NIKOLOVSKA,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mr K. TRAJA,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,

and also of Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 12 July 2002, 25 September 2002 and 9 July 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 48321/99) against the Republic of Latvia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two former residents of Latvia, Mrs Tatjana Slivenko and Ms Karina Slivenko ("the applicants"), on 28 January 1999. Initially, the application had also been brought by Mr Nikolay Slivenko, a Russian citizen married to the first applicant and father of the second applicant.

2. The applicants, who had been granted legal aid, were represented by Mr A. Asnis and Mr V. Portnov, lawyers practising in Moscow. The Latvian Government ("the respondent Government") were represented by their Agent, Ms K. Maļinovska.

3. The applicants alleged, in particular, that their removal from Latvia had violated Article 8 of the Convention, taken alone or in conjunction with Article 14, and that the applicants' detention on 28-29 October 1998 and 16-17 March 1999 had breached Article 5 §§ 1 and 4 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court).

5. The Chamber called upon to deal with the case was constituted according to Rule 26. Mr E. Levits, the judge elected in respect of Latvia, withdrew from sitting in the case (Rule 28). The respondent Government accordingly appointed Mr R. Maruste, the judge elected in respect of Estonia, to sit in his place (Article 27 § 2 of the Convention and Rule 29 § 1).

6. On 27 January 2000 the Chamber communicated the case to the respondent Government (former Rule 54 § 3 (b)). The parties submitted observations in writing and subsequently replied to each other's observations. In addition, third-party comments were received from the Russian Government, having exercised their right to intervene (Article 36 § 1 of the Convention and Rule 61 § 2). The parties replied to those comments (Rule 61 § 5).

7. On 14 June 2001 the Chamber of the Second Section, composed of Mr C.L. Rozakis, President, Mr A. B. Baka, Mrs V. Stráznická, Mr P. Lorenzen, Mrs M. Tsatsa-Nikolovska, Mr R. Maruste, Mr A. Kovler, judges, and Mr E. Fribergh, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24, Mr Maruste continuing in his function as an elected judge designated *ad hoc* by the respondent Government to replace the judge elected in respect of the respondent State (Rule 29 § 1).

9. A hearing on the admissibility and merits of the case took place in public in the Human Rights Building, Strasbourg, on 14 November 2001 (Rule 59 § 3).

There appeared before the Court:

(a) *for the respondent Government*
Ms K. MAĻINOVSKA, *Agent*,
Ms A. ASTAHOVA, *Counsel*;

(b) *for the applicants*
Mr A. ASNIS,
Mr V. PORTNOV,
Ms T. RYBINA, *Counsel*;

(c) *for the third party*
Mr P. LAPTEV, *Representative of the Russian Federation,*
Mr S. VOLKOVSKIY,
Mr S. KULIK, *Counsel.*

The applicants also attended the hearing.

The Grand Chamber heard addresses by Ms Maļinovska, Mr Portnov and Mr Laptev as well as their replies to questions from judges.

10. By a decision of 23 January 2002[1], the Grand Chamber declared the application admissible in so far as the applicants' complaints under Articles 5 §§ 1 and 4, 8 and 14 were concerned. Their remaining complaints, as well as those of Mr Nikolay Slivenko, were declared inadmissible.

11. At the Court's request, the parties and the third party submitted supplementary observations on the merits of the case. The parties replied to each other's observations.

12. On 12 July 2002 the Court rejected requests by the applicants and the third party to obtain an independent expert opinion on an allegedly falsified document submitted by the respondent Government (see paragraphs 19 and 20 below) and to hold a further hearing on the merits.

13. Although the applicants and the respondent Government had only been invited to comment on the Russian Government's third-party submissions, they made further extensive submissions which went beyond such comments. On 25 September 2002 the Court decided to admit those submissions to the file and to give the parties and the third party an opportunity to present their final conclusions. Final conclusions were received from the parties and the third party in November 2002.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

14. The facts of the case, as submitted by the parties, may be summarised as follows.

15. The first applicant is Mrs Tatjana Slivenko, born in 1959. The second applicant is her daughter, Ms Karina Slivenko, born in 1981.

16. The applicants are of Russian origin. The first applicant was born in Estonia into the family of a military officer of the Union of Soviet Socialist

1. *Note by the Registry*. Extracts of the decision are published in ECHR 2002-II.

Republics (USSR). At the age of one month she moved to Latvia together with her parents. Her husband, Nikolay Slivenko, born in 1952, was transferred to Latvia in 1977 to serve as a Soviet military officer. He met the first applicant in Latvia and married her there in 1980. In 1981 the first applicant gave birth to their daughter, the second applicant. The first applicant's father retired from the army in 1986.

17. Latvia regained independence from the USSR in 1991. On 28 January 1992 the Russian Federation assumed jurisdiction over the former Soviet armed forces, including those stationed in the territory of Latvia.

18. On 4 March 1993 the applicants and the first applicant's parents were entered in the register of Latvian residents ("the register") as "ex-USSR citizens" (see paragraphs 50-56 below). At that time, none of them were citizens of any particular State. In her request to be entered in the register, the first applicant had not indicated that her husband was a Russian military officer.

19. The respondent Government state that, in requesting her entry in the register, the first applicant submitted false information about the occupation of Nikolay Slivenko, stating that he worked at a factory. The respondent Government have submitted a copy of an annex to the first applicant's application for residence in Latvia, including the statement that her husband worked at a factory.

20. The applicants and the third party submit that the document is falsified, and that it does not exist. They also refer to the fact that, during the subsequent proceedings concerning the legality of their stay in Latvia (see paragraphs 34-39 below), the immigration authorities did not refer to any such false information, and the Latvian courts did not establish that the applicants had at any point submitted the information mentioned by the respondent Government.

21. Nikolay Slivenko, who had become a Russian citizen on an unspecified date in the early 1990s, continued his service in the Russian army until his discharge in 1994 on the ground of the abolition of his post. The parties disagree as to the actual date of his discharge: the applicants state that he was discharged on 2 March 1994. They rely on the fact that an order for his discharge was signed and became effective on 2 March 1994. The Russian Government support this conclusion. The respondent Government argue that the first applicant's husband was discharged on 5 June 1994 as it was only on that date that he formally completed his leave; his leave allowance and retirement benefits had been calculated with reference to that date.

22. The treaty between Latvia and Russia on the withdrawal of the Russian troops ("the treaty") was signed in Moscow on 30 April 1994 and became effective on that date (see paragraphs 64-67 below).

23. According to the respondent Government, even before the signature and entry into force of the treaty, various Latvian and Russian authorities

cooperated in establishing the names of the Russian military personnel liable to be removed from Latvia. In this context, on 31 March 1994, the Russian military authorities submitted to the Latvian authorities a list of the Russian military officers in Latvia, including the first applicant's husband, with an accompanying request to prolong his and his family's temporary residence in Latvia. This, the respondent Government contend, made it clear that their stay in Latvia was temporary, and that they would be required to leave.

24. According to the applicants and the Russian Government, the list of 31 March 1994 did not entail any obligation on Nikolay Slivenko to leave Latvia as it was a document solely requesting the prolongation of his temporary stay in Latvia, submitted before the actual signature and entry into force of the treaty.

25. On 7 October 1994 Nikolay Slivenko applied to the Latvian Citizenship and Migration Authority ("the CMA") for a temporary residence permit in Latvia by reason, *inter alia*, of his marriage to the first applicant, a permanent resident of Latvia. This was refused on the ground that, as a Russian military officer, he was required to leave Latvia as a result of the withdrawal of the Russian troops in accordance with the treaty.

26. On 29 November 1994 the CMA annulled the applicants' entry in the register on the ground of Nikolay Slivenko's military status. The applicants state that they were not informed about the decision, and that they found out about it only in 1996, in the context of the court proceedings brought by the first applicant's husband (see paragraph 29 below).

27. The respondent Government have also produced a list dated 10 December 1994, which according to them had been submitted to the Latvian authorities by the Russian armed forces. In the list Nikolay Slivenko was included in the category of military personnel who had retired after 28 January 1992. The applicants and the third party contest the authenticity of the list.

28. The respondent Government have further produced a list dated 16 October 1995, which according to them had been sent to the Latvian Ministry of Foreign Affairs by the Russian consulate in Riga. According to the respondent Government, Nikolay Slivenko's name appeared on the list among those Russian military pensioners who had been discharged from the Russian armed forces after 28 January 1992. It was also noted in the list that on 3 August 1994 Nikolay Slivenko had been given housing in the city of Kursk in Russia, and that he had left Latvia on 31 December 1994. The applicants and the third party contest the authenticity of the list.

29. In point of fact, however, the first applicant's husband had stayed in Latvia. He brought a court action against the CMA, claiming that their refusal to issue him with a temporary residence permit was void. On 2 January 1996 the Riga City Vidzeme District Court found in his favour. The CMA appealed against the judgment.

30. On 19 June 1996 the Riga Regional Court allowed the CMA's appeal, finding, *inter alia*, that Nikolay Slivenko had been a Russian military officer until 5 June 1994 and that the treaty of 30 April 1994 required all Russian officers in service on 28 January 1992 to leave Latvia together with their families. The Regional Court referred, *inter alia*, to the list of 16 October 1995, which confirmed that he had been provided with accommodation in Kursk, and that he had left Latvia in 1994. He did not bring a cassation appeal against the appellate judgment.

31. On 20 August 1996 the immigration authorities issued a deportation order in respect of the applicants. The order was served on them on 22 August 1996.

32. On that date the local authorities decided to evict the applicants from their flat, which they rented from the Latvian Ministry of Defence. Russian military officers and their families as well as other residents of Latvia lived in the block where the flat was located. The eviction order was not enforced.

33. On an unspecified date in 1996 Nikolay Slivenko moved to Russia, while the applicants remained in Latvia.

34. The first applicant brought a court action in her own name and on behalf of her daughter, claiming that they were in fact permanent residents of Latvia and that they could not be removed from the country.

35. On 19 February 1997 the Riga City Vidzeme District Court found in favour of the applicants. The court held, *inter alia*, that the first applicant had come to Latvia as a relative of her father, not her husband. As her father had retired in 1986, he could thereafter no longer be regarded as a military officer, and his close relatives, including the applicants, could be entered in the register as permanent residents of Latvia. The court quashed the deportation order in respect of the applicants and authorised their re-entry in the register.

36. The CMA appealed against the judgment of 19 February 1997. On 30 October 1997 the Riga Regional Court dismissed the appeal, finding that the first-instance court had decided the case properly. Upon a cassation appeal by the CMA, on 7 January 1998 the Supreme Court quashed the decisions of the lower courts and remitted the case to the appellate court for a fresh examination. The Supreme Court referred to the fact that the applicants had been provided with a flat in Kursk, and that they were subject to the provisions of the treaty of 30 April 1994.

37. On 6 May 1998 the Riga Regional Court allowed the CMA's appeal, finding that Nikolay Slivenko had been a serving Russian military officer until 5 June 1994. Referring to the fact that he had been given housing in Kursk in 1994 following his retirement from the Russian military, the court decided that he had been required to leave Latvia with his family in accordance with the treaty. The court found that the decision of the immigration authorities to annul the applicants' entry in the register had been lawful.

38. On 12 June 1998 the first applicant was informed by the immigration authorities that the deportation order of 20 August 1996 had become effective upon the delivery of the appellate court's judgment of 6 May 1998.

39. On 29 July 1998, on a cassation appeal by the applicants, the Supreme Court confirmed the decision of 6 May 1998. The Supreme Court stated that Nikolay Slivenko had been discharged from the Russian armed forces on 5 June 1994. The Supreme Court noted that the applicants had been allocated the flat in Kursk in the context of the material assistance provided by the United States of America for the withdrawal of Russian troops. Relying on the fact that Nikolay Slivenko had been discharged from the military after 28 January 1992, the Supreme Court concluded that the applicants, as part of his family, had also been required to leave Latvia in accordance with the treaty.

40. On 14 September 1998 the first applicant requested the CMA to defer execution of the deportation order. That was refused on 22 September 1998.

41. On 7 October 1998 the first applicant lodged with the immigration authorities an appeal against the deportation order, requesting a residence permit and her re-entry in the register. She stated, *inter alia*, that Latvia was her and her daughter's motherland as they had lived there all their lives and had no other citizenship, and that she was required to take care of her disabled parents who were permanently resident in Latvia.

42. In the late evening of 28 October 1998 the police entered the applicants' flat. They were arrested at 10.30 p.m. on the same date. On 29 October 1998, at 12.30 a.m., a police officer issued an arrest warrant in respect of the applicants on the basis of section 48-5 of the Aliens Act. The warrant stated that the applicants had no valid documents justifying their stay in Latvia, and that the applicants' entry in the register of Latvian residents had been annulled by the Supreme Court's final judgment of 29 July 1998. It was also mentioned in the warrant that the applicants "did not leave Latvia following the judgment, and there were reasonable grounds to suspect that they were staying in Latvia illegally". The warrant was signed by the applicants. On the basis of the warrant the applicants were immediately detained in a centre for illegal immigrants.

43. Also on 29 October 1998 the Director of the CMA sent a letter to the immigration police, stating that the applicants' arrest had been "premature" in view of the fact that the first applicant had lodged an appeal on 7 October 1998. No reference to domestic law was made in the letter. The Director of the CMA ordered the immigration police to release the applicants. They were released at an unspecified time on 29 October 1998.

44. On 3 February 1999 the applicants received a letter from the Director of the CMA dated 29 October 1998, informing them that they were required to leave Latvia immediately. They were also informed that, if they complied voluntarily with the deportation order, they could thereafter be

issued with a visa enabling them to stay in the country for ninety days per annum.

45. On 16 March 1999 the flat of the first applicant's parents was searched by the police in the presence of the second applicant. On the same date, at 9 a.m., a police officer issued a warrant for the second applicant's arrest on the basis of section 48-5 of the Aliens Act. The warrant stated that the second applicant had no valid document justifying her stay in Latvia, and that there were reasonable grounds to suspect that she was staying in Latvia illegally. The order was signed by the second applicant. She was immediately arrested and thereafter detained for thirty hours in a centre for illegal immigrants. She was released on 17 March 1999.

46. On 11 July 1999 the applicants moved to Russia to join Nikolay Slivenko. By that time the second applicant had completed her secondary education in Latvia. On an unspecified date in 2001 the applicants adopted Russian citizenship as former nationals of the USSR. The applicants now live in Kursk, in accommodation which was provided by the Russian defence authorities. After the applicants left Latvia, their flat in Riga was taken back by the Latvian authorities. Meanwhile, the first applicant's parents continued living in Latvia on the basis of their status as “ex-USSR citizens”.

47. According to the applicants, the first applicant's parents are seriously ill, but the applicants have not been able to go to Latvia to visit them. The deportation order of 20 August 1996 prohibited the applicants from entering Latvia for five years. That prohibition expired on 20 August 2001. Towards the end of 2001 the applicants obtained visas permitting their stay in Latvia for no more than ninety days per annum.

48. In view of the fact that Nikolay Slivenko had left Latvia voluntarily, the prohibition on entering Latvia was not extended to him. He was allowed to visit Latvia several times in the period between 1996 and 2001.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Citizenship and nationality in Latvia

49. Latvian laws use the term “citizenship” (*pilsonība*) to denote the nationality of a person. In the official English translations of the domestic statutes, the term “nationality” is sometimes used in brackets alongside the term “citizenship”. An official English translation of the Aliens Act (Part I) provides, for example, that “an 'alien' [is] a person having the citizenship (nationality) of another State; [a] 'stateless person' [is] a person having no citizenship (nationality)”.

B. Categories of Latvian residents

50. Latvian legislation on nationality and immigration identifies several categories of persons, each with its own status defined in a specific Act:

(a) Latvian citizens (*Latvijas Republikas pilsoņi*), whose legal status is governed by the Citizenship Act of 22 July 1994 (*Pilsonības likums*);

(b) "permanently resident non-citizens" (*nepilsoņi*) – that is, citizens of the former USSR who lost their Soviet citizenship following the dissolution of the USSR but have not subsequently obtained any other nationality – who are governed by the Status of Former USSR Citizens Act of 12 April 1995 (*Likums "Par to bijušo PSRS pilsoņu statusu, kuriem nav Latvijas vai citas valsts pilsonības"*); this group of persons may also be referred to as "ex-USSR citizens";

(c) asylum-seekers and refugees, whose status is governed by the Asylum Act of 7 March 2002 (*Patvēruma likums*);

(d) "stateless persons" (*bezvalstnieki*) within the meaning of the Stateless Persons Act of 18 February 1999 (*Likums "Par bezvalstnieka statusu Latvijas Republikā"*), read in conjunction with the Aliens Act and, since 1 May 2003, with the Immigration Act which replaced it;

(e) "aliens" in the broad sense of the term (*ārzemnieki*), including foreign nationals (*ārvalstnieki*) and stateless persons (*bezvalstnieki*) falling solely within the ambit of the Aliens and Stateless Persons (Entry and Residence) Act of 9 June 1992 (*Likums "Par ārvalstnieku un bezvalstnieku ieceļošanu un uzturēšanos Latvijas Republikā"* – "the Aliens Act") (before 1 May 2003), and the Immigration Act (after that date).

51. The Citizenship Act is based on two principles: the principle of *jus sanguinis* and the doctrine of State succession in matters of international and constitutional law. Accordingly, with certain exceptions, only those persons who had Latvian citizenship on 17 June 1940 (the date on which Latvia came under Soviet domination) and their descendants are recognised *ipso jure* as Latvian citizens (section 2(1)). The fact of having been born within Latvian territory or having been resident there for a long period does not in itself confer Latvian citizenship; accordingly, citizens of the former USSR who arrived in Latvia during the Soviet era (1944-91) and their descendants were not automatically granted Latvian citizenship after Latvia had regained its independence.

52. Furthermore, the Citizenship Act provides for the possibility of becoming a Latvian citizen by means of naturalisation, in accordance with the conditions and procedure laid down in Chapter II of the Act. Persons seeking naturalisation as Latvian citizens must have been lawfully resident in Latvia for at least the past five years, have a legal source of income, pass an examination testing proficiency in Latvian, be familiar with the Latvian Constitution and national anthem, have a basic knowledge of Latvian history, swear an oath of allegiance and, where appropriate, renounce their existing citizenship (section 12). Section 11(1) lists the grounds on which

naturalisation may be refused; for example the provision prohibits the naturalisation of persons who

> "... after 17 June 1940 chose the Republic of Latvia as their place of residence immediately after being discharged from the USSR (Russian) armed forces, and who did not have their permanent residence in Latvia on the date of their conscription or enlistment ...".

53. In the version in force before 25 September 1998, section 1 of the Status of Former USSR Citizens Act provided:

> "(1) This Act shall apply to citizens of the former USSR who are resident in Latvia ..., were resident within Latvian territory before 1 July 1992 and are registered as being resident there, regardless of the status of their housing, provided that they are not citizens of Latvia or of any other State, and also to their children below the age of majority, if the latter are not citizens of Latvia or of any other State."

In the version in force since 25 September 1998, section 1 of the Status of Former USSR Citizens Act provides:

> "(1) The persons governed by this Act – 'non-citizens' – shall be those citizens of the former USSR, and their children, who are resident in Latvia ... and who satisfy all the following criteria:
>
> 1. on 1 July 1992 they were registered as being resident within the territory of Latvia, regardless of the status of their housing; or their last registered place of residence by 1 July 1992 was in the Republic of Latvia; or a court has established that before the above-mentioned date they had been resident within the territory of Latvia for not less than ten years;
>
> 2. they do not have Latvian citizenship; and
>
> 3. they are not and have not been citizens of any other State.
>
> (2) The legal status of persons who arrived in the Republic of Latvia after 1 July 1992 shall be determined by the Aliens and Stateless Persons Acts.
>
> (3) The present Act shall not apply to:
>
> 1. military specialists engaged in the operation and dismantling of Russian Federation military [radar equipment] installed in the territory of Latvia, and civilians sent to Latvia for that purpose;
>
> 2. persons who were discharged from the armed forces after 28 January 1992, if on the date of their enlistment they were not permanently resident in the territory of Latvia and if they are not close relatives of Latvian citizens;
>
> 3. spouses of the persons [mentioned above] and members of their families (children and other dependants) living with them, where, irrespective of the date of their arrival, they arrived in Latvia in connection with the service of a member of the Russian Federation (USSR) armed forces;
>
> 4. persons who have received compensation for establishing their permanent residence abroad, regardless of whether the compensation was paid by a Latvian central or local authority or by an international or foreign authority or foundation; or

5. persons who on 1 July 1992 were officially registered as being resident for an indefinite period within a member country of the Commonwealth of Independent States."

Section 2( )2 of the Act prohibits the deportation of "non-citizens", "save where deportation takes place in accordance with the law and another State has agreed to receive the deportee". Furthermore, section 5 (which became section 8 on 7 April 2000) provides:

"(1) Section 2 ... of this Act shall also [apply to] stateless persons and their descendants who are not and have never been citizens of any State and who, before 1 July 1992, were resident within the territory of Latvia and were registered as being permanently resident there ...

(2) Section 2 of this Act shall also apply to nationals of other States and their descendants who were resident within the territory of Latvia before 1 July 1992 and were registered as being permanently resident there ..., provided that they do not have Latvian citizenship ..."

Lastly, section 49 provides that international agreements on immigration "concluded by the Republic of Latvia and approved by Parliament" take precedence over national legislation.

54. The relevant provisions of the Aliens Act were worded as follows:

Section 11

"Any foreigner or stateless person shall be entitled to stay in the Republic of Latvia for more than three months [*version in force from 25 May 1999:* 'more than ninety days in the course of one half of a calendar year'], provided that he or she has obtained a residence permit in accordance with the provisions of this Act. ..."

Section 23

"The following may obtain a permanent residence permit:

...

(2) the spouse of a Latvian citizen, of a 'permanently resident non-citizen' of Latvia or of an alien or stateless person who has [himself or herself] been granted a permanent residence permit, in accordance [with section] ... 26 of this Act, and the spouse's minor or dependent children ..."

55. When the Aliens Act came into force, it did not contain any provision excluding serving members of the Russian armed forces who had been discharged after 28 January 1992. Regulation no. 297 of 6 August 1996, confirmed by the Act of 18 December 1996, amended section 23 as follows:

"Permanent residence permits may be obtained by aliens who, on 1 July 1992, were officially registered as being resident for an indefinite period within the Republic of Latvia if, at the time of applying for a permanent residence permit, they are officially registered as being resident within the Republic of Latvia and are entered in the register of residents.

> Citizens of the former USSR who acquired the citizenship of another State before 1 September 1996 must apply for a permanent residence permit by 31 March 1997. Citizens of the former USSR who acquired the citizenship of another State after 1 September 1996 must apply within six months of the date on which they acquired the citizenship of that State.
>
> This section shall not apply to:
>
> 1. military specialists engaged in the operation and dismantling of Russian military [radar equipment] installed in the territory of Latvia, and civilians sent to Latvia for that purpose;
>
> 2. persons who were discharged from active military service after 28 January 1992 if on the date of their enlistment they were not permanently resident in the territory of Latvia and if they are not close relatives of Latvian citizens; or
>
> 3. spouses of the persons [mentioned above] and members of their families (children and other dependants) living with them, where, irrespective of the date of their arrival, they arrived in Latvia in connection with the service of a member of the Russian Federation (USSR) armed forces."

56. Persons who are lawfully resident in Latvia are entered in the register of residents and given a personal identification number (*personas kods*). The functioning of the register, which is kept by the interior authorities, is laid down in the Register of Residents Act of 27 August 1998 (*Iedzīvotāju reģistra likums*), which replaced the previous Act of 11 December 1991 (*Likums "Par iedzīvotāju reģistru"*).

57. According to the information provided by the respondent Government, about 900 persons – close relatives of Russian military officers required to leave Latvia under the treaty – were able to legalise their stay in Latvia because those persons were either Latvian citizens or close relatives of Latvian citizens, and had not arrived in Latvia in connection with service in the Soviet armed forces.

C. Expulsion of aliens and their detention pending deportation

58. Section 35 of the Aliens Act lists the circumstances in which a residence permit, even a temporary one, will not be issued. Section 36 of the Aliens Act lists the grounds on which a residence permit may be withdrawn. The fact of having been a serving member of the Russian armed forces after 28 January 1992 does not appear in either of these lists.

Point 1 of section 36 provides that a residence permit should be withdrawn where its holder "has knowingly submitted false information to the Department". Point 3 provides for the same consequences if the holder of a residence permit "arouses reasonable suspicion on the part of the competent authorities that he or she presents a threat to public order and safety or national security". Point 6 concerns persons who have "entered the service of a foreign State, whether in the armed forces or otherwise, except in cases provided for by international agreements". Lastly, point 14

concerns persons who have "received compensation for establishing their permanent residence abroad, regardless of whether the compensation was paid by a Latvian central or local authority or by an international or foreign authority or foundation".

59. Section 38 of the Act provides that the head of the Department of the Interior or of one of its regional offices should issue a deportation order where an alien or stateless person resides within the territory of Latvia without being in possession of a valid visa or residence permit or in any other circumstances listed in Article 36.

60. Sections 39 and 40 provide:

Section 39

"Where a deportation order is issued in respect of a person with dependent relatives in Latvia, the latter must leave with him or her. The deportation order shall not apply to members of his or her family who are Latvian citizens or non-citizens."

Section 40

"A person shall leave the territory of Latvia within seven days after the deportation order has been served on him or her, provided that no appeal is lodged against the order in the manner prescribed in this section.

Persons in respect of whom a deportation order is issued may appeal against it within seven days to the head of the Department, who shall extend the residence permit pending consideration of the appeal.

An appeal against the decision of the head of the Department shall lie to the court within whose territorial jurisdiction the Department's headquarters are situated, within seven days after the decision has been served."

61. Under section 48, where a person has not complied with a deportation order, he or she may be forcefully removed from Latvia by the police. Under section 48-4, the police have the right to arrest a person in order to execute a deportation order.

Under section 48-5, the police have the right to arrest a person where no decision to deport him or her has been taken, if:

(1) the person has illegally entered the State;

(2) the person has knowingly provided false information to the competent authorities in order to receive a visa or residence permit;

(3) the authorities have a well-founded suspicion that the person will hide, or that he or she has no permanent place of residence; or

(4) the authorities have a well-founded suspicion that the person poses a threat to public order or national security.

In such cases the police have the right to detain a person for not more than seventy-two hours, or, where a prosecutor has been notified, for not more than ten days. The police must immediately inform the immigration authorities about the arrest, with a view to their issuing an order for the

deportation of the person by the use of force. The person concerned can appeal against that deportation order in accordance with the provisions of section 40 of the Act.

By section 48-6, a person in respect of whom such a deportation order has been issued may be detained until the execution of the order, and a prosecutor must be notified of the order.

Section 48-7 provides that an arrested person must be immediately informed of the reasons for his arrest, and of his right to have legal assistance.

By section 48-10, the police have the right to arrest aliens and stateless persons who reside in Latvia without a valid visa or residence permit. Such persons must be brought to the immigration authorities or to a police remand centre within three hours.

D. Action for a breach of personal rights

62. Chapter 24-A of the Code of Civil Procedure guarantees the right to appeal to a court against administrative acts breaching personal rights.

Article 239-2 § 1 states that a complaint against an action (decision) of a State authority may be submitted to a court, after a hierarchical complaint in this connection has been determined by the competent administrative authority.

Under Article 239-3 § 1 of the Code, a complaint to a court may be submitted within one month from the date of the notification of the dismissal of the hierarchical complaint, or within one month from the date of the contested act, provided that the person concerned has not received a decision.

Article 239-5 provides that the court must examine the complaint within ten days, having questioned the parties and other persons, if necessary.

Pursuant to Article 239-7, if the court considers that the act concerned violates an individual's personal rights, the court should adopt a judgment obliging the authority to remedy the violation.

E. “Registration” of the place of residence

63. Under the Soviet legislation, a citizen was issued with a “registration” (*propiska*) at a particular address, by way of a special seal in his passport attesting to his place of permanent residence for the purposes of domestic law. Following the restoration of Latvian independence in 1991, the “registration” system remained effective under the Latvian legislation.

III. THE LATVIAN-RUSSIAN TREATY ON THE WITHDRAWAL OF THE RUSSIAN TROOPS

64. The treaty between Latvia and Russia on the conditions and schedule for the complete withdrawal of Russian Federation military troops from the territory of the Republic of Latvia and their status pending withdrawal ("the treaty") was signed in Moscow on 30 April 1994, published in *Latvijas Vēstnesis* (Official Gazette) on 10 December 1994, and came into force on 27 February 1995.

In the preamble of the treaty the parties stated, *inter alia*, that by signing the treaty they wished to "eradicate the negative consequences of their common history".

65. The other relevant provisions of the treaty read as follows:

Article 2

"The Russian Federation's military troops shall leave the territory of the Republic of Latvia by 31 August 1994.

The withdrawal of Russian Federation military troops shall concern all members of the armed forces of the Russian Federation, members of their families and their movable property.

The closure of military bases in the territory of the Republic of Latvia and the discharge of military personnel after 28 January 1992 shall not be regarded as the withdrawal of military troops.

..."

Article 3, fifth paragraph

"The Russian Federation shall inform the Republic of Latvia about its military personnel and their families in the territory of Latvia. It shall provide regular information, at least every three months, about the withdrawal of, and quantitative changes in, each of the above-mentioned groups. ..."

Article 9

"The Republic of Latvia shall guarantee the rights and freedoms of Russian Federation military troops affected by the withdrawal, and also of their families, in accordance with the legislation of the Republic of Latvia and the principles of international law."

Article 15

"This treaty ... shall be applied on a provisional basis from the date of signature and shall come into force on the date of exchange of the instruments of ratification. ..."

66. The conditions for the implementation by Latvia of the above-mentioned treaty are laid down in Regulation no. 118 of 22 April 1995, the relevant parts of the second paragraph of which provide:

> "The Ministry of the Interior:
>
> ...
>
> 2.2. shall issue residence permits, after checking the list of military personnel ... to discharged members of the Russian armed forces who were resident within the territory of Latvia on 28 January 1992 and have been registered by the Nationality and Immigration Department ...
>
> 2.3. shall issue deportation orders in respect of members of the armed forces who are unlawfully resident in the Republic of Latvia, and shall supervise the execution of such orders; ..."

67. An agreement between Russia and Latvia, also signed on 30 April 1994, concerns the social protection of retired members of the Russian Federation armed forces and their families residing within the territory of the Republic of Latvia. Article 2 of the agreement, which applies principally to persons discharged from the Soviet armed forces before Latvia regained its independence, provides:

> "The persons to whom this agreement applies shall enjoy their fundamental rights within the territory of the Republic of Latvia, in accordance with the standards of international law, the provisions of this agreement and Latvian legislation.
>
> The persons to whom this agreement applies ... and who were permanently resident within the territory of the Republic of Latvia before 28 January 1992, including those in respect of whom the relevant formalities have not been carried out and who are on the lists verified by both parties and appended to this agreement, shall retain the right to reside without hindrance in the territory of Latvia, if they so desire. By agreement between the Parties, any persons who were permanently resident within the territory of Latvia before 28 January 1992 and, for various reasons, have not been included on the lists referred to above may be added to them. ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

68. The applicants complained that their removal from Latvia had violated Article 8 of the Convention, which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society

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

A. The parties' submissions

1. The applicants

69. The applicants claimed that their removal from Latvia had violated their right to respect for their "private life", their "family life" and their "home" within the meaning of Article 8 of the Convention. They considered that their removal had not been required by Latvian law or by the Latvian-Russian treaty on the withdrawal of the Russian troops, interpreted correctly, and that in any event the resultant interference with their above rights had pursued no legitimate aim and had not been necessary in a democratic society. The applicants also stated that, on the basis of the Latvian courts' incorrect interpretation of the Latvian-Russian treaty on the withdrawal of the Russian troops, they had lost their legal status in Latvia and had been forced to leave the country as a result of political changes rather than of their own actions.

70. In this connection, the applicants submitted that they did in fact have the right to obtain legal status in Latvia according to Latvian law, and that the Latvian-Russian treaty on the withdrawal of the Russian troops had no bearing on that right. In their view, they were entitled to be registered as permanent residents of Latvia under the Status of Former USSR Citizens Act. According to the applicants, the only restriction imposed by that law (section 1) and also by the Aliens Act (section 23) on the right to obtain permanent residence in Latvia concerned persons who had arrived in Latvia as a member of the family of a Soviet or Russian military officer who had not retired from service by 28 January 1992. However, the first applicant had arrived in Latvia as a member of the family of her father, who had retired from the military before 28 January 1992, and the second applicant had been born in Latvia and had lived there all her life. Accordingly, the applicants were entitled to obtain the status of "ex-USSR citizens" and permanent residence permits, and to be entered in the register of Latvian residents. The applicants concluded in this respect that their entry in the register on 3 March 1994 had been perfectly lawful.

71. The applicants further submitted that the Latvian authorities had improperly interpreted Latvian law by subsequently quashing their legal status in Latvia on the ground that they were close relatives of Nikolay Slivenko. In the applicants' view, their right to live in Latvia was not dependent on the legal status of Nikolay Slivenko. The applicants admitted that the Latvian-Russian treaty on the withdrawal of the Russian troops had required Russian military officers to leave Latvia. But the treaty did not deal with situations such as the applicants', where members of the family of a

Russian military officer had arrived in Latvia independently from him, had entered into family ties with him while already living there, and had obtained legal status in Latvia following the restoration of Latvia's independence. Thus, the treaty could not be applied in regard to the applicants "without finding out how they had arrived in Latvia and what national laws regulated their status". In the applicants' view, the Latvian authorities' decision to apply the treaty and to annul their legal status in Latvia had been unlawful.

72. The applicants also contested the respondent Government's allegation that the Latvian authorities had annulled their legal status in Latvia on the further ground that when applying for permanent residence the first applicant had submitted false information as to Nikolay Slivenko's occupation. The applicants stated that the first applicant had never lied to the authorities about her husband's status, and that the document submitted in this connection by the respondent Government was falsified (see paragraphs 19-20 above). In this respect the applicants also pointed out that during the subsequent proceedings concerning the legality of their stay in Latvia the immigration authorities had not referred to any false information submitted by them, and the Latvian courts had not established that the applicants had at any point submitted the information mentioned by the respondent Government. The applicants concluded in this respect that they ought to have been allowed to stay in Latvia, that the deportation order of 20 August 1996 had constituted an interference with their rights under Article 8 of the Convention and that that interference had not been authorised by law within the meaning of the second paragraph of that Article.

73. Furthermore, the interference had pursued no legitimate aim within the meaning of that provision, and had in any event not been necessary in a democratic society. The applicants stated that during the proceedings concerning the legality of their stay in Latvia no consideration of national security, public order or prevention of crime had been mentioned by the domestic courts; the proceedings had related solely to the legality of their stay in accordance with the domestic legislation. Therefore, no ground referred to in the second paragraph of Article 8 had been advanced by the domestic courts to justify their removal from Latvia.

74. According to the applicants, they were completely integrated into Latvian society and had developed irreplaceable personal, social and economic ties in Latvia as a result of the following circumstances.

(a) The first applicant had lived in Latvia from the age of one month and the second applicant had been born in Latvia and had always lived there.

(b) There had been no separate lists of Soviet military officers or their close relatives in the register of residents during the Soviet rule of Latvia until 1991. During that period Nikolay Slivenko and the applicants had been fully-fledged citizens of the USSR living in the territory of Latvia and having their "registration" (see paragraph 63 above) in Riga; therefore their

formal residential status until 1991 had been the same as that of other Soviet citizens living in Latvia.

(c) The first applicant had been educated in Latvia, and from the age of 17 she had worked in various organisations and companies in the city of Riga. She had never worked for a Soviet or Russian military organisation.

(d) From 1991 until 1995 the first applicant had worked in certain Latvian companies, and in one of them she had worked as a secretary. In the first applicant's view, this fact attested to her proficiency in the Latvian language.

(e) The second applicant had completed her secondary education in Latvia in 1999, obtaining, *inter alia*, a certificate attesting to her fluency in the Latvian language.

(f) The first applicant's parents had lived in Latvia since 1959; they had obtained the status of "ex-USSR citizens" and currently lived in Latvia.

(g) Nikolay Slivenko had arrived in Latvia in 1977. Following the first applicant's marriage to him in 1980, they had lived in a flat in Riga among the civilian population, not in the Soviet army barracks or any other special or restricted area.

(h) Almost half of the Latvian population during the Soviet era and about 40% of the Latvian population today consisted of persons of Russian ethnic origin. Therefore, the applicants had had no problems leading a normal life in Latvia as a result of the fact that they were native Russian speakers. In any event, while the applicants had graduated from educational establishments teaching in Russian, they were also fully proficient in Latvian.

75. In view of the above circumstances, the applicants were completely integrated into Latvian society, and the level of their integration had not been different from that of persons having the status of permanent residents of Latvia. Following the restoration of Latvian independence in 1991, the applicants had considered that their future lay exclusively in Latvia. The applicants had had no connections, acquaintances or accommodation in any other State. After Nikolay Slivenko's move to Russia in 1996, he had obtained a flat from the local authorities in Kursk as a retired serviceman, not in compensation for his removal from Latvia. The applicants submitted that the Latvian authorities had separated them by force from Nikolay Slivenko, who had not been joined in Russia by the applicants until 1999. In addition, in forcing the applicants out of Latvia, the authorities had also separated them from the first applicant's elderly parents. The prohibition on the applicants' entering Latvia as visitors until 20 August 2001 had aggravated that situation. Against this background, the right to respect for the applicants' private life, family life and home had been violated as a result of their removal from Latvia.

2. The respondent Government

76. The respondent Government submitted that the issue of the applicants' removal from Latvia ought to be examined in the context of the eradication of the consequences of the illegal occupation of Latvia by the Soviet Union, which had been completed by the withdrawal of the Russian troops from the territory of Latvia.

77. The respondent Government further submitted that there had been no interference with the applicants' rights under Article 8 of the Convention. In any event, even assuming that their removal had constituted an interference with their rights under Article 8, it had been compatible with Latvian law and the Latvian-Russian treaty on the withdrawal of the Russian troops. Furthermore, the interference had pursued the legitimate aims of the protection of national security and the prevention of disorder and crime and it had been necessary in a democratic society in accordance with the second paragraph of Article 8 of the Convention.

78. The respondent Government stated that, pursuant to the third paragraph of Article 2 of the Latvian-Russian treaty on the withdrawal of the Russian troops, all those who had been active servicemen in the Russian army on 28 January 1992, including those discharged thereafter, had been required to leave Latvia. Therefore, the treaty had been duly applied in regard to Nikolay Slivenko and the applicants as members of his family, and the applicants' removal had been compatible with the treaty and Latvian law.

79. According to the respondent Government, prior to the withdrawal of the Russian armed forces from Latvia, all Russian military personnel stationed in Latvia had been required to obtain temporary residence permits. It was in this context that on 31 March 1994 the Russian authorities had submitted a list indicating the names of Russian military officers, including Nikolay Slivenko and the applicants as members of his family, in order for such temporary residence permits to be issued. The respondent Government stated that the list had attested that the applicants were “related to [members of the] Russian armed forces, [had no] right to be entered in the register of Latvian residents, and thus would leave Latvia during the forthcoming withdrawal of the Russian troops” (see also paragraphs 23-24 above).

80. The lists of 10 December 1994 and 16 October 1995 bearing the name of Nikolay Slivenko had been submitted by the Russian embassy in Latvia pursuant to the fifth paragraph of Article 3 of the Latvian-Russian treaty on the withdrawal of the Russian troops. The list of 10 December 1994 had been submitted to the Latvian authorities by the head of the Social Maintenance Section of the Russian embassy in Riga, indicating the names of the Russian military personnel, including Nikolay Slivenko, who had been discharged from the Russian armed forces after 28 January 1992 (see also paragraph 27 above). The list of 16 October 1995 had been submitted by the same Russian authority as an update of the list of 10 December 1994, indicating the Russian military personnel who had left Latvia or had

remained in Latvia, mostly for technical reasons, and persons who had requested permanent residence in Latvia despite the fact that they had been discharged from the Russian armed forces after 28 January 1992 (see also paragraph 28 above).

81. The respondent Government stated that the submission by the Russian authorities of the above lists, together with the fact that Nikolay Slivenko had been granted accommodation in Russia, had constituted notification by Russia that Nikolay Slivenko and the applicants, as members of his family, were subject to the provisions of the treaty.

82. The respondent Government further stated that the treaty had made no distinction between close relatives of a Russian military officer who had arrived in Latvia in connection with that officer's duties, and those persons who had lived in Latvia prior to joining the family of a military officer required to leave Latvia under the treaty. Therefore, the fact that the first applicant had arrived in Latvia as a relative of her father (who had not been required to leave Latvia under the treaty), and not as a relative of Nikolay Slivenko, had no bearing on the applicants' obligation under the treaty to leave Latvia together with Nikolay Slivenko.

83. With reference to the interpretation by the Latvian courts of the provisions concerning the register of residents (see paragraph 56 above), the respondent Government stated that domestic law (considered separately from the treaty) provided for specific legal treatment of persons who were close relatives of a Russian military officer required to leave the country under the treaty, and who had not arrived in Latvia in connection with the service of any of their relatives in the Soviet armed forces. Such persons could obtain permanent residence in Latvia, provided that they had grounds recognised in Latvian law for doing so. By contrast, no right to residence could be afforded to persons such as the applicants, who were close relatives of a Russian military officer required to leave Latvia under the treaty, and who had arrived in Latvia in connection with the service of another relative in the Soviet armed forces, even if that relative had been entitled to remain in Latvia. The respondent Government concluded in this connection that the applicants had been unable to claim permanent residence in Latvia under the domestic law, not only because they belonged to Nikolay Slivenko's family, but also because the first applicant had arrived in Latvia as a member of the family of another Soviet military officer, her father.

84. The respondent Government stated that they had no statistics as to how many persons had been in a legal situation similar to that of the applicants – that is, being members of the family of a Russian military officer required to leave Latvia under the treaty and, at the same time, belonging to the group of persons who had arrived in Latvia in connection with the service of other relatives in the Soviet armed forces.

85. The respondent Government could, however, confirm that about 900 persons – relatives of Russian military officers required to leave Latvia

under the treaty – had been able to legalise their stay in Latvia because those persons had not arrived in Latvia in connection with their relatives' service in the Soviet armed forces, and had been either Latvian citizens or relatives of Latvian citizens. However, the applicants did not belong to any of those categories.

86. The respondent Government further submitted that the Latvian authorities had also annulled the applicants' legal status in Latvia on the ground that the first applicant had submitted false information as to Nikolay Slivenko's occupation. The respondent Government stated that the document submitted by them as confirmation of the false statements by the first applicant had been genuine, that it had been included in the case file during the domestic proceedings, and that it had been used as evidence and referred to before the Latvian courts (see paragraphs 19-20 above).

87. The respondent Government also stated that the applicants had not been prevented from visiting Latvia following their move to Russia. Furthermore, the applicants had been informed that they could obtain an entry visa to Latvia if they complied voluntarily with the deportation order. The applicants' statement that they had therefore been prevented from taking care of the first applicant's parents was thus unjustified.

88. According to the respondent Government, the applicants, while living in the territory of Latvia, had never been integrated into Latvian society in view of the following circumstances.

(a) The applicants had not chosen Latvia as their place of residence but had arrived there in connection with the military service of members of their family.

(b) Soviet military servicemen had not had the same residence status in the former Soviet Union as other Soviet citizens; upon commencing their service, all military servicemen had been required to hand over their passport to the military authorities, to be replaced by a conscription document serving as their only piece of identification.

(c) In their everyday life the military personnel of the USSR stationed in the territory of Latvia had not been required to deal with the local inhabitants or authorities as the majority of services, such as medical care and accommodation, had been provided by the military authorities.

(d) The applicants were not proficient in the Latvian language; in particular, the certificate awarded to the second applicant on leaving secondary school attested to the lowest degree of proficiency in the Latvian language.

(e) According to the respondent Government, the facts that the applicants were Russian-speaking, held Russian citizens' passports and had accommodation in Russia also served as evidence that they had integrated into Russian, not Latvian, society. The respondent Government also stated that the first applicant's parents had lived separately from the applicants, and that there was no evidence that they had been in regular need of help from them for medical or any other care.

89. Against this background, the respondent Government concluded that the applicants' removal had been compatible with Article 8 of the Convention, given in particular that the Convention could not be interpreted as creating rights for military servicemen of a foreign State or members of their family to claim permanent residence in the country in which they are posted.

B. The third party's comments

90. According to the Russian Government, the removal of the applicants had not been required by the Latvian-Russian treaty on the withdrawal of the Russian troops as Nikolay Slivenko had already been discharged from the Russian armed forces on 2 March 1994. The treaty had not concerned persons who had been discharged from the armed forces before its signature and entry into force. The Russian authorities had not indicated to the Latvian authorities that Nikolay Slivenko and his family should be removed under the fifth paragraph of Article 3 of the treaty. The interpretation by the respondent Government that they had had to be removed from Latvia as part of the treaty-based withdrawal was therefore wrong.

91. The applicants had completely integrated into Latvian society as they had been nationals of the Latvian Soviet Socialist Republic. There had been no formal or other differences in the applicants' status compared with that of other USSR citizens living in Latvia at the material time. Any distinction of the applicants' legal status in Latvia as a result of the political changes in 1991 had therefore been completely unjustified.

92. In any event, the interference with the applicants' rights as a result of their removal had pursued no legitimate aim within the meaning of Article 8 § 2 of the Convention, and had not been necessary in a democratic society as there was no evidence showing that Nikolay Slivenko or the applicants could have caused any damage to the interests of security, safety, public order or the economic well-being of Latvia. Furthermore, the Latvian authorities had taken no account of the fact that the applicants had lived in Latvia almost all their lives and had been completely integrated into Latvian society. The third party concluded that the applicants had been arbitrarily excluded from their homeland in breach of Article 8 of the Convention.

C. The Court's assessment

1. *Interference with the applicants' rights under Article 8 § 1 of the Convention*

93. The applicants complained that their removal from Latvia had violated their rights guaranteed by Article 8 of the Convention in that the measures taken against them in that connection had not respected their

private life, their family life and their home in Latvia. They claimed that those measures had not been in accordance with the law, had not pursued any legitimate aim and could not be regarded as necessary in a democratic society within the meaning of Article 8 § 2. The Court must first determine whether the applicants are entitled to claim that they had a "private life", "family life" or "home" in Latvia within the meaning of Article 8 § 1, and, if so, whether their removal from Latvia amounted to an interference with their right to respect for them.

94. In the Convention case-law relating to expulsion and extradition measures, the main emphasis has consistently been placed on the "family life" aspect, which has been interpreted as encompassing the effective "family life" established in the territory of a Contracting State by aliens lawfully resident there, it being understood that "family life" in this sense is normally limited to the core family (see, *mutatis mutandis*, *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 21, § 45; see also, *X v. Germany*, no. 3110/67, Commission decision of 19 July 1968, Collection of decisions 27, pp. 77-96). The Court has, however, also held that the Convention includes no right, as such, to establish one's family life in a particular country (see, *inter alia*, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 34, § 68; *Gül v. Switzerland*, judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, pp. 174-75, § 38; and *Boultif v. Switzerland*, no. 54273/00, § 39, ECHR 2001-IX).

95. The Court further observes that the case-law has consistently treated the expulsion of long-term residents under the head of "private life" as well as that of "family life", some importance being attached in this context to the degree of social integration of the persons concerned (see, for example, *Dalia v. France*, judgment of 19 February 1998, *Reports* 1998-I, pp. 88-89, §§ 42-45). Moreover, the Court has recognised that Article 8 applies to the exclusion of displaced persons from their homes (see *Cyprus v. Turkey* [GC], no. 25781/94, § 175, ECHR 2001-IV).

96. As regards the facts of the present case, the first applicant arrived in Latvia in 1959, when she was only one month old. Until 1999, by which time she was 40 years of age, she continued to live in Latvia. She attended school there, found employment and married. Her daughter, the second applicant, was born in Latvia in 1981 and lived there until the age of 18, when she was compelled to leave the country together with her mother, having just completed her secondary education (see paragraphs 16 and 46 above). It is undisputed that the applicants left Latvia against their own will, as a result of the unsuccessful outcome of the proceedings concerning the legality of their stay in Latvia. They were thus removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being. Furthermore, as a result of the removal, the applicants lost the flat in which they had lived in Riga (see paragraphs 32 and 46

above). In these circumstances, the Court cannot but find that the applicants' removal from Latvia constituted an interference with their “private life” and their “home” within the meaning of Article 8 § 1 of the Convention.

97. In contrast, even though the applicants evidently had an established “family life” in Latvia, the impugned measures of removal from the country were not aimed at breaking up the family, nor did they have such an effect, given that the Latvian authorities deported the family, namely Nikolay, Tatjana and Karina Slivenko, in implementation of the Latvian-Russian treaty on the withdrawal of Russian troops. In the light of the Court's above-mentioned case-law, it is clear that under the Convention the applicants were not entitled to choose in which of the two countries – Latvia or Russia – to continue or re-establish an effective family life. Furthermore, the existence of “family life” could not be relied on by the applicants in relation to the first applicant's elderly parents, adults who did not belong to the core family and who have not been shown to have been dependent members of the applicants' family, the applicants' arguments in this respect not having been sufficiently substantiated. Nonetheless, the impact of the impugned measures on the applicants' family life – notably their ultimate enforced migration as a family unit to the Russian Federation – is a relevant factor for the Court's assessment of the case under Article 8 of the Convention. The Court will also take into account the applicants' link with the first applicant's parents (the second applicant's grandparents) under the head of the applicants' “private life” within the meaning of Article 8 § 1 of the Convention.

98. The Court will accordingly concentrate its further examination on the question whether the interference with the applicants' right to respect for their “private life” and their “home” was justified or not.

2. Justification of the interference

99. Such interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being “in accordance with the law”, as pursuing one or more of the legitimate aims listed therein, and as being “necessary in a democratic society” in order to achieve the aim or aims concerned.

(a) “In accordance with the law”

100. According to the established case-law of the Court, the expression “in accordance with the law” requires that the impugned measure should have some basis in domestic law, and it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see *Amann v. Switzerland* [GC], no. 27798/95, § 50, ECHR 2000-II).

101. In the present case, the respondent Government relied on two different grounds as the legal basis for the deportation order issued in respect of the applicants: in the first place, they relied on the decisions of

the Latvian courts, according to which the applicants were required to leave the country under the provisions of the Latvian-Russian treaty on the withdrawal of the Russian troops; secondly, they alleged, as an additional reason justifying the deportation of the applicants, that the first applicant, when requesting her entry in the register of Latvian residents, had submitted false information concerning her husband's occupation.

102. The Court considers it appropriate to deal first with the second, subsidiary ground relied on by the respondent Government. In this context, it notes that the applicants and the third party disputed that false information had been submitted and claimed that the document relied on by the respondent Government in this connection was a forgery. Indeed, the third party submitted an expert report by a forensic institute in Moscow which, they claimed, proved that the document had been falsified. They further asked the Court to order an independent expert opinion with a view to corroborating the Moscow institute's findings. However, in a decision of 12 July 2002 the Court rejected that request (see paragraph 12 above).

103. The Court points out that the basis for its examination must always be the impugned decisions of the domestic authorities and the legal grounds on which they relied. It cannot take into account any alternative legal grounds suggested by the respondent Government in order to justify the measure in question if those grounds are not reflected or inherent in the decisions of the competent domestic authorities. In the present case, it has not been shown that any of the decisions of the Latvian authorities, either in the proceedings brought by the first applicant's husband prior to the issuing of the deportation order (see paragraphs 25-26 and 29-30 above) or in those subsequently brought by the applicants themselves with a view to challenging that order (see paragraphs 34-39 above), relied on the submission of false information as a ground for justifying the removal of any of the members of the Slivenko family from Latvian territory. Under these circumstances, the respondent Government's submissions on this point must be disregarded and the applicants' and the third party's request for an expert opinion no longer has any purpose.

104. There remains the first and principal ground relied on by the respondent Government, the argument that the applicants' removal from Latvia was required by the bilateral treaty on the withdrawal of the Russian troops. In this connection, the applicants and the third party argued that the Latvian courts had incorrectly interpreted the treaty, that according to a correct interpretation of the treaty the first applicant's husband and indeed the applicants themselves could not have been ordered to leave Latvia, and that the Russian authorities had never requested the removal of the applicants' family from Latvia. The Court notes that here, too, the parties disagreed on certain factual matters, namely the date of the retirement of the first applicant's husband and the nature and authenticity of the lists of 31 March 1994, 10 December 1994 and 16 October 1995.

105. The Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see *Amann*, cited above, § 52). This also applies where international treaties are concerned; it is for the implementing party to interpret the treaty, and in this respect it is not the Court's task to substitute its own judgment for that of the domestic authorities, even less to settle a dispute between the parties to the treaty as to its correct interpretation. Nor is it the task of the Court to re-examine the facts as found by the domestic authorities as the basis for their legal assessment. The Court's function is to review, from the point of view of the Convention, the reasoning in the decisions of the domestic courts rather than to re-examine their findings as to the particular circumstances of the case or the legal classification of those circumstances under domestic law.

106. In the present case, the Latvian courts stated that the ground for the applicants' removal had been the Latvian-Russian treaty on the withdrawal of the Russian troops. In this context they also interpreted certain provisions of Latvian domestic legislation in the light of the treaty, in particular by concluding that neither the Russian military officers required to leave the country nor the members of their families qualified for residential status in Latvia as "ex-USSR citizens" (Article 2, second paragraph, of the treaty). Admittedly, at the time when the applicants first applied for their entry in the register of residents as "ex-USSR citizens", the treaty was not yet in force and, accordingly, only the relevant provisions of the domestic legislation applied. However, later on, the relevant domestic provisions could legitimately be interpreted and applied in the light of the treaty, a legal instrument which was clearly accessible to the applicants at the relevant time.

107. As to the foreseeability of the combined application of the treaty provisions and domestic law in the applicants' case, the Court is also satisfied that the requirements of the Convention were met. The applicants must have been able to foresee to a reasonable degree, at least with the advice of legal experts, that they would be regarded as covered by the treaty provisions requiring the departure of relatives of Russian military officers affected by the withdrawal and that, consequently, they could not be granted permanent residential status in Latvia as provided for in the domestic legislation. Absolute certainty in this matter could not be expected.

108. In any event, the decisions of the Latvian courts do not appear arbitrary. In particular, as regards the applicability of the treaty to the applicants' situation, the Court does not find arbitrary the interpretation of the third paragraph of Article 2 of the treaty according to which the cut-off date applied for determining whether or not a military officer was required to leave was 28 January 1992, the date when the Russian Federation assumed jurisdiction over the former Soviet armed forces stationed in Latvia (see paragraph 17 above). As the first applicant's husband was discharged from the armed forces after this date, the treaty could reasonably be regarded as applying to him and his family. Also, the date of his actual

discharge, whether before or after the signature of the treaty, could reasonably be regarded as irrelevant to the applicability of the treaty, notwithstanding the contrary view of the third party (see Articles 2, third paragraph, and 15 of the treaty). Furthermore, as to the legal assessment of the various lists submitted by the Russian authorities to the Latvian authorities, it could reasonably be considered that the validity and lawfulness of the deportation order itself, a measure taken under Latvian domestic law in implementation of the treaty, did not depend on the submission of a specific request by Russia.

109. The applicants' removal from Latvia can accordingly be considered to have been "in accordance with the law" within the meaning of Article 8 § 2 of the Convention.

(b) Legitimate aim

110. The respondent Government submitted that the applicants' removal from Latvia had pursued the legitimate aims of the protection of national security and the prevention of disorder and crime. They emphasised in this connection that the measure had to be seen in the context of the "eradication of the consequences of the illegal occupation of Latvia by the Soviet Union". The applicants contested those submissions, none of the above aims having been mentioned in the domestic proceedings concerning their own case, which had been limited to reviewing the lawfulness of their residential status in Latvia. The third party objected to the respondent Government's statement describing the situation of Latvia prior to 1991 as having been illegal under international law.

111. The Court considers that the aim of the particular measures taken in respect of the applicants cannot be dissociated from the wider context of the constitutional and international law arrangements made after Latvia regained its independence in 1991. In this context it is not necessary to deal with the previous situation of Latvia under international law. It is sufficient to note that after the dissolution of the USSR, former Soviet military troops remained in Latvia under Russian jurisdiction, at the time when both Latvia and Russia were independent States. The Court therefore accepts that with the Latvian-Russian treaty on the withdrawal of the Russian troops and the measures for the implementation of this treaty, the Latvian authorities sought to protect the interest of the country's national security.

112. In short, the measures of the applicants' removal can be said to have been imposed in pursuance of the protection of national security, a legitimate aim within the meaning of Article 8 § 2 of the Convention.

(c) "Necessary in a democratic society"

113. A measure interfering with rights guaranteed by Article 8 § 1 of the Convention can be regarded as being "necessary in a democratic society" if it has been taken in order to respond to a pressing social need and if the means employed are proportionate to the aims pursued. The national

authorities enjoy a certain margin of appreciation in this matter. The Court's task consists in ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual's rights protected by the Convention on the one hand and the community's interests on the other.

114. In the present case the applicants, who had resided in Latvia almost all their lives, but who had become stateless when Latvia regained its independence in 1991, were required to leave the country under a deportation order issued in respect of them, as members of the family of a retired Russian military officer, pursuant to the Latvian-Russian treaty on the withdrawal of the Russian troops. In connection with this measure, they were refused entry in the register of Latvian residents as "ex-USSR citizens".

115. The Court reiterates that no right of an alien to enter or reside in a particular country is as such guaranteed by the Convention. It is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens (see, among many other authorities, *Dalia*, cited above, p. 91, § 52).

116. In the Court's view, the withdrawal of the armed forces of one independent State from the territory of another, following the dissolution of the State to which they both formerly belonged, constitutes, from the point of view of the Convention, a legitimate means of dealing with the various political, social and economic problems arising from that dissolution. The fact that in the present case the Latvian-Russian treaty provided for the withdrawal of all military officers who after 28 January 1992 had been placed under Russian jurisdiction, including those who had been discharged from the armed forces prior to the entry into force of the treaty (which in this respect therefore had retroactive effect), and that it also obliged their families to leave the country, is not in itself objectionable from the point of view of the Convention and in particular Article 8. Indeed, it can be said that this arrangement respected the family life of the persons concerned in that it did not interfere with the family unit and obliged Russia to accept the whole family within its territory, irrespective of the origin or nationality of the individual family members.

117. In so far as the withdrawal of the Russian troops interfered with the private life and home of the persons concerned, this interference would normally not appear disproportionate, having regard to the conditions of service of military officers. This is true in particular in the case of active servicemen and their families. Their withdrawal can be treated as akin to a transfer to another place of service, which might have been ordered on other occasions in the course of their normal service. Moreover, it is evident that the continued presence of active servicemen of a foreign army, with their families, may be seen as being incompatible with the sovereignty of an independent State and as a threat to national security. The public interest in

the removal of active servicemen and their families from the territory will therefore normally outweigh the individual's interest in staying. However, even in respect of such persons it is not to be excluded that the specific circumstances of their case might render the removal measures unjustified from the point of view of the Convention.

118. The justification of removal measures does not apply to the same extent to retired military officers and their families. After their discharge from the armed forces a requirement to move for reasons of service will normally no longer apply to them. While their inclusion in the treaty does not as such appear objectionable (see paragraph 116 above), the interests of national security will in the Court's view carry less weight in respect of this category of persons, while more importance must be attached to their legitimate private interests.

119. In the present case, the first applicant's husband retired from the military after 28 January 1992, the deadline established by the third paragraph of Article 2 of the treaty, and was thus regarded by the Latvian authorities as being concerned by the withdrawal of troops, together with active servicemen. Regardless of the actual date of his retirement, which is disputed by the parties, the fact remains that from mid-1994 onwards, and during the proceedings concerning the legality of the applicants' stay in Latvia, the first applicant's husband was already retired. Yet that fact made no difference to the determination of the applicants' status in Latvia.

120. The Court further takes account of the information provided by the respondent Government on the treatment of hardship cases. According to that information about 900 persons (Latvian citizens or close relatives of Latvian citizens) were able to legalise their stay in Latvia notwithstanding their status as relatives of Russian military officers required to leave (see paragraphs 57 and 85 above). This shows that the Latvian authorities were not of the opinion that the treaty's provisions on the withdrawal of troops had to be applied without exceptions. On the contrary, the authorities considered that they had some latitude which allowed them to ensure respect for the private and family life and the home of the persons concerned, in accordance with the requirements of Article 8 of the Convention. As regards Latvian citizens, their expulsion would moreover have contravened Article 3 of Protocol no. 4 to the Convention. In any event, the Court reiterates that the treaty cannot serve as a valid basis for depriving the Court of its power to review whether there was an interference with the applicants' rights and freedoms under the Convention, and, if so, whether such interference was justified (see the admissibility decision in the present application, § 62, ECHR 2002-II).

121. The Court notes that the derogation from the obligation to leave was not limited to persons holding Latvian citizenship, but was apparently extended to other residents, the cases in question being decided on a case-by-case basis. However, it seems that in this context the authorities did not examine whether each person concerned presented a specific danger to

national security or public order. Nor has any allegation been made in this particular case that the applicants presented such a danger. The public interest instead seems to have been perceived in abstract terms underlying the legal distinctions made in domestic law.

122. The Court considers that schemes such as the present one for the withdrawal of foreign troops and their families, based on a general finding that their removal is necessary for national security, cannot as such be deemed to be contrary to Article 8 of the Convention. However, application of such a scheme without any possibility of taking into account the individual circumstances of persons not exempted by the domestic law from removal is in the Court's view not compatible with the requirements of that Article. In order to strike a fair balance between the competing interests of the individual and the community, the removal of a person should not be enforced where such measure is disproportionate to the legitimate aim pursued. In the present case the question is whether the applicants' specific situation was such as to outweigh any danger to national security based on their family ties with former foreign military officers.

123. The respondent Government argued that the applicants had not been sufficiently integrated into Latvian society (see paragraph 88 above). In this connection the Court observes that the applicants have spent virtually all their lives in Latvia (see paragraph 96 above). It is true that the applicants are not of Latvian origin, and that they arrived and lived in Latvia – then part of the USSR – in connection with the service of members of their family (the first applicant's father and her husband) in the Soviet armed forces. However, the applicants also developed personal, social and economic ties in Latvia unrelated to their status as relatives of Soviet (and later Russian) military officers. This is shown by the fact that the applicants did not live in army barracks or any other restricted area, but in a block of flats in which there were also civilians. Nor did they study or work in a military institution. The first applicant was able to find employment in Latvian companies after Latvia regained its independence in 1991.

124. As regards the respondent Government's argument about the level of the applicants' proficiency in Latvian, the Court observes that, in so far as this is a relevant consideration, it has not been shown that the degree of the applicants' fluency in the language – although the precise level is in dispute – was insufficient for them to lead a normal everyday life in Latvia. In particular, there is no evidence that the level of the applicants' knowledge of Latvian was in any way different from that of other native Russian speakers living in Latvia, including those who were able to obtain the status of “ex-USSR citizens” in order to remain in Latvia on a permanent basis.

125. Although in 1999 the applicants moved to Russia to join Nikolay Slivenko and eventually obtained Russian citizenship, by that time they had apparently not developed personal, social or economic ties in Russia similar to those they had established in Latvia. In short, the Court finds that at the

relevant time the applicants were sufficiently integrated into Latvian society.

126. Finally, the Court notes the respondent Government's statement (see paragraph 83 above) that the reason for the different treatment of the applicants' case was the fact that the first applicant had arrived in the country in 1959 as a member of the family of a Soviet military officer – her father and the second applicant's grandfather. The decisive element was therefore not the applicants' current family situation – that is, their being, respectively, the wife and daughter of Nikolay Slivenko, a retired Russian military officer who had left Latvia more than two years before the measures were enforced against the applicants – but their family history, that is, the fact of their being, respectively, the daughter and granddaughter of a former Soviet military officer.

127. However, the first applicant's father and the second applicant's grandfather had retired from the military as long ago as 1986. As this was long before the cut-off date provided for in the third paragraph of Article 2 of the treaty, he was not himself subject to the obligation to leave pursuant to the treaty, and there were no formal obstacles to prevent him and his wife from becoming permanent residents of Latvia as “ex-USSR citizens”. In fact, they remained in the country even after the applicants' removal. The Court is unable to accept that the applicants could be regarded as endangering the national security of Latvia by reason of belonging to the family of the first applicant's father, a former Soviet military officer who was not himself deemed to present any such danger.

128. Having regard to all the circumstances, the Court considers that the Latvian authorities overstepped the margin of appreciation enjoyed by the Contracting Parties in such a matter, and that they failed to strike a fair balance between the legitimate aim of the protection of national security and the interest of the protection of the applicants' rights under Article 8. Therefore, the applicants' removal from the territory of Latvia cannot be regarded as having been “necessary in a democratic society”.

129. Accordingly, there has been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

130. The applicants also alleged a violation of Article 14 of the Convention taken in conjunction with Article 8 on account of the difference in the statutory treatment of members of families of Russian military officers who were required to leave Latvia, and that of other Russian-speaking residents of Latvia who as former Soviet citizens could obtain residence in the country.

Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. The parties' submissions

1. The applicants

131. The applicants contended, relying on Article 14 of the Convention taken in conjunction with Article 8, that they had been removed from Latvia as members of the Russian-speaking ethnic minority and of the family of a former Russian military officer. They complained that they had thus been subjected to treatment different from that of other Latvian residents having the status of "ex-USSR citizens". In particular, they submitted that the difference in their treatment from that of persons who had been able to obtain the status of "ex-USSR citizens" could not be justified, in view of the fact that the level of their integration into Latvian society had been the same as that of other Russian speakers.

2. The respondent Government

132. The respondent Government denied that there was a difference in treatment on the ground of language or ethnic origin. They also maintained that the difference in statutory treatment regarding the Russian army officers and their families had been justified, as the removal of the foreign military forces and their families from the territory of independent Latvia had been essential for the protection of national security, and therefore justified under the Convention.

B. The third party's comments

133. The Russian Government submitted that the difference in the treatment in Latvia of former Soviet or Russian military officers and their families on the one hand, and of other Russian-speaking residents of Latvia on the other hand, was not justified by Article 14. There was no evidence to show that Nikolay Slivenko or the applicants could have caused any damage to the security, safety, public order, or economic well-being of Latvia. The applicants' removal had been the result of "ethnic cleansing" by the Latvian authorities. The third party further alleged that there was a difference in the statutory treatment of all ethnic Russians in Latvia.

C. The Court's assessment

134. In view of its finding of a violation of Article 8 of the Convention (see paragraph 129 above), the Court considers that it is not necessary to rule on the applicants' complaints under Article 14 of the Convention taken in conjunction with Article 8.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

135. The applicants complained that their detention on 28-29 October 1998 and the second applicant's detention on 16-17 March 1999 had been arbitrary and unlawful, in breach of Article 5 of the Convention.

The relevant parts of Article 5 § 1 of the Convention read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

A. The parties' submissions

1. The applicants

136. The applicants complained that their detention on 28-29 October 1998 and the second applicant's detention on 16-17 March 1999 had breached Article 5 § 1 of the Convention.

137. In regard to both periods of detention, the applicants submitted that the detention had pursued none of the aims referred to in Article 5 § 1 of the Convention. Furthermore, the detention had been arbitrary in that the Latvian authorities had had no reason to suspect that the applicants could have hidden or that they had had no place of residence. In this regard the detention had not complied with domestic law, namely the requirements set out in section 48 of the Aliens Act.

138. As regards their detention on 28-29 October 1998, the applicants submitted that their appeal against the deportation order should have suspended the validity of the order pursuant to Latvian law as from 7 October 1998, and that their detention had thus been contrary to section 40 of the Aliens Act. The applicants also stated that even the Latvian immigration authorities had themselves admitted, by way of the letter of

29 October 1998, that that period of detention had been unlawful within the meaning of domestic law (see paragraph 43 above).

139. The second applicant also complained that her detention on 16-17 March 1999 had been arbitrary and unlawful. She submitted that at the time she had been a minor, but that she had been detained without notification of her parents or other relatives. Moreover, the Latvian authorities had had no right to detain her during that period in view of the fact that minors could not be expelled from Latvia separately from their parents.

2. The respondent Government

140. The respondent Government submitted that the contested periods of detention had been compatible with the provisions of Article 5 § 1 (f) of the Convention as the unlawfulness of the applicants' stay in Latvia had been confirmed by valid decisions of the domestic courts, and there had been a valid deportation order in respect of them. According to the respondent Government, it had not been necessary for the applicants' detention to pursue any of the "legitimate aims" specified by the applicants as the fact remained that at that time deportation proceedings had been in place, thereby warranting the applicants' detention for the purpose of Article 5 § 1 (f) of the Convention.

141. The detention had not been arbitrary as the applicants had been detained in connection with the deportation proceedings based on the provisions of domestic legislation, which had been clear and accessible to them. The applicants had been arrested because the authorities had "reasonable grounds to believe that these persons [would] hide, or that these persons [had no] fixed place of residence". Moreover, the applicants had only been arrested following their repeated failure to comply with the deportation order, and following numerous warnings from the Latvian authorities in this regard.

142. The respondent Government also submitted that sections 40 and 48-5 of the Aliens Act provided that a deportation order became effective once all remedies had been exhausted, that is, once the complaint concerning the lawfulness of the issuing of the deportation order had been dismissed. According to the respondent Government, such a decision validating the deportation order had been taken by the Riga Regional Court on 6 May 1998. Thereafter, the deportation order had been effective, permitting the detention of the applicants.

143. The detention on 28-29 October 1998 and 16-17 March 1999 had been based on valid decisions by the police, taken pursuant to section 48-5 of the Aliens Act and the relevant provisions of the Police Act. The applicants had read and signed the decisions warranting the detention, and had therefore been aware of the reasons for it. The first applicant's appeal of 7 October 1998 against the deportation order had had no suspensive effect on the validity of the order within the meaning of domestic law as her

appeal in this connection had already been determined by the courts. The respondent Government concluded that the detention had been compatible with the domestic law.

144. The respondent Government also stated that the applicants' release on 29 October 1998 and the second applicant's release on 17 March 1999 had merely been gestures of good will by the immigration authorities for humanitarian reasons, in view of the state of health of the first applicants' parents and the necessity for the second applicant to finish school. As a result of these considerations the immigration authorities had "suspended the execution of the deportation order".

B. The third party's comments

145. The Russian Government stated that the applicants' detention on 28-29 October 1998 and the second applicant's detention on 16-17 March 1999 had been arbitrary and unlawful in that there had been no court order authorising their detention, and no reason had been indicated by the Latvian authorities to justify the detention. In addition, the detention of the second applicant, a minor, on 16-17 March 1999 had been unlawful in that she had had no legal capacity at the material time, and should not have been expelled or detained separately from the first applicant.

C. The Court's assessment

146. The Court is satisfied that the applicants' detention on the two occasions falls to be examined under Article 5 § 1 (f) of the Convention as detention "with a view to deportation". This provision requires only that "action is being taken with a view to deportation" and it is therefore immaterial, for the purposes of its application, whether the underlying decision to expel can be justified under national or Convention law. However, any deprivation of liberty under Article 5 § 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not pursued with due diligence, the detention will cease to be permissible under Article 5 § 1 (f) of the Convention (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, pp. 1862-63, §§ 112-13). In the present case, it has not been disputed that the applicants' detention, which on both occasions was of very short duration (less than twenty-four hours on 28-29 October 1998 and thirty hours on 16-17 March 1999), was ordered in the context of deportation proceedings against them which were still pending on the relevant dates. Moreover, it cannot be said that these proceedings were not pursued with due diligence by the authorities.

147. There remains the question whether the detention was in each case "lawful" and "in accordance with a procedure prescribed by law". In this connection, the Convention refers essentially to the obligation of the

authorities to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness (see *Chahal*, cited above, p. 1864, § 118).

148. The police warrants for the applicants' arrest issued on 29 October 1998 and 16 March 1999 (see paragraphs 42 and 45 above) set out both the relevant domestic legal basis for the arrest (namely, section 48-5 of the Aliens Act in each case) and the factual circumstances underlying the suspicion that the applicants were staying in Latvia illegally. The applicants countersigned the warrants, thereby confirming that they had acquainted themselves with the reasons stated therein (see Article 5 § 2 of the Convention).

149. It is true that in a letter of 29 October 1998 the immigration authority informed the police of its view that the applicants' arrest on that date was "premature" in view of the fact that on 7 October 1998 the first applicant had lodged an appeal against the expulsion order (see paragraph 43 above). However, even the existence of certain flaws in a detention order does not necessarily render the concomitant period of detention unlawful within the meaning of Article 5 § 1 (see, *mutatis mutandis*, *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, pp. 753-54, §§ 42-47) and this will be true, in particular, if, as in the present case, the putative error is immediately detected and redressed by the release of the persons concerned.

150. Moreover, as the respondent Government have observed, the immigration authority's view may not have been based on a correct interpretation of the applicable domestic law. In fact, on the relevant dates, namely 28-29 October 1998 and 16-17 March 1999, the deportation order issued on 20 August 1996 had already become final by virtue of the Supreme Court's judgment of 29 July 1998, and it was therefore apparent that no further remedies were available to the applicants to prevent their removal from Latvia. It is significant in this regard that the "appeal" of 7 October 1998 was not acted upon by the immigration authority, which instead informed the applicants in a letter, also dated 29 October 1998, that they had to leave the country immediately (see paragraph 44 above).

151. In view of the provisions of sections 40 and 48-5 of the Aliens Act, according to which a deportation order becomes effective once all remedies have been exhausted, the Court considers that neither of the arrest warrants issued by the police against the applicants lacked a statutory basis in domestic law. Moreover, there is no evidence that the police acted in bad faith or arbitrarily when issuing those orders.

152. It follows that the applicants' detention on 28-29 October 1998 and 16-17 March 1999 was ordered "in accordance with a procedure prescribed by law" and that it was "lawful" within the meaning of Article 5 § 1 (f) of the Convention. There has thus been no violation of this provision in the present case.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

153. The applicants further complained that they had not been able to obtain judicial review of their detention, contrary to the requirements of Article 5 § 4 of the Convention, which reads as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. The parties' submissions

1. The applicants

154. The applicants submitted that the absence of any possibility of applying to a court in order to contest the lawfulness of their detention on 28-29 October 1998 and 16-17 March 1999 had breached Article 5 § 4 of the Convention. In their view, the general possibility of contesting any administrative act in court had not conferred on them the right set forth in Article 5 § 4.

2. The respondent Government

155. The respondent Government submitted, with reference to *Fox, Campbell and Hartley v. the United Kingdom* (judgment of 30 August 1990, Series A no. 182), that Article 5 § 4 of the Convention was not applicable in cases where detainees had been released before a speedy determination of the lawfulness of the detention could have taken place. In view of the very brief periods of the contested detention, the above provision of the Convention had not been applicable in the present case.

156. The respondent Government further stated that the applicants had in any case had the right to challenge their detention in court, by submitting a complaint under the Code of Civil Procedure (Chapter 24-A), which guaranteed the right to appeal to a court against any administrative act breaching personal rights (see paragraph 62 above). In sum, there had been no violation of Article 5 § 4 in this case. The respondent Government stated that they were unable to find any decision by Latvian courts in which a complaint regarding allegedly unlawful detention in the context of deportation proceedings had been examined by means of the aforementioned procedure. However, in their view, the absence of any such case-law did not disprove the existence of such a remedy in practice.

B. The third party's comments

157. The Russian Government supported the applicants' contention, claiming that Latvian law had provided no possibility for the applicants to contest the lawfulness of their detention in court.

C. The Court's assessment

158. The Court notes that both applicants were detained for a period of less than twenty-four hours on 28-29 October 1998, and the second applicant was detained for a period of thirty hours on 16-17 March 1999. On both occasions the applicants were released speedily before any judicial review of the lawfulness of their detention could have taken place. It is not for the Court to determine *in abstracto* whether, had this not been so, the scope of the remedies available in Latvia would have satisfied the requirements of Article 5 § 4 of the Convention. The Court observes in this context that Article 5 § 4 deals only with those remedies which must be made available during a person's detention with a view to that person obtaining speedy judicial review of the lawfulness of the detention capable of leading, where appropriate, to his or her release. The provision does not deal with other remedies which may serve to review the lawfulness of a period of detention which has already ended, including, in particular, a short-term detention such as in the present case.

159. Accordingly, the Court does not find it necessary to examine the merits of the applicants' complaints under Article 5 § 4 of the Convention (see, *mutatis mutandis*, *Fox, Campbell and Hartley*, cited above, pp. 20-21, § 45).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

160. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

161. The applicants claimed 400,000 euros (EUR) for non-pecuniary damage as a result of their enforced removal from Latvia, which they considered their motherland. They alleged that the immigration and other authorities had treated them particularly harshly and severely, as was shown

especially by their detention, and that such treatment justified the amount of compensation they claimed for non-pecuniary damage.

162. The applicants also alleged that they had suffered certain pecuniary damage, namely the loss of earning opportunities in Latvia, and that their property had been taken away by the Latvian authorities. The applicants stated that they were unable to submit any documents in support of their claim for compensation in respect of pecuniary damage as all the relevant documents had been left behind in Latvia. Therefore, the applicants specified no particular sum in regard to this claim.

163. The respondent Government considered the claims to be exorbitant.

164. The third party supported the applicants' claims.

165. The Court has established a breach of Article 8 of the Convention on account of the applicants' removal from Latvia only as regards their right to respect for their private life and their home, but not in relation to any disturbance of their family life. It has furthermore found no violation of Article 5 of the Convention.

166. As to the applicants' claim for compensation in respect of pecuniary damage, the Court notes that they have not specified the amount which they claim under this head, nor have they provided any details concerning the property allegedly lost and the loss of earnings claimed. In any event, the Court cannot discern a sufficient causal link between the alleged pecuniary damage and the breach of the Convention found above.

167. As regards the applicants' claim for compensation in respect of non-pecuniary damage, the Court considers that they have suffered certain damage as a result of the violation found. Making its assessment on an equitable basis, the Court awards each of the applicants EUR 10,000 under this head.

B. Costs and expenses

168. The Court notes that it has granted the applicants legal aid under the Court's legal-aid scheme for the presentation of the case at the hearing, the submission of the applicants' observations and additional comments, the conduct of the friendly-settlement negotiations and secretarial expenses. The applicants submitted no claim for additional legal expenses. Accordingly, the Court is not required to make an award under this head.

C. Default interest

169. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by eleven votes to six that there has been a violation of Article 8 of the Convention;

2. *Holds* by eleven votes to six that it is not necessary to deal separately with the applicants' complaints under Article 14 of the Convention taken in conjunction with Article 8;

3. *Holds* by sixteen votes to one that there has been no violation of Article 5 § 1 of the Convention;

4. *Holds* unanimously that it is not required to deal with the merits of the applicants' complaint under Article 5 § 4 of the Convention;

5. *Holds* by eleven votes to six:
(a) that the respondent State is to pay each of the applicants, within three months, EUR 10,000 (ten thousand euros) for non-pecuniary damage, plus any tax that may be chargeable on the amount by the respondent State;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 9 October 2003.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of the Court, the following separate opinions are annexed to this judgment:

(a) partly concurring and partly dissenting opinion of Mr Kovler;

(b) joint dissenting opinion of Mr Wildhaber, Mr Ress, Sir Nicolas Bratza, Mr Cabral Barreto, Mrs Greve and Mr Maruste;

(c) separate dissenting opinion of Mr Maruste.

L.W.
P.J.M.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE KOVLER

(Translation)

1. As regards Article 8 of the Convention

Although I share the majority's opinion that there has been a violation of Article 8 § 1 of the Convention, I should nevertheless like to clarify my position on the alleged interference with the applicants' "family life", a complaint which the Court has dismissed in its reasoning.

In my humble opinion, in paragraph 97 of its judgment the Court has narrowed the concept of "family life" by taking it to cover ties within the "core family" only. In other words, the Court has opted for the traditional concept of a family based on the conjugal covenant – that is to say, a conjugal family consisting of a father, a mother and their children below the age of majority, while adult children and grandparents are excluded from the circle. That might be correct within the strict legal meaning of the term as used by European countries in their civil legislation, but the manner in which the Court has construed Article 8 § 1 in its case-law opens up other horizons by placing the emphasis on broader family ties.

In the actual text of the *Marckx* judgment cited in the instant case, the Court observed that " 'family life', within the meaning of Article 8, includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life" and concluded that " 'respect' for a family life so understood implies an obligation for the State to act in a manner calculated to allow these ties to develop normally" (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 21, § 45; see also *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 221, ECHR 2000-VIII). To put it another way, the Court could at least have made a more careful distinction between the "family" in the strict legal sense of the term and the broader concept of "family life" set out in *Marckx*.

Accordingly, the assertion in the present judgment that "the existence of 'family life' could not be relied on by the applicants in relation to the first applicant's elderly parents, adults who did not belong to the core family" departs from the case-law referred to above and does not take into account the sociological and human aspects of contemporary European families (I am deliberately leaving aside Muslim and African families since my reasoning relates solely to the geographical area within the Court's jurisdiction). Reference may be made, for example, to the Littré *Dictionnaire de la langue française*, which defines "*famille*" ("family") as "*l'ensemble des individus de même sang qui vivent les uns à côté des autres*" ("a group of persons related by blood who live together"). Even if

that concept is not necessarily a legal one, it reflects the perception of those subject to our courts' jurisdiction.

The restrictive concept of a conjugal family (known as a “nuclear family” in legal anthropology) is becoming obsolete in the light of the obvious changes reflected in family legislation recently enacted in a number of European States. At the same time, the tradition of the “extended family”, so strong in east and southern European countries, is enshrined in those countries' basic laws. For example, the Constitution of the Russian Federation – the State of which the applicants are now nationals – provides: “Children over 18 years of age who are able to work shall provide for their parents who are unfit for work” (Article 38 § 3). There are similar provisions in the Constitutions of Ukraine (Article 51 § 2), Moldova (Article 48 § 4) and other countries. This means that in those countries the tradition of helping one's elderly parents is firmly established as a moral imperative written into the Constitution. Those were essentially the considerations guiding the applicants in their ultimately unsuccessful request to the Latvian authorities not to separate them from their elderly, sick ascendants. “Family life” was plainly inconceivable for them if they were denied the possibility of looking after those relatives. What could be more natural or more humane?

It follows, in my opinion, that the applicants' removal amounted to unjustified interference not only with their “private life” and “home” but also, and above all, with their “family life”.

2. As regards Article 5 § 1 of the Convention

I regret that I am unable to agree with the opinion of the majority that there has been no violation of Article 5 § 1 of the Convention in the present case.

I would not have had any complaints about the measures taken to extradite the two applicants, including their arrest, if the Court had not held that their removal from the territory of Latvia had not been “necessary in a democratic society” (see paragraph 128 of the judgment). In the light of the finding of a violation of Article 8 of the Convention, the deportation proceedings, which are covered by Article 5 § 1 (f), are extremely hard to justify in themselves.

While deportation proceedings will often justify depriving a person of his or her liberty on the basis of Article 5 § 1 (f), such a deprivation of liberty must comply with the principle of the “lawfulness” of detention with a view to deportation (see, among other authorities, *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1864, § 118); in other words, the individual must be protected from arbitrariness. In my opinion, that requirement is especially pressing in the case of women, one of whom was a minor.

In general, "... under Article 5 of the Convention any deprivation of liberty must be 'lawful', which includes a requirement that it must be effected 'in accordance with a procedure prescribed by law'. On this point, the Convention essentially refers to national law and lays down an obligation to comply with its substantive and procedural provisions" (see *Witold Litwa v. Poland*, no. 26629/95, § 72, ECHR 2000-III). In the present case the representative of the national authorities stated in a letter to the immigration police that the applicants' arrest on 28 October 1998 had been "premature" (see paragraph 43 of the judgment). The Court accepted the respondent Government's comments that "the immigration authority's view may not have been based on a correct interpretation of the applicable domestic law", which in my opinion does not render the applicants' arrest entirely "lawful". The conduct of the two women, who countersigned the warrants for their arrest, proves that they had no intention of absconding or hiding. Seeing that they had a fixed place of residence until they left the country, there were no valid grounds on which the restrictions imposed on them could be justified as being necessary in a democratic society.

The detention of the second applicant (who at the material time had not reached the age of majority) in a camp outside the city on 16-17 March 1999 was even less "lawful" because the respondent Government failed to show that her arrest satisfied the requirements of section 48-5 of the Aliens Act, the likelihood of her "hiding" being more than illusory. It would be illogical to make a "gesture of good will" by releasing a detainee if there really were grounds for believing that she would attempt to hide. Accordingly, the procedure followed, which had no sound basis in the provisions of section 48-5 of the Act, was not "prescribed by law". The second applicant's arrest cannot have been anything other than an act of intimidation designed to exert psychological pressure on her and to hasten the applicants' departure. Moreover, at the time of her arrest the girl did not have the opportunity to contact a lawyer, or at least her mother, and was forcibly led away into the unknown.

Those are the considerations that have led me to conclude that there has been a violation of Article 5 § 1.

JOINT DISSENTING OPINION OF JUDGES WILDHABER, RESS, Sir Nicolas BRATZA, CABRAL BARRETO, GREVE AND MARUSTE

1. We are unable to agree with the majority of the Court that the expulsion of the present applicants from Latvia gave rise to a violation of Article 8 of the Convention.

2. We fully share the view of the majority not only that the Latvian-Russian treaty of 30 April 1994 on the withdrawal of the Russian troops from Latvia served a legitimate aim in terms of Article 8 of the Convention, but also that the fact that the treaty provided for the withdrawal of all military officers who after 28 January 1992 had been placed under Russian jurisdiction, and that it further obliged their families to leave the country, was not in itself objectionable from the point of view of the Convention. We also endorse the view that, in so far as the withdrawal of the Russian troops interfered with the private life and home of the persons concerned, such interference would not normally appear disproportionate, having regard to the conditions of service of military officers; the continued presence of servicemen of a foreign army, with their families, may, as the judgment points out, be seen as incompatible with the sovereignty of an independent State and as a threat to national security ,and the public interest in their removal from the territory will normally outweigh the individual's interest in staying. All these reasons taken together justified in our view a finding of no violation.

3. Where we therefore fundamentally differ from the majority is in their conclusion that the specific circumstances of the applicants' case were such as to render the removal measures disproportionate and unjustified in terms of Article 8 of the Convention.

4. We note at the outset the specific historical context and purpose for which the treaty was signed, namely the elimination of the consequences of the Soviet rule of Latvia. In the preamble of the treaty both parties to the agreement – Latvia and Russia – accepted that the withdrawal of the Russian troops was intended “to eradicate the negative consequences of their common history” (see paragraph 64 of the judgment). The legitimacy of this purpose of the treaty is, in our view, of foremost importance in assessing the justification for an interference with the rights of individual members of the armed forces and of their families, who were subject to removal from the country under the treaty.

It is also significant to note that the treaty itself did not impose on the Latvian authorities an obligation to justify each measure taken by reference to the actual danger posed to national security by the specific individual concerned, particularly in relation to non-military family members. General schemes such as the present one for the withdrawal of foreign troops and their families do not easily accommodate procedures of individual,

particularised justification on the merits of each and every case (see, *mutatis mutandis*, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, pp. 41-42, § 68). In our view the approach of defining in the governing instrument the broad categories of troops, and the accompanying members of their family, to be withdrawn without reference to their personal history strikes the requisite fair balance between the competing interests of the individual and the community.

5. In finding that such a balance was not struck in the present case, the majority of the Court lay emphasis on a number of features of the case. In particular, reliance is placed on the fact

(i) that the applicants were members of the family of a retired military officer and that the interests of national security should carry correspondingly less weight than in the case of serving officers;

(ii) that the evidence indicated that 900 persons were able to legalise their stay in Latvia, notwithstanding their status as relatives of Russian military officers required to leave, thus showing that the Latvian authorities were not of the opinion that the treaty's provisions had to be applied without exceptions;

(iii) that no allegation had been made in the present case that the applicants presented a specific danger to national security or public order, the public interest being perceived in abstract terms underlying the legal distinctions made in domestic law;

(iv) that, at the time of their removal from Latvia, the applicants were sufficiently integrated into Latvian society, having developed personal, social and economic ties in the country unrelated to their status as relatives of Soviet (and later Russian) military officers;

(v) that the decisive element in the different treatment of the applicants was not their current family situation but the fact of their being the daughter and granddaughter of a former Soviet military officer, who had retired in 1986 and who remained in the country even after the applicants' removal: the applicants could not be regarded as endangering national security by reason of belonging to a family of someone who was not himself deemed to present any such danger.

6. We regret that we do not find that these factors, whether considered individually or in combination, are such as to justify the conclusion that the Latvian authorities failed to strike a fair balance in requiring the removal of the applicants from the territory.

7. As to the first of the factors relied on, the majority have already found that the retrospective character of the treaty so as to include those who had been discharged from the armed forces prior to the entry into force of that treaty was not incompatible with the requirements of the Convention, even though such persons had no active military role at the time of their removal and could be said to pose less of an individual threat to national security. The inclusion of close relatives of members of the armed forces covered by

the treaty, whether still in active service or in retirement, seems to us to be equally justified in terms of the Convention, even though the vast majority of family members, taken individually, would not pose a danger to national security. Having regard to the legitimate aim pursued by the treaty – namely, the repatriation of the totality of a foreign army, including both military personnel and dependants – Article 8 cannot in our view be interpreted as requiring that the treaty be applied in such a manner that close relatives who had resided in Latvia for a considerable time, thereby establishing a home and a private life there, could only be expelled if they personally could be shown to represent a threat to the national security of Latvia. Such an interpretation would undermine the effective implementation of the treaty since, by its very nature, the condition of actual danger to territorial security will hardly ever be satisfied in relation to family members. Once the legitimacy of including family members in the programme of withdrawal has been recognised, we find it difficult to accept that more importance must be attached to the private interests of family members of recently retired officers than to those of officers still in active service.

8. The majority of the Court rely on the fact that, after their discharge from the armed forces, a requirement to move as part of the general conditions of military service will normally no longer apply to military officers and their families. While this is true, the present case is concerned not with a reposting of military officers and their families in accordance with the general conditions of service, but rather with the implementation of the terms of an international treaty, designed to secure the withdrawal of an imposed and long-standing military presence from a foreign territory. In this regard, we would note that the treaty arrangements themselves endeavoured to take account of the family life of the persons concerned, by treating the family as a unit, with the Russian Federation undertaking to accept the whole family within its territory, irrespective of the origin or nationality of the individual members of the family.

9. The fact that in some 900 cases the Latvian authorities had allowed a derogation from the obligation under the treaty to leave the country does not in our view serve to reinforce the applicants' case. The beneficiaries of these derogations were all either Latvian citizens or close relatives of Latvian citizens, and the decisions had not been based on any consideration as to whether each person concerned presented a specific danger to the national security of Latvia (see paragraphs 57 and 85 of the judgment). Furthermore, as regards Latvian citizens, a derogation of this kind was indeed required by the Convention, since their expulsion would have contravened Article 3 of Protocol No. 4 to the Convention. The applicants, in contrast, had no such connection with Latvia. The refusal to grant them permanent residential status in Latvia has been explained by the respondent Government as being due to their dual affiliation to families of military officers: the first applicant

came to the country in 1959 as the daughter of a Soviet military officer then in active service; in 1980 she married another Soviet military officer who had come to Latvia on active service and who later continued to serve in the Russian armed forces stationed in Latvia after that country had regained its independence. The sole reason for the residence of the two applicants in Latvia was thus the presence there of the Soviet armed forces, which with effect from January 1992 became the armed forces of the Russian Federation. That being so, the refusal to grant them a derogation on the grounds of personal hardship was in accordance with the underlying logic of the treaty, which the Court has found to strike a fair balance.

10. It is correctly pointed out in the judgment that the applicants had in the period of their residence in Latvia developed strong links with the country. However, in deciding whether these links were such as to qualify the applicants for special treatment under the treaty, we consider that the Latvian authorities were entitled also to take into account the significant personal ties which the applicants had with Russia. In this connection we would note that the applicants were of Russian national origin and Russian-speaking, attended Russian-speaking educational establishments, and eventually were able to become Russian citizens. The first applicant's husband became a Russian citizen while he was still living in Latvia, and had moved to Russia by the time of the events complained of by the applicants (see paragraphs 21 and 33 of the judgment). From late 1994 onwards, there was also accommodation available for the family in Kursk in Russia (see paragraphs 28, 37 and 46 of the judgment) and it has not been submitted that the applicants have ultimately been unable to pursue any personal, educational or employment activities in Russia. Therefore, while their personal, social and economic ties with Latvia cannot be denied, it also appears that the applicants had equally significant ties of that nature in Russia (see *Dalia v. France*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, pp. 91-92, § 53; see also *C. v. Belgium*, judgment of 7 August 1996, *Reports* 1996-III, p. 924, § 34).

11. In these circumstances, we are unable to conclude that the Latvian authorities overstepped the margin of appreciation afforded to them under Article 8 of the Convention in the particular context of the withdrawal of the Russian armed forces from the territory of Latvia after almost fifty years of Soviet presence there. The Latvian authorities were in our view entitled to consider that the impugned interference with the applicants' right to respect for their private life and their home was “necessary in a democratic society”.

12. In view of this finding, it is necessary to consider the further contention of the applicants that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8 on account of the difference in the statutory treatment of members of families of Russian military officers who were required to leave Latvia and that of other

Russian-speaking residents of Latvia, who as former Soviet citizens could obtain residence in the country.

13. According to the Court's case-law, a difference of treatment is discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see, among other authorities, *Van Raalte v. the Netherlands*, judgment of 21 February 1997, *Reports* 1997-I, p.186, § 39).

14. The applicants asserted that their removal disclosed discrimination on two grounds – their belonging to the Russian-speaking minority, and their belonging to the family of a Russian military officer. We find the applicants' claim that they were discriminated against as Russian speakers to be unsubstantiated. Indeed, a number of other Russian-speaking persons were in fact able to legalise their stay in Latvia. The distinction made in regard to the applicants by the Latvian authorities was not based on their ethnic origin, but on their dual affiliation with families of military officers, one of whom was a member of the Russian armed forces subject to withdrawal under the 1994 treaty. For the reasons already given in examining the complaint under Article 8 itself, these elements could in our view reasonably be taken into account to justify the imposition of the impugned measures to remove the applicants from the territory of Latvia.

15. For the same reasons, we find that the distinction made in the present case on the basis of the applicants' status – that is, the distinction made in the relevant legal provisions and then in the application of those provisions to the applicants – had an objective and reasonable justification and thus did not amount to discrimination within the meaning of Article 14 of the Convention.

16. There has, thus, in our view, been no breach of Article 14 of the Convention taken in conjunction with Article 8.

SEPARATE DISSENTING OPINION OF JUDGE MARUSTE

While sharing the views expressed in the joint dissenting opinion, I would like to express here some more reasons why I am unable to agree with the majority.

Firstly, I think the case is particular in its historical background. From that background flow consequences under constitutional and international law which cannot be disregarded. It is well known and recognised in international law that the Baltic States, including Latvia, lost their independence on the basis of the "Hitler-Stalin Pact" between Nazi Germany and the USSR, which actually refers to the Molotov-Ribbentrop Pact, or the secret protocols that were appended to the non-aggression treaty between the Soviet Union and Germany, which was signed on 23 August 1939. The result of this secret agreement was that Eastern Europe was divided into two spheres of influence, leaving the Baltic States, including Latvia, in the Soviet Union's sphere of interests. This was followed by Soviet threats of force in the form of an ultimatum addressed in 1940 to the Baltic States, including Latvia, in which the USSR demanded a change of government and the entry of Soviet armed forces (in addition to those already stationed in Soviet military bases). The actual entry of military forces and the change of government took place in June 1940.

According to Article 42 of the Hague Regulations on the Laws and Customs of War on Land, a territory is considered occupied "when it is actually placed under the authority of the hostile army". By way of comparison, the Nuremberg Military Tribunal included the ultimatum delivered by Germany to Austria in 1938 among the acts to be judged as "crimes against peace" within the meaning of the 1945 London Charter.

The above actions by the Soviet Union were not recognised by a majority of the international democratic community, including the European Parliament and the Council of Europe. The latter, for example, expressed its attitude in Resolution 189 (1960) on the situation in the Baltic States, noting, "on the twentieth anniversary of the occupation and forcible incorporation into the Soviet Union of the three European States of Estonia, Latvia and Lithuania" that "this illegal annexation took place without any genuine reference to the wishes of the people".

It has been an established principle in international law which is now also enshrined in the Statute of the International Criminal Court (Article 8) that the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies is not allowed. Indeed, according to the same Article 8, it is a war crime.

According to generally recognised principles of international law, every internationally wrongful act of a State entails international responsibility and gives rise to the obligation of that State to restore the *status quo ante*. Consequently, the restoration of the independence of the Baltic States on the

basis of legal continuity and the withdrawal of the Soviet/Russian troops has to be regarded as redress for a historical injustice. This aim was also stressed in the preamble of the Latvian-Russian treaty of 30 April 1994 on the withdrawal of troops, where it was mentioned that by signing the treaty the parties wished to "eradicate the negative consequences of their common history" (see paragraph 64 of the judgment). Thus, the treaty requirement of the withdrawal of military servicemen and their family members (second paragraph of Article 2 of the treaty) is fully in conformity with the principles of international law. Consequently, the aim pursued by the Latvian-Russian treaty of 30 April 1994 was fully legitimate for the purposes of the Convention (see paragraph 111 of the judgment). The Court rightly accepted that the withdrawal of the armed forces of one independent State from the territory of another constitutes an appropriate way of dealing with the various political, social and economic problems arising from that historical injustice.

As Latvia had regained its independence from the USSR in 1991 and the Russian Federation had assumed jurisdiction over the armed forces of the former Soviet Union with effect from 28 January 1992, the scheme established under the treaty covered all military officers together with their families who had been serving in the Russian armed forces in Latvia at that moment, even if they had been discharged prior to the entry into force of the treaty. The programme of withdrawal was not in itself such as to bring the measures ordered in respect of the two applicants outside the margin of appreciation available to the Latvian authorities for achieving the legitimate objective they pursued. It is to be noted that the treaty itself did not impose on the Latvian authorities an obligation to justify each measure taken by reference to the actual danger which the specific individual concerned posed to national security, particularly in relation to non-military family members. Moreover, the list of those to be removed, according to the terms of the treaty, was drawn up not by the Latvian, but by the Russian side. In these circumstances the responsibility for the removal belongs at least to both parties to the treaty and not only to the Latvian side. It must also be noted that, although this was contested by the applicants and the third party, it was the Latvian courts which found that the first applicant had not presented all the necessary information (in the 1995 registration form) about her husband's (military) occupation. The document was known to the applicants, but they never challenged its validity before the domestic courts. They and the third party did so only at a later stage.

Finally, from late 1994 onwards a large-scale Western financial-aid scheme was introduced to accommodate returning Soviet/Russian military personnel, under which accommodation, as decided by the Latvian Supreme Court, was made available to the Slivenko family also. Whereas I understand that for the majority the award of compensation to the applicants was the logical consequence of finding a violation, in the light of this aid

scheme and taking into account the historical context, in which most of those who suffered injustices were never able to get compensation for either pecuniary or non-pecuniary damage, it is hard for me to agree with the financial compensation awarded by the Court.

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

COURT (CHAMBER)

CASE OF STJERNA v. FINLAND

(Application no. 18131/91)

JUDGMENT

STRASBOURG

25 November 1994

In the case of Stjerna v. Finland[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[**], as a Chamber composed of the following judges:

Mr R. RYSSDAL, President,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Mr C. RUSSO,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr J.M. MORENILLA,
Mr L. WILDHABER,

and also of Mr H. PETZOLD, Acting Registrar,

Having deliberated in private on 21 June and 24 October 1994,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court on 9 September 1993 by the European Commission of Human Rights ("the Commission"), within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 18131/91) against the Republic of Finland lodged with the Commission under Article 25 (art. 25) by a Finnish national, Mr Stjerna, on 11 March 1991.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Finland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 8 and 14 (art. 8, art. 14) of the Convention.

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[*] The case is numbered 38/1993/433/512. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr R. Pekkanen, the elected judge of Finnish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 September 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Matscher, Mr L.-E. Pettiti, Mr N. Valticos, Mr B. Walsh, Mr I. Foighel, Mr J.M. Morenilla and Mr L. Wildhaber (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently Mr C. Russo, substitute judge, replaced Mr Valticos, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government of Finland ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 14 March 1994. In a letter of 7 April 1994 the Secretary to the Commission indicated that the Delegate did not wish to reply in writing.

5. On 25 March 1994 the President granted a request from the applicant not to disclose his first name.

6. Between 4 and 9 May 1994 the Commission produced various documents, as requested by the Registrar on the President's instructions.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 May 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr T. GRÖNBERG, Ambassador,
Director General for Legal Affairs, Ministry for Foreign Affairs, *Agent*,
Mr A. KOSONEN, Legal Adviser,
Ministry for Foreign Affairs, *Co-Agent*,
Mr Y. MÄKELÄ, Legal Adviser,
Ministry of Justice, *Adviser*;

- for the Commission

Mr H. DANELIUS, *Delegate*;

- for the applicant

Mr M. FREDMAN, asianajaja, advokat, *Counsel*.

The Court heard addresses by Mr Grönberg, Mr Danelius and Mr Fredman, and also the reply to a question put by one of its members.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

8. Mr Stjerna is a Finnish national and lives in Helsinki.

9. On 28 March 1989 he applied to the County Administrative Board (lääninhallitus, länsstyrelsen) of Uusimaa for permission to change his surname Stjerna (pronounced "Shaerna") to "Tawaststjerna". He maintained that his ancestors had used the proposed name and that he and other members of the Stjerna family had always felt it an injustice only to bear half of the original name. Moreover, the use of his surname gave rise to practical difficulties as it was an old Swedish form, was not well known and was difficult to pronounce. This meant that it was frequently misspelt (as "Stjärna", "Säärna", "Saarna", "Seerna", "Sierna", "Tierna" and "Stjerba").

10. In an opinion of 19 April 1989 submitted to the County Administrative Board, the Advisory Committee on Names (nimilautakunta, nämnden för namnärenden) opposed the change. It had not been shown that the proposed name had been used by his ancestors because the ancestor in question, Mr Fredrik Stjerna, had been born out of wedlock. The ancestors cited were too far back to satisfy the requirements of section 10 (2) of the 1985 Surnames Act (sukunimilaki 694/85, släktnamnslagen 694/85, see paragraph 17 below).

11. In the course of an exchange of views with the Advisory Committee on Names, on 14 June 1989 the applicant stated that his name had given rise to a pejorative nickname "kirnu" in Finnish derived from the Swedish word "kärna" ("churn"). Moreover, in his view, the remoteness of the ancestors in question could not be a ground for refusing to authorise the name change. Referring to a genealogical report, he disputed the allegation that Mr Magnus Fredrik Tawaststjerna was not the father of Mr Fredrik Stjerna.

12. On 25 October 1989 the Advisory Committee on Names recommended that the applicant’s request be rejected; it considered the proposed name inappropriate. Although Mr Stjerna had cited a telling argument in support of his request - the obscure nature of his name - and was a descendant of a person named Tavaststjerna, his ancestor, who had died in 1773, was very far back and the suggested name would result in sources of inconvenience similar to his present name.

13. On 21 November 1989 the applicant told the Advisory Committee on Names that his mail was delayed as a result of his name being misspelt. In line with the spelling recommended by one of its members, he asked for his name to be changed to "Tavaststjerna" (as opposed to Tawaststjerna).

14. On 12 February 1990, on the basis of section 10 (2) of the Surnames Act, the County Administrative Board rejected the applicant’s request for permission to change his name. It was not satisfied that the proposed name

had been used by his ancestors in such a way as to become "established", since the first one to bear his current name had been born out of wedlock. Since the proposed name had been used by ancestors who were very far back, it would not be appropriate to change his name to theirs.

15. The applicant appealed from the County Administrative Board's decision to the Supreme Administrative Court (korkein hallinto-oikeus, högsta förvaltningsdomstolen), which, in a judgment of 14 November 1990, upheld the Board's decision by four votes to one. It observed that it emerged from the written evidence that the applicant's ancestor, Mr Fredrik Stjerna was born in 1764 and had been the illegitimate son of Mr Magnus Fredrik Tavaststjerna. For this reason alone the proposed name could not be considered to have been the "established" name of the applicant's ancestors as required by section 10 (2) of the Surnames Act. In the light of this and the reasoning given by the Board there was no ground for altering the latter's decision.

In the opinion of the minority the name Tavaststjerna had been the "established" name of the applicant's ancestors. The fact that Fredrik Stjerna, the first of his ancestors to be called Stjerna, was born out of wedlock was irrelevant. In view of the inconvenience which the present surname was causing the applicant, the County Administrative Board's decision should be quashed and the case referred back to it.

16. According to the Government a Finnish surname guide of 1984 listed approximately 7,000 which had fallen out of use and, in addition, some 2,000 names based on common Finnish nouns and place names.

II. RELEVANT DOMESTIC LAW AND COMPARATIVE LAW

A. Finnish legislation

1. Name changes

17. Section 10 of the Surnames Act provided that a surname may be changed on the condition that the person concerned could show:

> "(1) that the use of his current surname causes inconvenience because of its foreign origin, its meaning in common usage or its common occurrence or for any other reason;
>
> (2) that the proposed surname has previously been used by himself or in an established way (vakiintuneesti, hävdvunnen) by his ancestors and the name change may be considered appropriate; or
>
> (3) that a change of surname may be considered justified by changed circumstances or by any other special reasons."

18. Section 11 of the 1985 Act contained provisions on obstacles of a general character to authorising changes of surname. A new surname was not to be improper or otherwise one the use of which would be manifestly inconvenient. Save in particular circumstances, the new surname should not by virtue of its form or spelling be incompatible with domestic name practice (paragraph 1); or be a name very commonly used as a surname (paragraph 2); or be commonly used as a christian name (paragraph 3).

A surname which was well known as the name of a particular Finnish or foreign family could not, unless there were particular reasons for doing so, be approved as a new surname (section 12 (1)).

19. Pursuant to section 13 (2) (1) (which contained provisions on "particular reasons for permitting a new surname"), a new surname falling foul of the restrictions in sections 11 (2) or 12 could nevertheless be permitted if the person requesting the name change showed that the surname in question had previously and lawfully been used by him or his ancestors.

20. If the County Administrative Board, after the Advisory Committee on Names had given its opinion, found no grounds under sections 10 to 13 for refusing to authorise an application for a change of surname, the application was published in the Official Gazette (section 18).

21. A person who claimed that the granting of an application for a change of surname would be incompatible with section 12 and would infringe his or her rights could, under section 19, file an objection with the County Administrative Board within thirty days from the date of the above-mentioned publication. An objection submitted after expiry of this time-limit could be taken into account in the examination of the application unless the matter had already been decided.

22. If the County Administrative Board rejected the application, its reasons were to be stated in the decision (section 20 (2)).

A decision on an application for a change of surname was to be notified to the applicant and also to any person who has filed objections under section 19 (section 21) and could be the subject of an appeal by them (section 22) to the Supreme Administrative Court.

23. In 1991 the provisions concerning first names were included by Act 253/91 in the 1985 Surnames Act, which was then retitled the Names Act (nimilaki, namnlagen).

2. Population registration

24. Population registration was effected at national and local level.

Population registration was administered, at national level, by the Population Register Centre (chapter 3, section 8 of the 1970 Act on Population Registers - västökirjalaki 141/69, lag 141/69 om befolkningsböcker) and, at local level, by the evangelical-lutheran and orthodox parishes or, for persons who were not members of such parishes, by the local registration office (chapter 2, sections 3, 6 and 26).

25. The national register, which was updated five times a week, contained the names and personal identity numbers of the persons registered and also other information, making it possible to trace by electronic data processing a person's name and address, even if the name or identity number did not appear on the register. Only public authorities had direct access to the register (see Le système d'information de l'état civil finlandais, Journée internationale de l'état civil, published in 1992 by the Commission internationale de l'état civil - "International Commission on Civil Status").

26. The Centre established a personal identity number for every person registered, consisting of the person's date of birth, an individual number, and a control number (sections 4 and 5 of the 1970 Decree on Population Registers - väestökirja- asetus 198/70, förordning 198/70 om befolkningsböcker).

27. If the County Administrative Board or, on an appeal, the Supreme Administrative Court, authorised a change of name, it had to inform the Centre of the new name (section 8 (1) of the 1991 Names Decree (nimiasetus 254/91, namnförordning 254/91)). The authority which gave permission for the name change had to be specified in the register (section 7 (4) of the 1970 Decree).

28. As from 1 November 1993, the 1970 Act and the 1970 Decree were replaced by the 1993 Act on Population Data (väestötietolaki 507/1993, befolkningsdatalag 507/1993) and the 1993 Decree on Population Data (väestötietoasetus 886/1993, befolkningsdataförordning 886/1993).

B. Comparative law

29. Under the legislation on names in the twelve member States of the International Commission on Civil Status, all members of the Council of Europe, the possibility of a person to change his or her name is subject to certain conditions. In Belgium, Portugal and Turkey, any reason may be invoked in support of a request for a change of name. In France, Germany, Luxembourg and Switzerland the reasons must be convincing ones. In some countries specific reasons are required: for instance that the current name gives rise to pronunciation and spelling difficulties (Austria) or causes legal or social difficulties (Austria and Greece) or is contrary to decency (the Netherlands and Spain), or is ridiculous (Austria, Italy and the Netherlands) or is otherwise contrary to the dignity of the person concerned (Spain) (see the International Commission's Guide pratique international de l'état civil, Paris).

Name changes are noted in population records, at the request of the interested person (Belgium and France) or of a public authority (France), or are done so automatically (the other ten members of the International Commission).

30. Under English law a person is entitled to adopt a surname of his own choosing and to use this name without any restrictions or formalities, except in connection with the practice of some professions (Halsbury's Laws of England, 4th ed., vol. 35, paras. 1173-76). The new name is valid for purposes of legal identification, may be used in public documents and is entered on the electoral roll (Cossey v. the United Kingdom judgment of 27 September 1990, Series A no. 184, p. 9, para. 16). The United Kingdom has no civil status certificates or equivalent current identity documents (ibid., para. 17). The near absence in English law of formalities governing changes of name has not resulted in a large number of changes (Margaret Killerby, 'Précisions sur le droit anglais du nom', pp. 183-84, in La nouvelle loi sur le nom, Paris, 1988).

PROCEEDINGS BEFORE THE COMMISSION

31. In his application of 11 March 1991 (no. 18131/91) to the Commission, Mr Stjerna complained that the refusal by the Finnish authorities to grant his request for a change of surname violated his right to respect for private life under Article 8 (art. 8) of the Convention. He also relied on Article 14 (art. 14) (prohibition of discrimination).

32. On 29 June 1992 the Commission declared the application admissible. In its report of 8 July 1993 (Article 31) (art. 31), the Commission expressed the opinion that there had been no violation of either Article 8 (art. 8) (by twelve votes to nine) or Article 14 in conjunction with Article 8 (art. 14+8) (unanimously). The full text of the Commission's opinion and of the separate opinions contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS TO THE COURT

33. At the hearing on 25 May 1994 the Government invited the Court to hold that, as contended in their memorial, there had been no violation of the Convention in the present case.

The applicant confirmed the submissions set out in his memorial to the effect that the facts of his case gave rise to violations of Article 8 (art. 8) taken alone and together with Article 14 (art. 14+8). He also reiterated his claim for compensation under Article 50 (art. 50).

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[*] Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 299-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8) OF THE CONVENTION

34. The applicant alleged that the refusal by the Finnish authorities to allow him to change his surname to Tavaststjerna, constituted a breach of Article 8 (art. 8) of the Convention, which reads:

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

35. The Government and the Commission took the contrary view.

A. Scope of the issues before the Court

36. In his application, as declared admissible by the Commission, the applicant claimed that the impugned refusal amounted to a breach of Article 8 (art. 8) under the head of "private life", on account of the fact that his current name gave rise to practical difficulties and a pejorative nickname and in view of his links to the Tavaststjerna family.

Before the Court he further submitted that he wished to change his surname in order to avoid a former colleague who had subjected him to threats and harassment. However, this argument was not raised before the Commission and is in any event unsubstantiated. Accordingly, the Court will limit its examination to the facts of his application as declared admissible by the Commission (see, for instance, the Olsson v. Sweden (no. 2) judgment of 27 November 1992, Series A no. 250, pp. 30-31, para. 75).

B. Applicability of Article 8 (art. 8)

37. The Court notes that Article 8 (art. 8) does not contain any explicit reference to names. Nonetheless, since it constitutes a means of personal identification and a link to a family, an individual’s name does concern his or her private and family life (Burghartz v. Switzerland judgment of 22 February 1994, Series A no. 280-B, p. 28, para. 24). The fact that there may exist a public interest in regulating the use of names is not sufficient to remove the question of a person’s name from the scope of private and family life, which has been construed as including, to a certain degree, the right to establish relationships with others (ibid.).

The subject-matter of the complaint thus falls within the ambit of Article 8 (art. 8).

C. Compliance with Article 8 (art. 8)

38. The refusal of the Finnish authorities to allow the applicant to adopt a specific new surname cannot, in the view of the Court, necessarily be considered an interference in the exercise of his right to respect for his private life, as would have been, for example, an obligation on him to change surname. However, as the Court has held on a number of occasions, although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interferences by the public authorities with his or her exercise of the right protected, there may in addition be positive obligations inherent in an effective "respect" for private life.

The boundaries between the State's positive and negative obligations under Article 8 (art. 8) do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole (see, for instance, the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, p. 19, para. 49).

39. Despite the increased use of personal identity numbers in Finland and in other Contracting States, names retain a crucial role in the identification of people. Whilst therefore recognising that there may exist genuine reasons prompting an individual to wish to change his or her name, the Court accepts that legal restrictions on such a possibility may be justified in the public interest; for example in order to ensure accurate population registration or to safeguard the means of personal identification and of linking the bearers of a given name to a family.

In this connection it is to be noted that in a number of Contracting States a request to change one's name must be supported by convincing or specific reasons whereas in other States any reasons may be invoked (see paragraph 29 above) and in one State there are in principle no restrictions (see paragraph 30 above). There is little common ground between the domestic systems of the Convention countries as to the conditions on which a change of name may be legally effected. The Court deduces that in the particular sphere under consideration the Contracting States enjoy a wide margin of appreciation. The Court's task is not to substitute itself for the competent Finnish authorities in determining the most appropriate policy for regulating changes of surnames in Finland, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see, for instance, the Hokkanen v. Finland judgment of 23 September 1994, Series A no. 299-A, p. 20, para. 55; and, mutatis mutandis,

the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 23, para. 49).

40. Before the Court the applicant maintained that the use of his current surname caused him inconvenience. It was an old and uncommon Swedish name and, in any case, the Swedish-speaking people in Finland amounted to only some six per cent of the population and resided mainly in the coastal regions. Although Swedish names were not unusual in Finland, his name, starting with a combination of three consonants - "stj" - , was exceptionally difficult for a non-Swedish-speaking Finnish person to spell and pronounce. His mail was delayed as a result of his name being misspelt and the name had given rise to a pejorative nickname: "kirnu" in Finnish, derived from the Swedish word "kärna" ("churn" in English). He argued that decisive weight should be given to the fact that he himself resented these sources of inconvenience. The proposed name, Tavaststjerna, although in many ways similar to Stjerna, would not give rise to the same problems; it was more common and better known in the region in which he lived and could not easily be turned into a pejorative nickname.

Secondly, the applicant reiterated his principal contention to the Finnish authorities, namely that, in line with the Finnish tradition of choosing names, he had opted for a surname borne by a paternal ancestor. Tavaststjerna was the only surname satisfying that tradition and differing from his present surname. The strength of his relationship to the Tavaststjerna family was primarily a matter to be assessed by himself. Particular importance should therefore be attached to the fact that, in his view, the period of approximately one hundred and sixty years between the death of the last ancestor named Tavaststjerna and his own birth was not long enough to sever the bonds linking him to that family and his sense of belonging to it.

The refusal by the Finnish authorities to permit him to change his surname to Tavaststjerna was not aimed at protecting the interests of that family; in any event such considerations were irrelevant since the applicant was a direct descendant of a Tavaststjerna. Nor could the decisions of refusal be justified on the ground of population registration requirements in Finland, as identity numbers are now used for this purpose. In this connection, the applicant argued that the 1985 Act afforded excessive protection to names in use. The refusal meant that he was forced either to continue using his inconvenient surname or to take a new one that he did not like.

41. The Government and the Commission were of the view that the refusal to let him change his surname to Tavaststjerna did not constitute a lack of respect for his right to private life, mainly on the grounds that the inconvenience suffered by the applicant due to his current name was not significant enough and that his connection to the requested name Tavaststjerna was too remote.

42. As to the instances of inconvenience complained of by the applicant, the Court is not satisfied on the evidence adduced before it that the alleged difficulties in the spelling and pronunciation of the name can have been very frequent or any more significant than those experienced by a large number of people in Europe today, where movement of people between countries and language areas is becoming more and more commonplace.

In any event, in the view of the Advisory Committee on Names, the use of the name Tavaststjerna involved similar practical difficulties to those associated with Stjerna (see paragraph 12 above). In this connection the Court considers that the national authorities are in principle better placed to assess the level of inconvenience relating to the use of one name rather than another within their national society and, in the present case, no sufficient grounds have been adduced to justify the Court coming to a conclusion different from that of the Finnish authorities.

Finally, although the applicant's current name may have given rise to a pejorative nickname, this was not a specific feature of his name since many names lend themselves to distortion.

In the light of the foregoing, the Court does not find that the sources of inconvenience the applicant complained of are sufficient to raise an issue of failure to respect private life under paragraph 1 (art. 8-1).

43. As to the applicant's attachment to the proposed name, the Court observes that the last ancestor who bore that name died more than two hundred years before the applicant applied to acquire the name. Notwithstanding the applicant's own feelings about being a descendant of the ancestors in question, the latter lived so far back in time that no significant weight can be given to those links for the purposes of paragraph 1 of Article 8 (art. 8-1).

44. In addition, as pointed out by the Government, had the applicant been willing to invent a new name for himself or identify a name not already in use, he would have had a multitude of possibilities (see paragraph 16 above).

45. In view of these circumstances the Court, like the Commission and the Government, finds that the refusal by the Finnish authorities to allow the applicant to change his surname from Stjerna to Tavaststjerna did not constitute a lack of respect for his private life within the meaning of Article 8 (art. 8) of the Convention. Accordingly, there has been no violation of that Article (art. 8).

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 8 (art. 14+8)

46. The applicant further alleged that the impugned refusal constituted a breach of Article 14 of the Convention taken together with Article 8 (art. 14+8). Article 14 (art. 14) provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

47. The Government and the Commission disagreed.

48. In view of its findings in paragraph 37 above, the Court holds that Article 14 (art. 14) applies to the present case (see, amongst many authorities, the Inze v. Austria judgment of 28 October 1987, Series A no. 126, p. 17, para. 36).

For the purposes of Article 14 (art. 14), a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law (ibid., p.18, para. 41).

49. The applicant complained of the fact that, when rejecting his request for a change of surname, the County Administrative Board had mentioned in its reasoning that Mr Fredrik Stjerna, the first ancestor who bore the applicant’s surname, had been the illegitimate son of Mr Magnus Fredrik Tavaststjerna, the last ancestor to bear the proposed surname. This fact, which was taken from the opinion of the Advisory Committee on Names, was also invoked by the Supreme Administrative Court, as was shown by the opinion of the dissenting judge who dismissed it as irrelevant. The refusal to let him take the name Tavaststjerna was thus based on discriminatory grounds incompatible with Article 14 (art. 14), namely his "social origin, ... birth or other status".

50. According to the Government and the Commission the applicant’s allegation was unsubstantiated; the fact that the ancestor in question had been born out of wedlock had not been decisive for the impugned refusal.

51. The Court is not convinced that the applicant was subjected to discriminatory treatment. The references made in the relevant decisions to the fact that one of his ancestors was born out of wedlock explain why Fredrik Stjerna was not named Tavaststjerna but does not appear to have had any bearing on the impugned refusal. There is nothing to suggest that the Finnish authorities would have arrived at different decisions had the ancestor been a "legitimate" child who had for some other reason taken the name Stjerna.

The reason for refusing his request seems rather to have been the fact that the name Tavaststjerna had not been in use in the applicant's family for more than two hundred years and could not therefore be said to have been in "established" use in the family, a condition for acquisition of a surname under section 10 (2) of the 1985 Act (see paragraphs 15 and 17 above). It is not contended that the latter reason was discriminatory within the meaning of Article 14 (art. 14) and, on the evidence before it, the Court has no cause to hold that it was. In short, the justification advanced by the Government appears objective and reasonable.

Having regard to the above, the Court concludes that there has been no violation of Article 14 taken together with Article 8 (art. 14+8).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that Article 8 (art. 8) of the Convention is applicable in the present case;

2. Holds that there has been no violation of Article 8 (art. 8) of the Convention;

3. Holds that there has been no violation of Article 14 of the Convention taken together with Article 8 (art. 14+8).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 November 1994.

Rolv RYSSDAL
President

Herbert PETZOLD
Acting Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the concurring opinion of Mr Wildhaber is annexed to this judgment.

R. R
H. P.

CONCURRING OPINION OF JUDGE WILDHABER

Paragraph 38 of the Court's judgment in the instant case reiterates an established but still somewhat incoherent jurisprudence. On a number of occasions the Court has stated that the "essential object" of Article 8 (art. 8) is "to protect the individual against arbitrary interference by the public authorities"[1]. It has reserved the term "interference" for facts capable of infringing the State's negative obligations. Whenever it has found that an interference in this sense existed, the Court has examined whether the interference could be justified under paragraph 2 of Article 8 (art. 8-2). In addition, the Court has acknowledged that there could be positive obligations inherent in an effective respect for private and family life. The existence of such positive obligations must be evaluated having regard to "the fair balance that has to be struck between the general interest of the community and the interests of the individual"[2]. To this it has added rather vaguely that in the sphere of positive obligations "the aims mentioned in the second paragraph of Article 8 (art. 8-2) may be of a certain relevance"[3]. But the Court has in effect applied only the first paragraph (art. 8-1) in such instances. Moreover, it has stressed that Contracting States enjoy a wide margin of appreciation in the implementation of their positive obligations.

However, the dividing line between negative and positive obligations is not so clear-cut. In the Gaskin case, the refusal by the British authorities to grant a former child in care unrestricted access to child-care records could be considered as a negative interference, whereas a duty on the State to

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[1] Belgian Linguistic judgment of 23 July 1968, Series A no. 6, p. 33, para. 7; Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, p. 15, para. 31; Airey v. Ireland judgment of 9 October 1979, Series A no. 32, p. 7, para. 32; X and Y v. the Netherlands judgment of 26 March 1985, Series A no 91, p. 11, para. 23; Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment of 28 May 1985, Series A no. 94, pp. 33-34, para. 67; Rees v. the United Kingdom judgment of 17 October 1986, Series A no. 106, p. 14, para. 35; Johnston and Others v. Ireland judgment of 18 December 1986, Series A no. 112, p. 25, para. 55 (c); Leander v. Sweden judgment of 26 March 1987, Series A no. 116, p. 23, para. 51; W., B. and R. v. the United Kingdom judgments of 8 July 1987, Series A no. 121, respectively p. 27, para. 60, p. 72, para. 61, p. 117, para. 65; Gaskin v. the United Kingdom judgment of 7 July 1989, Series A no. 160, p. 15, para. 38; Niemitz v. Germany judgment of 16 December 1992, Series A no. 251-B, p. 34, para. 31; Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, p. 19, para. 49; Hokkanen v. Finland judgment of 23 September 1994, Series A no. 299-A, p. 20, para. 55.

[2] Rees v. the United Kingdom judgment of 17 October 1986, Series A no. 106, p. 15, para. 37; Gaskin v. the United Kingdom judgment of 7 July 1989, Series A no. 160, p. 17, para. 42; Cossey v. the United Kingdom judgment of 27 September 1990, Series A no. 184, p. 15, para. 37; and similarly Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, p. 18, para. 41; B. v. France judgment of 25 March 1992, Series A no. 232-C, pp. 47, 53-54, paras. 44 and 63; Hokkanen v. Finland judgment of 23 September 1994, Series A no. 299-A, p. 20, para. 55.

[3] Rees judgment, p. 15, para. 37; Gaskin judgment, p. 17, para. 42; Powell and Rayner judgment, p. 18, para. 41; note 2 above.

provide such access could arguably be viewed as a positive obligation. In the Cossey case the claim of the applicant, an operated transsexual, was that she should be issued with a fresh birth certificate showing her present sex rather than her sex at the date of birth. The refusal of the United Kingdom to carry out a modification of its system for recording civil status could be analysed either as a negative interference with the applicant's rights or as a violation of the State's positive obligation to adapt its legislation so as to take account of the applicant's situation. The Keegan case against Ireland concerned the placement of a child for adoption without the natural father's knowledge or consent, a measure permitted under Irish law. This state of affairs could be taken as a negative interference with the father's right to respect for his family life or as a failure by Ireland to fulfil a positive obligation to confer a right of guardianship on natural fathers. Again, in the instant case of Stjerna, the refusal by the Finnish authorities to allow the applicant freely to acquire the surname of his ancestors may be perceived as either a negative or a positive interference.

In my view, it would therefore be preferable to construe the notion of "interference" so as to cover facts capable of breaching an obligation incumbent on the State under Article 8 para. 1 (art. 8-1), whether negative or positive. Whenever a so-called positive obligation arises the Court should examine, as in the event of a so-called negative obligation, whether there has been an interference with the right to respect for private and family life under paragraph 1 of Article 8 (art. 8-1), and whether such interference was "in accordance with the law", pursued legitimate aims and was "necessary in a democratic society" within the meaning of paragraph 2 (art. 8-2).

To be sure, this approach would not lead to a different result in the instant case, nor in all likelihood in the vast majority of cases of this kind. It does, however, have the advantage of making it clear that in substance there is no negative/positive dichotomy as regards the State's obligations to ensure respect for applicable private and family life, but rather a striking similarity between the applicable principles[4].

[4] As stated in the Keegan v. Ireland judgment, p. 19, para. 49; and the Hokkanen v. Finland judgment, p. 20, para. 55; note 2, previous page.

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

COURT (CHAMBER)

CASE OF WEBER v. SWITZERLAND

(Application no. 11034/84)

JUDGMENT

STRASBOURG

22 May 1990

In the Weber case*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court**, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mrs D. BINDSCHEDLER-ROBERT,
Mr B. WALSH,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr J. DE MEYER,
Mr I. FOIGHEL,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 January and 25 April 1990,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 12 April 1989 and by the Government of the Swiss Confederation ("the Government") on 3 July 1989, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11034/84) against Switzerland lodged with the Commission under Article 25 (art. 25) by a national of that State, Mr Franz Weber, on 15 May 1984.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) of the Convention and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the

* Note by the Registrar: The case is numbered 10/1989/170/226. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** Note by the Registrar: The amendments to the Rules of Court which entered into force on 1 April 1989 are applicable to this case.

respondent State of its obligations under Article 6 § 1 and Article 10 (art. 6-1, art. 10).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mrs D. Bindschedler-Robert, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 29 April 1989, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr B. Walsh, Mr R. Macdonald, Mr C. Russo, Mr J. De Meyer and Mr I. Foighel (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 § 1). In accordance with the order made in consequence on 6 July 1989, the registry received the Government's memorial, on 13 October, and the applicant's memorial, on the 16th.

In a letter he received on 13 December 1989 the Registrar was informed by the Secretary to the Commission that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 6 July 1989 that the oral proceedings should open on 23 January 1990 (Rule 38).

6. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government
  Mr P. BOILLAT, Head
  of the European Law and International Affairs Section,
  Federal Office of Justice, *Agent*,
  Mr C. VAUTIER, former Vaud cantonal judge,
  Mr J.P. KURETH, Deputy Head
  of the European Law and International Affairs Section,
  Federal Office of Justice, *Counsel*;
- for the Commission
  Mr S. TRECHSEL, *Delegate*;
- for the applicant
  Mr R. SCHALLER, avocat, *Counsel*.

The Court heard addresses by Mr Boillat and Mr Vautier for the Government, by Mr Trechsel for the Commission and by Mr Schaller for the applicant, as well as their replies to its questions.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. Mr Franz Weber, a Swiss journalist, lives at Clarens, in the Canton of Vaud.

8. On 2 April 1980 the applicant and one of the associations he runs, Helvetia Nostra, lodged a complaint alleging defamation against R.M., who had written a letter published in the letters column of the newspaper L'Est vaudois under the headline "Franz Weber is fooling you". The letter contained the following passages:

> "Like all your readers, no doubt, I recently found in my letter-box another of the begging letters sent out by unscrupulous people when they want to cadge money.
>
> Everyone is getting really sick of it and I think Franz Weber would do better to go and knock down the factory chimneys which crowd the skyline of Basle and protect his beloved captive seals in the zoo than to pester us with his initiatives, which he lives on at our expense - in case you didn't know.
>
> If Mr Weber had the courage to show us his tax returns, you would be amazed. But the list of municipal taxpayers is not published and it is easy to hide behind that sort of censorship and live by devious means, sponging off decent people who still believe that these drop-outs have their uses and in so doing demonstrate their distrust of the whole country's democratically - and how democratically! - elected authorities.
>
> May everyone have the courage to tell Helvetia Nostra (there's a fine name to fleece you with!) that we have had enough of playing into the hands of people who sponge off us and whose behaviour borders on the criminal.
>
> ..."

9. Interviewed by the investigating judge (juge informateur) of the Vevey-Lavaux district, R.M. acknowledged the virulence of these accusations and attributed it to a nervous breakdown he had suffered at the time. Mr Weber refused all conciliation. In order to establish the truth of his allegations, R.M. then requested Mr Weber to produce a number of documents relating to his and his associations' financial position.

10. On 4 November 1980 the investigating judge ordered disclosure of the Helvetia Nostra association's and the Franz Weber Foundation's articles and their accounts for the previous two financial years. On 22 January 1981, having still not received them, he ordered their sequestration, but on 13 April 1981 he had to renew the order, as the applicant had not complied.

In May 1981 Mr Weber forwarded Helvetia Nostra's accounts in a sealed envelope but not those of the Foundation. Two subsequent sequestration orders were not executed.

11. The applicant was dissatisfied with the way in which the investigating judge was proceeding and on 1 March 1982 he lodged a criminal complaint alleging misuse of official authority and coercion, but the investigating judge of the Canton of Vaud refused to take any action, whereupon Mr Weber challenged the Cantonal Court en bloc.

12. R.M. was charged with defamation (Article 173 of the Criminal Code) and on 1 March 1982 was committed for trial at the Vevey district police court. He appealed against the order committing him for trial, but the Indictment Division (tribunal d'accusation) dismissed the appeal on 25 May 1982.

13. On 2 March 1982 at a press conference in Lausanne the applicant informed the public that defamation proceedings had been taken against R.M., that orders had been made for the production and then for the sequestration of the associations' accounts and that these had been handed over under seal. He also stated that he had lodged a challenge and a complaint against the investigating judge. Mr Weber had already divulged the first three items of information at a press conference in Berne on 11 May 1981, during which he denounced "the plot hatched against him by the Vaud authorities in order to intimidate him".

A. The proceedings before the President of the Criminal Cassation Division of the Vaud Cantonal Court

14. On 3 March 1982 the daily newspapers Gazette de Lausanne, 24 heures and Tribune/Le Matin reported what the applicant had said.

15. Under Article 185 § 3 of the Vaud Code of Criminal Procedure, the President of the Criminal Cassation Division of the Vaud Cantonal Court commenced of his own motion a summary investigation for breach of the confidentiality of a judicial investigation. In a letter of 10 March 1982 he ordered Mr Weber to provide information within ten days about what exactly he said on 2 March 1982.

The applicant replied on 22 March 1982. He denied having given any "information about the investigation proceedings" and relied on Articles 6 and 10 (art. 6, art. 10) of the Convention.

16. On 27 April 1982 the President of the Cassation Division imposed a fine of 300 Swiss francs on him, together with a probationary period of a year for the purposes of deletion of the fine from the cantonal register. He based his decision on the following grounds:

> "II. 1. Mr Weber relied on Article 6 (art. 6) of the European Convention on Human Rights (ECHR) and impugned the procedure provided for in Article 185 § 3 of the Code of Criminal Procedure (CCP), which is the same as the one provided for in Articles 384 § 2, 386 § 2 and 336 CCP. This complaint is irrelevant, as Article 6 (art. 6) ECHR does not apply to the summary investigation proceedings provided for in respect of these breaches of procedure under cantonal law, reserved by Article 335 §

1, second sub-paragraph, of the Criminal Code (CC), because it is not a question of a 'criminal charge'.

...

Mr Weber also submitted that he did not disclose any confidential matters on 2 March 1982, since the matters in question had already become public knowledge as a result of his press conference of 11 May 1981.

Since no judicial investigation was commenced following the press conference of 11 May 1981 and as Mr Weber did not have any occasion to avail himself of his right to a hearing, there is no need to deal with it in the present proceedings. Furthermore, criminal proceedings will shortly be time-barred (s. 12 of the Vaud Criminal Justice Act, s. 4 of the Minor Offences Act, s. 109 CC).

It is true that as a result of the press conference of 11 May 1981 the matters dealt with at the press conference of 2 March 1982 were public knowledge, but that is of no importance as breaching the confidentiality of an investigation means 'disclosing' a matter which ought to be kept confidential. It is therefore of little importance that the matter which was to be kept confidential was known to a limited or indefinite number of people because confidentiality had already been breached by a third party or by the same person.

The actus reus of the offence punishable under Article 185 CC is therefore made out. This offence is punishable even if it has been committed inadvertently (s. 4 of the Vaud Criminal Justice Act, s. 6 of the Minor Offences Act). In the instant case it is plain that Mr Weber acted deliberately.

3. By disclosing that he had challenged the investigating judge, Mr Weber revealed that there was an investigation, but it may be doubted whether that was 'information about the investigation'.

4. Disclosing that a criminal complaint has been lodged - which may amount to a different offence - is not caught by Article 185 CC, more particularly where it has been decided to take no action on the complaint.

5. Mr Weber himself admits that the breach of the confidentiality of the investigation was intentional. His submission based on a kind of necessity is devoid of merit since it was open to him to appeal to the Indictment Division against the orders for the sequestration of the Franz Weber Foundation's and the Helvetia Nostra association's accounts, as he in fact did two days later.

..."

B. The proceedings in the Criminal Cassation Division of the Vaud Cantonal Court

17. On 15 October 1982 an appeal that Mr Weber brought against this decision was unanimously dismissed by the Criminal Cassation Division

sitting in private (under Article 431 §§ 2 and 3 of the Vaud Code of Criminal Procedure), on the following grounds:

"...

In the instant case the disclosure that criminal complaints had been lodged - on 2 April 1980 against [R.M.] and on 1 March 1982 against the investigating judge - is not information about an investigation except in so far as it implies - and discloses - that an investigation has been commenced ..., but it may indeed amount to an offence (defamation, calumny, on the part of the complainant). Article 185 of the Code of Criminal Procedure (CCP) is therefore not applicable to the disclosure that the first complaint had been lodged, because this was punishable as defamation, or to the disclosure that the second complaint had been lodged, because no investigation was commenced. The decision is therefore well-founded on that point.

The disclosure of the challenge is not information about an investigation. The challenge is not the purpose of the investigation, and the disclosure that such a challenge has been made says nothing about the purpose of the investigation, its content or its results. It remains true, on the other hand, that the existence of such an investigation is disclosed; but such a disclosure is not punishable under Article 185 CCP, since it was punishable as defamation.

The disclosure of the orders for production and sequestration of the accounts in the file does amount to information about an investigation.

It remains to be considered whether one can talk of disclosure, given that the matters had already been made public at an earlier press conference.

...

Article 185 CCP, which is designed also - and even primarily - to protect the public interest in ensuring that investigations take place in the best possible conditions, prohibits parties from communicating information from the file; it is therefore sufficient that the matters should be confidential in nature, without necessarily still being confidential; communication of matters of a confidential nature to someone who knows them already as a result of an earlier indiscretion is therefore a punishable offence. Furthermore, the applicant cannot rely on common knowledge when that knowledge is due to an earlier disclosure that he himself has made.

The appellant was therefore rightly convicted.

..."

Finally, the Criminal Cassation Division set aside of its own motion the entry of the fine in the cantonal register. It noted that under Vaud law and notwithstanding that they were convertible into days of imprisonment (arrêts), the fines for "procedural offences", such as breaching the confidentiality of a judicial investigation, were disciplinary in nature, since they were designed to ensure that the investigation proceeded normally. On this point cantonal law differed from federal law.

C. The proceedings in the Federal Court

18. Mr Weber lodged a public-law appeal with the Federal Court. He relied on Articles 10 and 6 (art. 10, art. 6) of the Convention. In his view, Article 6 (art. 6) applied because of the criminal nature of the fine, which under Article 18a of an Order of 23 January 1982 was convertible into a custodial sentence.

19. On 16 November 1983 the Federal Court dismissed the appeal. It noted in particular:

"...

2. The applicant ... maintained that Article 185 of the Vaud Code of Criminal Procedure (Vaud CCP) violates in the abstract, and in the alternative in the specific case, freedom of expression as secured in federal constitutional law and in Article 10 (art. 10) of the European Convention on Human Rights (ECHR). In so doing, he overlooked that it may be legitimate in the public interest to impose certain restrictions on the exercise of that fundamental right ... Article 10 § 2 (art. 10-2) in fine ECHR, moreover, provides expressly that such restrictions are permissible where they are necessary in a democratic society, in particular for maintaining the authority and impartiality of the judiciary. The rule enacted in Article 185 Vaud CCP clearly conforms to these principles. A weighing of the competing interests at stake leads to the same conclusions. While it may indeed be readily appreciated that the applicant had grounds for rebelling against the sometimes unorthodox course taken by the proceedings against him, it must not be forgotten that the usual remedies were open to him; and, indeed, on a number of occasions he successfully availed himself of them. His interest in expressing his views on this matter in public and the public's interest in being informed by this means cannot outweigh the interest in ensuring that the judicial system can function as smoothly and impartially as possible. The prohibition against communicating information about an investigation until its completion and the penalties attaching to the offence are undoubtedly consistent with the proportionality principle. Consideration of whether the impugned interference was founded on sufficient reasons which rendered it necessary in a democratic society, having regard to all the public-interest aspects of the case (European Court of Human Rights, Sunday Times case, Series A no. 30, paragraphs 65-67) leads inevitably to the conclusion - particularly if the interests at stake in the Sunday Times case previously cited and in the applicant's case are compared - that there was no violation of freedom of expression.

...

In the instant case the appellant was liable to a fine not exceeding 500 francs (Article 185 § 1 Vaud CCP) and was fined 300 francs. Under Vaud law, such a penalty typically comes within the sphere of rules of conduct to be observed during proceedings. That is not decisive, however, according to the European institutions.

Such rules are generally directed primarily at barristers, and in that instance their disciplinary nature is not in doubt; the parties to criminal proceedings, however, may also be subject to certain disciplinary rules. Admittedly, it has to be recognised that the measure taken against the appellant could have been based on a combination of Article 184 Vaud CCP, which lays down that judicial investigations shall be confidential, and Article 293 of the Criminal Code (CC), which provides that anyone

who makes public any proceedings in a judicial investigation or deliberations by an authority which are secret by law shall be punishable with imprisonment or a fine. In that event the application of the Criminal Code would have justified an application of Article 6 § 1 (art. 6-1) ECHR. This was not the case, however, and it was on the basis of a cantonal rule of procedure that the appellant suffered a penalty whose disciplinary or criminal nature can be determined only by assessing the degree of its severity.

The appellant showed, aptly enough, that such a fine was convertible into ten days' imprisonment under Article 12 of the Vaud Order on the recovery of fines and their conversion into imprisonment. That procedure indeed leaves the authorities only a very limited discretion and at all events does not enable them to comply retrospectively with the requirements of Article 6 (art. 6) ECHR. The appellant overlooks, however, that Article 49 § 3, second sub-paragraph, of the Swiss Criminal Code (SCC) enables the judge to rule out conversion where the person convicted has proved that, through no fault of his own, he is unable to pay the fine. In view of the foregoing, the possibility of a custodial sentence could not make the penalty imposed in the instant case a criminal one.

Ultimately, while the fine imposed in the instant case was not a negligible one, it nonetheless came into the category of penalties which by their nature, duration or manner of execution are deemed not to be appreciably detrimental. The possibility of conversion into a custodial sentence makes no difference, since conversion is possible only in the event of the appellant's refusing to pay the fine out of sheer unwillingness. The safeguards provided for in Article 6 § 1 (art. 6-1) ECHR were therefore not applicable in the instant case."

The applicant paid the fine in January 1985.

II. THE RELEVANT DOMESTIC LAW

A. The Vaud Code of Criminal Procedure

20. The confidentiality of judicial investigations is governed by Articles 184 and 185 of the Vaud Code of Criminal Procedure, which provide:

Article 184

"All judicial investigations shall remain confidential until they are finally completed.

Judges, other members of the national legal service and civil servants shall not communicate any documents or information about an investigation except to experts, other witnesses or an authority where such communication assists the investigation or is justified on administrative or judicial grounds."

Article 185

"The parties, their counsel, employees of their counsel and experts and witnesses shall be bound to maintain the confidentiality of an investigation, on pain of a fine of up to five hundred francs, unless the breach is punishable under other provisions.

The punishment provided for in the foregoing paragraph shall be ordered by the President of the Cassation Division, of his own motion or acting on an information.

He shall give his ruling after a summary investigation."

In 1983 the applicant was the sponsor of a constitutional initiative entitled "For a system of criminal justice with a human face", one of whose aims was to secure the repeal of Article 185. This was in line with the approach adopted by those who had drafted the 1977 Geneva Code of Criminal Procedure, which does not attach any penalty to the obligation to maintain the confidentiality of an investigation, an obligation from which it even completely exempts witnesses, complainants, accused persons and their lawyers. In a referendum on 20 May 1984 the people of the Canton of Vaud rejected the Weber initiative by a clear majority.

B. The Swiss Criminal Code

21. Article 293 § 1 of the Swiss Criminal Code - which was not applied in the instant case (see paragraph 19 above) - provides:

"Anyone who, without being entitled to do so, makes public all or part of the proceedings of an investigation or of the deliberations of any authority which are confidential by law or in virtue of a decision taken by such an authority acting within its powers shall be punished with imprisonment or a fine."

C. The Vaud cantonal Fines (Recovery and Conversion into Imprisonment) Order of 23 January 1942

22. The cantonal Order of 23 January 1942, which has been supplemented and amended several times since, provides, inter alia:

Article 8

"If the person convicted has neither paid nor redeemed the fine and if it appears that recovery proceedings would be fruitless, the Prefect shall convert the fine into a term of imprisonment.

...

The Prefect may, however, decide against conversion at any time if the person convicted proves that, through no fault of his own, he is unable to pay the fine."

Article 12

"The conversion rate shall be one day's imprisonment for every thirty francs of fine; fractions of less than thirty francs shall be left out of account; the length of imprisonment shall not exceed three months.

..."

Article 14

"Within twenty-four hours of receiving them, the Department shall send to the Prefect of the district in which the court that heard the case is situated copies of any judgments and decisions entailing imposition of a fine which have been communicated to it.

It shall order the Prefect to enforce the judgment or decision."

Article 15

"If the person convicted has neither paid nor redeemed the fine and if it appears that recovery proceedings would be fruitless, the Prefect shall inform the Department accordingly with a view to converting the fine into a term of imprisonment, unless such conversion was excluded at the outset in the judgment or decision concerned."

Article 17

"The presiding judge of the court shall decide whether to convert the fine into a term of imprisonment pursuant to Article 49 of the Criminal Code and shall proceed in accordance with Articles 459 and 460 of the Code of Criminal Procedure.

..."

Article 18a

"Articles 14 and 15 shall apply to fines imposed for breaches of provisions of criminal or civil procedure.

In the case of Article 15, the Department shall report the matter to the appropriate judicial officer, who shall be able to convert the fine into a term of imprisonment, wholly or in part; he shall inform the Department of his decision.

Articles 8 and 10-13 shall apply to the conversion, save that the judge with jurisdiction to determine the matter shall be:

(a) the President of the Cantonal Court in respect of fines imposed by him or by the court as such;

(b) the presidents of the various sections or divisions of the Cantonal Court in respect of fines imposed by them or by the section or division;

..."

III. SWITZERLAND'S RESERVATION IN RESPECT OF ARTICLE 6 § 1 (art. 6-1) OF THE CONVENTION

A. Wording

23. When depositing the instrument of ratification of the Convention, the Swiss Government made the following reservation:

> "The rule contained in Article 6, paragraph 1 (art. 6-1), of the Convention that hearings shall be in public shall not apply to proceedings relating to the determination ... of any criminal charge which, in accordance with cantonal legislation, are heard before an administrative authority.
>
> The rule that judgment must be pronounced publicly shall not affect the operation of cantonal legislation on civil or criminal procedure providing that judgment shall not be delivered in public but notified to the parties in writing."

B. The Schaller judgment

24. The Swiss courts have had occasion to give their views on the concept of an "administrative authority". In its judgment of 2 December 1983 in the Schaller case, for instance, the Federal Court stated:

> "Moreover, the expression 'administrative authority' (autorité administrative) is not to be found in the text of the European Convention on Human Rights (ECHR) but appears in Switzerland's reservation in respect of the principle laid down in Article 6 (art. 6) of the Convention that hearings must be public and judgments pronounced publicly. It is therefore not a Convention concept which should be construed according to the principle of reasonable expectation, that is to say in the meaning which the other signatory States might and should in good faith give it, or directly under Articles 31 and 32 of the Vienna Convention of 23 May 1969, which Switzerland has not yet ratified. A reservation made when ratifying a treaty is a unilateral declaration which must in general be interpreted by reference to the domestic law of the State which has adopted it, like a provision in a statute or regulation.
>
> In the case of a reservation, an interpretation in accordance with the will of the declaring State makes it possible to take into account the real purpose of the reservation, whose justification lies precisely in the special features of national law ...
>
> That being so, regard should be had to the meaning which the Swiss Government and Parliament intended giving to the expression 'administrative authority'. While the Federal Parliament accepted the reservation without discussion or comment, the Federal Council gave the following particulars in its 1968 Communication (FF [Federal Gazette] 1968 II p. 1118/1119).

'... In Switzerland, as was pointed out above, the administrative authorities may have to determine private-law disputes and impose penalties in the way that a criminal court would. Administrative proceedings, however, are not normally public. The same is true of proceedings in the administrative courts, although they are adversarial. It is, moreover, doubtful whether the principle that proceedings must be public is generally applicable to administrative criminal proceedings.'

In its communication of 4 March 1974 (FF 1974 I, p. 1020), on the other hand, the Federal Council merely stated that proceedings before administrative authorities were not public.

It is therefore possible to confirm the precedent of R. and Others of 25 November 1982, referred to above. In the light of the 1968 Communication it is apparent that Switzerland meant to exclude application of the principle that hearings and judgments must be public not only before administrative authorities but also in the administrative courts, notwithstanding that proceedings there are adversarial. It would, moreover, be consistent with the principle of good faith to accept that the reservation applies to such-and-such an authority not because of the way the authority is organised but rather because of the functions it discharges, in the instant case administrative functions.

(cc) The respondent authority was right in considering that it could apply the reservation made in respect of Article 6 (art. 6) ECHR and in accepting that in Switzerland 'disciplinary regulations come within the domain of administrative law and the authorities which apply them exercise an administrative jurisdiction'."

PROCEEDINGS BEFORE THE COMMISSION

25. Mr Weber applied to the Commission on 15 May 1984 (application no. 11034/84). He alleged a failure to comply with the requirements of Article 6 § 1 (art. 6-1) of the Convention (right to a fair, public trial with a view to the determination of a "criminal charge") in that the summary proceedings had been conducted in chambers and without any hearing of the parties or the witnesses. He also claimed that the imposition of a fine was an unjustified interference with his right to freedom of expression, as guaranteed in Article 10 (art. 10).

26. The Commission declared the application admissible on 7 July 1988. In its report of 16 March 1989 (made under Article 31) (art. 31) it expressed the opinion (by nine votes to four) that there had been no breach of Article 6 § 1 (art. 6-1) - which, in its view, did not apply in the instant case - but (unanimously) that there had been a breach of Article 10 (art. 10).

The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[*].

[*] Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 177 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

27. At the hearing the Government confirmed the submissions they had made in their memorial. The Court was asked to hold:

"As to Article 6 § 1 (art. 6-1) of the Convention,

- that this provision is not applicable to the instant case;

- in the alternative that, having regard to Switzerland's reservation in respect of this provision, the principle that proceedings must be public was not applicable to the proceedings complained of;

As to Article 10 (art. 10) of the Convention,

- that the State interference complained of was justified under paragraph 2 (art. 10-2) of this provision."

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 (art. 6-1)

28. The applicant complained that the President of the Criminal Cassation Division of the Vaud Cantonal Court and then the Cassation Division itself gave judgment without any public hearing beforehand. He claimed that there had been a breach of Article 6 § 1 (art. 6-1) of the Convention, which provides:

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

Having regard to the arguments of the Government and the Commission, the question whether Article 6 (art. 6) is applicable must be determined first.

A. Applicability of Article 6 § 1 (art. 6-1)

29. The Government submitted that the present case did not come within the ambit of this provision, because in Vaud law the proceedings

taken against the applicant were not "criminal" proceedings but disciplinary ones.

A majority of the Commission agreed.

30. The Court has already had to determine a similar issue in two cases concerning military discipline (see the Engel and Others judgment of 8 June 1976, Series A no. 22) and the maintenance of order in prisons (see the Campbell and Fell judgment of 28 June 1984, Series A no. 80). While recognising the right of States to distinguish between criminal law and disciplinary law, it has reserved the power to satisfy itself that the line drawn between these does not prejudice the object and purpose of Article 6 (art. 6). In the instant case it will apply the criteria which have been consistently laid down in the matter in its earlier decisions (apart from the two judgments previously cited, see, among other authorities, the Öztürk judgment of 21 February 1984, Series A no. 73).

31. It must first be ascertained whether the provisions defining the offence in issue belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This factor is of relative weight and serves only as a starting-point.

The legal basis of Mr Weber’s conviction was provided by Article 185 of the Vaud Code of Criminal Procedure (see paragraph 20 above) and not by Article 293 of the Swiss Criminal Code (see paragraph 21 above). In its judgment of 16 November 1983 the Federal Court recognised that the measure taken against the applicant could have been based on a combination of the two (see paragraph 19 above) but added that this had not happened in the event. The word "peine" (punishment) in Article 185 gives an indication but is not decisive.

32. The second, weightier criterion is the nature of the offence.

In the Government’s submission, the impugned sentence was designed to punish a breach of a rule intended to protect defendants and ensure that proceedings were conducted objectively by shielding the judge in charge of them from any pressure, in particular by the media. The Commission considered that Article 185 applied to a limited number of people who shared the characteristic of taking part in a judicial investigation; although these people did not belong to the staff responsible for the administration of justice, they were in a "special relationship of obligation" with the relevant authorities, which justified subjecting them to a special discipline.

33. The Court does not accept this submission. Disciplinary sanctions are generally designed to ensure that the members of particular groups comply with the specific rules governing their conduct. Furthermore, in the great majority of the Contracting States disclosure of information about an investigation still pending constitutes an act incompatible with such rules and punishable under a variety of provisions. As persons who above all others are bound by the confidentiality of an investigation, judges, lawyers and all those closely associated with the functioning of the courts are liable

in such an event, independently of any criminal sanctions, to disciplinary measures on account of their profession. The parties, on the other hand, only take part in the proceedings as people subject to the jurisdiction of the courts, and they therefore do not come within the disciplinary sphere of the judicial system. As Article 185, however, potentially affects the whole population, the offence it defines, and to which it attaches a punitive sanction, is a "criminal" one for the purposes of the second criterion.

34. As regards the third criterion - the nature and the degree of severity of the penalty incurred - the Court notes that the fine could amount to 500 Swiss francs (see paragraph 20 above) and be converted into a term of imprisonment in certain circumstances (see paragraph 22 above). What was at stake was thus sufficiently important to warrant classifying the offence with which the applicant was charged as a criminal one under the Convention.

35. In conclusion, Article 6 (art. 6) applied to the instant case.

B. Validity of Switzerland's reservation in respect of Article 6 § 1 (art. 6-1)

36. The Government submitted in the alternative that Switzerland's reservation in respect of Article 6 § 1 (art. 6-1) (see paragraph 23 above) would in any case prevent Mr Weber from relying on non-compliance with the principle that proceedings before cantonal courts and judges should be public; the reservation was separate from the interpretative declaration which the Court had had to deal with in the Belilos case (see the judgment of 29 April 1988, Series A no. 132) and was designed to withdraw from the ambit of that principle "proceedings relating to the determination of ... any criminal charge which, in accordance with cantonal legislation, are heard before an administrative authority". The concepts in a reservation should be understood with reference to the domestic law of the State which made it. In Swiss law, including the settled case-law of the Federal Court, the concept of "administrative authority" also included judicial authorities where these exercised administrative powers, as when the President of the Criminal Cassation Division and the Cassation Division itself determined disciplinary matters.

The Commission did not discuss the matter in its report since it concluded that Article 6 (art. 6) was not applicable. Before the Court its Delegate argued, however, that if the Court did not take the same view of that question, it would be bound to find that there had been a breach of the Article (art. 6), notwithstanding the reservation and irrespective of whether the relevant cantonal authorities had performed judicial functions or administrative duties, since in the first case there would have been a clear failure to comply with the requirement that proceedings should be public,

while in the second eventuality an administrative body would have determined the merits of a criminal case.

37. The Court must ascertain whether the reservation under consideration satisfies the requirements of Article 64 (art. 64).

38. Clearly it does not fulfil one of them, as the Swiss Government did not append "a brief statement of the law [or laws] concerned" to it. The requirement of paragraph 2 of Article 64 (art. 64-2), however, "both constitutes an evidential factor and contributes to legal certainty"; its purpose is to "provide a guarantee - in particular for the other Contracting Parties and the Convention institutions - that a reservation does not go beyond the provisions expressly excluded by the State concerned" (see the Belilos judgment previously cited, Series A no. 132, pp. 27-28, § 59). Disregarding it is a breach not of "a purely formal requirement" but of "a condition of substance" (ibid.). The material reservation by Switzerland must accordingly be regarded as invalid.

That being so, it is unnecessary to determine whether the reservation was of "a general character" contrary to Article 64 § 1 (art. 64-1).

C. Compliance with Article 6 § 1 (art. 6-1)

39. The applicant was consequently entitled in principle to a public hearing in the determination of the "criminal charge" against him. The President of the Criminal Cassation Division, however, did not hold a hearing at all but gave his decision after a summary investigation entirely in written form, as provided for in Article 185 of the Vaud Code of Criminal Procedure (see paragraph 20 above). The Criminal Cassation Division too dismissed the applicant’s appeal without hearing argument, as it was empowered to do by Article 431 §§ 2 and 3 of the same Code (see paragraph 17 above). The fact that the proceedings in the Federal Court were public did not suffice to cure the two defects just noted. Having before it a public-law appeal, the Federal Court could only satisfy itself that there had been no arbitrariness and not determine all the disputed questions of fact and law (see, mutatis mutandis, the Belilos judgment previously cited, Series A no. 132, pp. 31-32, §§ 71-72). Furthermore, the Government did not claim that Mr Weber had waived his right to hearings; and the case did not come within any of the exceptions listed in the second sentence of Article 6 § 1 (art. 6-1).

40. There has therefore been a breach of Article 6 § 1 (art. 6-1).

II. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

41. In the applicant’s submission, his conviction and sentence to a fine violated Article 10 (art. 10) of the Convention, which provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

The Government disputed that submission, whereas the Commission accepted it.

42. There was unquestionably an interference by public authority with the exercise of the right guaranteed in Article 10 (art. 10). It arose from the decision of 27 April 1982 by the President of the Criminal Cassation Division, which was upheld by the Cassation Division on 15 October 1982. Such an interference is not contrary to the Convention, however, if the requirements of paragraph 2 of Article 10 (art. 10-2) are satisfied.

43. The penalty was certainly "prescribed by law", because it was based on Article 185 of the Vaud Code of Criminal Procedure; and this indeed was common ground.

The Commission, the Government and the applicant concentrated their submissions on whether the aim pursued by the impugned measure was a legitimate one and whether it was "necessary in a democratic society".

A. Legitimacy of the aim pursued

44. The Government contended that the interference complained of was necessary "for maintaining the authority and impartiality of the judiciary", arising as it did from the confidentiality of the investigation and being designed to protect the defendant and ensure the smooth administration of justice.

In the Commission’s view, Article 185 was clearly intended to maintain the authority of the judiciary; there was nothing to suggest that it had been used for any other purpose in this instance.

Mr Weber, on the other hand, submitted that the cantonal judicial authorities’ real but unavowed purpose had been to intervene in a political controversy in order to "nip in the bud" any criticism of the functioning of the Canton of Vaud’s system of justice. This aim of intimidation and censorship was inconsistent with the pluralism and tolerance characteristic of democratic society.

45. Having regard to the particular circumstances of the case and the actual terms of the judgments of the relevant judicial authorities, the Court

considers that the application of the Article in question to the applicant was intended to ensure the proper conduct of the investigation and was therefore designed to protect the authority and impartiality of the judiciary.

B. Necessity "in a democratic society"

46. The applicant cited his role as an ecologist and the political and social background to his activities. The effectiveness of these, he claimed, was dependent on the public's trust in him, particularly as regards the management of money donated to the associations he had set up; the way he was treated by the judicial system consequently amounted to an attack on the causes he championed. His many successes annoyed his political opponents, who, supported by "part of the Vaud judicial apparatus", were attempting to damage his reputation. The fine complained of, which was sheer "pestering of a relentless opponent", was part of a campaign of harassment against him, especially as it was a penalty for disclosing not the content or outcome of the investigation but merely a stage or a step in the investigation.

The Commission considered that the interference complained of by Mr Weber was not "necessary in a democratic society". In its view, Mr Weber had a "legitimate interest in expressing his views on judicial proceedings which chiefly concern[ed] him", an interest which "coincid[ed] with the public's interest in being informed". Furthermore, imposing a penalty "for revealing information already made public" could not be said to be answering a "pressing social need".

The Government did not overlook the fact that there was a genuine public interest, but they condemned the defendant's "partisan" exploitation of it. They criticised Mr Weber for having attempted to bring the discussion out into the open in order to secure a trial which conformed to his own ideas of fairness.

47. According to the Court's settled case-law, the States have a certain margin of appreciation in assessing whether and to what extent an interference is necessary, but this margin goes hand in hand with European supervision covering both the legislation and the decisions applying it, even where the latter have been taken by an independent court (see, among other authorities, the Groppera Radio AG and Others judgment of 28 March 1990, Series A no. 173, p. 28, § 72). The Court therefore has jurisdiction to ascertain whether, having regard to the facts and circumstances of the case, a "penalty" is compatible with freedom of expression. The necessity for a restriction pursuant to one of the aims listed in Article 10 § 2 (art. 10-2) must be convincingly established (see the Barthold judgment of 25 March 1985, Series A no. 90, p. 26, § 58).

48. The Court notes - without attaching any decisive importance to the fact - that the applicant was well known for his commitment to nature

conservation. The energetic action he had taken both nationally and internationally had given rise to lively public debate, which had been widely reported by the press. Consequently, a trial concerning him the conduct of which had in some respects proved to be "unorthodox", in the words of the Federal Court (see paragraph 19 above), was bound to arouse the interest of all who had taken a close interest in his activities.

49. It should be pointed out especially that at his press conference in Lausanne on 2 March 1982 Mr Weber essentially repeated what he had said on 11 May 1981. He added only two new pieces of information: that he had challenged the investigating judge and that he had lodged a complaint against him alleging misuse of official authority and coercion (see paragraph 11 above). The President of the Criminal Cassation Division himself accepted, in his decision of 27 April 1982 (see paragraph 16 above), that the three other circumstances that were disclosed - namely the defamation proceedings against R.M., the orders for the production and sequestration of accounts and the handing over of the accounts under seal (see paragraph 13 above) - were "public knowledge". In its judgment of 15 October 1982, however, the Criminal Cassation Division held that only the disclosure of the orders for production and sequestration of accounts was caught by Article 185 (see paragraph 17 above). Since the applicant had already given this information to the public in Berne on 11 May 1981, it had by that very fact ceased to be confidential.

50. In the Government’s submission this finding was not decisive, because of the formal nature of the confidentiality referred to in Articles 184 and 185 of the Code. According to the relevant Swiss case-law and legal literature, the mere fact of communicating a piece of information in a judicial investigation was sufficient for commission of the offence; whether it was common knowledge beforehand and its importance or degree of confidentiality were relevant only in determining the amount of the fine.

51. The Court finds this submission unpersuasive. For the purposes of the Convention, the interest in maintaining the confidentiality of the aforementioned facts no longer existed on 2 March 1982. On that date, therefore, the penalty imposed on the applicant no longer appeared necessary in order to achieve the legitimate aim pursued. The situation might perhaps have been different at the first press conference, but as the Vaud authorities did not bring proceedings at the time, the Court does not have to examine the question.

As to the submission that the impugned statements by Mr Weber on 2 March 1982 could be interpreted as an attempt to bring pressure to bear on the investigating judge and could therefore have been prejudicial to the proper conduct of the investigation, the Court notes that by that time the investigation was practically complete, because on the previous day the judge had committed R.M. for trial (see paragraph 12 above), and that from then on any attempt of that kind would have been belated and thus devoid of

effect. Admittedly R.M. appealed against his committal for trial, but even though his appeal meant that the order committing him for trial did not become final, the investigation nonetheless remained suspended (see paragraph 12 above). It was accordingly not necessary to impose a penalty on the applicant from this point of view either.

52. Having regard to the particular circumstances of the case, the Court concludes that in being convicted and sentenced to a fine Mr Weber was subjected to an interference with the exercise of his right to freedom of expression, which was not "necessary in a democratic society" for achieving the legitimate aim pursued.

III. APPLICATION OF ARTICLE 50 (art. 50)

53. By Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicant's claims under this provision included both the award of financial compensation and reimbursement of costs and expenses.

54. In respect of non-pecuniary damage Mr Weber sought compensation in the amount of 5,000 Swiss francs. The Court considers, however, that the finding of a violation of Articles 6 and 10 (art. 6, art. 10) constitutes sufficient just satisfaction in this regard.

55. In respect of costs and expenses relating to the proceedings in Switzerland and before the Convention institutions the applicant claimed the sum of 8,482.50 Swiss francs, of which he gave a breakdown.

The Government thought this amount reasonable and said they were willing to pay it if the Court held that there had been a violation of the Convention. The Delegate of the Commission regarded this sum as modest and wholly justified.

The Court agrees and will therefore allow this claim.

FOR THESE REASONS, THE COURT

1. Holds by six votes to one that Article 6 § 1 (art. 6-1) of the Convention applied in the instant case and that there has been a breach of it;

2. Holds unanimously that there has been a breach of Article 10 (art. 10);

3. Holds unanimously that the respondent State is to pay the applicant costs and expenses in the sum of 8,482.50 Swiss francs (eight thousand four hundred and eighty-two francs, fifty centimes);

4. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 May 1990.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 53 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mrs Bindschedler-Robert;

(b) concurring opinion of Mr De Meyer.

R.R.
M.-A.E.

DISSENTING OPINION OF JUDGE BINDSCHEDLER-ROBERT

(Translation)

For the reasons which follow, I voted in support of the view that Article 6 (art. 6) was not applicable in this case.

In the cases of Engel and Others (Series A no. 22, § 81) and Öztürk (Series A no. 73, §§ 48 et seq.) the Court accepted that the Convention allowed the State to make a distinction between, on the one hand, criminal cases and, on the other, disciplinary cases or administrative offences and that only the former automatically came within the ambit of Article 6 (art. 6) of the Convention; but it added that it did not follow that the classification thus adopted by the State was decisive for the purposes of the Convention and that Article 6 (art. 6) could apply to an offence deemed in the State's legislation not to be a criminal one if the nature of the offence and/or the severity of the penalty warranted it.

In the instant case the majority have accepted that the offence in question was a criminal one on the ground that since the relevant Article of the Vaud Code of Criminal Procedure applied to practically the whole population, the offence did not come within the disciplinary sphere.

Having regard to the judgment in the case of Engel and Others, in which the Court accepted that the case was a disciplinary one because it concerned legal rules "governing the operation of the ... armed forces", one might consider that in the present case too, in which the applicable provision was designed to ensure the proper functioning of another public service, the judicial system, the offence in question could legitimately be classified as a disciplinary one. Even if this conception of disciplinary law is deemed to be too broad, it does not necessarily follow that the offence was a criminal one within the meaning of the Convention.

If it is noted that the behaviour which Article 185 is intended to punish lies within a well-defined sphere - ensuring the proper conduct of judicial proceedings - and that by applying to it not the provisions of the Swiss Criminal Code but a provision of the Vaud Code of Criminal Procedure, the prosecuting authority itself classified the offence as being of minor importance, it can be accepted that the offence was an administrative one contravening merely a provision for the maintenance of order. As to the penalty incurred, it is not of such seriousness that it would entail the applicability of Article 6 (art. 6). This is no doubt a matter of opinion, but it appears to me that the Court has not had sufficient regard to the circumstances in which a fine may be converted into a term of imprisonment, namely where there is a deliberate intention not to pay it, and not merely where the person concerned finds himself unable to do so through no fault of his own. In the applicant's case, failure to pay would

have been deliberate and the conversion into imprisonment actively desired. There is therefore no occasion to take into account, as the majority have done, the possibility of conversion in order to assess the seriousness of the penalty incurred. Furthermore, as is apparent from the case of Engel and Others, not all penalties consisting in deprivation of liberty are necessarily criminal ones within the meaning of Article 6 (art. 6) where they cannot be appreciably detrimental either by their nature or by their duration or by their manner of execution. Furthermore, the maximum amount of the fine (CHF 500) - and the fine imposed in the instant case amounted to CHF 300 - does not appear substantial in the Swiss context or likely to cause appreciable detriment. From this point of view too, therefore, I consider it unjustified to classify the offence as a criminal one within the meaning of the Convention.

I will add that the punitive, deterrent nature of the penalty incurred does not seem to me to be such as to affect that view, since it is inherent in any penalty and since any offence necessarily calls for a penalty.

The foregoing considerations accordingly prompt me to say that in my humble opinion Article 6 (art. 6) was not applicable in the instant case and that consequently there cannot have been a violation of it. I will add that if I had reached a different conclusion as to applicability, I would have held, like my colleagues, that there had been a breach of that provision.

CONCURRING OPINION OF JUDGE DE MEYER

(Translation)

As regards Switzerland's reservation in respect of Article 6 § 1 (art. 6-1) of the Convention[1], I confirm, if need be, the observations I made in 1988 with regard to the Belilos case[2].

[1] Paragraphs 23, 24 and 36-38 of the judgment.
[2] Judgment of 29 April 1988, Series A no. 132, p. 36.

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

CASE OF WILLE v. LIECHTENSTEIN

(Application no. 28396/95)

JUDGMENT

STRASBOURG

28 October 1999

In the case of Wille v. Liechtenstein,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mrs E. PALM, *President*,
Mr C.L. ROZAKIS,
Mr L. FERRARI BRAVO,
Mr G. RESS,
Mr L. CAFLISCH,
Mr I. CABRAL BARRETO,
Mr J.-P. COSTA,
Mr W. FUHRMANN,
Mr K. JUNGWIERT,
Mr B. ZUPANCIC,
Mrs N. VAJIC,
Mr J. HEDIGAN,
Mrs W. THOMASSEN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr T. PANTÎRU,
Mr E. LEVITS,
Mr K. TRAJA,

and also of Mrs M. DE BOER-BUQUICCHIO, *Deputy Registrar*,

Having deliberated in private on 2 June and 13 October 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") and by the Liechtenstein Government ("the Government") on 24 and 27 October 1998 respectively, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 28396/95) against the Principality of Liechtenstein lodged with the Commission under former Article 25 by a Liechtenstein citizen, Mr Herbert Wille, on 25 August 1995.

Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

The Commission's request referred to former Articles 44 and 48 and to the declaration whereby Liechtenstein recognised the compulsory jurisdiction of the Court (former Article 46); the Government's application referred to former Article 48. The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 10 and 13 of the Convention.

2. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mr L. Caflisch, the judge elected in respect of Liechtenstein (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mrs E. Palm and Mr C.L. Rozakis, the Vice-Presidents of the Court, and Mr J.-P. Costa and Mr G. Ress, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr L. Ferrari Bravo, Mr I. Cabral Barreto, Mr W. Fuhrmann, Mr K. Jungwiert, Mr B. Zupancic, Mrs N. Vajic, Mr J. Hedigan, Mrs W. Thomassen, Mrs M. Tsatsa-Nikolovska, Mr T. Pantîru, Mr E. Levits and Mr K. Traja (Rule 24 § 3 and Rule 100 § 4).

3. The applicant designated the lawyers who would represent him (Rule 36). The lawyers were given leave by the President of the Grand Chamber, Mrs Palm, to use the German language (Rule 34 § 3).

4. As President of the Grand Chamber, Mrs Palm, acting through the Deputy Registrar, consulted the Agent of the Government, the applicant's lawyers and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 25 February 1999 and the Government's memorial on 30 March 1999.

5. In accordance with the decision of the President of the Grand Chamber, a hearing took place in public in the Human Rights Building, Strasbourg, on 2 June 1999.

There appeared before the Court:

(a) *for the Government*
Mr H. GOLSONG, Attorney, *Co-Agent*,
Mr N. MARXER,
Mr T. STEIN,
Mr M. WALKER, *Counsel*;

(b) *for the applicant*
Mr W.E. SEEGER, *Rechtsanwalt*,
Mr A. KLEY, *Rechtsanwalt*, *Counsel*.

Mr Wille was also present.

The Court heard addresses by Mr Seeger, Mr Kley, Mr Golsong and Mr Stein.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. In 1992 a controversy arose between His Serene Highness Prince Hans-Adam II of Liechtenstein ("the Prince") and the Liechtenstein government on political competences in connection with the plebiscite on the question of Liechtenstein's accession to the European Economic Area. At the relevant time, the applicant was a member of the Liechtenstein government. Following an argument between the Prince and members of the government at a meeting on 28 October 1992, the matter was settled on the basis of a common declaration by the Prince, the Diet (*Landtag*) and the government.

7. Following elections and the constitution of the new Diet in May 1993, discussions on various constitutional issues took place between the Prince and the government, when the applicant no longer held a government office. The applicant had not stood for re-election in May 1993, and he was appointed President of the Liechtenstein Administrative Court (*Verwaltungsbeschwerdeinstanz*) in December 1993 for a fixed term of office (see paragraph 26 below).

8. On 16 February 1995, in the context of a series of lectures on questions of constitutional jurisdiction and fundamental rights, the applicant gave a public lecture at the Liechtenstein-Institut, a research institute, on the "Nature and Functions of the Liechtenstein Constitutional Court" ("*Wesen und Aufgaben des Staatsgerichtshofes*"). In the course of the lecture, the applicant expressed the view that the Constitutional Court was competent to decide on the "interpretation of the Constitution in case of disagreement between the Prince (government) and the Diet" ("*Entscheidung über die Auslegung der Verfassung bei einem Auslegungsstreit zwischen Fürst (Regierung) und Landtag*").

9. On 17 February 1995 the newspaper *Liechtensteiner Volksblatt* published an article on the lecture given by the applicant, mentioning, *inter alia*, his views on the competences of the Constitutional Court.

10. On 27 February 1995 the Prince addressed a letter to the applicant concerning the above lecture, as summarised in the article published in the *Liechtensteiner Volksblatt*.

11. The letter, written on heraldic letter paper, read as follows:

"Vaduz Castle, 27 February 1995

Dr Herbert Wille
President of the Liechtenstein Administrative Court
[applicant's private address]

Sir,

I was astonished to read the report in the 17 February issue of the *Liechtensteiner Volksblatt* on your lecture on the theme of the 'Nature and Functions of the Liechtenstein Constitutional Court'. I assume that the statements you made on the Court's areas of responsibility have been correctly reproduced in this report, in particular the comment that the Constitutional Court can, as a court that interprets the law, be appealed to in the event of a disagreement between the Prince and the people.

You will doubtless remember the discussion between the government and me in the period before 28 October 1992, at which you were present as deputy head of government. I drew the government's attention during this exchange of views at Vaduz Castle to the fact that it was not abiding by the Constitution and read out the relevant Articles thereof. You replied that you did not agree (or words to that effect) with these parts of the Constitution in any case and that you therefore did not consider yourself bound by it. Since the other members of the government did not contradict you, I was forced to assume that the entire government was of the opinion that the two bodies that hold supreme power, the people and the Prince, must observe the Constitution and the ordinary laws but not the members of the government, who have sworn an oath of allegiance to the Constitution.

I considered your statement at that time and the government's attitude to be incredibly arrogant and therefore informed the government in no uncertain terms that it had lost my confidence. Following the compromise that was fortunately reached a little later between the government and the Diet, on the one hand, and myself, on the other, I declared that I once again had confidence in the government, doing so in the hope that individual members had realised that they had taken up an inexcusable position in relation to our Constitution and now recognised that they were bound by it. Just as I would have appointed Mr Brunhart head of government, had his party won the election, I appointed you President of the Administrative Court on the Diet's recommendation.

Unfortunately, I had to realise following the publication of the report in the *Liechtensteiner Volksblatt* that you still do not consider yourself bound by the Constitution and hold views that are clearly in violation of both the spirit and the letter thereof. Anyone reading the relevant Articles of the Constitution will be able to establish that the Constitutional Court has no competence to decide as a court of interpretation in the event of a disagreement between the Prince and the people (the Diet). In my eyes your attitude, Dr Wille, makes you unsuitable for public office. I do not intend to get involved in a long public or private debate with you, but I should like to inform you in good time that I shall not appoint you again to a public office should you be proposed by the Diet or any other body. I only hope that in your judgments as

President of the Administrative Court you will abide by the Constitution and the ordinary laws for the rest of your term of office.

Yours sincerely,

Hans-Adam II
Prince of Liechtenstein"

"Schloss Vaduz, 27. Februar 1995

Herrn Dr. Herbert Wille
Präsident der Fürstlich Liecht.
Verwaltungsbeschwerdeinstanz
...

Sehr geehrter Herr Präsident

Mit Erstaunen habe ich im Liechtensteiner Volksblatt *vom 17. Februar den Bericht über Ihren Vortrag am Liechtenstein Institut zum Thema 'Wesen und Aufgaben des Staatsgerichtshofes' gelesen. Ich nehme an, dass Ihre Aussagen über die Zuständigkeitsbereiche des Staatsgerichtshofes in diesem Bericht korrekt wiedergegeben wurden, insbesondere jene, in der Sie feststellen, dass der Staatsgerichtshof als Interpretations-gerichtshof bei unterschiedlichen Auffassungen zwischen Fürst und Volk angerufen werden könne.*

Sie werden sich bestimmt noch an die Auseinandersetzung zwischen der Regierung und mir vor dem 28. Oktober 1992 erinnern, bei der Sie als stellvertretender Regierungschef anwesend waren. Ich habe damals bei der Aussprache auf Schloss Vaduz die Regierung darauf aufmerksam gemacht, dass sie sich nicht an die Verfassung hält, und die entsprechenden Artikel aus der Verfassung der Regierung vorgelesen. Sie haben dazumal sinngemäss geantwortet, dass Sie mit diesen Teilen der Verfassung sowieso nicht einverstanden seien, und sich deshalb auch nicht an die Verfassung gebunden fühlten. Nachdem die anderen Regierungsmitglieder Ihrer Aussage nicht widersprochen haben, musste ich davon ausgehen, dass die gesamte Regierung der Auffassung ist, dass sich zwar die beiden Souveräne, Volk und Fürst, an Verfassung und Gesetze zu halten haben, nicht aber die Regierungsmitglieder, welche einen Eid auf die Verfassung abgelegt haben.

Ich habe Ihre damalige Aussage sowie die Haltung der Regierung als unglaubliche Arroganz empfunden, und deshalb habe ich der Regierung in sehr klaren Worten mitgeteilt, dass sie mein Vertrauen verloren hat. Beim Kompromiss, der glücklicherweise etwas später zwischen Regierung und Landtag auf der einen Seite und mir auf der anderen Seite erzielt wurde, habe ich der Regierung wieder mein Vertrauen ausgesprochen. Ich habe dies auch in der Hoffnung getan, dass die einzelnen Regierungsmitglieder ihre unentschuldbare Haltung gegenüber unserer Verfassung eingesehen haben und die Verfassung für sie wieder als bindend anerkennen. Ebenso wie ich Herrn Brunhart bei einem Sieg seiner Partei wiederum zum Regierungschef ernannt hätte, so habe ich Sie über Vorschlag des Landtages zum Präsidenten der Verwaltungs-beschwerdeinstanz ernannt.

Leider muss ich aufgrund des Berichtes im Liechtensteiner Volksblatt *nun feststellen, dass Sie sich nach wie vor nicht an die Verfassung gebunden fühlen und Auffassungen vertreten, die eindeutig gegen Sinn und Wortlaut der Verfassung*

verstossen. Jeder wird beim Lesen der einschlägigen Verfassungsartikel feststellen können, dass der Staatsgerichtshof eben nicht Interpretationsgerichtshof bei unterschiedlichen Auffassungen zwischen Fürst und Volk (Landtag) ist. In meinen Augen sind Sie, Herr Dr. Wille, aufgrund Ihrer Haltung gegenüber der Verfassung ungeeignet für ein öffentliches Amt. Ich habe nicht die Absicht, mich mit Ihnen öffentlich oder privat in eine lange Auseinandersetzung einzulassen, aber ich möchte Ihnen rechtzeitig mitteilen, dass ich Sie nicht mehr für ein öffentliches Amt ernennen werde, sollten Sie mir vom Landtag oder sonst irgendeinem Gremium vorgeschlagen werden. Es verbleibt mir die Hoffnung, dass Sie sich während des Restes Ihrer Amtszeit als Präsident der Verwaltungsbeschwerdeinstanz in Ihren Urteilen an Verfassung und Gesetze halten.

Mit vorzüglicher Hochachtung

Hans-Adam II.
Fürst von Liechtenstein"

12. By letter of 9 March 1995 the applicant informed the President of the Diet about the letter of 27 February 1995. He denied having ever made a statement to the effect that he did not consider himself bound by the Constitution or parts thereof. He further explained his research on the competences of the Constitutional Court in constitutional matters. According to him, the expression of an opinion not shared by the Prince could not be regarded as a failure to comply with the Constitution. However, taking into account the conclusions drawn by the Prince in the said letter, his office as President of the Administrative Court was called into question. The President of the Diet subsequently informed the applicant that the Diet had discussed the matter in camera and had come to the unanimous conclusion that the applicant's office was not called into question on account of his legal opinions as stated in the context of his lecture.

13. On 20 March 1995 the applicant replied to the letter sent by the Prince on 27 February 1995, and enclosed a copy of his letter to the President of the Diet. He explained in particular that it was his conviction as a lawyer that his statements on the occasion of the lecture of 16 February 1995, namely that the Constitutional Court was competent to decide on the interpretation of the Constitution in case of a dispute between the Prince and the people (Diet), were correct and did not infringe the Constitution. The applicant concluded that the declaration made by the Prince that he did not intend to appoint the applicant to a public office, amounted to an interference with his rights to freedom of opinion and to freedom of thought, as guaranteed under the Constitution and the European Convention on Human Rights. It further called into question the constitutional right to equal access to public office and constituted an attempt to interfere with judicial independence.

14. In his letter in reply dated 4 April 1995, the Prince noted that Mr Wille had distributed the letter of 27 February 1995 to a large group of

persons. The Prince stated that it had been his intention to avoid a public discussion in informing Mr Wille, in a personal letter, about his decision as early as possible. He considered that a long debate between them on the question of Mr Wille's qualification for the office of judge was inappropriate, as Mr Wille had remained in office and the Prince's criticism had not been directed at the decisions of the Administrative Court, but at Mr Wille's general attitude towards the Constitution.

15. The Prince added that it was left to his discretion whether or not to appoint a candidate for public office and that he was not obliged to give any reasons for such a decision. However, as he had known Mr Wille for many years, he had considered it appropriate to state the reasons for his decision regarding him. Moreover, the decision no longer to appoint him to the office of President of one of the highest courts, on account of his attitude in the past as well as the opinions expressed by him, did not amount to an interference with Mr Wille's rights to freedom of expression and to freedom of thought. All citizens were free to propose and to plead for amendments to constitutional or other legal provisions. However, Mr Wille, during his term of office as a member of the government and in his lecture, had not availed himself of such constitutional and democratic means, but had simply ignored those parts of the Constitution with which he disagreed.

16. The Prince further explained that the relevant provision, namely Article 112 of the Constitution, concerned the competence of the Constitutional Court to decide on the interpretation of the Constitution in case of a dispute between the government and the Diet. Confusing the terms "Government" and "Diet" with "Prince" or "people", as Mr Wille had done, would undermine the rule of law. As head of State, he was obliged to safeguard the constitutional order and the democratic rights of the people. He would be failing in his duties if he were to appoint to one of the highest judicial offices a person whom, owing to his attitude and the statements he had made, he could not regard as being committed to upholding the Constitution.

17. On 2 June 1995 the Prince sent to the applicant, President of the Administrative Court, an open letter which was published in Liechtenstein newspapers. The Prince noted that Mr Wille had made public at least part of the Prince's letter of 27 February 1995. As this had given rise to various comments, the Prince considered it necessary to explain his point of view in an open letter.

18. In his opinion, in a democratic State based on the rule of law (*demokratischer Rechtsstaat*), a distinction had to be drawn between freedom of expression and the means used by an individual for imposing his views in such a society. In that connection, the individual should respect the rules defined in the Constitution and other statutory provisions. The Prince further stated that it was the right of Mr Wille, in his position as a judge, to express the opinion that the monarchy was no longer opportune; that

Article 7 of the Constitution should be amended; that the Prince should be subject to the jurisdiction of the Liechtenstein judiciary; and that the Liechtenstein Constitutional Court should be given supplementary competences. However, Mr Wille was not entitled to place himself above the existing Constitution or incite the Constitutional Court to lay claim to competences which were not vested in it by virtue of the Constitution. The Prince considered that Mr Wille, having regard to his education and professional experience, knew that the terms "people" ("*Volk*"), "Diet" ("*Landtag*"), "Government" ("*Regierung*") and "Prince" ("*Fürst*") and their respective rights and obligations were clearly defined in the Constitution. The applicant's contention that these terms were interchangeable would jeopardise the Constitution and the constitutional State as a whole.

19. The Prince also made reference to the political events in the autumn of 1992 and, lastly, he stated that, on the basis of the article in a Liechtenstein newspaper of 17 February 1995, he was forced to conclude that Mr Wille continued to have the intention of placing himself above the Liechtenstein Constitution. He explained that he had therefore intended to inform Mr Wille, in a personal letter and as early as possible, about his decision not to appoint him to public office in future.

20. In spring 1997 the applicant's term of office as President of the Administrative Court expired. On 14 April 1997 the Liechtenstein Diet decided to propose the applicant again as President of the Administrative Court.

21. In a letter of 17 April 1997 to the President of the Diet the Prince refused to accept the proposed appointment. He explained that, considering his experiences with Mr Wille, he had become convinced that Mr Wille did not feel bound by the Liechtenstein Constitution. In these circumstances, he would be failing in his duties as head of State if he were to appoint Mr Wille as President of the Administrative Court. The Prince further stated that Mr Wille, on account of his other professional qualifications, had made important contributions as a judge of the Administrative Court and that he (the Prince) could therefore understand the proposal made to a certain extent. If the Diet did not share his doubts regarding Mr Wille, it could elect him as associate judge of the Administrative Court.

22. The applicant is currently employed as a researcher by the Liechtenstein-Institut.

II. RELEVANT DOMESTIC LAW

23. The Principality of Liechtenstein is a constitutional, hereditary monarchy on a democratic and parliamentary basis; the power of the State is inherent in and emanates from the Prince and the people and shall be exercised by both of them in accordance with the provisions of the Constitution (Article 2 of the Constitution of 24 October 1921).

24. Chapter II of the Constitution is entitled "The Prince". In its Article 7, it stipulates that the Prince is the head of the State and exercises his sovereign authority in conformity with the provisions of the Constitution and of the other laws; and that his person is sacred and inviolable. Further competences are laid down in Articles 8 to 13. According to Article 11, the Prince appoints the State officials, in conformity with the provisions of the Constitution (see Article 79 concerning the head of the government, the government councillors and their substitutes; Article 97 concerning the president of the Administrative Court and his deputy; Article 99, in conjunction with the Court Organisation Act, concerning the first-instance judges; Article 102 § 3 concerning the members of the High Court (*Obergericht*) and the Supreme Court of Justice (*Oberster Gerichtshof*)). By letter of 28 April 1997, the Prince informed the Liechtenstein government that he instructed it to proceed, within its competence, with the appointment in 1997 of State officials who, pursuant to Article 11 of the Constitution, were to be appointed by the Prince.

25. Chapter IV of the Constitution contains the general rights and obligations of citizens of the Principality. Article 31 stipulates the equality of all citizens before the law, and also provides that the public offices are equally open to them, subject to observance of the legal regulations.

26. According to Article 97 of the Constitution, all decisions or orders by the government are subject to appeal before the Administrative Court. The Administrative Court consists of a president trained in the law and of his deputy, who are appointed by the Prince on the proposal of the Diet, and of four appeal judges and their substitutes, who are elected by the Diet. The president and his deputy must be Liechtenstein nationals. Their term of office coincides with that of the Diet, and ends at such time as they are replaced.

27. According to Article 104 of the Constitution, the Constitutional Court is, *inter alia*, competent to protect rights accorded by the Constitution. Section 23 of the Constitutional Court Act (*Staatsgerichtshofgesetz*) provides that decisions of a court or of an administrative authority may be challenged before the Constitutional Court, by alleging that there has been an infringement of constitutional rights or of rights guaranteed under the Convention for the Protection of Human Rights and Fundamental Freedoms.

28. Pursuant to Article 105 of the Constitution, in conjunction with section 4 of the Constitutional Court Act, the judges of the Constitutional Court are elected by the Diet; the election of the president and the deputy president are subject to confirmation by the Prince.

29. Article 112 of the Constitution reads as follows:

> "If doubts arise as to the interpretation of specific provisions of the Constitution and cannot be dispelled on the basis of an agreement between the Government and the Diet, the Constitutional Court is called upon to decide on the matter."

"Wenn über die Auslegung einzelner Bestimmungen der Verfassung Zweifel entstehen und nicht durch Übereinkunft zwischen der Regierung und dem Landtage beseitigt werden können, so hat hierüber der Staatsgerichtshof zu entscheiden."

30. In 1991 the Liechtenstein government introduced a bill in Parliament with the object of amending the Constitutional Court Act of 1925. In its comments on the provision regarding the Constitutional Court's competence to decide on the interpretation of specific provisions of the Constitution, the government explained, *inter alia*, its views on the wording and purpose of Article 112 of the Constitution and in particular on the term "Government" which should be understood as referring to the Prince. At the preparatory stage, the Prince, in a letter addressed to the applicant, who at the time held the office of deputy head of the Liechtenstein government, had stated his disagreement with the proposed interpretation. The applicant explained the bill in Parliament when it received its first reading in April 1992. In the course of the discussions, the President of the Parliament questioned the interpretation of Article 112 of the Constitution, as contained in the government's comments. The bill was passed by the Diet on 11 November 1992; however, the Prince failed to sign it so that it did not enter into force.

31. Under section 20 of the Liechtenstein Court Organisation Act (*Gerichtsorganisationsgesetz, LGBl 1922 Nr. 16*), judges are required to swear an oath, including the duties of loyalty to the Prince and of obedience to the laws and the Constitution.

PROCEEDINGS BEFORE THE COMMISSION

32. Mr Herbert Wille applied to the Commission on 25 August 1995. He alleged that following a public lecture he had given on issues of constitutional law the monarch of Liechtenstein, His Serene Highness Prince Hans-Adam II, as announced in a letter, decided not to appoint the applicant to public office in the future. This measure constituted a violation of his rights under Articles 6, 10, 13 and 14 of the Convention.

33. The Commission declared the application (no. 28396/95) admissible on 27 May 1997. In its report of 17 September 1998 (former Article 31 of the Convention), it expressed the opinion that there had been a violation of Article 10 (fifteen votes to four); that it was not necessary to determine whether there had been a violation of Article 6 (seventeen votes to two); that there had been a violation of Article 13 taken in conjunction with Article 10 (sixteen votes to three); and that no separate issue arose under Article 14 taken in conjunction with Article 10 (seventeen votes to two).

The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

34. In his memorial, the applicant requested the Court to find the respondent State in breach of its obligations under Articles 10 and 13 of the Convention and to award him just satisfaction under Article 41.

The Government, for their part, invited the Court to dismiss the applicant's complaints under Articles 10 and 13 of the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

35. The applicant complained that, on account of the views expressed by him in the course of a public lecture on constitutional law at the Liechtenstein-Institut on 16 February 1995, the monarch of Liechtenstein, His Serene Highness Prince Hans-Adam II, in a letter addressed to him, announced his intention not to appoint the applicant to a public office again. He considered that this constituted a breach of his right to freedom of expression as guaranteed by Article 10 of the Convention, which reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

1. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

A. As to the applicability of Article 10 and the existence of an interference

36. The applicant submitted that the Prince's decision not to appoint him to a public office in the future should he be proposed by the Diet or any other body as expressed in the Prince's letter of 27 February 1995 constituted an immediate reaction to his academic speech delivered a few days before and could not be considered anything else but a sanction for the expression of his legal opinion. Although the Convention did not guarantee a right of access to the civil service, civil servants nevertheless enjoyed the protection of Article 10.

37. The Government submitted that the applicant's speech and the Prince's reaction thereto expressed in his letter of 27 February 1995 should be considered against the background of an ongoing political debate in Liechtenstein regarding the Prince's authority and should not be seen in isolation. In 1992 there was a controversy between the Prince and the government over the date of a referendum for accession to the European Economic Area. The applicant was then a member of the Liechtenstein government, deputy head of the government and in charge of the justice portfolio. In the course of that controversy the applicant had expressed the view that, under Article 112 of the Constitution, the Constitutional Court had the power to decide on the interpretation of the Constitution in case of a disagreement between the Prince and the Diet. At the same time the Diet was considering a draft amendment to the Constitutional Court Act. In the explanatory report thereon the applicant had expressed the same opinion. In both cases the Prince had directly contradicted the applicant. Nevertheless, in December 1993, he had appointed the applicant President of the Administrative Court. Thus the Prince's letter essentially expressed the Prince's disappointment and surprise that the applicant, despite a previous compromise on the controversy regarding the jurisdiction of the Constitutional Court, had given a public speech on this issue although he must have known that the Prince could not have been in agreement with the opinion expressed.

38. The Prince's letter to the applicant of 27 February 1995 was a personal letter not intended for the general public and sent to the applicant's private address. It did not constitute an act of State but was rather the notice of an intent to make a decision at a later time. The letter did not have a direct impact on the applicant's legal status. He was not dismissed from office nor was his professional activity as President of the Administrative Court obstructed in any other way. But even if the Prince's letter could be construed as an act of State, the Convention would not be applicable to the case. As the sanction was the refusal to appoint the applicant to a specific public office, it did not affect the applicant in any of his rights, as there was no right, either under Liechtenstein law or under the Convention, to be

appointed to such office. Article 10 did not apply when the central issue was a question of access to public office.

39. The Commission essentially agreed with the applicant. It found that the Prince's decision, as expressed in his letter of 27 February 1995, not to appoint the applicant in the future to public office was an interference with the applicant's right to freedom of expression as secured in Article 10 of the Convention.

40. The Court will first deal with the Government's argument that the case essentially concerns access to the civil service, a right not guaranteed by the Convention.

41. In this connection the Court points out that the right of recruitment to the civil service was deliberately omitted from the Convention. Consequently, the refusal to appoint a person as a civil servant cannot as such provide the basis for a complaint under the Convention. This does not mean, however, that a person who has been appointed as a civil servant cannot complain of being dismissed if that dismissal violates one of his or her rights under the Convention. Civil servants do not fall outside the scope of the Convention. In Articles 1 and 14, the Convention stipulates that "everyone within [the] jurisdiction" of the Contracting States must enjoy the rights and freedoms in Section I "without discrimination on any ground". Moreover, Article 11 § 2 *in fine*, which allows States to impose special restrictions on the exercise of the freedoms of assembly and association by "members of the armed forces, of the police or of the administration of the State", confirms that as a general rule the guarantees in the Convention extend to civil servants (see the Glasenapp and Kosiek v. Germany judgments of 28 August 1986, Series A nos. 104, p. 26, § 49, and 105, p. 20, § 35, and the Vogt v. Germany judgment of 26 September 1995, Series A no. 323, pp. 22-23, § 43).

42. Accordingly, the status of civil servant obtained by the applicant when he was appointed President of the Liechtenstein Administrative Court did not deprive him of the protection of Article 10.

43. In order to determine whether this provision was infringed it must first be ascertained whether the disputed measure amounted to an interference with the exercise of freedom of expression – in the form of a "formality, condition, restriction or penalty" – or whether it lay within the sphere of the right of access to the civil service, a right not secured in the Convention. In order to answer this question, the scope of the measure must be determined by putting it in the context of the facts of the case and of the relevant legislation (see the Glasenapp and Kosiek judgments cited above, p. 26, § 50, and p. 20, § 36).

44. In the Glasenapp and Kosiek cases, the Court analysed the action of the authorities as a refusal to grant the applicants access to the civil service on the ground that they did not possess one of the necessary qualifications. In the Vogt case, the Court found that Mrs Vogt, for her part, had been a

permanent civil servant since February 1979. She was suspended in August 1986 and dismissed in 1987. It concluded that there was indeed an interference with the exercise of the right protected by Article 10 of the Convention (see the Vogt judgment cited above, p. 23, § 44). In the instant case, the Court considers likewise that recruitment to the civil service does not lie at the heart of the issue submitted to it. Even though the Prince raised the matter of a possible reappointment of the applicant as President of the Administrative Court in the future, his communications to the applicant essentially consisted in a reprimand for the opinions the latter had expressed previously.

45. The Government argue that the Prince's letter of 27 February 1995 was merely an advance announcement of a possible decision to be taken by the Prince in the future; thus it was a private letter and could not be equated to a sanction.

46. The Court reiterates in this connection that the responsibility of a State under the Convention may arise for acts of all its organs, agents and servants. As is the case in international law generally, their rank is immaterial since the acts by persons accomplished in an official capacity are imputed to the State in any case. In particular, the obligations of a Contracting Party under the Convention can be violated by any person exercising an official function vested in him (see Ireland v. the United Kingdom, application no. 5310/71, Commission's report of 25 January 1976, Yearbook 19, p. 758).

47. The Court notes that the Principality of Liechtenstein is a constitutional hereditary monarchy on a democratic and parliamentary basis; the power of the State is inherent in and emanates from the Prince and the people and shall be exercised by both of them in accordance with the provisions of the Constitution (Article 2 of the Constitution). Chapter II of the Constitution specifies various sovereign powers of the Prince, *inter alia*, the appointment of State officials (Article 11 of the Constitution).

48. The Court further notes that the applicant had been appointed President of the Liechtenstein Administrative Court in December 1993. On 27 February 1995 the Prince of Liechtenstein, in a letter to the applicant, informed him of his intention not to appoint him to public office again, should he be proposed by the Diet or any other body. The Prince's letter was prompted, and this is not in dispute between the parties, by a report in the *Liechtensteiner Volksblatt* concerning the lecture given by the applicant on 16 February 1995 on the nature and functions of the Liechtenstein Constitutional Court, including a statement that the competence of that court under the Constitution could, in matters of interpretation of the Constitution, extend to disputes involving the powers of the Prince. According to the latter, the views thus expressed by the applicant infringed the Constitution, and the applicant's attitude towards the Constitution made him unsuitable for public office. The Prince confirmed his intention not to appoint the

applicant in subsequent letters of 4 April and 2 June 1995 and eventually, by letter of 17 April 1997, refused to reappoint the applicant as President of the Administrative Court after he had been proposed for this post by the Diet. Hence the Court cannot accept the argument that the letters of the Prince were private correspondence and did not constitute an act of State.

49. In examining whether there has been an interference with the applicant's right to freedom of expression the Court finds that the Prince's letter of 27 February 1995 should be at the centre of its attention as it expressed for the first time the Prince's intentions *vis-à-vis* the applicant. However, this measure has to be seen in the context of the Prince's subsequent communications which confirmed these intentions.

50. Considering the contents of this letter the Court finds that there has been an interference by a State authority with the applicant's freedom of expression. The measure complained of occurred in the middle of the applicant's term of office as President of the Administrative Court; it was unconnected with any concrete recruitment procedure involving an appraisal of personal qualifications. From the terms of the letter of 27 February 1995 it appears that the Prince had come to a resolution regarding his future conduct towards the applicant, which related to the exercise of one of his sovereign powers, that is his power to appoint State officials. Moreover, the said letter was expressly addressed to the applicant as President of the Administrative Court, though sent to his place of residence. Thus, the measure complained of was taken by an organ which was competent to act in the manner it did and whose acts engaged the responsibility of Liechtenstein as a State under the Convention. The right of the applicant to exercise his freedom of expression was interfered with once the Prince, criticising the contents of the applicant's speech, announced the intention to sanction the applicant because he had freely expressed his opinion. The announcement by the Prince of his intention not to reappoint the applicant to a public post constituted a reprimand for the previous exercise by the applicant of his right to freedom of expression and, moreover, had a chilling effect on the exercise by the applicant of his freedom of expression, as it was likely to discourage him from making statements of that kind in the future.

51. It follows that there was an interference with the exercise of the applicant's right to freedom of expression, as secured in Article 10 § 1.

B. As to whether the interference was justified

52. Such an interference gives rise to a breach of Article 10 unless it can be shown that it was "prescribed by law", pursued one or more legitimate aim or aims as defined in paragraph 2 and was "necessary in a democratic society" to attain them.

1. "Prescribed by law" and legitimate aim

53. The applicant submitted that the interference complained of did not have any legal basis in Liechtenstein law. In particular, it had been unforeseeable for him that as a reaction to his speech the Prince would impose such a serious and far-reaching sanction. Furthermore the Prince's measure did not pursue any legitimate aim.

54. In the Government's view the interference, if there had been any, was justified on account of the applicant's violation of judicial norms of conduct and of his oath of office under Liechtenstein law, which included swearing loyalty to the Prince and obedience to the Constitution and the laws. Furthermore, the aim of the interference was to maintain public order and promote civil stability, and to preserve judicial independence and impartiality.

55. The Commission found that in examining the justification of the interference with the applicant's right to freedom of expression, the central issue was whether this interference was "necessary in a democratic society". In view of the conclusions it reached with regard to this third condition, it did not find it necessary to examine compliance with the first two conditions.

56. Assuming that the interference was prescribed by law and pursued a legitimate aim, as the Government claimed, the Court considers that it was not "necessary in a democratic society", for the following reasons.

2. "Necessary in a democratic society"

57. The applicant submitted that the measure complained of constituted an interference with his right to freedom of expression which could not be justified under paragraph 2 of Article 10 as it was not "necessary in a democratic society".

58. The Commission shared this opinion while it was contested by the Government.

59. The Government submitted that Article 10 § 2 granted States a wide margin of appreciation in determining what political conduct was incompatible with the "decorum of judicial office". At the hearing they explained that beyond a certain level in the public service, dissenting from those who were free to appoint, reappoint or dismiss high-ranking officials, including (high-ranking) judges, carries a certain risk, a risk known to all concerned and so far not regarded as a violation of human rights. In their view, it was inherent in the nature of judicial office that a particularly high degree of self-restraint be observed by the holder of such office in making public pronouncements which had a political flavour.

60. The Government considered that the applicant's lecture on the functions of the Liechtenstein Constitutional Court contained a controversial political statement and a subtle but significant provocation of

one of the sovereigns of Liechtenstein. The applicant had been aware that his statement regarding the competence of the Constitutional Court to decide in the event of a conflict between the Prince and Parliament contradicted the Prince's view, supported by the text of the Constitution, that he was completely immune from the compulsory jurisdiction of any court. In their submission, the applicant was invited as a judge to give a lecture, and he used the opportunity to make his own political and legal beliefs public. He thereby put at risk the public trust in judicial independence and impartiality.

61. The Court recalls that in its above-mentioned Vogt judgment (pp. 25-26, § 52) it summarised as follows the basic principles concerning Article 10 as laid down in its case-law:

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted, and the necessity for any restrictions must be convincingly established.

(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.

62. In the same judgment the Court declared:

> "These principles apply also to civil servants. Although it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention. It therefore falls to the Court, having regard to the circumstances of each case, to determine whether a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10 § 2. In carrying out this review, the Court will bear in mind that whenever civil servants' right to freedom of expression is in issue the 'duties and responsibilities' referred to in Article 10 § 2 assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim." (p. 26, § 53, and the Ahmed and Others v. the United Kingdom judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2378, § 56)

63. In assessing whether the measure taken by the Prince as a reaction to the statement made by the applicant in the course of his lecture on 16 February 1995 corresponded to a "pressing social need" and was "proportionate to the legitimate aim pursued", the Court will consider the impugned statement in the light of the case as a whole. It will attach particular importance to the office held by the applicant, the applicant's statement, the context in which it was made and the reaction thereto.

64. In December 1993 the applicant was appointed President of the Administrative Court and he held this office when, on 16 February 1995, he gave the lecture at issue. Since the applicant was a high-ranking judge at that time, the Court must bear in mind that, whenever the right to freedom of expression of persons in such a position is at issue, the "duties and responsibilities" referred to in Article 10 § 2 assume a special significance since it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question. Nevertheless the Court finds that an interference with the freedom of expression of a judge in a position such as the applicant's calls for close scrutiny on the part of the Court.

65. As regards the applicant's lecture on 16 February 1995, the Court observes that this lecture formed part of a series of academic lectures at a Liechtenstein research institute on questions of constitutional jurisdiction and fundamental rights (see paragraph 8 above). The applicant's discourse included a statement on the competences of the Constitutional Court under Article 112 of the Liechtenstein Constitution. It was the applicant's view that the term "Government" used in this provision included the Prince, an opinion allegedly in conflict with the principle of the Prince's immunity from the jurisdiction of the Liechtenstein judiciary (see paragraphs 24 and 29).

66. In the applicant's view this statement was an academic comment on the interpretation of Article 112 of the Constitution. The Government, on the other hand, maintained that although it was being made in the guise of a

legally aseptic statement, it constituted, in essence, a highly political statement involving an attack on the existing constitutional order and not reconcilable with the public office held by the applicant at the time.

67. The Court accepts that the applicant's lecture, since it dealt with matters of constitutional law and more specifically with the issue of whether one of the sovereigns of the State was subject to the jurisdiction of a constitutional court, inevitably had political implications. It considers that questions of constitutional law, by their very nature, have political implications. It cannot find, however, that this element alone should have prevented the applicant from making any statement on this matter. The Court further observes that in the context of introducing a bill amending the Constitutional Court Act in 1991, the Liechtenstein government had, in its accompanying comments, held a similar view, which had been opposed by the Prince but had found agreement in the Liechtenstein Diet, albeit only by a majority (see paragraph 30 above). The opinion expressed by the applicant cannot be regarded as an untenable proposition since it was shared by a considerable number of persons in Liechtenstein. Moreover, there is no evidence to conclude that the applicant's lecture contained any remarks on pending cases, severe criticism of persons or public institutions or insults of high officials or the Prince.

68. Turning to the Prince's reaction, the Court observes that he announced his intention not to appoint the applicant to public office again, should the applicant be proposed by the Diet or any other body. The Prince considered that the above-mentioned statement by the applicant clearly infringed the Liechtenstein Constitution. In this context, he also made reference to a political controversy with the Liechtenstein government in October 1992 and, in conclusion, he reproached the applicant, who had been a member of the government at that time and President of the Liechtenstein Administrative Court since 1993, with regarding himself as not being bound by the Constitution. In the Prince's view, the applicant's attitude towards the Constitution made him unsuitable for public office (see paragraph 11 above).

69. The Prince's reaction was based on general inferences drawn from the applicant's previous conduct in his position as a member of the government, in particular on the occasion of the political controversy in 1992, and his brief statement, as reported in the press, on a particular, though controversial, constitutional issue of judicial competence. No reference was made to any incident suggesting that the applicant's view, as expressed at the lecture in question, had a bearing on his performance as President of the Administrative Court or on any other pending or imminent proceedings. Also the Government did not refer to any instance where the applicant, in the pursuit of his judicial duties or otherwise, had acted in an objectionable way.

70. On the facts of the present case, the Court finds that, while relevant, the reasons relied on by the Government in order to justify the interference with the applicant's right to freedom of expression are not sufficient to show that the interference complained of was "necessary in a democratic society". Even allowing for a certain margin of appreciation, the Prince's action appears disproportionate to the aim pursued. Accordingly the Court holds that there has been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

71. The applicant complained that he did not have an effective judicial or other remedy enabling him to challenge the action taken by the Prince with regard to the opinion expressed on the occasion of his lecture. He relied on Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

72. The Government disputed the above contention, emphasising that a remedy existed of which the applicant had failed to avail himself.

At the hearing the Government submitted that there were strong indications in the case-law of the Constitutional Court that it would not only consider a court or an administrative authority but also the Diet as one of the bodies against which a request for adjudication could be lodged with the Constitutional Court under Section 23 of the Constitutional Court Act. The applicant therefore had at his disposal an effective remedy within the meaning of Article 13 of the Convention as he could and should have challenged the Diet's failure to insist on his nomination as President of the Administrative Court.

73. In the applicant's submission, a request for adjudication to the Constitutional Court under Section 23 of the Constitutional Court Act required that the decision complained of should emanate from a court or an administrative authority. The Prince, however, was neither of these.

74. The Commission agreed with the applicant. It found that the Government had not succeeded in showing that, against the violation of Article 10 of the Convention alleged by the applicant, a remedy effective in practice as well as in law existed under Liechtenstein law. In particular, as regards a complaint with the Constitutional Court the Government had not put forward any example showing its application in a case similar to the present one.

75. Article 13 has been consistently interpreted by the Court as requiring a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (see the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23,

§ 52, and the Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, p. 14, § 31). Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the "competent national authority" both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligation under this provision. The remedy must be "effective" in practice as well as in law (see the Mentes and Others v. Turkey judgment of 28 November 1997, *Reports* 1997-VIII, p. 2715, § 89).

76. In the light of the conclusion in paragraph 70 above, the requirement that the complaint be "arguable" is satisfied in respect of the submission in question (see the Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria judgment of 19 December 1994, Series A no. 302, p. 20, § 53).

77. As regards the Government's argument that the applicant should have seised the Constitutional Court against the Diet for not having insisted on its right to nominate him for a new term of office as President of the Administrative Court, it suffices to note that the applicant's complaint under Article 10 concerned acts by the Prince and not by the Diet. The Government, however, have failed to show that there exists any precedent in the Constitutional Court's case-law, since its establishment in 1925, that that court has ever accepted for adjudication a complaint brought against the Prince. They have therefore failed to show that such a remedy would have been effective.

78. It follows that the applicant has also been the victim of a violation of Article 13.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AND OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 10

79. Before the Commission the applicant further alleged that he had been denied access to a tribunal to defend his reputation and seek protection of his personal rights, including his occupation and professional career, against the statements of the Prince. He relied on Article 6 § 1 of the Convention, the relevant part of which provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …"

80. Before the Commission the applicant also complained that, because of his opinion regarding a particular legal issue, he was prejudiced in his access to public office. He relied on Article 14 of the Convention taken in conjunction with Article 10. Article 14 of the Convention states:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

81. As regards the complaint under Article 6, the Commission found it appropriate to examine this complaint in relation to the more general obligation on States under Article 13 to provide an effective remedy in respect of violations of the Convention. It concluded that it was not necessary to determine whether there had been a violation of Article 6. As regards the complaint under Article 14, the Commission, having regard to its conclusion concerning Article 10, found that no separate issue arose under Article 14 taken in conjunction with Article 10.

82. Before the Court the applicant did not reiterate these complaints and the Court does not find it necessary to deal with the matter of its own motion.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. The applicant sought just satisfaction under Article 41 of the Convention, which provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

84. Under the head of pecuniary damage, the applicant claimed 25,000 Swiss francs (CHF) compensation for economic loss suffered by him as a consequence of the measure complained of. He submitted that, unlike his predecessors, he had not been offered any remunerated position in Liechtenstein industrial and business circles.

85. The Government objected to this claim.

86. The Court finds that there is no sufficient causal link established between the damage claimed and the violation of the Convention found. Thus, it cannot allow the compensation claim submitted under this head.

87. Under the head of non-pecuniary damage, the applicant claimed CHF 30,000. He submitted that the Prince's statements had been highly offensive and had adversely affected his reputation.

88. The Government also opposed this claim.

89. The Court considers that the applicant may be taken to have suffered distress on account of the facts of the case. On an equitable basis, the Court awards him CHF 10,000 for non-pecuniary damage.

B. Costs and expenses

90. In respect of costs and expenses relating to his representation before the Convention institutions, the applicant claimed a total of CHF 91,014.05, namely CHF 44,927.20 for Mr Kley and CHF 46,086.85 for Mr Seeger.

91. The Government did not contest this claim.

92. The Court is satisfied that the hourly rates charged in the Strasbourg proceedings were reasonable. Taking into account that a hearing was held both before the Commission and the Court, it also finds the number of hours claimed not excessive. The claim for costs and expenses is thus to be allowed in its entirety.

C. Default interest

93. According to the information available to the Court, the statutory rate of interest applicable in Liechtenstein at the date of adoption of the present judgment is 5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by sixteen votes to one that there has been a violation of Article 10 of the Convention;

2. *Holds* by sixteen votes to one that there has been a violation of Article 13 of the Convention;

3. *Holds* unanimously that it is not necessary to consider whether there has been a violation of Article 6 of the Convention and of Article 14 taken in conjunction with Article 10;

4. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months, the following amounts:
      (i) 10,000 (ten thousand) Swiss francs for non-pecuniary damage;
      (ii) 91,014.05 (ninety-one thousand and fourteen) Swiss francs and five centimes for costs and expenses;

(b) that simple interest at an annual rate of 5% shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 October 1999.

Elisabeth PALM
President

Maud DE BOER-BUQUICCHIO
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Mr Caflisch, Mr Zupancic and Mr Hedigan;

(b) dissenting opinion of Mr Cabral Barreto.

E.P.
M.B.

JOINT CONCURRING OPINION OF JUDGES CAFLISCH, ZUPANCIC AND HEDIGAN

We concur with the Court in its judgment but should like to enter a reservation as to the Court's reasoning in finding a violation of Article 10.

The matter complained of by the applicant, who alleged that it amounted to an interference with a right guaranteed by Article 10, is held to have been completed by the first letter written by HSH Prince Hans-Adam II of Liechtenstein. We do not share that view. The letter in question was dated 27 February 1995. At that juncture it could be regarded as the mere expression of an intention, which might very well have changed in the months that followed and which only crystallised into an "interference" with the Prince's subsequent confirming communications. Only in the light of the latter can it be accepted that the threat of a sanction indeed hung over the applicant. Furthermore, taken alone, the letter of 27 February 1995 could have been regarded as the expression of a private personal opinion. It is the subsequent confirming letters which justify concluding, without any possible doubt, that this measure was, in fact, an act of State.

We thus reach the conclusion that the measure which infringed the right guaranteed by Article 10 consisted in the Prince's communications taken as a whole.

DISSENTING OPINION OF JUDGE CABRAL BARRETO

(*Translation*)

I regret that I cannot share the opinion of the majority of the Court; in my opinion, there has not been a violation of the applicant's right to freedom of expression.

There are two decisive pieces of evidence in the case: the Prince's letter of 27 February 1995, in which the Prince expressed for the first time his intention of not reappointing the applicant as President of the Administrative Court, and the letter of 17 April 1997 to the President of the Diet, in which the Prince refused to make that appointment.

Let us examine these.

1. The letter of 27 February 1995 was a personal letter, sent to the applicant's private address, in which the Prince indicated his intention of not appointing the applicant to any public office again.

It will, I think, be helpful to reproduce the following passage:

> "In my eyes your attitude, Dr Wille, makes you unsuitable for public office. I do not intend to get involved in a long public or private debate with you, but I should like to inform you in good time that I shall not appoint you again to a public office should you be proposed by the Diet or any other body …"

I note at the outset that the Prince did not wish to get involved in a public discussion and that he merely wanted to indicate in good time his intention of taking a certain course of action if the opportunity arose.

I have difficulty in seeing how this letter constituted a "reprimand" (see paragraph 50 of the judgment).

The letter expressed above all the Prince's disagreement with the applicant's ideas about the interpretation of the Liechtenstein Constitution. That disagreement entailed the loss of the political confidence which the Prince was supposed to have in the applicant and consequently the announcement that the Prince intended to draw the necessary political conclusions.

Nothing more, in other words, than what the applicant could expect, regard being had to the controversy in 1992 between the Prince and the government (of which the applicant was then a member).

An intention does not, in itself, amount to a legal act or even an initial step towards performing such an act.

There is no doubt that we are here in the purely psychological field, still far from even a preparatory act, which would presuppose that physical acts had already been performed.

I would therefore be able to understand that the Prince's letter should be judged as having been quite simply designed to announce "in good time" his intention of carrying out an act, in order to give the applicant time to make the necessary preparations for his future.

It is true that this private letter announcing an intention became public and that it was confirmed by the other letters from the Prince, which were open letters.

All that, however, was due solely to the applicant's conduct and, as Mr Conforti rightly said in his dissenting opinion annexed to the Commission's report, the applicant cannot "avoid the application of the principle *nemo contra factum suum proprium venire potest*".

Accepting the contrary would, to my mind, contravene the letter and the spirit of Article 10 of the Convention. It is not possible to judge intentions without falling into the realm of a "virtual" violation, and that seems to me to be what has happened in the instant case.

2. The refusal to reappoint the applicant as President of the Administrative Court was, without any doubt, a legal act, and in the circumstances of the case I can accept that it was prompted by the opinions that the applicant had expressed, and that poses a problem under Article 10.

However, I consider that it is unnecessary to determine whether that refusal pursued a legitimate aim and whether it was necessary in a democratic society, since no one will dispute that we are here in the field of access to public office, a subject which was deliberately omitted from the Convention. That is acknowledged by the majority of the Court in paragraph 41 of the judgment.

I therefore conclude that there has been no violation of the Convention.

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

COURT (PLENARY)

CASES OF DE WILDE, OOMS AND VERSYP ("VAGRANCY")
v. BELGIUM (MERITS)

(Application no. 2832/66; 2835/66; 2899/66)

JUDGMENT

STRASBOURG

18 June 1971

In the De Wilde, Ooms and Versyp cases,

The European Court of Human Rights, taking its decision in plenary session in accordance with Rule 48 of its Rules and composed of the following Judges:

Sir Humphrey WALDOCK, *President*,
MM. H. ROLIN,
R. CASSIN,
Å.E.V. HOLMBÄCK,
A. VERDROSS,
E. RODENBOURG,
A.N.C. ROSS,
T. WOLD,
G. BALLADORE PALLIERI,
H. MOSLER,
M. ZEKIA,
A. FAVRE,
J. CREMONA,
S. BILGE,
G. WIARDA,
S. SIGURJÓNSSON,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. J.F. SMYTH, *Deputy Registrar*,

Decides as follows:

PROCEDURE

1. The De Wilde, Ooms and Versyp cases were referred to the Court by the Government of the Kingdom of Belgium ("the Government"). The cases have their origin in applications lodged in 1966 with the European Commission of Human Rights ("the Commission"), under Article 25 (art. 25) of the Convention, by Belgian nationals - Jacques De Wilde, Franz Ooms and Edgard Versyp - and concerning certain aspects of Belgian legislation on vagrancy and its application to these three persons. In 1967 the Commission ordered the joinder of the said applications insofar as they had been declared admissible and, on 19th July 1969, it adopted in their respect the report provided for in Article 31 (art. 31) of the Convention. The report was transmitted to the Committee of Ministers of the Council of Europe on 24th September 1969.

The Government’s application, which referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48) of the Convention, was lodged with the Registry of

the Court on 24th October 1969 within the period of three months laid down in Articles 32 (1) and 47 (art. 32-1, art. 47).

2. On 28th October 1969, the Registrar obtained from the Secretary of the Commission twenty-five copies of its report.

3. On 10th November 1969, the President of the Court drew by lot, in the presence of the Registrar, the names of six of the seven Judges called upon to sit as members of the Chamber, Mr. Henri Rolin, the elected Judge of Belgian nationality, being an ex officio member under Article 43 (art. 43) of the Convention. The six Judges so chosen were MM. Å. Holmbäck, A. Verdross, G. Balladore Pallieri, A. Favre, J. Cremona and S. Sigurjónsson. The President also drew by lot the names of three substitute Judges, namely MM. A. Bilge, E. Rodenbourg and G. Maridakis in this order.

Mr. Å. Holmbäck assumed the office of President of the Chamber in accordance with Rule 21, paragraph 7, of the Rules of Court.

4. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Government and of the President of the Commission on the procedure to be followed. By an Order of 23rd November 1969, he decided that the Government should file a memorial within a time-limit expiring on 15th February 1970 and that the Delegates of the Commission should have the right to reply in writing by 9th April 1970 as fixed by an Order of 12th February 1970. The respective memorials of the Government and the Commission reached the Registry on 9th February and 9th April 1970.

5. As authorised by the President of the Chamber in an Order of 18th April 1970, the Government filed a second memorial on 10th June 1970. On 1st July 1970, the Secretary of the Commission informed the Registrar that the Delegates did not wish to file a rejoinder.

6. On 10th January and 3rd March 1970, the President of the Chamber had instructed the Registrar to invite the Commission and the Government to produce a number of documents, which were placed on the file in February, April and May 1970.

7. At a meeting in Strasbourg on 28th May 1970, the Chamber decided, by virtue of Rule 48, "to relinquish jurisdiction forthwith in favour of the plenary Court" for the reason that the Commission had raised in the submissions of its memorial "certain questions on which it (was) desirable that the Court should be able to rule in plenary session".

Sir Humphrey Waldock assumed the office of President of the Court for the consideration of the present cases under Rule 21, paragraph 7, taken in conjunction with Rule 48, paragraph 3.

8. On 28th and 29th September 1970, the Court held a meeting in Paris to prepare the oral part of the procedure. On this occasion it decided to request the Commission and the Government to provide it with further documents and information which were received on 30th October and 16th November 1970, respectively.

Some other documents were filed by the Agent of the Government on 15th and 17th March 1971.

9. After having consulted the Agent of the Government and the Delegates of the Commission, the President decided, by Order of 1st October 1970, that the oral hearings should open on 16th November 1970.

10. The oral hearings began on the morning of 16th November 1970 in the Human Rights Building at Strasbourg. They continued during the two following days.

There appeared before the Court:

- for the Government:
  Mr. J. DE MEYER, Professor
  at Louvain University, Assessor to the Council of State,
  Agent and *Counsel*;
- for the Commission:
  Mr. M. SØRENSEN, *Principal Delegate*, and
  Mr. W.F. DE GAAY FORTMAN, *Delegate*.

On the afternoon of 17th November, Mr. Sørensen informed the Court that the Delegates of the Commission intended to be assisted on a particular point by Me X. Magnée, avocat at the Brussels Bar. The Agent of the Belgian Government having expressed objections, the Court took note, by a judgment of 18th November, of the intention of the Delegates to avail themselves of the right conferred on them by Rule 29, paragraph 1, in fine.

The Court heard the addresses and submissions of Mr. Sørensen and Mr. De Meyer as well as their replies to the questions put by several Judges. It also heard, on the afternoon of 18th November, a short statement by Me Magnée of the point mentioned by the Principal Delegate.

The hearings were declared provisionally closed on 18th November.

11. Judge G. Maridakis, who had attended the oral hearings, could not take part in the consideration of the present cases after 31st December 1970, as the withdrawal of Greece from the Council of Europe became effective from that date.

12. After having made final the closure of the proceedings and deliberated in private, the Court gives the present judgment.

AS TO THE FACTS

13. The purpose of the Government’s application is to submit the De Wilde, Ooms and Versyp cases for judgment by the Court. On several points the Government therein expresses its disagreement with the opinion stated by the Commission in its report.

14. The facts of the three cases, as they appear from the said report, the memorials of the Government and of the Commission, the other documents

produced and the addresses of the representatives appearing before the Court, may be summarised as follows:

A. De Wilde case

15. Jacques De Wilde, a Belgian citizen, born on 11th December 1928 at Charleroi, spent a large part of his childhood in orphanages. On coming of age, he enlisted in the French army (Foreign Legion) in which he served for seven and a half years. As a holder of books for a fifty per cent war disablement pension and a military retirement pension, he draws from the French authorities a sum which in 1966 amounted to 3,217 BF every quarter. He has work, from time to time at any rate, as an agricultural labourer.

16. The applicant reported on 18th April 1966 at 11.00 a.m. to the police station at Charleroi and declared that he had unsuccessfully looked for work and that he had neither a roof over his head nor money as the French Consulate at Charleroi had refused him an advance on the next instalment of his pension due on 6th May. He also stated that he had "never" up to then "been dealt with as a vagrant". On the same day at 12 noon, Mr. Meyskens, deputy superintendent of police, considered that De Wilde was in a state of vagrancy and put him at the disposal of the public prosecutor at Charleroi; at the same time, he asked the competent authorities to supply him with information about De Wilde. A few hours later, after being deprived of his liberty since 11.45 a.m., De Wilde attempted to escape. He was immediately caught by a policeman and he disputed the right of the police to "keep him under arrest for twenty four hours". He threatened to commit suicide.

The information note, dated 19th April 1966, showed that between 17th April 1951 and 19th November 1965 the applicant had had thirteen convictions by courts of summary jurisdiction or police courts and that, contrary to his allegations, he had been placed at the Government’s disposal five times as a vagrant.

17. On April 19th, at about 10 a.m., the police court at Charleroi, after satisfying itself as to "the identity, age, physical and mental state and manner of life" of De Wilde, decided, at a public hearing and after giving him an opportunity to reply, that the circumstances which caused De Wilde to be brought before the court had been established. In pursuance of Section 13 of the Act of 27th November 1891 "for the suppression of vagrancy and begging" ("the 1891 Act") the court placed the applicant "at the disposal of the Government to be detained in a vagrancy centre for two years" and directed "the public prosecution to execute the order".

18. After being first detained at the institution at Wortel and then from 22nd April 1966 at that of Merksplas, De Wilde was sent on 17th May 1966 to the medico-surgical centre at St. Gilles-Brussels from where he was returned to Merksplas on 9th June 1966. On 28th June 1966, he was

transferred to the disciplinary prison at Turnhout for refusal to work (Section 7, sub-section 2, of the 1891 Act), and on 2nd August 1966 to that of Huy to appear before the criminal court which, on 19th August, sentenced him to three months' imprisonment for theft from a dwelling house. He was returned to Turnhout shortly afterwards.

19. On 31st May and 6th June 1966, that is, about a month and a half after his arrest and four weeks after sending his first letter to the Commission (3rd May 1966), the applicant wrote to the Minister of Justice invoking Articles 3 and 4 (art. 3, art. 4) of the Convention. He underlined the fact that on 6th May he had received 3,217 BF in respect of his pension and showed surprise that he had not yet been released. He also complained of being forced to work for the hourly wage of 1.75 BF. He added that he had refused to work in protest against the behaviour of the head of the block at Merksplas who had wrongfully claimed to be entitled to "take" from him 5% of his pension. Finally, he complained of the disciplinary measures taken on such refusal - punishment in a cell and confinement without privileges - and of hindrance to correspondence. On 7th June 1966, the Ministry of Justice requested the governor of the prison at St. Gilles to inform De Wilde "that his request for release" of 31st May would "be examined in due course".

The applicant took up his complaints again on 13th June and later on 12th July 1966. In this last letter, he enquired of the Minister why he had been transferred to the prison at Turnhout. He also pointed out that there was no work available at this institution which would enable him to earn his "release savings". On 15th July, the Ministry had him notified that his release before the prescribed period had expired could "be considered" "provided that his conduct at work (was) satisfactory" and "adequate arrangements for rehabilitation (had) been made".

De Wilde wrote again to the Minister on 8th August 1966. Due to his pension, he argued, he had "sufficient money"; in any case, "the results of (his) work" already amounted to more than 4,000 BF. As regards his rehabilitation, he stated that his detention made it "impossible"; it prevented him from corresponding freely with employers and the welfare officer had failed to help him. Nevertheless, on 12th August 1966, the Ministry considered that his application "(could) not at present be granted".

On 13th August 1966, the applicant wrote once again to the Minister claiming he could find board and lodging and work on a farm.

20. On 25th and 26th October 1966, the Ministry of Justice decided that, at the expiry of the sentence he had received on 19th August, the applicant could be released once his rehabilitation seemed ensured by the Social Rehabilitation Office of Charleroi (Section 15 of the 1891 Act).

De Wilde regained his freedom at Charleroi on 16th November 1966. His detention had lasted a little less than seven months, of which three months were spent serving the prison sentence.

21. According to a report of the Prisons' Administration, the applicant received only one disciplinary punishment between the beginning of his detention (19th April 1966) and the date of his application to the Commission (17th June 1966): for refusal to work at Merksplas, he was not permitted to go to the cinema or receive visits in the general visiting room until his transfer to Turnhout.

22. In his application lodged with the Commission on 17th June 1966 (No. 2832/66) De Wilde invoked Articles 3 and 4 (art. 3, art. 4) of the Convention. He complained in the first place of his "arbitrary detention" ordered in the absence of any offence on his part, without a conviction and in spite of his having financial resources. He also protested against the "slavery" and "servitude" which, in his view, resulted from being obliged to work in return for an absurdly low wage and under pain of disciplinary sanctions.

The Commission declared the application admissible on 7th April 1967; prior to this, the Commission had ordered the joinder of the case with the applications of Franz Ooms and Edgard Versyp.

B. Ooms case

23. On 21st December 1965 at 6.15 a.m., Franz Ooms, a Belgian citizen born on 12th April 1934 at Gilly, reported to Mr. Renier, deputy superintendent of police at Namur, in order "to be treated as a vagrant unless one of the social services (could find him) employment where (he could) be provided with board and lodging while waiting for regular work". He explained that of late he had been living with his mother at Jumet but that she could no longer provide for his upkeep; that he had lost a job as a scaffolding fitter at Marcinelle and, in spite of his efforts, had failed to find another job for over a month; that he no longer had any means of subsistence and that he had been "convicted" in 1959 for vagrancy by the police court at Jumet.

24. On the same day at about 10 a.m., the police court at Namur, after satisfying itself as to "the identity, age, physical and mental state and manner of life" of Franz Ooms, considered at a public hearing and after giving him an opportunity to reply that the circumstances which had caused him to be brought before the court had been established. In pursuance of Section 16 of the 1891 Act, the court placed him "at the disposal of the Government to be detained in an assistance home" and directed "the public prosecution to execute this order".

25. Ooms was detained partly at Wortel and partly at Merksplas. He also spent some weeks at the prison medico-surgical centre at St. Gilles-Brussels (June 1966).

26. On 12th April 1966, that is less than four months after his arrest and about five weeks before applying to the Commission (20th May 1966), the

applicant petitioned the Minister of Justice for his release. He alleged he was suffering from tuberculosis and that his family had agreed to take him back with them and place him in a sanatorium. On 5th May, the Ministry, after receiving the unfavourable opinion of the doctor and of the director of the institution at Merksplas, considered the request to be premature.

Franz Ooms again made a petition for release on 6th June, this time to the Prime Minister. He pleaded that as "he had been ill since his detention" he had been unable to earn by his own work the 2,000 BF needed to make up his release savings, and repeated that his mother was willing to have him with her and to take care of him. The Ministry of Justice, to whom the Prime Minister's office had transmitted the request, also considered it to be premature; on 14th June, it requested the governor of St. Gilles prison to inform the applicant accordingly.

On 25th June 1966, the welfare department of the Salvation Army at Brussels certified that Franz Ooms would "be given work and lodging in (their) establishments immediately on his release". The applicant sent this declaration to the director of the welfare settlement at Wortel on 1st July, but without result.

His mother, Mme. Ooms, confirmed her son's declarations by letter of 15th July 1966 to the same director. In his reply of 22nd July, the director asked her to produce a certificate of employment, pointing out that "at the time of his possible discharge", the applicant had to have, besides a resting place, "a definite job by which he (could) ensure his upkeep".

Mme. Ooms also wrote to the Minister of Justice on 16th July, asking for a "pardon for (her) son". On 3rd August 1966, the Ministry informed her that he would be freed when "he (had) earned, by his prison work, the sum of money prescribed in the regulations as the release savings of vagrants interned for an indefinite period at the disposal of the Government".

In a report of 31st August 1966 drawn up for the Ministry of Justice, the director of the Wortel settlement pointed out that Franz Ooms had already received several criminal convictions, that this was his fourth detention for vagrancy, that his conduct could not be described as exemplary, and that his earnings amounted to only 400 BF. According to a medical certificate appended to the report, physical examinations of the applicant had revealed nothing wrong. As a result, on 6th September 1966, the Ministry instructed the director to inform the detainee "that his complaints had been found groundless".

On 26th September 1966, Ooms again petitioned the Prime Minister. To justify this step, he cited the negative attitude of the Department of Justice. He stated that he was the victim of "monstrous injustices" which he attributed to his being a Walloon. He alleged, in particular, that on 23rd March 1966, at Merksplas, he had been punished with three days in the cells and a month's confinement without privileges for refusing to sleep in a foul-smelling dormitory where the light was kept on all night, that he had been

locked up naked and later "lightly clad" in a freezing cell which had brought on an attack of pneumonia and of tuberculosis for which he had had to spend three months in the sanatorium at the Merksplas institution. He also protested against the dismissal of the many petitions for release presented both by himself and by his mother. He finally declared his agreement to the opening of an enquiry for the purpose of verifying the truth of his allegations and he stated that he was ready to take action, if necessary, before a "national authority" within the meaning of Article 13 (art. 13) of the Convention.

Two days later, the Prime Minister's office informed the applicant that his letter had been transmitted to the Department of Justice.

Ooms was released ex officio at Charleroi on 21st December 1966, one year to the day after being put at the disposal of the Government (Section 18, first sentence, of the 1891 Act).

27. In his application lodged with the Commission on 20th May 1966 (No. 2835/66), the applicant mentioned that he was in the sanatorium of the Merksplas institution but that his mother had agreed to have him hospitalised in a "civil" clinic. He added that his illness completely prevented him from working and thereby earning the 2,000 BF for his release savings; in any case, he would need at least a year to earn such a sum, at the rate of 1.75 BF per hour. He was therefore surprised that the Ministry of Justice had considered his request for release to be premature.

Ooms, who had meanwhile been transferred to the prison at St. Gilles-Brussels, supplemented his original application on 15th June 1966. He declared that he had for the moment been cured of his pulmonary disease caused by ill-treatment and undernourishment, but his illness had left "traces" which made it impossible for him to perform "any heavy work". He also stressed that his mother, who was in receipt of a pension, wanted him home with her. In these circumstances he considered he was entitled to be released, and he complained of the Belgian authorities' refusal to recognise this right. Invoking Article 6, paragraph (3) (b) and (c) (art. 6-3-b, art. 6-3-c), of the Convention he further maintained that on his arrest he had asked in vain for free legal aid; this fact was contested before the Court by the Government's Agent.

That part of the application where Franz Ooms complained – apparently in subsequent letters - of ill-treatment and of a violation of his liberty of conscience and religion (Articles 3 and 9 of the Convention) (art. 3, art. 9) was declared inadmissible on 11th February 1967 as manifestly ill-founded (Appendix II to the Commission's report). On 7th April 1967, the Commission declared the remaining part of his application admissible, after having ordered its joinder with the applications of Jacques De Wilde and Edgard Versyp.

C. Versyp case

28. Edgard Versyp, a Belgian citizen born in Bruges on 26th April 1911, works, at least from time to time, as a draughtsman; he seems to have had his residence at Schaarbeek.

On 3rd November 1965, at 9 p.m., he appeared before Mr. Meura, deputy superintendent of police at Brussels; he carried a letter from the Social Rehabilitation Office requesting that he be given a night's shelter. He stated he had no fixed abode, no work or resources, and "(begged) to be sent to a welfare settlement"; he pointed out that he had "previously (been) in Merksplas" and did not wish for "any other solution". After spending the night in the municipal lock-up, where he had already been the night before, he was taken in charge by the Social Rehabilitation Office on 4th November at 9 a.m. On the same day, this office certified that so far as its services were concerned there was no objection to Versyp "being but in the charge of the prosecuting officer with a view to his possible placement in a state welfare settlement": he was "well-known to both (the) after-prison care and vagrancy sections" at the office and attempts so far to rehabilitate him had failed due to "his apathy, idleness and weakness for drink"; in any case, he refused "any other welfare action", except his detention. As a result, Versyp was immediately put at the disposal of the public prosecutor's office.

29. A few hours later, the police court in Brussels, having satisfied itself as to "the identity, age, physical and mental state and manner of life" of the applicant, considered, at a public hearing and after giving Edgard Versyp an opportunity to reply, that the circumstances which had caused him to be brought before the court had been established. In pursuance of Section 13 of the 1891 Act, the court placed him "at the disposal of the Government to be detained in a vagrancy centre for two years". It entrusted the execution of this order to the public prosecutor, who on that same day, 4th November 1965, required the director of the vagrancy centre of Merksplas to receive Versyp into his institution.

30. Versyp was detained at different times at Wortel, Merksplas and Turnhout.

31. On 7th February 1966, that is more than three months after his arrest and more than six months before applying to the Commission (16th August 1966), he wrote from Wortel to the Minister of Justice requesting his transfer to the solitary confinement division in Merksplas. His request was not transmitted to Brussels due to the imminent visit of the inspector-general who granted his request the next day.

On 10th May 1966, the applicant requested his transfer form Merksplas to the prison at St. Gilles-Brussels where, he thought, the Head of the Social Rehabilitation Service could succeed in getting him "work outside" to allow him "to live as an honest citizen". He stated that living "with other vagrants in Wortel and Merksplas" had "shattered" his morale and that he had neglected his work as he had had to receive treatment in hospital twice; he promised, however, to attend to "(his) business outside more efficiently in

order to avoid a similar situation recurring". In a report of 16th May, the director of the Merksplas institution pointed out that Versyp, who had nine criminal convictions and had been detained four times for vagrancy, had spent the greater part of his detention in solitary confinement and could not adapt himself to communal life; the director therefore suggested his transfer to a solitary confinement prison (op zijn vraag naar een celgevangenis), in accordance with his request. As a result, he was sent on 23rd May to Turnhout Prison and not to that of St. Gilles; on 6th June, he complained of this to the Ministry of Justice, which ordered his return to Wortel.

On 22nd August 1966, Versyp begged the Ministry to grant him the opportunity of rehabilitating himself "in society according to (his) aptitudes through the good offices of the Brussels' Social Service". On 6th September, the authorities of the Wortel settlement informed him, on the instructions of the Ministry, that his case would be examined when the amount of his release savings showed that he was capable of doing a suitable job of work.

On 26th September, the applicant protested to the Ministry against this reply. According to him, he had been prevented "by devious means" from earning anything both at Wortel and Turnhout in order "that (he) could then be held for an even longer period". Thus, at Wortel they wanted to make him do work for which he was not fit - potato picking - and refused to give him other work which he was able to do. Furthermore, they had purported to forbid him to correspond with the Commission but without success as he had invoked the regulations and informed the public prosecutor's office. In short, he felt himself exposed to hostility which made him want to leave Wortel for Merksplas, or better still, for St. Gilles prison where, he claimed, the Social Rehabilitation Service would find him a suitable job and accommodation "in a hostel in Brussels".

The Ministry of Justice filed this letter without further action; on 28th September 1966, the director of the state welfare settlement at Wortel was requested so to inform the applicant.

Versyp was released on 10th August 1967, by virtue of a ministerial decision of 3rd August (Section 15 of the 1891 Act) and after one year, nine months and six days of detention. On 1st August the authorities of the Wortel settlement had given a favourable opinion on the new request for release which he had made some time before; they noted, amongst other things, that he would more easily find a job at that time than at the expiry of the term fixed in 1965 by the Brussels magistrate, that is in the month of November.

32. In the application which he lodged with the Commission on 16th August 1966 (No. 2899/66) and supplemented on 6th September 1966, the applicant invoked Articles 4, 5 and 6 (3) (c) (art. 4, art. 5, art. 6-3-c) of the Convention. He complained in the first place of his detention: he emphasised that he had a fixed abode at Brussels-Schaarbeek and had never

begged and so he was surprised at having been placed in a vagrancy centre. He further alleged that he had had no opportunity of defending himself before the Brussels police court on 4th November 1965 as the hearing had lasted "scarcely two minutes" and he had not been granted free legal aid. He also complained of various features of the regime to which he was subjected. In order to prevent him accumulating the 2,000 BF required to constitute release savings, he had been left, he alleged, for several months without sufficient work. In a general way, he added, the directors of the various institutions acted in concert in order to prolong the detention of vagrants as much as possible; the Government, for its part, "encouraged" vagrancy which gave it a labour force almost without cost (1.75 BF per hour at manual work) and huge profits. Finally, Versyp maintained that his numerous letters addressed to the competent authorities, such as, for example, the inspector of prisons, the public prosecutor's office (July 1966) and the Minister of Justice (June and August 1966), invariably returned "to the director" who filed them without further action; these letters were not the object of any decision or, like his request for a transfer to Brussels, met with a refusal. One of them, that addressed on 7th February 1966 to the Minister of Justice by registered post, had even been opened by the director of the Wortel settlement who had not sent it.

On 7th April 1967, the Commission declared the application admissible; it had previously ordered its joinder with the applications of Jacques De Wilde and Franz Ooms.

D. Factors common to the three cases

33. According to Article 347 of the Belgian Criminal Code of 1867 "vagrants are persons who have no fixed abode, no means of subsistence and no regular trade or profession". These three conditions are cumulative: they must be fulfilled at the same time with regard to the same person.

34. Vagrancy was formerly a misdemeanour (Criminal Code of 1810) or a petty offence (Act of 6th March 1866), but no longer of itself constitutes a criminal offence since the entry into force of the 1891 Act: only "aggravated" vagrancy as defined in Articles 342 to 345 of the present Criminal Code is a criminal offence and these articles were not applied in respect of any of the three applicants. "Simple" vagrancy is dealt with under the 1891 Act.

35. According to Section 8 of the said Act "every person picked up as a vagrant shall be arrested and brought before the police court" - composed of one judge, a magistrate. The public prosecutor or the court may nonetheless decide that he be provisionally released (Section 11).

"The person arrested shall be brought before the magistrate within twenty-four hours and in his ordinary court, or at a hearing applied for by the public prosecutor for the following day". If that person so requests "he

(shall be) granted a three days' adjournment in order to prepare his defence" (Section 3 of the Act of 1st May 1849); neither De Wilde, nor Ooms nor Versyp made use of this right.

36. Where, after having ascertained "the identity, age, physical and mental state and manner of life" of the person brought before him (Section 12), the magistrate considers that such person is a vagrant, Section 13 or Section 16 of the 1891 Act becomes applicable.

Section 13 deals with "able-bodied persons who, instead of working for their livelihood, exploit charity as professional beggars", and with "persons who through idleness, drunkenness or immorality live in a state of vagrancy"; Section 16 with "persons found begging or picked up as vagrants when none of the circumstances specified in Section 13 ... apply".

In the first case the court shall place the vagrant "at the disposal of the Government to be detained in a vagrancy centre, for not less than two and not more than seven years"; in the second case, the court may "place (him) at the disposal of the Government to be detained in an assistance home" for an indeterminate period which in no case can exceed a year (see paragraph 40 below).

Section 13 was applied to Jacques De Wilde and Edgard Versyp and Section 16 to Franz Ooms.

The distinction between the "reformatory institutions" referred to as "vagrancy centres" and "assistance homes" or "welfare settlements" (Sections 1 and 2 of the Act) has become a purely theoretical one; it has been replaced by a system of individual treatment of the persons detained.

Detention in a vagrancy centre is entered on a person's criminal record; furthermore, vagrants "placed at the disposal of the Government" suffer certain electoral incapacities (Articles 7 and 9 of the Electoral Code).

37. Magistrates form part of the judiciary and have the status of an officer vested with judicial power, with the guarantees of independence which this status implies (Articles 99 and 100 of the Constitution). The Court of Cassation, however, considers that the decisions given by them in accordance with Sections 13 and 16 of the 1891 Act are administrative acts and not judgments within the meaning of Section 15, sub-section 1, of the Act of 4th August 1832. They are not therefore subject to challenge or to appeal nor - except when they are ultra vires (see paragraph 159 of the Commission's report) – to cassation proceedings. The decisions of the highest court in Belgium are uniform on this point.

As to the Conseil d'État, it has so far had to deal with only two appeals for the annulment of detention orders for vagrancy. In a judgment of 21st December 1951 in the Vleminckx case, the Conseil d'État did not find it necessary to examine whether the Brussels police court's decision taken on 14th July 1950 in pursuance of Section 13 of the 1891 Act emanated from an authority which was "acting as an administrative authority within the

meaning of Section 9 of the Act of 23rd December 1946"; the appeal lodged by Mr. Vleminckx on 31st July 1950 had been dismissed because:

> "the decision appealed against (was) a preliminary decision which (had been) followed by the Government's decision to detain the appellant in a vagrancy centre ...; the appellant (could) not establish that he (had) any interest in the annulment of a decision which merely (allowed) the Government to detain him, while the actual decision by which he was interned (had not) been appealed against".

As against this, on 7th June 1967, that is two months after the Commission had declared admissible the applications of Jacques De Wilde, Franz Ooms and Edgard Versyp, the Conseil d'État gave a judgment annulling the decision by which on 16th February 1965 the Ghent police court had placed a Mr. Du Bois at the disposal of the Government in pursuance of Section 16 of the 1891 Act. Before examining the merits, the Conseil d'État examined the admissibility - contested by the Minister of Justice - of the appeal lodged by Mr. Du Bois on 14th April 1965. In the light of the legislative texts in force, of the preparatory work thereto and of "the consistent case-law of the ordinary courts", the Conseil d'État considered that the placing of a vagrant at the disposal of the Government does not result from "the finding of a criminal offence" but amounts to "an administrative security measure" and that the decision ordering it is therefore "of a purely administrative nature" "so that no form of appeal is open to the person concerned ... before the ordinary courts". It added that "such an administrative decision by the magistrate" could not be considered as "a preliminary measure enabling the Government to take the effective decision on the matter of detention but is itself the effective decision placing the person concerned in a different legal position and is therefore of itself capable of constituting a grievance"; in any event, "the person concerned is immediately deprived of his liberty without any further decision by the Government".

Section 20, sub-section 2, of the Act of 23rd December 1946 constituting the Conseil d'État provides that where both this body and "an ordinary court rule that they are either competent or incompetent to entertain the same proceedings, the conflict of jurisdiction is settled, on the motion of the most diligent party, by the Court of Cassation" in plenary session. No such conflict appears to have come before the highest court of Belgium in vagrancy matters up to the present time.

The Belgian Government has had the reform of the 1891 Act under consideration for some time. According to the information given to the Court on 17th November 1970, the Bill which it is preparing to submit to Parliament provides in particular that an appeal against the magistrates' decisions may be made to the court of first instance.

38. "Able-bodied persons detained in a vagrancy centre or assistance home" are "required to perform the work prescribed in the institution" (Section 6 of the 1891 Act). Persons who, like Jacques De Wilde, and

Edgard Versyp, refuse to comply with this requirement without good reason, in the opinion of the authorities, are liable to disciplinary measures. "Infirmity, illness or punishment may lead to a suspension, termination or stopping of work" (Articles 64 and 95, read in conjunction, of the Royal Decree of 21st May 1965 laying down general prison regulations).

"Unless stopped for disciplinary reasons", detained vagrants are entitled to "a daily wage" known as "allowances". Sums are retained "for administrative expenses" - "for the benefit of the State" – and "to form the release savings" which shall be "granted ... partly in cash and partly in clothing and tools". The Minister of Justice fixes the amount of the said release savings and, having regard to the various categories of detained persons and of work, the wages and the sums to be retained (Sections 6 and 17 of the 1891 Act; Articles 66 and 95, read in conjunction, of the Royal Decree of 21st May 1965).

At the time of the detention of the three applicants, the amount of the release savings which had to be thus accumulated - sums of money which a vagrant may receive from other sources not being taken into account - was fixed at 2,000 BF, at least for the "inmates" of welfare settlements (ministerial circular of 24th April 1964).

The minimum hourly allowance "actually paid" to detainees - save any deductions made for "wastage and poor work" - was 1,75 BF up to 1st November 1966, on which date it was increased by 25 centimes (ministerial circulars of 17th March 1964 and 10th October 1966). The allowance was not capable of assignment or liable to seizure in execution and was divided into two equal parts: "the reserved portion" which was credited to the person concerned and enabled him to form his release savings and the free portion which he received immediately (Articles 67 and 95, read in conjunction, of the Royal Decree of 21st May 1965).

39. According to Articles 20 to 24 and 95 of the Royal Decree of 21st May 1965, the correspondence of detained vagrants - who, in this as well as in other respects, are assimilated to convicted persons - may be subjected to censorship except any correspondence with the counsel of their own choice, the director of the institution, the inspector-general and the director-general of the prison administration, the secretary-general of the Ministry of Justice, the judicial authorities, the ministers, the chairmen of the legislative Chambers, the King, etc. Their correspondence with the Commission is not mentioned in this Decree but the Minister of Justice informed the governors of prisons and Social Protection Institutions, including those at Merksplas and Wortel, that "a letter addressed to this organ by a detainee is not to be censored but should be forwarded, duly stamped for abroad by the sender ..., to the Legal Department ... which shall undertake to transmit it to its destination" (circular of 7th September 1957 as it was in force at the time of the detention of the applicants; see also paragraph 31 above).

40. "Persons detained in an assistance home" - as Franz Ooms - may not "in any case be kept against their will for more than one year" (Section 18, first sentence, of the 1891 Act). They regain their freedom, as of right, before the expiry of this period "when their release savings (have reached) the amount ... fixed by the Minister of Justice", who shall, moreover, release them if he considers their detention "to be no longer necessary" (Sections 17 and 18, second sentence, of the 1891 Act).

As regards vagrants detained in a vagrancy centre - such as Jacques De Wilde and Edgard Versyp - they leave the centre either at the expiry of the period varying from two to seven years "fixed by the court" or at an earlier date if the Minister of Justice considers "that there is no reason to continue their detention" (Section 15 of the 1891 Act); the accumulation of the release savings and any other means which the detainee might have do not suffice for this purpose.

It seems that no detained vagrant has to date lodged an appeal with the Conseil d'État, under Article 9 of the Act of 23rd December 1946, for the annulment of a ministerial decision which had rejected his application for release.

41. Before the Commission and Sub-Commission, the three applicants invoked Articles 4, 5 (1), 5 (3), 5 (4), 6 (1), 6 (3) (b) and (c), 7, 8 and 13 (art. 4, art. 5-1, art. 5-3, art. 5-4, art. 6-1, art. 6-3-b, art. 6-3-c, art. 7, art. 8, art. 13) of the Convention. Two of them, De Wilde and Versyp, also alleged that Article 3 (art. 3) had not been observed.

42. In its report of 19th July 1969, the Commission expressed the opinion:

- that there was a violation of Articles 4 (art. 4) (nine votes to two), 5 (4) (art. 5-4) (nine votes to two) and 8 (art. 8) (ten votes to one);
- that there was no violation of Articles 3 (art. 3) (unanimous) and 5 (1) (art. 5-1) (ten votes to one);
- that Articles 5 (3) (art. 5-3) (unanimous), 6 (1) (art. 6-1) (ten votes to one), 6 (3) (art. 6-3) (ten votes to one) and 7 (art. 7) (unanimous) were inapplicable.

The Commission was further of the opinion that "it (was) no longer necessary to consider Article 13 (art. 13)" (unanimous).

The report contains several individual opinions, some concurring, others dissenting.

43. After the cases were brought before the Court the applicants repeated, and sometimes developed, in a memorandum which the Commission appended to its memorial, the greater part of their earlier arguments. They indicated their agreement or otherwise, according to the case, with the opinion of the Commission, to which De Wilde and Versyp "bowed" as regards Article 3 (art. 3) of the Convention.

AS TO THE LAW

I. ON THE QUESTIONS OF JURISDICTION AND ADMISSIBILITY RAISED IN THE PRESENT CASES

44. In its memorials of February and June 1970, the Government requested the Court, principally,

> "to declare that the applications introduced against Belgium by Jacques De Wilde on 17th June 1966, Franz Ooms on 20th May 1966 and Edgard Versyp on 16th August 1966, were not admissible as the applicants had failed to exhaust the domestic remedies and that therefore they should have been rejected by the European Commission of Human Rights under Article 26 and Article 27 (3) (art. 26, art. 27-3) of the Convention".

The Commission, for its part, requested the Court in its memorial of April 1970:

> "(1) In the first place:
>
> - to hold inadmissible the Belgian Government's request that it be declared that the Commission should have rejected the three applications under Articles 26 and 27, paragraph (3) (art. 26, art. 27-3), of the Convention, on the ground that the Court has no jurisdiction to pronounce on decisions by the Commission concerning the admissibility of applications;
>
> (2) alternatively:
>
> - to declare the said request inadmissible on the ground that the Belgian Government is debarred from making such a request to the Court since it did not raise the objection of non-exhaustion of domestic remedies before the Commission at the stage where the admissibility of the applications was under consideration;
>
> (3) in the further alternative:
>
> - to declare the said request ill-founded since, at the time when the three applications were submitted to the Commission, there was no effective remedy in Belgian law against decisions by magistrates in vagrancy cases".

45. At the oral hearings, the Agent of the Government submitted that it should please the Court:

> - "to find that it is fully competent to decide on the admissibility of the applications in the cases now before it and in particular to verify whether the applicants have or have not exhausted the domestic remedies";
>
> - "to find that the applications ... are inadmissible since the applicants failed to observe the provisions of Article 26 (art. 26) of the Convention".

The failure to observe Article 26 (art. 26) is alleged to have consisted not only in the non-exhaustion of domestic remedies but also, in the case of Edgard Versyp, in a failure to observe the six-month time-limit.

The Delegates of the Commission maintained without change the submissions on this point contained in their memorial of April 1970.

46. The Court is thus asked to consider, before any examination of the merits:

(1) whether it has jurisdiction to examine the contentions of the Government based on the alleged failure to comply with Article 26 (art. 26) of the Convention, either as regards the exhaustion of domestic remedies or as regards the six-month time-limit;

(2) if so, whether the Government must be held to be precluded from raising the inadmissibility of the applications, either on the ground of non-exhaustion of domestic remedies or, alternatively, in the case of Versyp, on the ground of his being out of time;

(3) if the Government is not held to be precluded, whether its contentions in regard to inadmissibility are well-founded.

A. As to the jurisdiction of the court to examine the submissions of non-exhaustion of domestic remedies and of delay made by the government against the applications accepted by the commission

47. In order to judge whether it has jurisdiction to examine the submissions of the Government objecting to the examination of the present applications, the Court refers to the text of the Convention and especially to Article 45 (art. 45) which determines its jurisdiction ratione materiae. This Article (art. 45) specifies that "the jurisdiction of the Court shall extend to all cases ("toutes les affaires") concerning the interpretation and application of the ... Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48 (art. 48)". Under this provision, as the Court pointed out in its judgment of 9th February 1967 ("Linguistic" case, Series A, p. 18), "the basis of the jurisdiction ratione materiae of the Court is established once the case raises a question of the interpretation or application of the Convention".

48. The phrase "cases concerning the interpretation and application of the ... Convention", which is found in Article 45 (art. 45), is remarkable for its width. The very general meaning which has to be attributed to it is confirmed by the English text of paragraph (1) of Article 46 (art. 46-1) which is drafted in even wider terms ("all matters") than Article 45 (art. 45) ("all cases").

49. True, it follows from Article 45 (art. 45) that the Court may exercise its jurisdiction only in regard to cases which have been duly brought before it and its supervision must necessarily be directed first to the observance of the conditions laid down in Articles 47 and 48 (art. 47, art. 48). Once a case

is duly referred to it, however, the Court is endowed with full jurisdiction and may thus take cognisance of all questions of fact and of law which may arise in the course of the consideration of the case.

50. It is therefore impossible to see how questions concerning the interpretation and application of Article 26 (art. 26) raised before the Court during the hearing of a case should fall outside its jurisdiction. That possibility is all the less conceivable in that the rule on the exhaustion of domestic remedies delimits the area within which the Contracting States have agreed to answer for wrongs alleged against them before the organs of the Convention, and the Court has to ensure the observance of the provisions relating thereto just as of the individual rights and freedoms guaranteed by the Convention and its Protocols.

The rule of exhaustion of domestic remedies, which dispenses States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, is also one of the generally recognised principles of international law to which Article 26 (art. 26) makes specific reference.

As for the six months' rule, it results from a special provision in the Convention and constitutes an element of legal stability.

51. This conclusion is in no way invalidated by the powers conferred on the Commission under Article 27 (art. 27) of the Convention as regards the admissibility of applications. The task which this Article (art. 27) assigns to the Commission is one of sifting; the Commission either does or does not accept the applications. Its decisions to reject applications which it considers to be inadmissible are without appeal as are, moreover, also those by which applications are accepted; they are taken in complete independence (see mutatis mutandis, the Lawless judgment of 14th November 1960, Series A, p. 11). The decision to accept an application has the effect of leading the Commission to perform the functions laid down in Articles 28 to 31 (art. 28, art. 29, art. 30, art. 31) of the Convention and of opening up the possibility that the case may be brought before the Court; but it is not binding on the Court any more than the Court is bound by the opinion expressed by the Commission in its final report "as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention" (Article 31) (art. 31).

52. For the foregoing reasons, the Court considers it has jurisdiction to examine the questions of non-exhaustion and of delay raised in the present cases.

B. As to estoppels (French "forclusion")

53. The jurisdiction of the Court to rule on the submissions made by a respondent Government based on Article 26 (art. 26) as a bar to claims directed against it, does not in any way mean that the Court should disregard the attitude adopted by the Government in this connection in the course of the proceedings before the Commission.

54. It is in fact usual practice in international and national courts that objections to admissibility should as a general rule be raised in limine litis. This, if not always mandatory, is at least a requirement of the proper administration of justice and of legal stability. The Court itself has specified in Rule 46, paragraph 1, of its Rules, that "a preliminary objection must be filed by a Party at the latest before the expiry of the time-limit fixed for the delivery of the first pleading".

Doubtless, proceedings before the Court are not the same as those which took place before the Commission and usually the parties are not even the same; but they concern the same case and it results clearly from the general economy of the Convention that objections to jurisdiction and admissibility must, in principle, be raised first before the Commission to the extent that their character and the circumstances permit (compare the Stögmüller judgment of 10th November 1969, Series A, pp. 41-42, paragraph 8, and the Matznetter judgment of the same date, Series A, p. 32, paragraph 6).

55. Furthermore, there is nothing to prevent States from waiving the benefit of the rule of exhaustion of domestic remedies, the essential aim of which is to protect their national legal order. There exists on this subject a long established international practice from which the Convention has definitely not departed as it refers, in Article 26 (art. 26), to "the generally recognised rules of international law". If there is such a waiver in the course of proceedings before the Commission (see, for example, Yearbook of the Convention, Vol. 7, pp. 258-260), it can scarcely be imagined that the Government concerned is entitled to withdraw the waiver at will after the case has been referred to the Court.

56. In examining the proceedings which took place before the Commission, the Court finds that the Government had, in its first observations on the admissibility of the applications, raised against one of the complaints of Franz Ooms grounds of inadmissibility based on non-exhaustion of domestic remedies. As the Commission considered that complaint to be manifestly ill-founded, it did not find it necessary to rule on this objection. The partial decision which it gave on this point in the Ooms case is dated 11th February 1967.

At the oral hearings which followed that partial decision and the decisions of the same date in the two related cases, a member of the Commission put a question, on 6th April 1967, to the Agent of the Government about the possibility of challenging before the Conseil d'État magistrates' decisions in vagrancy matters (Sections 13 and 16 of the 1891 Act) and the Minister of Justice's decisions refusing to release a detained

vagrant (Sections 15 and 18 of the same Act). The Agent of the Government replied that that superior administrative court considered it had no jurisdiction to hear an appeal against a magistrate's order (Vleminckx judgment of 21st December 1951, cf. paragraph 37 above); he underlined, however, that there was "at least one case" - Du Bois - "pending before the Conseil d'État in which the problem of the right to appeal against a magistrate's decision had again been raised"; he further expressed his personal opinion that "a decision of the Minister refusing" to release a detained vagrant could doubtless be set aside if need be by the Conseil d'État "on a pure point of law". He did not, however, use this as an argument to request the Commission either to reject the applications for non-exhaustion of domestic remedies or to adjourn its decision on their admissibility.

The Commission thus felt itself able to conclude that there were no domestic remedies and consequently to find in its decision of 7th April 1967, declaring the applications admissible, "that the applicants (had) observed the conditions laid down in Article 26 (art. 26) of the Convention".

57. Two months later, however, on 7th June 1967, the Conseil d'État delivered a judgment in which it reversed its former case-law; it declared admissible and allowed Mr. Du Bois' appeal for annulment of the magistrate's order (see paragraph 37 above). The Government informed the Commission of this judgment in its memorial of 31st July 1967 and formally requested that the three applications be rejected as inadmissible for non-exhaustion of domestic remedies. Counsel for the applicants expressed the view that the respondent Government "could not at this stage dispute the admissibility of the applications as this had been finally determined by the Commission's decision of 7th April 1967" (paragraph 59 of the report). On 8th February 1968, the Agent of the Belgian Government repeated the request at the hearing before the Commission (paragraphs 124 and 125 of the report): he invited the Commission to give "a second decision on admissibility to the effect that the wording of the Belgian Conseil d'État's judgment clearly establishes that (the) applicants had available to them a remedy which they did not make use of, although they could have done so".

Finally, the Commission refused this request in its report adopted on 19th July 1969 (paragraph 177). The Commission recalled that "in accordance with the principles of international law referred to by Article 26 (art. 26) of the Convention an applicant is not required to exhaust a domestic remedy if, in view of the consistent case-law of the national courts, this remedy has no reasonable chance of success"; it pointed out that this was the case prior to the Du Bois judgment of 7th June 1967 as regards recourse against magistrates' decisions in vagrancy matters and concluded that it had been right in declaring the three applications admissible and that the above-mentioned judgment did "not constitute a new factor justifying the reopening of the decision on the admissibility of the applications".

In these circumstances, the Court cannot consider that the Government is precluded from raising before it the objection of non-exhaustion of domestic remedies as regards the orders of the magistrates at Charleroi, Namur and Brussels.

58. The same is not true of the Government's alternative submission that the applicant Versyp was out of time.

Versyp applied to the Commission on 16th August 1966 that is more than six months after the decision of the Brussels police court of 4th November 1965, ordering his detention for vagrancy (see paragraphs 29 and 31 above). The Government argues from this that, if the Court considered that the decision was not at the time subject to any form of appeal, Versyp's application to the Commission should be held to be inadmissible for failure to observe the time-limit laid down by Article 26 (art. 26) in fine of the Convention.

The Court observes that this submission was never made before the Commission nor even before the Court during the written procedure: the Agent of the Government presented it for the first time in his address of 16th November 1970, that is more than three years after the Commission's decision on admissibility and more than one year after the case had been brought before the Court.

In these circumstances, the Court finds that the Government is precluded from submitting that Versyp's application was out of time.

59. The same finding holds good for the submission of non-exhaustion of remedies made by the Government before the Court as regards the decisions of the Minister of Justice rejecting the three applicants' petitions for release.

The applicants argued that their being kept in detention by the Minister had violated Article 5 (1) (art. 5-1) of the Convention. The Government contends that it would have been open to them to contest the said decisions before the Conseil d'État alleging a violation of Article 5 (art. 5), which is directly applicable in Belgian law, and that they failed to take this course. But the Government never relied, before the Commission, on Article 26 (art. 26) of the Convention on this point (cf. paragraphs 56 and 57 above); for the reasons already mentioned, it cannot do so for the first time before the Court.

C. As to the substance of the contention of the government regarding the exhaustion of domestic remedies

60. The Court recalls that under international law, to which Article 26 (art. 26) makes express reference, the rule of exhaustion of domestic remedies demands the use only of such remedies as are available to the persons concerned and are sufficient, that is to say capable of providing redress for their complaints (Stögmüller judgment of 10th November 1969, Series A, p. 42, paragraph 11).

It is also recognised that it is for the Government which raises the contention to indicate the remedies which, in its view, were available to the persons concerned and which ought to have been used by them until they had been exhausted.

The information provided by the Belgian Government in this connection partly concerns the orders for detention, partly relates to the subsequent detention of the applicants. As the Court has found that the Government is precluded from making submissions based on the latter information (see paragraph 59 above), only the former part is relevant in connection with Article 26 (art. 26) of the Convention. The Government's line of argument on this point underwent a clear change in the course of the proceedings.

61. It was never contested that the decisions taken by the magistrates in regard to Jacques De Wilde, Franz Ooms and Edgard Versyp were of an administrative nature and so were not subject to appeal or to proceedings in cassation (see paragraph 37 above).

The Agent of the Government acknowledged too, at the first hearings before the Commission and apparently basing himself on the Vleminckx judgment of 21st December 1951, that the Conseil d'État would not either have allowed an appeal against the said orders for detention.

After the Du Bois judgment of 7th June 1967, the Government's Agent acknowledged that the former case-law was "a little out of touch with the facts in the sense that there was in fact no further administrative decision after the magistrate's decision" (paragraph 120 of the Commission's report). Before the Court he expressed the same view, noting that the alleged ministerial decision referred to in the Vleminckx judgment was "simply an administrative measure of execution" of the magistrate's order or in other words "a purely physical operation". This point of view appears to be correct: the examination of the files of the proceedings before the magistrates shows that what actually happened was that the competent officers of the public prosecutor's department were instructed by the magistrates at Charleroi, Namur and Brussels to execute their orders and to this end they "required" the directors of the institutions at Wortel and Merksplas "to receive" De Wilde, Ooms and Versyp "into (the) institution" without there being any further "decision" in the matter (see paragraphs 17, 24 and 29 above). The Minister may doubtless intervene under the 1891 Act to stop the execution of the orders for detention. In practice, however, the Minister does not as a rule use this power and he did not do so in the present cases.

Yet the Agent of the Government argued before the Commission and then before the Court that it followed from the same Du Bois judgment that the magistrates' orders for detention for vagrancy were in fact open to challenge before the Conseil d'État. He added that the Du Bois case was already pending before that superior administrative court at the time when the detention of the applicants was ordered, that there existed therefore at

that time a possibility of a reversal of the rule stated in the Vleminckx case and that, for this reason, the applicants were not entitled to be excused from attempting to use such a remedy.

62. The Court is unable to accept this point of view. The Court finds - without it even being necessary to examine here whether recourse to the Conseil d'État would have been of such a nature as to satisfy the complaints - that according to the settled legal opinion which existed in Belgium up to 7th June 1967 recourse to the Conseil d'État against the orders of a magistrate was thought to be inadmissible.

This was the submission of the Government itself before the Conseil d'État in the Du Bois case. One cannot reproach the applicants that their conduct in 1965 and 1966 conformed with the view which the Government's Agent continued to express at the beginning of 1967 at the hearings on admissibility before the Commission and which was prevalent in Belgium at the time.

Furthermore, once the Du Bois judgment of 7th June 1967 was known, the applicants were not in a position to benefit from the possible remedy it seemed to open up because, well before that judgment was pronounced, the time-limit of sixty days prescribed by Article 4 of the Regent's Decree of 23rd August 1948 on the procedure before the administrative division of the Conseil d'État had expired.

The Court is therefore of the opinion that, as regards the complaints concerning the detention orders, the Government's submission of inadmissibility on the ground of failure to observe the rule on the exhaustion of domestic remedies is not well-founded.

II. AS TO THE MERITS

63. In regard to the merits of the present cases the Government and the Commission in substance reiterated at the oral hearings the submissions contained in their respective memorials.

The Government requested the Court:

> "to find that the decisions and measures which are the subject of the applications brought against Belgium by Jacques De Wilde on 17th June 1966, by Franz Ooms on 20th May 1966 and by Edgard Versyp on 16th August 1966 are not in conflict with Belgium's obligations under the European Convention of Human Rights."

For its part, the Commission asked the Court to "decide:

> (1) whether or not the jurisdiction exercised by the magistrate in deciding to place the applicants at the Government's disposal on the ground of vagrancy is such as to fulfil the requirements of the Convention, particularly of Article 5, paragraph (4) (art. 5-4);
>
> (2) whether or not the Convention, particularly Article 5, paragraph (4) (art. 5-4), was violated by the fact that the applicants did not have at their disposal a remedy before a court which, at reasonable intervals, after the initial decision on detention,

could have investigated whether their detention was still lawful and order their release if such was no longer the case;

(3) whether or not the Convention, particularly Article 7 and Article 6, paragraph (1) and paragraph (3) (b) and (c) (art. 7, art. 6-1, art. 6-3-b, art. 6-3-c), was violated by the fact that the reformative measures taken vis-à-vis vagrants under Belgian law are in practice, as alleged, of a penal nature;

(4) whether or not the Convention, particularly Article 4 (art. 4), was violated by the fact that the applicants were subjected to forced labour during a period of detention which allegedly did not meet the requirements of Article 5 (art. 5);

(5) whether or not the Convention, particularly Article 8 (art. 8), was violated by the fact that the applicants' correspondence was censored during their detention."

It appears from the cases before the Court that questions on the merits arise also in connection with Article 5, paragraphs (1) and (3), Article 3 and Article 13 (art. 5-1, art. 5-3, art. 3, art. 13).

A. As to the "general and preliminary observation" of the government

64. In its memorials and oral pleadings, the Government recalled that the Court's function is to rule on three specific cases where the legislation in issue was applied and not on an abstract problem relating to the compatibility of the legislation with the Convention; on this point the Government cited the De Becker judgment of 27th March 1962 (Series A, p. 26 in fine). Starting from that premise, the Government stressed that the applicants had reported voluntarily to the police and that their admission to Wortel and Merksplas had been the result "of an express or implicit request" on their part, express for Versyp and Ooms, implicit for De Wilde. According to the Government, such a "voluntary reporting" can scarcely amount to being "deprived of liberty" within the meaning of Article 5 (art. 5). From this it concluded that the Court ought to rule out forthwith any idea of a failure to comply with the requirements of the Convention, as regards both "the detention itself" and "the conditions of detention".

65. The Court is not persuaded by this line of argument. Temporary distress or misery may drive a person to give himself up to the police to be detained. This does not necessarily mean that the person so asking is in a state of vagrancy and even less that he is a professional beggar or that his state of vagrancy results from one of the circumstances - idleness, drunkenness or immorality - which, under Section 13 of the Belgian Act of 1891, may entail a more severe measure of detention.

Insofar as the wishes of the applicants were taken into account, they cannot in any event remove or disguise the mandatory, as opposed to contractual, character of the decisions complained of; this mandatory

character comes out unambiguously in the legal texts (Sections 8, 13, 15, 16 and 18 of the 1891 Act) and in the documents before the Court.

Finally and above all, the right to liberty is too important in a "democratic society" within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention. Detention might violate Article 5 (art. 5) even although the person concerned might have agreed to it. When the matter is one which concerns ordre public within the Council of Europe, a scrupulous supervision by the organs of the Convention of all measures capable of violating the rights and freedoms which it guarantees is necessary in every case. Furthermore, Section 12 of the 1891 Act acknowledges the need for such supervision at national level: it obliges the magistrates to "ascertain the identity, age, physical and mental state and manner of life of persons brought before the police court for vagrancy". Nor does the fact that the applicants "reported voluntarily" in any way relieve the Court of its duty to see whether there has been a violation of the Convention.

B. As to the alleged violation of paragraph (1) of article 5 (art. 5-1)

66. It appears from the record that the applicants alleged, inter alia, a violation of the first paragraph of Article 5 (art. 5-1) of the Convention; the Government contested this submission and the Commission itself rejected it in its report.

Insofar as it applies to the present cases, Article 5 (1) (art. 5-1) provides as follows:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (e) the lawful detention ... of vagrants;
>
> ...."

67. The applicants were provisionally deprived of their freedom by the police superintendent to whom they presented themselves and they were brought by him within twenty-four hours, as provided by Section 3 of the Act of 1st May 1849, before the magistrate who placed them at the disposal of the Government (see paragraphs 16, 17, 23, 24, 28 and 29 above).

The lawfulness of the action of the police superintendents has not been challenged; as the persons concerned reported voluntarily and indicated that they were in a state of vagrancy it was only normal that they should be

brought before the magistrate for a decision. This action, moreover, was of a purely preliminary nature.

It was by virtue of the magistrates' orders that the detention took place. It is therefore by reference to these orders that the lawfulness of the detention of the three applicants must be assessed.

68. The Convention does not contain a definition of the term "vagrant". The definition of Article 347 of the Belgian Criminal Code reads: "vagrants are persons who have no fixed abode, no means of subsistence and no regular trade or profession". Where these three conditions are fulfilled, they may lead the competent authorities to order that the persons concerned be placed at the disposal of the Government as vagrants. The definition quoted does not appear to be in any way irreconcilable with the usual meaning of the term "vagrant", and the Court considers that a person who is a vagrant under the terms of Article 347 in principle falls within the exception provided for in Article 5 (1) (e) (art. 5-1-e) of the Convention.

In the present cases the want of a fixed abode and of means of subsistence resulted not merely from the action of the persons concerned in reporting voluntarily to the police but from their own declarations made at the time: all three stated that they were without any employment (see paragraphs 16, 23 and 28 above). As to the habitual character of this lack of employment the magistrates at Charleroi, Namur and Brussels were in a position to deduce this from the information available to them concerning the respective applicants. This would, moreover, also be indicated by the fact that, although they purported to be workers, the three applicants were apparently not in a position to claim the minimum number of working days required to be effected within a given period which, in accordance with the Royal Decree of 20th December 1963 (Articles 118 et seqq.), would have qualified them for unemployment benefits.

69. Having thus the character of a "vagrant", the applicants could, under Article 5 (1) (e) (art. 5-1-e) of the Convention, be made the subject of a detention provided that it was ordered by the competent authorities and in accordance with the procedure prescribed by Belgian law.

In this connection the Court observes that the applicants did not receive the same treatment: De Wilde was placed at the disposal of the Government on 19th April 1966 for two years but was released on 16th November 1966; Ooms was placed at the disposal of the Government on 21st December 1965 for an indefinite period and was released after one year, that is on the expiry of the statutory term; Versyp was placed at the disposal of the Government on 4th November 1965 for two years and was released on 10th August 1967, that is after one year, nine months and six days (see paragraphs 17, 20, 24, 26, 29 and 31 above).

As the Court has already noted, the placing of a person at the disposal of the Government for a fixed period differs from that for an indefinite period not solely by the fact that it is pronounced for a minimum period of two

years (Section 13 of the 1891 Act) while the other may not last longer than one year (Sections 16 and 18): the first is also more severe in that it is entered on the criminal record (see paragraph 36 above), and in regard to electoral disabilities (see paragraph 158 of the Commission's report).

In the present cases, the orders concerning De Wilde and Versyp do not disclose which of the four conditions mentioned in Section 13 may have led the magistrates to apply this section rather than Section 16, but they refer to the administrative file of the persons concerned. The file on Jacques De Wilde contained an information note dated 19th April 1966 - the day he appeared before the magistrate at Charleroi - which listed various convictions and orders placing him at the disposal of the Government (see paragraph 16 above). Furthermore, the Brussels police court had before it, when Versyp appeared there, a document from the Social Rehabilitation Office in which his state of vagrancy was attributed to idleness and to weakness for drink (see paragraph 28 above).

70. The Court has, therefore, not found either irregularity or arbitrariness in the placing of the three applicants at the disposal of the Government and it has no reason to find the resulting detention incompatible with Article 5 (1) (e) (art. 5-1-e) of the Convention.

C. As to the alleged violation of paragraph (3) of article 5 (art. 5-3)

71. Before the Commission, the applicants also alleged that there had been a violation of paragraph (3) of Article 5 (art. 5-3) which provides that:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) (art. 5-1-c) ... shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial ...".

Paragraph (1) (c) of Article 5 (art. 5-1-c), to which the text quoted refers, is solely concerned with "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so"; as simple vagrancy does not amount to an offence in Belgian law (see paragraph 34 above), the applicants were arrested and detained not under sub-paragraph (c) of the first paragraph of Article 5 (art. 5-1-c) - nor, it may be added, under sub-paragraph (a) (art. 5-1-a) ("after conviction by a competent court") - but in fact under sub-paragraph (e) (art. 5-1-e). From this the Court must conclude - as did the Commission - that paragraph (3) (art. 5-3) was not applicable to them.

D. As to the alleged violation of paragraph (4) of article 5 (art. 5-4)

72. The Commission accepted to a certain extent the arguments of the applicants and expressed the opinion that the system in issue fails to comply with Article 5 (4) (art. 5-4) of the Convention.

According to paragraph (4) of Article 5 (art. 5-4), which is applicable inter alia to vagrants detained under sub-paragraph (e) of paragraph (1) (art. 5-1-e), "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

73. Although the Court has not found in the present cases any incompatibility with paragraph (1) of Article 5 (art. 5-1) (see paragraphs 67 to 70 above), this finding does not dispense it from now proceeding to examine whether there has been any violation of paragraph (4) (art. 5-4). The latter is, in effect, a separate provision, and its observance does not result eo ipso from the observance of the former: "everyone who is deprived of his liberty", lawfully or not, is entitled to a supervision of lawfulness by a court; a violation can therefore result either from a detention incompatible with paragraph (1) (art. 5-1) or from the absence of any proceedings satisfying paragraph (4) (art. 5-4), or even from both at the same time.

1. As to the decisions ordering detention

74. The Court began by investigating whether the conditions in which De Wilde, Ooms and Versyp appeared before the magistrates satisfied their right to take proceedings before a court to question the lawfulness of their detention.

75. The applicants were detained in execution of the magistrates' orders: their arrest by the police was merely a provisional act and no other authority intervened in the three cases (see paragraph 67 above).

A first question consequently arises. Does Article 5 (4) (art. 5-4) require that two authorities should deal with the cases falling under it, that is, one which orders the detention and a second, having the attributes of a court, which examines the lawfulness of this measure on the application of the person concerned? Or, as against this, is it sufficient that the detention should be ordered by an authority which had the elements inherent in the concept of a "court" within the meaning of Article 5 (4) (art. 5-4)?

76. At first sight, the wording of Article 5 (4) (art. 5-4) might make one think that it guarantees the right of the detainee always to have supervised by a court the lawfulness of a previous decision which has deprived him of his liberty. The two official texts do not however use the same terms, since the English text speaks of "proceedings" and not of "appeal", "recourse" or "remedy" (compare Articles 13 and 26 (art. 13, art. 26)). Besides, it is clear that the purpose of Article 5 (4) (art. 5-4) is to assure to persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected; the word "court"

("tribunal") is there found in the singular and not in the plural. Where the decision depriving a person of his liberty is one taken by an administrative body, there is no doubt that Article 5 (4) (art. 5-4) obliges the Contracting States to make available to the person detained a right of recourse to a court; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case the supervision required by Article 5 (4) (art. 5-4) is incorporated in the decision; this is so, for example, where a sentence of imprisonment is pronounced after "conviction by a competent court" (Article 5 (1) (a) of the Convention) (art. 5-1-a). It may therefore be concluded that Article 5 (4) (art. 5-4) is observed if the arrest or detention of a vagrant, provided for in paragraph (1) (e) (art. 5-1-e), is ordered by a "court" within the meaning of paragraph (4) (art. 5-4).

It results, however, from the purpose and object of Article 5 (art. 5), as well as from the very terms of paragraph (4) (art. 5-4) ("proceedings", "recours"), that in order to constitute such a "court" an authority must provide the fundamental guarantees of procedure applied in matters of deprivation of liberty. If the procedure of the competent authority does not provide them, the State could not be dispensed from making available to the person concerned a second authority which does provide all the guarantees of judicial procedure.

In sum, the Court considers that the intervention of one organ satisfies Article 5 (4) (art. 5-4), but on condition that the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question.

77. The Court has therefore enquired whether in the present cases the magistrate possessed the character of a "court" within the meaning of Article 5 (4) (art. 5-4), and especially whether the applicants enjoyed, when appearing before him, the guarantees mentioned above.

There is no doubt that from an organisational point of view the magistrate is a "court"; the Commission has, in fact, accepted this. The magistrate is independent both of the executive and of the parties to the case and he enjoys the benefit of the guarantees afforded to the judges by Articles 99 and 100 of the Constitution of Belgium.

The task the magistrate has to discharge in the matters under consideration consists in finding whether in law the statutory conditions required for the "placing at the disposal of the Government" are fulfilled in respect of the person brought before him. By this very finding, the police court necessarily decides "the lawfulness" of the detention which the prosecuting authority requests it to sanction.

The Commission has, however, emphasised that in vagrancy matters the magistrate exercises "an administrative function" and does not therefore carry out the "judicial supervision" required by Article 5 (4) (art. 5-4). This opinion is grounded on the case-law of the Court of Cassation and of the

Conseil d'État (see paragraph 37 above). The Commission had concluded from this that the provision of a judicial proceeding was essential.

78. It is true that the Convention uses the word "court" (French "tribunal") in several of its Articles. It does so to mark out one of the constitutive elements of the guarantee afforded to the individual by the provision in question (see, in addition to Article 5 (4), Articles 2 (1), 5 (1) (a) and (b), and 6 (1) (tribunal) (art. 5-4, art. 2-1, art. 5-1-a, art. 5-1-b, art. 6-1). In all these different cases it denotes bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case (see Neumeister judgment of 27th June 1968, Series A, p. 44, paragraph 24), but also the guarantees of judicial procedure. The forms of the procedure required by the Convention need not, however, necessarily be identical in each of the cases where the intervention of a court is required. In order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place. Thus, in the Neumeister case, the Court considered that the competent courts remained "courts" in spite of the lack of "equality of arms" between the prosecution and an individual who requested provisional release (ibidem); nevertheless, the same might not be true in a different context and, for example, in another situation which is also governed by Article 5 (4) (art. 5-4).

79. It is therefore the duty of the Court to determine whether the proceedings before the police courts of Charleroi, Namur and Brussels satisfied the requirements of Article 5 (4) (art. 5-4) which follow from the interpretation adopted above. The deprivation of liberty complained of by De Wilde, Ooms and Versyp resembles that imposed by a criminal court. Therefore, the procedure applicable should not have provided guarantees markedly inferior to those existing in criminal matters in the member States of the Council of Europe.

According to Belgian law, every individual found in a state of vagrancy is arrested and then brought - within twenty-four hours as a rule - before the police court (Section 8 of the 1891 Act and Section 3 of the Act of 1st May 1849). Regarding the interrogation of this individual, the 1891 Act limits itself to specifying in Section 12 that the magistrate ascertains the identity, age, physical and mental state and manner of life of the person brought before him. Regarding the right of defence, the only relevant provision is found in Section 3 of the Act of 1st May 1849, which provides that the person concerned is granted a three-day adjournment if he so requests. According to information provided by the Government, the Code of Criminal Procedure does not apply to the detention of vagrants.

The procedure in question is affected by the administrative nature of the decision to be given. It does not ensure guarantees comparable to those which exist as regards detention in criminal cases, notwithstanding the fact

that the detention of vagrants is very similar in many respects. It is hard to understand why persons arrested for simple vagrancy have to be content with such a summary procedure: individuals liable to sentences shorter than the terms provided for by Section 13, and even Section 16, of the 1891 Act - including those prosecuted for an offence under Articles 342 to 344 of the Criminal Code (aggravated vagrancy) - have the benefit of the extensive guarantees provided under the Code of Criminal Procedure. This procedure undoubtedly presents certain judicial features, such as the hearing taking place and the decision being given in public, but they are not sufficient to give the magistrate the character of a "court" within the meaning of Article 5 (4) (art. 5-4) when due account is taken of the seriousness of what is at stake, namely a long deprivation of liberty attended by various shameful consequences. Therefore it does not by itself satisfy the requirements of Article 5 (4) (art. 5-4) and the Commission was quite correct in considering that a remedy should have been open to the applicants. The Court, however, has already held that De Wilde, Ooms and Versyp had no access either to a superior court or, at least in practice, to the Conseil d'État (see paragraphs 37 and 62 above).

80. The Court therefore reaches the conclusion that on the point now under consideration there has been a violation of Article 5 (4) (art. 5-4) in that the three applicants did not enjoy the guarantees contained in that paragraph.

2. As to the rejection of the requests for release addressed by the applicants to the administrative authorities

81. In the applicants' view there was a violation of Article 5 (4) (art. 5-4) not only because of the conditions in which their detention was ordered by the magistrate, but also because of the refusal of their requests for release.

82. The Court finds that the applicants could without doubt have appealed to the Conseil d'État and that this appeal would have been effective if the Minister of Justice had violated the 1891 Act in refusing their requests for release. None of them, however, claims to have been in one of those situations where the Act requires that detention should end. De Wilde and Versyp were in fact released 0before the expiry of the period of two years fixed by the magistrate (Section 13 of the 1891 Act; paragraphs 17, 20, 29, 31 in fine and 40 above); Ooms was released on the expiry of the statutory period of one year and his release savings had not before that time reached the prescribed amount (Sections 16, 17 and 18, first paragraph, of the 1891 Act; paragraphs 24, 26 in fine and 40 above).

The applicants could also have contended before the Conseil d'État

- as they did before the Commission, though not very precisely (see paragraph 48 of the report) - that their detention had in any event violated Article 5 (1) (art. 5-1) of the Convention, particularly because, due to supervening circumstances, they had lost their character of vagrants. In fact

Article 5 (art. 5) of the Convention is directly applicable in the Belgian legal system, such that its violation could have been complained of before the Conseil d'État and it cannot be affirmed a priori that it would not have decided speedily.

83. On the other hand, the requests looked to the Minister of Justice to use the discretionary power conferred upon him by the 1891 Act (Sections 15 and 18) to decide, in the light of the circumstances relied on by the interested party or of other pertinent information, whether a detained vagrant should be released before the statutory period or the term fixed by the magistrate's decision. To that extent, whatever action was taken thereafter falls completely outside the application of the provision of Article 5 (4) (art. 5-4) of the Convention. This latter provision, in fact, requires supervision only of the lawfulness of the placing in detention or of its continuation.

84. The Court does not therefore find any violation of Article 5 (4) (art. 5-4) on the point at issue.

E. As to the alleged violation of articles 6 and 7 (art. 6, art. 7)

85. The Commission and the Government both submit that Articles 6 and 7 (art. 6, art. 7), relied upon by the applicants, are inapplicable.

86. The Court has come to the conclusion that, during the hearing before the magistrates, the applicants were not dealt with in accordance with the requirements of Article 5 (4) (art. 5-4) (see paragraphs 74 to 80 above). This conclusion makes it superfluous to examine whether Article 6 (art. 6) was applicable in this case, and if so, whether it was observed.

87. As to Article 7 (art. 7), it is clear that it is not relevant. Simple vagrancy is not an "offence" under Belgian law and the magistrate did not find the applicants "guilty" nor impose a "penalty" on them (see, mutatis mutandis, the Lawless judgment of 1st July 1961, Series A, p. 54, paragraph 19).

F. As to the alleged violation of article 4 (art. 4)

88. According to Article 4 (art. 4) of the Convention,

> "(1) ...
>
> (2) No one shall be required to perform forced or compulsory labour.
>
> (3) For the purpose of this Article the term 'forced or compulsory labour' shall not include:
>
> (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 (art. 5) (...);

..."

In the Commission's view the work which the applicants were compelled to perform was not justified under Article 4 (art. 4) as, in its opinion, there had been a breach of paragraph (4) of Article 5 (art. 5-4).

89. The Court too has, in these cases, found a violation of the rights guaranteed by Article 5 (4) (art. 5-4) (see paragraphs 74 to 80 above), but it does not think that it must deduce therefrom a violation of Article 4 (art. 4). It in fact considers that paragraph (3) (a) of Article 4 (art. 4-3-a) authorises work ordinarily required of individuals deprived of their liberty under Article 5 (1) (e) (art. 5-1-e). The Court has found moreover, on the basis of information before it, that no violation of Article 5 (1) (e) (art. 5-1-e) has been established in respect of De Wilde, Ooms and Versyp (see paragraphs 67 to 70 above).

90. Furthermore, the duty to work imposed on the three applicants has not exceeded the "ordinary" limits, within the meaning of Article 4 (3) (a) (art. 4-3-a) of the Convention, because it aimed at their rehabilitation and was based on a general standard, Section 6 of the 1891 Act, which finds its equivalent in several member States of the Council of Europe (see paragraph 38 above and Appendices IV and V to the Commission's report).

The Belgian authorities did not therefore fail to comply with the requirements of Article 4 (art. 4).

G. As to the alleged violation of article 8 (art. 8)

91. During their detention, the applicants' correspondence was supervised to a certain extent. In the Commission's view this led to a violation of Article 8 (art. 8), on the one hand because the detention of the applicants was unlawful in that Article 5 (4) (art. 5-4) had not been complied with and on the other hand because, even if it was lawful, ordinary detention for vagrancy cannot entail the restrictions on the freedom of correspondence which are permissible in criminal matters.

92. On the first argument, the Court recalls mutatis mutandis the reasons given in paragraph 89 above on compulsory labour.

93. On the second argument, the Court recalls that Article 8 (art. 8) of the Convention provides that:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Court finds that the supervision in question, which constitutes unquestionably an "interference by a public authority with the exercise of (the) right" enshrined in paragraph (1) of Article 8 (art. 8-1), was "in accordance with the law" - within the meaning of paragraph (2) (art. 8-2) - as it is provided for in Articles 20 to 23 of the Royal Decree of 21st May 1965 taken in conjunction with Article 95. It then observes, in the light of the information given to it, that the competent Belgian authorities did not transgress in the present cases the limits of the power of appreciation which Article 8 (2) (art. 8-2) of the Convention leaves to the Contracting States: even in cases of persons detained for vagrancy, those authorities had sufficient reason to believe that it was "necessary" to impose restrictions for the purpose of the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others. These restrictions did not in any event apply in a long series of instances enumerated in Article 24 of the Royal Decree of 21st May 1965 nor in connection with the applicants' correspondence with the Commission (see paragraph 39 above). Finally, there is nothing to indicate that there was any discrimination or abuse of power to the prejudice of the applicants (Articles 14 and 18 of the Convention) (art. 14, art. 18).

H. As to the alleged violation of article 3 (art. 3)

94. De Wilde and Versyp complained of disciplinary punishments inflicted on them for refusing to work but the Commission did not consider that these punishments violated Article 3 (art. 3).

Having regard to the facts before it, the Court also does not find, even ex officio, any suggestion of a violation of this text.

I. As to the alleged violation of article 13 (art. 13)

95. The applicants invoked Article 13 (art. 13) of the Convention, alleging that they did not have "an effective remedy before a national authority" in order to obtain the protection of the rights guaranteed by Articles 5, 3, 4, 6, 7 and 8 (art. 5, art. 3, art. 4, art. 6, art. 7, art. 8).

The Court has already ruled that the applicants were not dealt with in a manner compatible with the requirements of Article 5 (4) (art. 5-4) (see paragraphs 74 to 80 above); to this extent, it does not think it has to enquire whether there has been a violation of Article 13 (art. 13).

As to the applicants' other complaints, the Court limits itself to finding that Articles 3 to 8 (art. 3, art. 4, art. 5, art. 6, art. 7, art. 8) of the Convention are directly applicable in Belgian law. If, therefore, the applicants considered that the administrative decisions put in issue had violated the rights guaranteed by these articles, they could have challenged them before the Conseil d'État.

FOR THESE REASONS, THE COURT,

I. AS TO THE QUESTIONS OF JURISDICTION AND ADMISSIBILITY RAISED IN THESE CASES

1. Holds by twelve votes to four that the Court has jurisdiction to deal with the questions of non-exhaustion of domestic remedies and of delay raised in these cases;

2. Holds unanimously that the Government is not precluded from relying on the rule of exhaustion of domestic remedies as regards the orders of the magistrates at Charleroi, Namur and Brussels;

3. Holds unanimously that the Government is precluded from submitting that the application of Edgard Versyp was made out of time;

4. Holds unanimously that the Government is precluded from relying on the rule of exhaustion of domestic remedies as regards the decisions of the Minister of Justice rejecting the three applicants' requests for release;

5. Declares ill-founded, unanimously, the Government's submission that there was non-exhaustion of domestic remedies as regards the complaints relating to the detention orders;

6. Finds, therefore, unanimously, that the Court has jurisdiction to rule on the merits of the present cases.

II. AS TO THE MERITS

1. Holds unanimously that the "voluntary reporting" by the applicants does not suffice to establish the absence of any violation of the Convention;

2. Holds unanimously that there has been no breach of Article 5 (1) (art. 5-1);

3. Holds unanimously that Article 5 (3) (art. 5-3) is not applicable in the present cases;

4. Holds by nine votes to seven that there has been a breach of Article 5 (4) (art. 5-4) in that the applicants had no remedy open to them before a court against the decisions ordering their detention;

5. Holds by fifteen votes to one that there has been no violation of Article 5 (4) (art. 5-4) by reason of the rejection of the requests for release addressed by the applicants to the administrative authorities;

6. Holds unanimously that it is not called upon to pronounce on the alleged breach of Article 6 (art. 6);

7. Holds unanimously that Article 7 (art. 7) is not applicable in the present cases;

8. Holds unanimously that there has been no breach of Article 4 (art. 4);

9. Holds by fifteen votes to one that there has been no breach of Article 8 (art. 8);

10. Holds unanimously that there has been no breach of Article 3 (art. 3);

11. Holds unanimously that it is not called upon to pronounce on the alleged violation of Article 13 (art. 13) as regards the point referred to at II-4 above;

12. Holds unanimously that there has been no breach of Article 13 (art. 13) as regards the other complaints of the applicants;

13. Reserves for the applicants the right, should the occasion arise, to apply for just satisfaction on the issue referred to at point II-4 above.

Done in French and English, the French text being authentic, at the Human Rights Building, Strasbourg, this eighteenth day of June one thousand nine hundred and seventy-one.

Sir Humphrey WALDOCK
President

M.-A. EISSEN
Registrar

The following separate opinions are annexed to the present judgment in accordance with Article 51 (2) (art. 51-2) of the Convention and Rule 50 (2) of the Rules of Court:

- opinion of Judges Ross and Sigurjónsson;

- opinion of Judge Bilge;

- opinion of Judge Wold;

- opinion of Judge Zekia;

- opinion of Judges Balladore Pallieri and Verdross,

- opinion of Judges Holmbäck, Rodenbourg, Ross, Favre and Bilge.

H. W.
M.-A.

JOINT SEPARATE OPINION OF JUDGES ROSS AND SIGURJÓNSSON

(Translation)

According to Article 26 (art. 26) of the Convention, the Commission may not deal with the petition addressed to the Secretary General of the Council of Europe (Article 25) (art. 25) until all domestic remedies have been exhausted.

According to Article 27 (3) (art. 27-3), the Commission shall reject any petition referred to it which it considers inadmissible under Article 26 (art. 26).

According to Article 28 (art. 28), in the event of the Commission accepting a petition referred to it, it shall undertake an examination of the petition with a view to ascertaining the facts and place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights.

According to Article 31 (art. 31), if a solution is not reached the Commission shall draw up a report on the facts and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention, and this report shall be transmitted to the Committee of Ministers.

According to Article 32 (art. 32), if the question is not referred to the Court in accordance with Article 48 (art. 48) within a period of three months from the date of the transmission of the Commission's report to the Committee of Ministers, the Committee of Ministers shall decide by a two-thirds majority whether there has been a violation of the Convention.

According to Article 45 (art. 45), "The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48 (art. 48)".

The expression "case" means the facts found by the Commission in its report. A "case" does not exist until the Commission's report has been transmitted to the Committee of Ministers. The Commission, in its report which is transmitted to the Committee of Ministers, finds the facts and states an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention. If the case is not referred to the Court in accordance with Article 48 (art. 48), the Committee of Ministers decides whether there has been a violation of the Convention.

If the "case" is referred to the Court, its jurisdiction consists in interpreting and applying the Convention to all the "matters", i.e. to all the facts found by the Commission in its report, and in rendering a final judgment (Article 52) (art. 52) as to whether those facts disclose a breach by the State concerned of its obligations (engagements: Article 19 (art. 19))

under the Convention. A final judgment can only be a judgment that deals with the merits of the "case", that is to say, whether the facts found by the Commission disclose a violation of the Convention.

The admissibility or inadmissibility of the petition is a preliminary (procedural) question which is left to the "powers" of the Commission (Article 25 (4)) (art. 25-4). As against this, the question whether the facts found in the Commission's report disclose a breach by the State concerned of its obligations under the Convention is a matter for the jurisdiction of the Court, and if the case is not brought before the Court it is a matter for the jurisdiction of the Committee of Ministers.

The question of the admissibility or inadmissibility of the petition is, from the standpoint of pure logic, one and indivisible. The Commission either has jurisdiction or it has not. It would be illogical if the Commission had exclusive jurisdiction when it rejected a petition but did not have exclusive jurisdiction when it accepted one, so that the Court's jurisdiction (or that of the Committee of Ministers if the case is not referred to the Court) also covers the preliminary (procedural) question whether the Commission, in accepting the petition, has rightly or wrongly interpreted and applied Article 27 (art. 27) of the Convention.

Under Protocol No. 3 (P3) to the Convention, Article 29 (art. 29) is deleted from the Convention and the following provision is inserted:

> "After it has accepted a petition submitted under Article 25 (art. 25), the Commission may nevertheless decide unanimously to reject the petition if, in the course of its examination, it finds that the existence of one of the grounds for non-acceptance provided for in Article 27 (art. 27) has been established.
>
> In such a case, the decision shall be communicated to the parties."

Under this provision, the Commission may at any time return to the preliminary (procedural) question of the admissibility or inadmissibility of the petition accepted and reject the petition, by a unanimous decision, if it finds that the existence of one of the grounds for inadmissibility provided for in Article 27 (art. 27) has been established.

The Commission's power to resume at any time its consideration of the admissibility proves that it has sole jurisdiction on this point and that, unless there is a unanimous decision to reject a petition accepted, the Court has no jurisdiction to consider this preliminary question. Thus, there is a saving of time and, at the same time, the prestige of the Court remains intact as the Court is rid of questions which do not relate to the facts found in the Commission's report.

The Contracting Parties inserted Article 26 (art. 26) in order to have it solemnly declared that the Convention does not depart from the generally recognised principle that there can be no access to an international authority until all domestic remedies have been exhausted.

One might have expected the sanction to be included in the same Article 26 (art. 26). One might even have expected that nothing be said. On the contrary, the sanction was included in Article 27 (art. 27) as one of the grounds for inadmissibility. The words "the Commission shall reject" have the same meaning as "the Commission feels, the Commission considers".

SEPARATE OPINION OF JUDGE BILGE

(Translation)

I do not share the opinion expressed in the judgment as regards the jurisdiction of the Court to entertain submissions on the non-exhaustion of domestic remedies. In paragraphs 47-49, the judgment, referring to Article 45 (art. 45), gives the Court's jurisdiction a wide scope which corresponds neither to the texts nor to the aim and purpose of the Convention.

It is true that, according to Article 45 (art. 45), "The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48 (art. 48)", but the Court has interpreted the text broadly. One of the three elements of the basis of the Court's jurisdiction provided for in this article (art. 48) is the word "affaires" ("cases"). Relying on the English version of paragraph (1) of Article 46 (art. 46-1), the Court interprets this word as "all matters". But in interpreting a text which is authentic in two languages, one cannot, in my opinion, give preference to one language: one must find the meaning which best reconciles the two texts, taking into account the aim and purpose of the Convention. In the different articles of the Convention, the French text constantly uses the word "affaire" while the English text expresses the same concept by the words "question", "cases" and "matters". The English version is not, from this point of view, a text which has a uniform terminology on which one can rely. The text of Article 45 (art. 45) does not provide sure indications to clarify the meaning of the word "affaires". One must therefore go to the source of the Court's jurisdiction to harmonise the words quoted and find a common meaning. According to Articles 31 and 32 (art. 31, art. 32) what is referred as an "affaire" ("case") by the Commission to the Committee of Ministers or to the Court is the question whether there has or has not been a violation of the Convention. The word "affaire" must therefore be interpreted in this sense.

This meaning of the word "affaire" is also confirmed by the general plan of the Convention. By Article 19 (art. 19), the Convention set up two organs, the Commission and the Court, to ensure the observance of Human Rights. To this aim, the Commission and the Court have defined powers. Competence to accept an application and to check its admissibility belongs to the Commission. Jurisdiction to decide whether there has been a violation of the Convention belongs to the Court. It is within this field that the Court enjoys full jurisdiction.

The purpose of the Convention is to ensure the observance of Human Rights. To achieve this end the Court must reach a decision as quickly as possible without letting the case drag on unreasonably. Through a broad interpretation of Article 45 (art. 45), the judgment has set up a system of

supervision by the Court of the Commission's decisions on admissibility. An enormous waste of time and effort would result in cases where the Court should find, generally four or five years after the admissibility of the applications, that Article 26 (art. 26) has not been observed. If there is jurisdiction to supervise decisions of admissibility, it must be exercised at the first stage of the proceedings. Such supervision is not provided for by the Convention, because it is left to the competence of the Commission.

I agree with the judgment when it states, in paragraph 50, that "the rule of exhaustion of domestic remedies, which dispenses States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, is also one of the generally recognised principles of international law to which Article 26 (art. 26) makes specific reference". However, I do not agree with the judgment in deducing therefrom a supervisory jurisdiction of the Court. In effect, the rule of exhaustion of domestic remedies is not concerned with the internal organisation of a given international jurisdictional body. As stated above, the Convention set up two organs to ensure the observance of Human Rights. The aim of the rule in question is achieved if the rule is observed by one of these organs and, above all, by the organ entrusted with the task of checking the observance of the conditions of admissibility. This is all the more true since, according to paragraph (3) of Article 27 (art. 27-3), the condition of exhaustion of domestic remedies is a preliminary question which concerns essentially the admissibility of the application. It is for the Commission to decide whether this condition is fulfilled. If the question of exhaustion of domestic remedies is raised before the Commission and the latter has decided the issue, the requirements of the rule in question are completely satisfied from the point of view of international law.

Moreover, the judgment states in paragraph 51 that "the task which this Article [27] (art. 27) assigns to the Commission is one of sifting; the Commission either does or does not accept the applications. Its decisions to reject applications which it considers to be inadmissible are without appeal as are, moreover, also those by which applications are accepted; they are taken in complete independence". The judgment adds, however, that the decision of the Commission to accept a case "is not binding on the Court any more than the Court is bound by the opinion expressed by the Commission". I cannot accept this reasoning. First of all, the decision of admissibility taken by the Commission and the opinion expressed by it on the merits are of a different nature. An opinion, by its very nature, does not bind anyone. There is no need to cite it alongside the decision of admissibility for the purpose of making an argument against the latter.

According to Articles 25 and 27 (art. 25, art. 27), the decision on the admissibility of an application falls within the competence of the Commission. In the exercise of this jurisdiction, the Commission checks the

observance of the conditions of admissibility. In the course of this examination it takes into consideration the condition laid down in Article 26 (art. 26). This article (art. 26) is addressed, as the text itself bears witness, to the Commission and not to the Court. It is part of the Commission's field of activity. On the other hand, it is not reasonable to declare that the decision of refusal binds the Court while that of admissibility does not, for the two aspects of the same jurisdiction cannot be separated. In adopting another solution, the judgment has opened a way of proceeding, which, in my view, does not conform to the principles of good administration of justice.

For the reasons set out above, I think that the Court has no jurisdiction to entertain submissions of non-exhaustion of domestic remedies.

SEPARATE OPINION OF JUDGE WOLD

As to the jurisdiction

I have come to the conclusion that the Court has no jurisdiction regarding admissibility. In regard to individual petitions, the task of the Commission is one of sifting and screening. One feared to get too many unjustified petitions. It was necessary at an early stage to select the applications which the European supervisory organs should deal with. The preparatory works show that all conditions for admissibility - exhaustion of remedies, compatibility with the provisions of the Convention and not manifestly ill-founded – were considered from the same angle, namely to prevent a flood of cases. The whole responsibility with regard to admissibility - also including exhaustion of local remedies - was laid upon the Commission. The member States seemed to be fully satisfied that this function should be the task of the Commission and the Commission alone.

The Court is not a court of appeal in relation to the Commission. The Commission shall, according to Article 19 (art. 19), ensure observance of the engagements undertaken by the Contracting States. The Court has the same duty. But the task is divided between these two organs. The majority of the Court admits that "... the Commission either does or does not accept the applications. Its decisions to reject applications which it considers to be inadmissible are without appeal as are, moreover, also those by which applications are accepted; they are taken in complete independence ...". But if this is so, how can then the Court through "interpretation or application" of Article 26 (art. 26) set aside the Commission's final decision laying down that all internal remedies are exhausted? The majority contend that as the Court's jurisdiction according to Article 45 (art. 45) shall extend to "all cases concerning the interpretation and application ... which the High Contracting Parties or the Commission shall refer to it", it is "impossible to see how questions concerning the interpretation and application of Article 26 (art. 26) ... should fall outside its jurisdiction". But the Court's jurisdiction is limited to cases referred to it by the Commission or a State. The question of exhaustion of internal remedies is not part of the case as this question is already finally decided by the Commission, exercising a judicial function against which no appeal lies. The interpretation and application of Article 26 (art. 26) do not therefore fall within the jurisdiction of the Court.

The Court has competence to decide its own jurisdiction, but it is not competent to make decisions regarding the jurisdiction of the Commission.

A decision of non-admissibility on the ground that the local remedies have not been exhausted is a final judicial decision. The application of the individual cannot go further. In this respect the Commission's jurisdiction is absolute without any interference by the Court, although the decision will always depend on an interpretation and application of Article 26 (art. 26). But exactly the same is the fact when the Commission finds that the

application is admissible on the ground that the internal remedies have been exhausted. That is also a final judicial decision.

The Contracting States must accept the negative decision by the Commission: why should they have a right to challenge the positive one? It is an identical jurisdiction which the Commission exercises in both cases. The individual has to abide by a decision of non-admissibility. The opposite decision gives him a justified expectation that his claim will now be dealt with by the European international organs. If the Court nevertheless exercises its own jurisdiction in regard to admissibility and decides against the Commission's decision, the inequality between the applicant and the State in proceedings before the Court will be more aggravated, which can only harm the cause of Human Rights. The provisions in Articles 28 to 31 (art. 28, art. 29, art. 30, art. 31) clearly show that the meaning of the Convention is that the Contracting States shall also abide by a decision of admissibility. The Commission acts immediately upon its finding that the application, in whole or in part, is admissible. There is no means by which the decision laying down that all internal remedies have been exhausted can be controlled or tried by any other organ. The Commission's further dealing with the application is consequently in full compliance with the Convention when the Commission accepts the petition (Article 28) (art. 28), and undertakes to ascertain the facts, to examine the petition and carry out - if need be - an investigation. It shall try to secure a friendly settlement and if a friendly settlement is not reached, the Commission shall draw up its report on the facts and state its opinion "as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention". The Commission performs a conscientious, strenuous and very extensive work - and we are confronted with a report which is prepared in full legal compliance with the provisions of the Convention and consequently according to Article 44 (art. 44), the Commission - as well as a State - has "the right to bring a case before the Court". When the Commission, or a State, exercises this right and decides to bring a case before the Court, the Court cannot decline to deal with it or decide that it will not go into the merits of the case.

As regards especially the exhaustion of internal remedies, it should be noted that the Commission, regularly and in several meetings, discusses thoroughly the question of admissibility in default of which it is not possible to bring the case duly before the Court. A State may easily waive any objections regarding exhaustion of remedies. Furthermore, a State will have every opportunity to remedy a decision during the time the application has been under consideration by the Commission, and the question of exhaustion discussed at length. This is usually the situation in every application which is dealt with by the Commission. It seems unreasonable that, under these circumstances, a State shall have the right to pursue this question of local remedies further and take it up before the Court. In this

connection to speak about the rule of exhaustion as marking out the limits "within which the Contracting States have agreed to answer for wrongs alleged against them before the organs of the Convention", and that "the Court has to ensure (its) observance ... just as of the individual rights and freedoms ...", carries really no weight. As to the interests of a State in regard to exhaustion of remedies, the State itself has every opportunity to look after them before the Commission, which also protects these interests.

Articles 44, 45 and 48 (art. 44, art. 45, art. 48) speak about "a case" or "cases" brought before the Court by the Commission or by a State. The Court's jurisdiction, as mentioned above, is laid down in Article 45 (art. 45) as extending to all cases the Commission - or a State - has referred to the Court. One may ask what the Convention means by using the denomination case. The answer is simple. The case is the "report on the facts" and the Commission's opinion "whether the facts found disclose a breach by the State concerned of its obligations under the Convention" (Article 31) (art. 31). It is in respect of this report that the Court has jurisdiction to interpret and apply the Convention. In other words it is the merits which the Court shall try. Nothing less, nothing more!

The report shall be transmitted to the Committee of Ministers (Article 31 (2)) (art. 31-2) and, if the case is not referred to the Court, the Ministers shall make the decision. The Committee of Ministers is competent to "decide ... whether there has been a violation of the Convention" (Article 32 (1)) (art. 32-1), the Court has jurisdiction to examine "cases concerning the interpretation and application of the Convention" (Article 45) (art. 45). But there is in actual fact no difference between the competence of the Committee of Ministers and the competence of the Court. It is generally understood that the Ministers shall not deal with the question of admissibility, they shall only decide whether there has been a violation. But is it not just the same competence the Court exercises? The Ministers shall of course also "interpret and apply" the Convention in the same way as the Court. The fact that the Ministers do not deal with the question of admissibility bears out the contention that the Court has not this competence either. The Ministers and the Court stand in a supplementary position to each other. There is no reason to believe that their jurisdiction in regard to exhaustion of internal remedies should not be the same.

Finally, if the Court takes upon itself jurisdiction in regard to admissibility, the consequence will be that the Commission's report may not be dealt with by any responsible organ, and no final decision taken whether a violation has taken place or not. And that in spite of the fact that the report may very well contain the considered opinion of the members of the Commission that grave violations of the Convention have taken place! This result is really detrimental to the cause of Human Rights and it does not seem consistent with sound common sense.

Regarding the alleged violation of paragraph (1) of Article 5 (art. 5-1)

In this regard I concur with the conclusions of the Court. I find it, however, sufficient to state that I am in full agreement with the opinion of the Commission in regard to paragraph (1) (e) of Article 5 (art. 5-1-e) (paragraph 186 of the Commission's report). It is not for the Court or the Commission to decide whether a municipal law was correctly applied, it is sufficient that the procedure prescribed by the municipal law is applied correctly.

As to the alleged violation of paragraph (4) of Article 5 (art. 5-4)

Here I concur with the conclusion of the Court but I cannot adhere to the Court's reasoning in regard to the question whether Article 5 (4) (art. 5-4) requires that two authorities should deal with a case. The Court's reasoning in respect to the text of the Convention and also the Court's statement that the supervision required by Article 5 (4) (art. 5-4) is incorporated in the magistrate's decision are, in my view, not adequate on this point regarding the question of a person deprived of his liberty being entitled, even at a later stage, to bring proceedings before a court. The opinion of the Commission was divided. The European Court does not, however, in my view, need to decide this question. With this reservation I concur with the Court's conclusion on this point.

As regards the alleged violation of Article 4 (art. 4)

In this respect I also concur with the conclusions of the Court but in my view the work imposed upon the vagrants, De Wilde, Ooms and Versyp, was an incorporated consequence of the magistrate's decision of detention and cannot be considered an independent separate violation of the Convention. On these grounds I vote for the conclusion that no violation of Article 4 (art. 4) has taken place.

As to the alleged violation of Article 8 (art. 8)

Here I have a dissenting opinion. I cannot see that it was necessary for the public authorities to interfere with the correspondence of the detained vagrants. The authorities had no reason to believe that they had to censor the correspondence, either for the purpose of preventing disorder or crime, or for the protection of health and morals, or for the protection of the rights and freedoms of others. The vagrants had committed no crime and even if the authorities, in their interference with the vagrants' private correspondence, were within their jurisdiction according to Belgian law they were most certainly overstepping Article 8 (art. 8) of the Convention.

In regard to Article 8 (art. 8) of the Convention I therefore find that a violation has taken place.

SEPARATE OPINION OF JUDGE ZEKIA

The main issues involved in the present case may be summarised as follows:

1. Has this Court jurisdiction to examine, after the ruling made by the Commission in favour of the admissibility of the petitions lodged by the applicants, submissions relating to (a) the non-exhaustion of domestic remedies, (b) the non-observance of the six months' time-limit, occurring in Article 26 (art. 26) of the Convention?

2. If this Court possesses such jurisdiction, to decide:
(a) whether domestic remedies had been exhausted, and
(b) whether the six months' limit was observed with the object and meaning of Article 26 (art. 26) of the Convention.

3. Whether the Belgian State has failed to meet its obligation under Article 5 (4) (art. 5-4) of the Convention by not providing the judicial machinery envisaged by the said Article for the benefit and protection of persons detained under the Belgian Vagrancy Act of 1891 in conjunction with Article 5 (1) (e) (art. 5-1-e) of the Convention.

4. Whether as a consequence of the alleged failure to provide an appropriate judicial machinery as per Article 5 (4) (art. 5-4) or for other reasons, Belgium violated Articles 3, 4 (2) and (3), 5 (1), 6 (1) (3b) (3c), 7 and 13 (art. 3, art. 4-2, art. 4-3, art. 5-1, art. 6-1, art. 6-3-b, art. 6-3-c, art. 7, art. 13) of the said Convention.

Although I respectfully agree with the majority decision and the conclusions arrived at in respect of the major issues, yet as my line of reasoning differs to some extent in a number of points from that of the majority, I thought it appropriate to give very briefly a concurrent opinion.

I am not dealing with the factual aspect of the case. I am content for this purpose to refer to the part of the main judgment dealing with the facts of the case.

As to issue No. 1

My answer to the questions framed in issue No. 1 is in the affirmative. The Court has jurisdiction to examine (a) whether the domestic remedies have been exhausted and (b) whether the six months' time-limit has been observed. Both (a) and (b) are preconditions laid down under Articles 26 and 27 (art. 26, art. 27) for the exercise of jurisdiction by the Commission and as they constitute component parts of the Convention both fall within the ambit of Article 45 (art. 45) shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48 (art. 48)". Article 49 (art. 49) leaves the last word to the Court in deciding its own jurisdiction.

I do not consider, however, that the holding of this view in any way amounts to a transgression of the domain of the Commission, admittedly an

independent body within the structure of the European Convention. A ruling on the inadmissibility of an application by the Commission is final for all intents and purposes with all its implications. On the other hand, a ruling on the admissibility of such application does not and ought not to have the far-reaching effect and result that all matters touching the prerequisites for the acceptance of a petition have been decided upon once and for all and can not be questioned by any authority whatsoever including the Committee of Ministers and the Court. Had the case been so, the Court would have been handicapped in the exercise of its jurisdiction and precluded from arriving at conclusions which might appear to be inconsistent with the way in which the Commission dealt with one or more of the preconditions attached to the admissibility of a petition under Articles 26 and 27 (art. 26, art. 27).

This could not have been the intention of the Parties to the Convention. Moreover, the exhaustion of domestic remedies, prior to any right of a recourse to an international tribunal, is a vital precondition recognised by international law and governments are as a rule particularly jealous for the observance of such conditions.

The ruling on the admissibility of a petition by the Commission, strictly speaking, is not in issue before the Court. Such a ruling in the affirmative was made and as a result it set in motion the Commission who investigated the applicants' complaints under Articles 28 and 29 (art. 28, art. 29), and made its report under Article 31 (art. 31). In other words the ruling in question fulfilled the object it was intended to achieve.

As to issue No. 2

I agree with the Commission's decision that domestic remedies in the accompanying circumstances of the case were exhausted. The same applies as to whether Versyp's petition was made in time. I am of the opinion that all these applicants, throughout the material time, could not reasonably anticipate any remedy for which they could institute proceedings prior to the "Du Bois" judgment.

As to issue No. 3 relating to the alleged violation of Article 5 (4) (art. 5-4) of the Convention

The Belgian Government strongly argued that the requirement of the Convention under Article 5 (4) (art. 5-4) has been satisfied by the fact that the detention of the applicants in a vagrancy centre or assistance home was ordered by a magistrate. Article 5 (4) (art. 5-4) reads: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

Article 5 (4) (art. 5-4) postulates the detention of a person effected by some authority and that such person disputes the lawfulness of his detention and wishes to take proceedings in a court in order to obtain a judicial decision on the lawfulness or otherwise of his detention with a view to his release from such detention if he succeeds in his recourse or appeal.

Could the functions of the magistrate whose primary duty is to implement the Vagrancy Act of 1891, and in pursuance of that Act, to investigate "the identity, age, physical and mental state and manner of life" of the person involved and if satisfied to send such person suspected as vagrant in pursuance of Sections 13 and 16 of the said Act to a vagrancy centre or to an assistance home, conform or correspond with the functions of a court whose primary duty would be to ascertain, according to Article 5 (4) (art. 5-4), whether the vagrant in question is lawfully detained or not.

Even if we admit that the magistrate constitutes a court for deciding the lawfulness of the detention, he has not before him a case of detention the lawfulness of which is sub judice. Detention originates from his own order. He cannot be the judge of his own act. He is not there to decide either as to the lawfulness of the arrest and detention by the policemen who brought the applicant before him with a view to investigating whether a state of vagrancy existed and if it did which of the courses under Sections 13 and 16 of the Vagrancy Act of 1891 is to be adopted.

The applicants are not the persons who instituted proceedings before the magistrate. Apart from the unsuitability and inadequacy of its procedural rules, if the magistrate could be considered as the court under Article 5 (4) (art. 5-4), then his decision is expected to be a judicial one, that is a decision in a declaratory form that the detention of the applicants is lawful or unlawful. The Conseil d'État, however, in the Du Bois case, in connection with the nature of the order of the magistrate, authoritatively stated that placing a vagrant at the disposal of the Government is not the result of a criminal offence but "an administrative security measure ... of a purely administrative nature".

It is obvious from what has been said that the magistrate in applying Sections 13 and 16 of the Vagrancy Act of 1891 was performing administrative and not judicial functions, as one would have expected a court to discharge its duties under Article 5 (4) (art. 5-4).

Even if we accept, for argument's sake, the magistrate constituting a police court with a competence to decide speedily lawfulness of detention for the purpose of Article 5 (4) (art. 5-4), could it be said that a detainee during the period of his continued detention can apply anew to the said magistrate to decide about the legality of such detention? An order of detention might be lawful at its inception but it cannot be said that irrespective of any supervening events it continues to be lawful throughout the duration of his detention.

Can it be said that, after the decision of the Conseil d'État in the Du Bois case, the way to seeking a remedy by a vagrant detainee is wide open and therefore if there was a gap in the Belgian judicial system in connection with Article 5 (4) (art. 5-4) this no longer existed? I have my doubts about this. As a rule, High Judicial or Administrative Tribunals, in all countries, are not suited for the delivery of speedy decisions contemplated in the

Article (art. 5) in question. The decision on the lawfulness of a detention might depend not only on the legal aspect but also on the consideration of the factual aspect of a case. The High Courts, administrative or otherwise, as a rule are not inclined to go deeply into the factual aspects of the case.
But this is a matter for the future. If the constitution and the procedural rules of the Conseil d'État, as well as the time at their disposal, allow them to deal speedily with recourses coming from the inmates of the vagrancy centres or assistance homes so much the better for this class of detainees.

I am therefore of the opinion that the Belgian State failed, within the material period, to discharge its obligations under Article 5 (4) (art. 5-4) of the Convention.

As to issues in No. 4

Failure on the part of the Government to make available, for the applicants under detention, a court in which they could institute proceedings for obtaining a decision on the lawfulness of their detention, in my view, does not necessarily amount to a violation of Articles 3 to 6 (art. 3, art. 4, art. 5, art. 6) of the Convention. These Articles (art. 3, art. 4, art. 5, art. 6), although inter-related with Article 5 (4) (art. 5-4), are not interdependent. Because there was no court available for the applicants to decide whether they were rightly or wrongly kept in detention it does not necessarily follow that they were unlawfully detained. On the material, documentary or otherwise, put before us, I cannot say that the detention of the applicants under the relevant Belgian Act and procedure was unlawful. Allegations of contraventions of other Articles of the Convention, independently of Article 5 (4) (art. 5-4), have not been substantiated. In this connection I respectfully associate myself with the views expressed in the main judgment.

The consideration for a remedy, due to violation of Article 5 (4) (art. 5-4), is up to the national authority to decide as per Article 13 (art. 13), which reads:

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

I have, however, to make certain reservations. This Court having been called upon to decide on allegations of contraventions of certain Articles of the Convention has to pronounce judgment on the evidence available. In doing so, however, one can not lose sight of the fact that the proper forum for deciding the legality of the detention under Article 5 (1) (e) (art. 5-1-e) is the national court where applicants could go and adduce before it the evidence they possess. Strictly speaking, applicants are not parties before our Court.

I entertain, therefore, doubts as to what extent our Court can pronounce final and binding judgments on matters primarily falling within the

jurisdiction of the national courts, access to which might be rendered possible in the future.

JOINT SEPARATE OPINION OF JUDGES BALLADORE PALLIERI AND VERDROSS

(Translation)

We regret that on several points we are not able to agree with the judgment.

First, we cannot go so far as the judgment in declaring at paragraph 69: "Having thus the character of a vagrant the applicants could ... be made the subject of a detention". In our opinion, the Court is not, in the first place, competent to declare that a person is a vagrant any more than to declare that a person is a criminal or of unsound mind. It can only find that this or that criterion has been established in internal law in accordance with a lawful procedure conforming to the requirements of the Convention in a way which renders legitimate certain measures taken by the State. Apart from this, since in the Court's opinion the applicants were not in a position to have supervised within the meaning of Article 5 (4) (art. 5-4) of the Convention the lawfulness of their alleged character of a vagrant, it had to be concluded that there were perhaps very strong reasons to hold that they were vagrants and that it was permitted to undertake and pursue the appropriate procedure, but that the state of vagrancy could not yet be considered to exist according to the Convention. The same principle as that in Article 6 (2) (art. 6-2) of the Convention is applicable here ("Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law"). According to the Court, the state of vagrancy was not lawfully established because of the violation of Article 5 (4) (art. 5-4) of the Convention; it was therefore still to be presumed that they were not vagrants.

The judgment finds, on the contrary, that the state of vagrancy could be taken as established (a conclusion of which it takes account, moreover, in paragraphs 89 and 92) and it accepts that the Belgian Government took the measures allowed by the Convention against vagrants. In these circumstances, it seems rather difficult to understand how the conclusion can be reached that there has been a violation of the Convention by the Belgian State.

On the other hand, if, while admitting that in the present cases one was actually dealing with vagrants for whom the measures (deprivation of liberty) provided for by the Convention were allowed, one nonetheless adds that the Belgian Act, due to its undeniable imperfections, does not offer sufficient guarantees to ensure the observance of the Convention in all cases, it is easy to object that it is not at all the Court's function to judge in abstracto the worth of the legislation of a Contracting State. The jurisdiction of the Court is conditioned by the presence of a victim (Articles 5 (5) and 48 (b) of the Convention) (art. 5-5, art. 48-b) and the Court's task is to put right

the wrong suffered by the person concerned. Without a victim, no condemnation of a State by the Court is possible.

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As regards more particularly the proceedings mentioned in Article 5 (4) (art. 5-4) of the Convention, there are several points on which we are in agreement with the Court. First of all, the Court states, quite rightly in our opinion, that the Convention requires only the supervision by a judicial organ of the measures taken by the police, irrespective of whether this control is exercised ex officio or at the request of the interested party. We also agree with the Court in accepting that the Belgian magistrate, invested with jurisdiction to decide in vagrancy matters, is a court independent of the executive and enjoying the guarantees afforded to the judges by Articles 99 and 100 of the Belgian Constitution. Similarly, we can also accept that the magistrate necessarily decides on the lawfulness of the detention which the prosecuting authority requests him to sanction. Lastly, the same is true of the finding that the procedure before the said magistrate allows certain rights of the defence and presents certain judicial features, such as the hearing taking place and the decision being given in public. Nevertheless, the Court finishes by deciding that all this is not sufficient.

In the opinion of the Court the forms of the procedure need not necessarily be identical in each of the cases where the Convention requires the intervention of a court. Once again, we agree with the Court: one cannot, for example, consider the procedure for the detention of a person of unsound mind to be satisfactory if it did not include medical examinations fully guaranteeing objectivity and competence. But, in the present cases, the Court says that the deprivation of liberty complained of by the applicants resembles very closely that imposed in criminal cases and that therefore the procedure to be followed should not provide guarantees markedly inferior to those existing in criminal matters in the member States of the Council of Europe. This comparison seems scarcely exact to us. Shelter in an assistance home or in a vagrancy centre is not quite the same as being locked in prison; the consequences are not shameful to the same degree; release can be requested and obtained at any time, which is not the case where a prison sentence is being served. On the other hand, it must be emphasised that the decision of the magistrate in vagrancy matters deals simply with the existence of certain factual conditions which are quite easily established and which do not require either a lengthy investigation or long hearings. A rather simplified procedure therefore normally suffices.

To conclude, detention for vagrancy is a particular measure of security, sometimes requested by the interested persons themselves and very different

from detention in a criminal case. It is perhaps otherwise in the only case where the placing at the disposal of the Government is not of a temporary and transitory nature but is decided for a whole determinate period which, according to Belgian law, can go up to seven years. In that case it can reasonably be asked whether this is not a sort of conviction and sentence, and even quite a serious one, to which the ordinary guarantees of criminal procedure should apply. The Court however has not made an abstraction of this case, which concerned only some of the applicants; moreover, De Wilde and Versyp, who were both placed at the disposal of the Government for two years, were released before, and one of them well before, the expiry of the term which thus does not seem to be as rigorous as a criminal sentence. With all reservations as to the compatibility in general of the Belgian law with the Convention, we do not believe that in the present cases there are sufficient elements to support the conclusion that there has been a violation on this point by the Belgian Government of the applicants' right protected by Article 5 (4) (art. 5-4) of the Convention.

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We cannot follow the Court on yet another point. Even if the decision of the magistrate does not constitute the result of proceedings before a court, within the meaning of Article 5 (4) (art. 5-4) of the Convention, the Court has not taken into account, as it should have done, the possibility of appealing to the Conseil d'État. It is true that, although the applicants failed to appeal to the Conseil d'État, the Court has unanimously declared the submission of non-exhaustion of domestic remedies to be ill-founded for the reason that the applicants can not be blamed for not having attempted an appeal which, according to established case-law, was inadmissible. This, however, does not mean that such an appeal could not have been possible. The Du Bois case, which was already pending at the time of the detention of the applicants, reversed the former case-law and the Conseil d'État decided that the orders of the magistrates in vagrancy matters were subject to appeal to it. An appeal by the applicants which would very likely have been the subject of a decision by the Conseil d'État subsequent to the Du Bois judgment would have been dealt with in the same way and would have been declared admissible and then judged. From the uncertainty of the situation existing at the time, while in spite of the previous case-law to the contrary a new attempt to appeal to the Conseil d'État had already been made and had finally been crowned with success, no argument can be drawn either to deny that, according to the communis opinio, there had then been exhaustion of domestic remedies or to deny that, this notwithstanding, the real possibility of an appeal existed. The applicants can ask to be excused for not having

entered an appeal which at that time seemed ill-founded but they cannot seriously complain that an appeal did not exist which in fact existed.

It must also be added that the Court has acknowledged (paragraph 82) that the Convention is directly applicable in Belgium so that any alleged violation of the Convention could have been submitted for examination by the superior administrative court once the latter had, as in the Du Bois case, declared itself competent to examine the magistrate's orders. The Court finally does not omit to emphasise that nothing allows it to be affirmed a priori that the Conseil d'État would not have decided speedily.

Even if the magistrate does not constitute the court mentioned in Article 5 (4) (art. 5-4) of the Convention, the appeal to the Conseil d'État, which was admissible at the time of the proceedings, is enough to prevent it being declared that there has been a violation of this provision of the Convention by the Belgian Government.

COLLECTIVE SEPARATE OPINION OF JUDGES HOLMBÄCK, RODENBOURG, ROSS, FAVRE AND BILGE

(Translation)

The Court has decided, by a majority of nine votes to seven, that there has been a violation of Article 5 (4) (art. 5-4) in that the applicants could not take proceedings before a court against the decisions ordering their detention.

In our opinion this decision is not well-founded. The following are the reasons for our opposition to this part of the judgment.

1. The system of protection of Human Rights set up by the Convention comprises two types of applications:

(a) interstate applications, that is those by which a State refers to the Commission any breach of the provisions of the Convention by another State (Article 24 of the Convention) (art. 24); and

(b) individual applications, that is by persons claiming to be victims of the violation by a State of the rights set forth in the Convention (Article 25 of the Convention) (art. 25).

The difference in character between the two types of applications has been demonstrated in particular by the decision of the Commission on the admissibility of the applications by Denmark, Norway, Sweden and the Netherlands against Greece, of 31st May 1968. The Commission observed

> "that, under Article 24 (art. 24) of the Convention, any High Contracting Party may refer to the Commission 'any alleged breach of the provisions of the Convention by another High Contracting Party' ('tout manquement aux dispositions de la présente Convention qu'elle croira pouvoir être imputé à une autre Partie Contractante'); whereas it is true that, under Article 25 (art. 25), only such individuals may seize the Commission as claim to be 'victims' of a violation of the Convention; whereas, however, the condition of a 'victim' is not mentioned in Article 24 (art. 24); whereas, consequently, a High Contracting Party, when alleging a violation of the Convention under Article 24 (art. 24), is not obliged to show the existence of a victim of such violation either as a particular incident or, for example, as forming part of an administrative practice". (Yearbook 1968, p. 776)

Then again, the Commission's precedents are well-defined in the decision of 8th January 1960, X against Ireland, in which the Commission considered that

> "it is clear from Article 25 (1) (art. 25-1) of the Convention that the Commission can properly receive an application from a person, non-governmental organisation or group of individuals only if such persons ... claim to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention; ... it follows that the Commission can examine the compatibility of domestic legislation with the Convention only with respect to its application to a person ... and only insofar as its application is alleged to constitute a violation of the Convention in regard to the applicant person, ... and whereas, therefore, in a case submitted by an individual under

> Article 25 (art. 25), the Commission is not competent to examine in abstracto the question of the conformity of domestic legislation with the provisions of the Convention". (Yearbook 3, pp. 218-220)

In perfect harmony with the Commission, the Court decided in the De Becker case (Judgment of 27th March 1962, p. 26) that

> "the Court is not called upon, under Articles 19 and 25 (art. 19, art. 25) of the Convention, to give a decision on an abstract problem relating to the compatibility of (the national) Act with the provisions of the Convention, but on the specific case of the application of such an Act to the applicant and to the extent to which the latter would, as a result, be prevented from exercising one of the rights guaranteed by the Convention". (See also Digest of Case Law, No. 299; "Les Droits de l'Homme", European Colloquy of 1965: Ganshof van der Meersch, pp. 208 et seqq., Scheuner, p. 363; Vasak: La Convention européenne, No. 190; Monconduit: La Commission européenne, p. 188)

Thus, the Court has to examine not whether Belgian legislation, analysed in abstracto, satisfies the requirements of the Convention, but solely whether the applicants have been "victims" of a violation of the provisions of the Convention guaranteeing their rights in the specific circumstances in which they found themselves and having regard to their conduct, acts and omissions. In such cases there can be no violation of the Convention unless it is proved that the rights of the applicants have been violated, not nominally, but in a concrete way by a decision or measure of the administrative or judicial authority.

2. The underlying concept of the judgment is that the procedure instituted by Belgian legislation is too summary; consequently, it does not guarantee to the vagrants sufficient protection of their rights and does not meet the requirements of Article 5 (4) (art. 5-4) of the Convention.

The consequence which the Convention draws from the violation of Article 5 (art. 5) is that the victim of an unlawful detention has an enforceable right to compensation (Article 5 (5)) (art. 5-5). It is for the State to make reparation, if possible, for the consequences of the decision or measure attacked; all the same, the judgment must inform it as to the nature and extent of the damage. If internal law allows of only partial reparations "the Court shall, if necessary, afford just satisfaction to the injured party" (Article 50 of the Convention) (art. 50).

Yet the judgment, which has limited itself to an abstract criticism of the Belgian legal system, does not say what are the legal effects of the unlawful detention of the applicants.

3. Article 5 (4) (art. 5-4) of the Convention provides that "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings ..." before "a court ...". The Convention clearly specifies proceedings (un recours) before a court (un tribunal). There is no doubt that it is the magistrate who orders the detention. Nor was there in the Belgian legal system as applied up to the Du Bois judgment of 7th June 1967 - a

judgment subsequent to the ratification of the Convention - any real possibility of taking proceedings before a court. But it is obvious that Article 5 (4) (art. 5-4) of the Convention was conceived in contemplation of the case where detention is ordered by the police authorities, which measure must be submitted to judicial supervision (Commission's report, para. 176). As, under Belgian law, the detention is ordered by a judge, judicial supervision of the lawfulness of detention is incorporated in the decision and this is done ex officio.

The hearings have clarified this point. The Commission's report shows (para. 176) that, in the opinion of MM. Sørensen and Castberg, members of the Commission, the requirements of Article 5 (4) (art. 5-4) are satisfied as soon as the lawfulness of the deprivation of liberty is examined by a court exercising judicial jurisdiction, even if there has not been a previous judicial decision; in such a case, the word "proceedings" ("recours") had no independent meaning. At the hearing of 18th November 1970, Mr. Sørensen, the Principal Delegate of the Commission, explained that the majority of the Commission had not shared his opinion because Belgian legislation did not provide a further supervision of the lawfulness of the detention. However, the 1891 Act provides at Sections 15 and 18 that the Minister of Justice shall release detained persons, whose detention he considers to be no longer necessary. The Commission did not take into account that, during their detention, the applicants had had the right to request their release, on the ground that their detention was no longer justified, and to complain of the nature, which in their opinion had become unlawful, of their detention, as well as, moreover, of any violation of their rights by the administrative authorities by addressing themselves to the Minister of Justice and by way of an appeal against a negative decision of this authority to the Conseil d'État. Although the applicants addressed many requests to the Minister of Justice, none of them appealed to the Conseil d'État which did not therefore pronounce itself on the lawfulness of their continued detention.

It must finally be pointed out that, under Article 60 (art. 60) of the Convention, the provisions of the Convention may not be construed in a way that limits the rights ensured under national legislation. Hence, as the Belgian legislation goes further than Article 5 (4) (art. 5-4) in that it institutes a compulsory supervision of the lawfulness of detention - while the Convention provides only the possibility of taking proceedings - it takes precedence over the text of Article 5 (4) (art. 5-4) on this point, and this precisely by virtue of Article 60 (art. 60) of the Convention.

4. The Commission, although acknowledging that the magistrate is a judicial organ (report, paras. 89-90), considered that Belgian legislation did not observe Article 5 (4) (art. 5-4) of the Convention because the decision the magistrate takes is of an administrative nature. And the judgment of our

Court states that the procedure in question is affected by the administrative nature of the decision to be given (para. 79).

The Convention, however, does not here distinguish between an administrative and a judicial decision. In any event, the boundary line between the two functions cannot be traced according to specific criteria. Many administrative acts involve a jurisdictional function (see Carré de Malberg, Théorie générale de l'État, I, p. 762). Many judicial acts contain an administrative element: in passing judgment, the judge sitting in a criminal court fulfils a judicial function, which consists in ascertaining whether the conduct of the accused comes under the provisions of the law and in assessing the degree of guilt; in addition, he determines the sentence by a decision which forms part of the administrative function.

The 1891 legislator expressly considered the magistrate to be a judicial authority (Section 2). In fact the function of a magistrate in vagrancy matters involves a decision of an administrative nature, which is preceded by a judicial activity consisting of the examination of the legal conditions which justify the detention and of the decision which closes this examination.

5. The criticism which the judgment levels at Belgian legislation is that it has not instituted satisfactory guarantees for the protection of the rights of vagrants. It is appropriate to examine whether the applicants have had the opportunity to defend themselves and whether the decisions taken in their regard are vitiated by arbitrariness.

The decision which the magistrate is called upon to take is the detention, that is a measure of deprivation of liberty. Contrary to what was said in the Neumeister judgment (p. 44, para. 24), that the term court "in no way relates to the procedure to be followed", it has to be accepted that where the authority can order deprivation of liberty, a procedure must be followed which gives the person concerned every possibility of defending himself.

Now "in these cases the proceedings before the magistrate are in public and ... the parties have an opportunity to be heard. The judge is required to hear the defence of the person brought before him who has the right to be assisted by a lawyer; he can apply to the judge for investigation to be made and in particular for witnesses to be heard; when the judge grants such an application the witnesses are heard in the presence of the person concerned who may make his observations on the evidence given. The judge must give reasons for his decision". (report, para. 190, individual opinion of Mr. Welter, member of the Commission)

The judgment states (para. 79) that the only provision relevant to the right of defence appears in Section 3 of the Act of 1st May 1849 which affords an adjournment of three days to the person concerned if he so requests. It must however be added that, by virtue of Section 11 of the 1891 Act, the public prosecutor is empowered to release the arrested person

pending the hearing (report, footnote 1 to para. 164); this is to allow for a preparation of the defence.

It is quite true that the legal procedure is summary. However, if there were no national rule of procedure applicable, it would not necessarily follow that the decision of detention would be unlawful. What is essential is that the principles of law underlying Articles 5 and 6 (art. 5, art. 6) of the Convention be respected and, particularly, that the vagrants be given the opportunity to state all the circumstances relating to their condition, that they can bring forward all their means of defence and, if necessary, that they have the benefit of free legal aid. And these principles are incorporated in Belgian national law; they are in perfect accord with Belgian legislation. At a hearing of the Commission on 6th April 1967, Me Magnée, counsel for the applicants, admitted expressly that the assistance of a lawyer is granted to the vagrant within the three-day period if he so requests.

It is clearly established then that the three applicants abandoned the exercise of the rights granted to them for their defence. We shall see further on under point 6 how very understandable it was that they behaved in this way.

Under Section 12 of the 1891 Act "the magistrate shall ascertain the identity, age, physical and mental state and manner of life of the persons brought before the police court". It is not open to the Court to presume that any of the magistrates who dealt with these cases did not act in all conscience and mindful of all the rights of the persons concerned.

6. It is not contested that, at the time of the orders of detention, the three applicants were vagrants. The magistrate was, therefore, bound to order their detention. He had to decide whether the vagrant was to be sent to an assistance home (Section 16 of the 1891 Act) or to a vagrancy centre (Section 13). Detention in an assistance home is ordered for one year at most. Detention in a vagrancy centre is for at least two years. Ooms was detained in an assistance home, De Wilde and Versyp in a vagrancy centre.

The case of Ooms is a simple one. Ooms, who had many convictions in criminal cases and had been detained four times as a vagrant, presented himself at the police station to be dealt with as a vagrant, unless a social service found him a job. His request was acceded to; he was placed in an assistance home.

Does the application of Section 13 of the 1891 Act rather than Section 16 in the cases of De Wilde and Versyp indirectly amount to a violation of Article 5 (4) (art. 5-4) of the Convention which implies that the judgment must be delivered in circumstances which guarantee a proper administration of justice?

Regarding Article 5 (1) (art. 5-1) of the Convention the Commission stated (report, para. 186): "It is not for the Commission to decide whether the municipal law was correctly applied by the competent authorities in the

present cases, provided that an examination of the proceedings does not show that the authorities acted arbitrarily". The same holds good for Article 5 (4) (art. 5-4) and for the role of the Court.

Section 13 of the 1891 Act provides for placement in a vagrancy centre of "able-bodied persons who, instead of working for their livelihood, exploit charity as professional beggars and persons who through idleness, drunkenness or immorality live in a state of vagrancy".

The detention of vagrants is a security measure which, while training the individual to work and possibly overcoming his urge for drink, aims at removing the dangers he represents for society.

The Brussels magistrate, before whom Versyp was brought – Versyp insisted on his return to the welfare settlements, as he had been in Merksplas before - was, at the time of the interrogation, in possession of a report of the Brussels Social Rehabilitation Office (dated 4th November 1965), stating in particular: "all our attempts at rehabilitation have failed on account of his apathy, idleness and weakness for drink". Furthermore, his criminal record discloses 24 convictions for larceny and attempted larceny, indecent assault, drunkenness, travelling without a ticket, assault and receiving stolen property; and, in addition, three previous detentions for vagrancy. The magistrate's order refers expressly to Versyp's examination and to his file, which contains, inter alia, the aforementioned report from the Social Rehabilitation Office. The detention note (of 4th November 1965) indicates the motives for the detention, "apathy, idleness and weakness for drink".

When De Wilde presented himself at the Charleroi police station after spending some nights at the railway station, he declared that he had never been placed as a vagrant. The magistrate asked for an information note (it is dated 19th April 1966) which shows thirteen convictions for various offences, of which six involved sentences of imprisonment for larceny, and, in addition, five previous detentions for vagrancy. The magistrate's order refers to the examination and file which includes the aforementioned information note. It is worthy of note that De Wilde, released on 16th November 1966, was again detained for vagrancy, during the proceedings, from 11th January 1967 to 15th May 1967.

Is it possible to consider that the measure taken by the two magistrates at Brussels and Charleroi was arbitrary? An act is arbitrary when it violates in a serious and obvious way a legal rule or again when it is devoid of all serious justification. The least one can say is that it has not been proved that the magistrates at Brussels and Charleroi clearly violated Section 13 of the 1891 Act when, in placing Versyp and De Wilde in a vagrancy centre, they took into consideration the moral and social disorder which characterised the behaviour of these two vagrants.

Even the applicants' counsel, who had stated "very incidentally" that Versyp was contesting the application of Section 13 of the 1891 Act in his regard, did not, as the Commission stated (report, para. 51, footnote 1), take up the complaint again either at the hearing before the Commission on 8th February 1968 or in the final conclusions submitted during that hearing. Moreover, the Commission did not go into this complaint in its memorial to the Court, nor did the applicants' counsel do so in his observations appended to the Commission's memorial.

7. To conclude: the three applicants were vagrants. They were detained for vagrancy. The order of detention was made by a court and with the formalities of a public hearing in the presence of the parties during and after which the persons appearing had the opportunity to avail themselves of all means of defence. They did not make use of this right. The clearly established facts show that the measures taken in their regard were not arbitrary and that it is doubtful whether other magistrates or even a court of appeal could have come to decisions appreciably different from those which were taken.

It is impossible to deduce from the facts that the applicants were victims of a violation by the Belgian authorities of the rights which the Convention guarantees to them.

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

COURT (PLENARY)

CASES OF DE WILDE, OOMS AND VERSYP ("VAGRANCY")
v. BELGIUM (ARTICLE 50)

(Application no. 2832/66; 2835/66; 2899/66)

JUDGMENT

STRASBOURG

10 March 1972

In the De Wilde, Ooms and Versyp cases,

The European Court of Human Rights, taking its decision in plenary session in accordance with Rule 48 of its Rules and composed of the following Judges:

Sir Humphrey WALDOCK, *President*,
MM. G. BALLADORE PALLIERI
R. CASSIN
Å. E. V. HOLMBÄCK
A. VERDROSS
H. ROLIN
E. RODENBOURG
A. N. C. ROSS
T. WOLD
H. MOSLER
M. ZEKIA
A. FAVRE
J. CREMONA
G. WIARDA
S. SIGURJÓNSSON,

and also MM. M.-A. EISSEN, *Registrar*, and J. F. SMYTH, *Deputy Registrar*,

Decides as follows on the question of the application of Article 50 (art. 50) of the Convention in the present cases:

PROCEDURE

1. The De Wilde, Ooms and Versyp cases - referred to the Court on 24 October 1969 by the Government of the Kingdom of Belgium ("the Government") - have their origin in petitions lodged in 1966 with the European Commission of Human Rights ("the Commission") by three Belgian nationals concerning certain aspects of Belgian legislation on vagrancy and its application to these three persons.

2. By judgment of 18 June 1971 the Court rejected a number of complaints made by the three applicants with respect to their detention under the vagrancy laws in force in Belgium. In particular, the Court held that there had been no breach of Article 5 (1) (art. 5-1) of the Convention, since it had "not found either irregularity or arbitrariness in the placing of the three applicants at the disposal of the Government" and had "no reason to find the resulting detention incompatible with Article 5 (1) (e) (art. 5-1-e) of the Convention" (point II-2 of the operative part of the judgment and paragraphs 66-70 of the reasoning).

On the other hand, the Court held that there had been a breach of Article 5 (4) (art. 5-4) in that the applicants had "had no remedy open to them before a court against the decisions ordering their detention" (point II-4 of the operative part of the judgment). On this point the Court found that the proceedings before a magistrate in regard to vagrants prescribed by Belgian law did not by themselves satisfy the requirements of Article 5 (4) (art. 5-4) and that a remedy before a court should therefore have been open to the applicants by which the lawfulness of their detention might be determined (paragraphs 74-80 of the reasoning). The Court further reserved for the applicants the right, should the occasion arise, to apply for just satisfaction on this issue (point II-13 of the operative part of the judgment).

3. On 27 September 1971, the Principal Delegate of the Commission, making reference to point II-13 of the operative part of the judgment, transmitted to the Registrar a letter dated 23 July in which the applicants' counsel asked the Commission to request the Court to award to his clients damages for "unlawful detention".

4. After consultation with the members of the Court, the President directed that the examination of this aspect of the cases should be conducted by the Judges who had taken part in the judgment of 18 June 1971. One of these Judges, Mr. Bilge, could not, however, exercise his functions as he has been appointed a member of the Turkish Government (Rule 4 of the Rules of Court).

5. On the instructions of the President, the Registrar requested the Agent of the Government, and then the Delegates of the Commission, to present their written observations on the question of the application of Article 50 (art. 50) of the Convention. The Registrar received these observations on 27 October and 17 December 1971; a memorandum from the applicants' counsel was appended to the Commission's observations.

6. By Order of 4 January 1972, the President of the Court:

- authorised the Agent of the Government to file a second memorial not later than 31 January on the understanding that he could complete it at the oral hearings;

- and, the Delegates of the Commission having intimated that they did not desire to present further written observations, decided that the oral hearings should open on 14 February.

The Government's second memorial was received at the Registry on 31 January 1972.

7. On 10 January, the Agent of the Government sent to the Registrar, for the information of the Court, statistics of the appeals presented under the transitional provisions contained in Section 2 of the Act of 6 August 1971 (see paragraph 13 below).

8. The public hearings took place on 14 February in the Human Rights Building at Strasbourg.

There appeared before the Court:

- for the Government:
Mr. J. DE MEYER, Professor
at Louvain University, Assessor to the Council of State,
Agent and *Counsel*;
- for the Commission:
Mr. M. SØRENSEN, *Principal Delegate*, and
Mr. G. SPERDUTI, *Delegate*.

The Court heard the addresses and submissions of Mr. Sørensen and Mr. De Meyer as well as their replies to questions put by the Court and by individual Judges.

The hearings were declared provisionally closed on 14 February.

9. After having made final the closure of the hearings and deliberated in private, the Court gives the present judgment.

AS TO THE FACTS

10. The Court is called upon to rule only on the question of the application of Article 50 (art. 50) in the present cases. Thus, as regards the facts the Court will confine itself here to giving a brief outline and for the rest it refers to paragraphs 15 to 43 of its judgment of 18 June 1971.

11. That judgment concerned the detention of De Wilde, Ooms and Versyp ordered by decisions of the magistrates at Charleroi, Namur and Brussels on 19 April 1966, 21 December 1965 and 4 November 1965 respectively under Sections 13 (in the cases of De Wilde and Versyp) and 16 (in the case of Ooms) of the Act of 27 November 1891 for the suppression of vagrancy and begging. De Wilde regained his freedom after a little less than seven months (three of which he spent serving a prison sentence), Ooms after one year and Versyp after one year, nine months and six days.

12. In the course of the proceedings before the Commission, the applicants each claimed 500 Belgian francs (BF) damages per day of detention. Their counsel, Me. Magnée, now relies on the judgment of 18 June 1971 to claim, on behalf of each of them, damages of 300 BF per day of "unlawful detention".

With that object, Me. Magnée began by addressing to the Belgian Minister of Justice, on 22 and 30 June 1971, two letters of which the first related to Versyp and the second to Ooms. On 12 July, the Minister replied that the Government could only apply the law as it stood while waiting for the Bill on "social misfits" - which it had introduced even before the judgment of 18 June 1971 - to be passed. Considering this reply to amount to a refusal contrary to the principle of the supremacy of international treaty law over national law, Me. Magnée informed the Minister, on 14 July that

he proposed to bring the matter before the "competent authorities" and to notify the Commission.

Counsel for the applicants did in fact write first to the Committee of Ministers - 16 July - to inform them of the Minister of Justice's refusal which implied, he alleged, a violation of the Court's judgment; he later wrote, on 23 July, to the Commission referring to Articles 5 (5), 48 and 50 (art. 5-5, art. 48, art. 50) of the Convention and requested the Commission to bring before the Court the claim made by each of his three clients.

On 2 August, he addressed to the Minister of Justice a letter concerning De Wilde which was worded in the same terms as the letters of 22 and 30 June. The Minister acknowledged its receipt on 12 August, noting that along with the other two it had been communicated by Me. Magnée to the Commission.

13. In its memorial of 27 October 1971, the Government pointed out to the Court that on 17 June 1971 it had tabled in Parliament a Bill on "social misfits" intended to replace the 1891 Act. The Government added that, desiring to comply with the judgment of 18 June 1971 without awaiting the passage of this Bill, it had voted by Parliament an Act of 6 August 1971 amending the 1891 Act and containing two sections. The first, which inserted a new section, numbered 16 bis, in the 1891 Act, provides that decisions taken under Sections 13 and 16 are henceforth made subject to the remedies available under the Code of Criminal Procedure, including appeal. Section 2 was a transitional provision: it specified that vagrants or beggars held in detention on the entry into force of the 1971 Act (4 September 1971) in execution of a decision taken under Section 13 or Section 16 of the 1891 Act, could exercise for a period of one month the remedy provided for at Section 16 bis.

AS TO THE LAW

I. AS TO THE ADMISSIBILITY OF THE APPLICANTS' CLAIMS

14. In its written observations of October 1971 and January 1972 and also at the oral hearings, the Government requested the Court to rule

> "that the applications for compensation lodged with the Commission on behalf of the applicants are not admissible since the domestic remedies have not been exhausted".

15. In support of this submission, the Government relied, in the first place, on Article 26 (art. 26) of the Convention contending that this provision applied not only to the original petition addressed by an individual to the Commission under Article 25 (art. 25) but also to a claim for

compensation made by him after the Court has held that in his case there has been a violation of a right guaranteed by the Convention.

Article 26 (art. 26) reads: "The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ..."; Article 27 (3) (art. 27-3) then provides that "the Commission shall reject any petition referred to it which it considers inadmissible under Article 26 (art. 26)". This last provision therefore defines a condition to which the Commission's "dealing with" the case is subjected; it concerns "petitions" lodged with that organ. In other words, this provision relates to the institution of the proceedings which fall within Section III of the Convention. The present cases no longer relate to such proceedings but to the final phase of proceedings brought before the Court in accordance with Section IV on the conclusion of those to which the petitions of Jacques De Wilde, Franz Ooms and Edgard Versyp gave rise before the Commission. The claims made by the three applicants for compensation are not new petitions; they relate to the reparation to be decided by the Court in respect of a violation adjudged by the Court and they have nothing to do with the introduction of proceedings before the Commission under Articles 25, 26 and 27 (art. 25, art. 26, art. 27) of the Convention; while the Commission transmitted them to the Court, it did so without any accompanying report and solely with a view to giving the Court the assistance which, in a general way, it lends to the Court in accordance with Rule 71 of its Rules of Procedure.

The Court, like the Delegates of the Commission, is therefore of the opinion that Article 26 (art. 26) is not applicable in the present matter.

16. In support of its plea of inadmissibility, the Government put forward a second argument based on Article 50 (art. 50): as they had not exhausted domestic remedies, the applicants had not established, according to the Government, that Belgian internal law "allows only partial reparation to be made for the consequences" of the violation found by the judgment of 18 June 1971; it followed that their claims for damages were inadmissible.

In the Court's opinion, the part of the sentence just quoted states merely a rule going to the merits. If the draftsmen of the Convention had meant to make the admissibility of claims for "just satisfaction" subordinate to the prior exercise of domestic remedies they would have taken care to specify this in Article 50 (art. 50) as they did in Article 26 (art. 26), combined with Article 27 (3) (art. 27-3), in respect of petitions addressed to the Commission. In the absence of such an explicit indication of their intention, the Court cannot take the view that Article 50 (art. 50) enunciates in substance the same rule as Article 26 (art. 26).

Moreover, Article 50 (art. 50) has its origin in certain clauses which appear in treaties of a classical type - such as, Article 10 of the German Swiss Treaty on Arbitration and Conciliation, 1921, and Article 32 of the Geneva General Act for the Pacific Settlement of International Disputes,

1928 - and have no connection with the rule of exhaustion of domestic remedies.

In addition, if the victim, after exhausting in vain the domestic remedies before complaining at Strasbourg of a violation of his rights, were obliged to do so a second time before being able to obtain from the Court just satisfaction, the total length of the procedure instituted by the Convention would scarcely be in keeping with the idea of the effective protection of Human Rights. Such a requirement would lead to a situation incompatible with the aim and object of the Convention.

17. The Court therefore sees no reason to declare the claims in question inadmissible and will proceed to examine into their merits.

II. AS TO THE MERITS OF THE APPLICANTS' CLAIMS

18. The present stage of these cases revolves around Article 50 (art. 50) of the Convention which reads:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

19. In its written observations of October 1971 and January 1972 and at the oral hearings, the Government requested the Court to rule:

> - "that the conditions required for the application of Article 50 (art. 50) of the Convention have not been fulfilled in the present cases;
>
> - that it is not necessary to afford satisfaction to the applicants".

At the hearing in the afternoon of 14 February, the Commission's final submission was

> "may it please the Court to grant the applicants appropriate satisfaction, bearing in mind that a new remedy has been introduced in Belgian law following the judgment given on 18 June 1971 by the European Court of Human Rights and thus indirectly following the applications lodged by MM. De Wilde, Ooms and Versyp with the Commission".

20. The Government submitted in particular that Belgian internal law enables the national courts to order the State to make reparation for damage caused by an illegal situation for which it is responsible whether this situation constitutes a breach of rules of internal law or of rules of international law. It would follow that the applicants have to take proceedings before the national courts; as they have not done so their claims for damages were not only inadmissible (see paragraph 16 above) but also without foundation.

The Court cannot accept this view.

No doubt, the treaties from which the text of Article 50 (art. 50) was borrowed had more particularly in view cases where the nature of the injury would make it possible to wipe out entirely the consequences of a violation but where the internal law of the State involved precludes this being done. Nevertheless, the provisions of Article 50 (art. 50) which recognise the Court's competence to grant to the injured party a just satisfaction also cover the case where the impossibility of restitutio in integrum follows from the very nature of the injury; indeed, common sense suggests that this must be so a fortiori. The Court sees no reason why, in the latter case just as in the former, it should not have the right to award to the injured persons the just satisfaction that they had not obtained from the Government of the respondent State.

This is clearly the position in the present cases. Neither the Belgian internal law, nor indeed any other conceivable system of law, can make it possible to wipe out the consequences of the fact that the three applicants did not have available to them the right, guaranteed by Article 5 (4) (art. 5-4), to take proceedings before a court in order to have the lawfulness of their detention decided. Furthermore, the Belgian Government has declined to give De Wilde, Ooms and Versyp the compensation which they claimed.

The mere fact that the applicants could have brought and could still bring their claims for damages before a Belgian court does not therefore require the Court to dismiss those claims as being ill-founded any more than it raises an obstacle to their admissibility (see paragraph 16 above).

21. Where the consequences of a violation are only capable of being wiped out partially, the affording of "just satisfaction" in application of Article 50 (art. 50) requires that:

(i) the Court has found "a decision or measure taken" by an authority of a Contracting State to be "in conflict with the obligations arising from the ... Convention";

(ii) there is an "injured party";

(iii) the Court considers it "necessary" to afford just satisfaction.

According to the Government, none of these conditions has been fulfilled in the present cases.

22. First, the Court's judgment of 18 June 1971 was, it is alleged, directed only to a situation created by a "certain deficiency in legislation and in case-law" which did not amount to a "decision" or "measure".

The Court cannot accept this view. In the cases brought before it which had their origin in petitions lodged under Article 25 (art. 25), the Court was not called upon to give a decision on an abstract problem relating to the compatibility of provisions of Belgian law with the Convention but on the specific case of the application of the provisions in law to the applicants (see the De Becker judgment of 27 March 1962, Series A, page 26). In questions of liability arising from the failure to observe the Convention there is in any event no room to distinguish between acts and omissions.

23. Nor can the existence of an "injured party" be denied. In the context of Article 50 (art. 50) these two words must be considered as synonymous with the term "victim" as used in Article 25 (art. 25); they denote the person directly affected by the act or omission which is in issue. De Wilde, Ooms and Versyp, whom the Commission rightly found to be victims in declaring their petitions admissible, are thus also "injured parties".

24. On the other hand, the Government is correct in questioning the existence of damage. Each of the applicants claims, as just satisfaction, the sum of 300 BF per day of detention. For this claim to be successful, it would be necessary that their deprivation of liberty had been caused by the absence - found by the Court to be contrary to Article 5 (4) (art. 5-4) of the Convention - of any right to take proceedings before a court by which the lawfulness of their detention might be decided. But this is not the case here. In its judgment of 18 June 1971, the Court did not find "either irregularity or arbitrariness in the placing of the three applicants at the disposal of the Government" and it had "no reason to find the resulting detention incompatible with Article 5 (1) (e) (art. 5-1-e) of the Convention" (Series A, pp. 38-39, para. 70). The Court therefore does not see how the taking of proceedings to test merely the point of lawfulness dealt with in the requirements of Article 5 (4) (art. 5-4) could have enabled the applicants to obtain their release any sooner.

Moreover, the applicants had the benefit of free legal aid before the Commission, and later with the Commission’s Delegates, and they have not made any point concerning costs which they may have incurred without reimbursement.

Finally, the Court does not find that in the present cases any moral damage could have been caused by the lack of a remedy which met the requirements of Article 5 (4) (art. 5-4).

25. Although, for the reasons given above, the Court finds it has to refuse to grant the compensation claimed by the applicants, it notes that Belgium has taken, as the Committee of Ministers stated on 18 January 1972 in connection with Article 54 (art. 54) of the Convention, legislative measures with a view to ensuring in matters of vagrancy the application of the Convention in that State.

FOR THESE REASONS, THE COURT,

1. Declares unanimously that the applicant’s claims for damages are admissible,

2. Declares by fourteen votes to one that the applicants’ claims for damages are not well-founded.

Done in French and English, the French text being authentic, at the Human Rights Building, Strasbourg, this tenth day of March one thousand nine hundred and seventy-two.

Sir Humphrey WALDOCK
President

Marc-André EISSEN
Registrar

The following separate opinions are annexed to the present judgment in accordance with Article 51 (2) (art. 51-2) of the Convention and Rule 50 (2) of the Rules of Court:

- opinion of Judges Holmbäck, Ross and Wold;

- opinion of Judge Verdross;

- opinion of Judge Mosler;

- opinion of Judge Zekia.

H. W.
M.-A. E.

JOINT SEPARATE OPINION OF JUDGES HOLMBÄCK, ROSS AND WOLD

Although we concur in the decision rendered by the Court we regret not to be able to agree with the reasons given for this decision on a particular point, namely the interpretation of Article 50 (art. 50) of the Convention in paragraph 20 of the judgment.

It is a well known fact that this Article (art. 50) is modelled on clauses found in a number of arbitration treaties, e.g. the German-Swiss Treaty of Arbitration and Conciliation, 1921, Article 10, and the Geneva General Act for the Pacific Settlement of International Disputes, 1928, Article 32 (see, for example, Heribert Golsong, Das Rechtsschutzsystem der Europäischen Menschenrechtskonvention (1958), p. 106). These clauses were inserted to deal with the situation that a State, although willing enough to fulfil its international obligations, for constitutional reasons is unable to do so without changing its Constitution. They confer on the arbitral tribunal the power to transform this obligation into an obligation to pay to the injured party an equitable satisfaction of another kind.

We assume that Article 50 (art. 50) serves the same purpose as these model clauses and that it should be interpreted accordingly. On this basis it is obvious that the article according to its wording does not apply to the cases before the Court.

It appears from the wording of Article 50 (art. 50) that this article applies only under the condition that "the internal law of the said Party", i.e. the Party who has taken a decision or measure completely or partially in conflict with the obligations arising from the Convention, "allows only partial reparation to be made for the consequences of this decision or measure". Such reparation must in the present cases consist in the paying of compensation for damages, if any, incurred by the applicants as a consequence of the fact that their detention was ordered in contravention of Article 5 (4) (art. 5-4) of the Convention. The applicants themselves assess their claim for compensation in the amount of 300 BF for each of them per day of unlawful detention.

So the question arises, whether or not internal Belgian law allows the Belgian State to make full reparation in the sense of paying full compensation to the applicants as claimed, assuming that their claim is well-founded. In our opinion the applicants have afforded no proof that Belgian law does not allow full reparation to be made, whereas the Belgian Agent has convincingly argued that Belgian law provides remedies for the granting of full compensation. It follows that the said condition for the application of Article 50 (art. 50) is not fulfilled.

The reasoning of the judgment in paragraph 20 is to the effect that although according to its wording Article 50 (art. 50) covers only situations in which the impossibility of making full reparation is due to the law of the

State that has contravened the Convention, common sense suggests that the article a fortiori must apply also where the impossibility of restitutio in integrum follows from the very nature of the injury. This argument is, in our opinion, unsound. It presupposes that there is an absolute obligation on the State to restore to the applicants the liberty of which they have been deprived. But this cannot be so because of the maxim impossibilium nulla est obligatio.

The judgment operates with two hypothetical situations, the one "where the nature of the injury would make it possible to wipe out entirely the consequences of a violation" and the other where the very nature of the injury makes restitutio in integrum impossible. The Court sees no reason why "in the latter case just as in the former" the Court should not have the right to award just satisfaction. Of course the Court has the same right in both cases. But in both cases the competence of the Court is dependent upon the fact that the internal law does not allow full reparation. The consequences of a violation can never "be wiped out entirely". This criterion, which is completely alien to the text of Article 50 (art. 50) can only give rise to doubt and uncertainty. But even more serious is the fact that the judgment leads to the Court in fact assuming jurisdiction in respect to claims for reparation in all cases where full restitutio is impossible, regardless of the state of the internal law.

Our interpretation of Article 50 (art. 50) is in complete harmony with other provisions of the Convention and with the general ideas inherent in it concerning the enforcement of the obligations it imposes.

Thus, Article 5 (5) (art. 5-5) provides that "everyone who has been the victim of arrest or detention in contravention of this Article shall have an enforceable right to compensation". This provision clearly directs the injured party to seek redress in the courts of the State which has committed the contravention. More generally, Article 13 (art. 13) provides that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". It would, indeed, be astonishing and disharmonious if Article 50 (art. 50), alongside this reference to national remedies, instituted a concurrent means of redress by direct application to this Court.

Further, in Article 53 (art. 53) the High Contracting Parties have undertaken to abide by the decision of the Court in any case to which they are parties. And in Article 54 (art. 54) it is provided that the judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution.

The general idea behind these various provisions obviously is that the Convention relies on the Contracting Parties to fulfil their obligations according to the Convention voluntarily by means of decisions and measures taken within their domestic jurisdiction. Relying on this

willingness of the Contracting Parties to comply in good faith with their obligations, the general rule is that a party claiming to be injured must seek redress before the national courts and not before the European Court of Human Rights. There is one exception: if the national law of the State prevents it from making full reparation Article 50 (art. 50) confers on this Court the power to afford just satisfaction to the injured party.

For these reasons we hold that Article 50 (art. 50) does not apply in the cases now before the Court from which it follows that the Court lacks jurisdiction to deal with the applicant’s claims.

SEPARATE OPINION OF JUDGE VERDROSS

(Translation)

I am in agreement with the Court's judgment but would like to add some general remarks on the interpretation of Article 50 (art. 50) of the Convention.

Under this provision the Court, after finding that the Convention has been violated, may "if necessary" afford "just satisfaction to the injured party", "if the internal law" of the respondent State "allows only partial reparation to be made for the consequences" of the act that was held to be contrary to the Convention.

It clearly follows from the French text ("si le droit interne ... ne permet qu'imparfaitement d'effacer les conséquences") - as from the English text - that before it may make a decision on just satisfaction the Court must enquire whether the injured person can obtain adequate compensation by taking appropriate steps under the internal law of the respondent State.

If the Court comes to the conclusion that this question should be answered in the affirmative it seems to me that it is in accordance with the spirit and general system of the Convention for the Court first to allow the respondent State the option of granting the injured party adequate compensation under its own procedure. By acting in this way the Court retains its jurisdiction to assure itself that this satisfaction is provided in an adequate manner and within a reasonable time to be fixed by the Court.

It is true that one might counter this line of argument by saying that the respondent State could settle the matter with the injured party immediately after the judgment in which the Court found that the Convention had been violated. This solution, however, would seem to me to overlook the fact that in order to have legally adequate satisfaction there must always be impartial judicial proceedings. If, therefore, the respondent State makes such proceedings available to the injured party it has done all it can at the beginning to make reparation for the consequences of the violation of the Convention.

The need for the Court to give in the first place the respondent State the option of affording the injured party adequate satisfaction through its own courts is felt especially at the initial stage of the application of Article 50 (art. 50): on the Court's interpretation of this provision will depend the legislative measures which the States will have to take in order to comply with this interpretation.

SEPARATE OPINION OF JUDGE MOSLER

(Translation)

I agree with the whole of the judgment. I would, however, like to add some remarks as to the scope of the Court's jurisdiction in connection with the obligation of the State concerned to make reparation through its own law and through its internal administrative and judicial procedures for the consequences of the violation imputed to it. In the present cases, the Court rightly remarked that it was not necessary to refrain from taking a decision until the applicants had applied for compensation to a Belgian court (see paragraph 20 in fine of the judgment). However, the relevant part of the judgment does not state whether the Court drew this conclusion merely from the twofold fact that in the three cases before it restitutio in integrum was impossible (paragraph 20) and that no pecuniary loss or moral damage could be found (paragraph 24) or whether it considered generally that Article 50 (art. 50), in referring to the internal law of the State in question, covers only the cases in which restitutio in integrum is possible and those where it is excluded by the very nature of the violation. It thus remains uncertain whether the Court should take the internal law into consideration in other situations where neither of these two last hypotheses applies.

I should like to explain the interpretation of Article 50 (art. 50) on which I have relied in concurring in this part of the reasons set out in the judgment.

1. In my opinion, Article 50 (art. 50) constitutes the basis of the Court's jurisdiction in all cases - including those mentioned in Article 5 (4) (art. 5-4) - where just satisfaction ("une satisfaction équitable") is claimed by an applicant whose case before the European Commission of Human Rights has finally terminated in a decision by the Court establishing that the State in question has violated the Convention.

2. In all cases where the Court finds that there has been a violation resulting from a decision or measure taken by an authority of a High Contracting Party the Court must, in the very words of Article 50 (art. 50), enquire whether the internal law of the said Party allows reparation to be made for the consequences of this decision or measure. This conclusion is essential on account of the broad wording used in the text as well as its intrinsic meaning.

3. It follows by implication from Article 50 (art. 50) that the obligation imposed on the High Contracting Parties by Article 53 (art. 53) of the Convention to abide by the decision of the Court includes a duty to make reparation for all the consequences which the violation has caused to the applicants whose complaint has led to the Court's judgment. This duty is therefore not limited to putting an end to the violation: it also extends to making good the damage suffered by the applicants. Although the duty to make good the damage resulting from an injury which has been established

by the decision of an international court derives from general international law, it was necessary to confer expressly upon the Court, by a clause in the European Convention on Human Rights, jurisdiction to grant satisfaction to the person injured. Since the applicant is not party to the proceedings before the Court, the object of those proceedings, strictly speaking, is not the damage suffered by him but the violation of the Convention alleged against the respondent State. It follows that the effects of the judgment relate only to the finding of a violation; they do not extend to the consequences which the violation has involved for the person concerned. It was thus necessary to confer on the Court an additional jurisdiction enabling it in special circumstances to afford just satisfaction.

4. The first question to be investigated by the Court when applying Article 50 (art. 50) is therefore to determine exactly what these consequences are: the measures to be taken to ensure as complete a reparation as possible will depend on the answer to this question.

5. These measures will vary according to the nature of the damage suffered.

(a) If the nature of the violation allows of restitutio in integrum it is the duty of the State held liable to bring this about. For example, the consequences of an expropriation which has been declared unlawful by the Court must be wiped out by restoring the expropriated property. The Court has neither the jurisdiction nor the practical means to do this itself. If in such a case the national law only allows partial restitutio in integrum to be made, it is the Court which has to afford just satisfaction for those consequences of the injury for which it has not been possible to make reparation. It is for the Court to assess the effectiveness of the national law in this matter.

(b) If the nature of the injury prevents any restitutio in integrum, for example because the violation involved facts the effect of which cannot be retroactively removed, the violation may also have involved other consequences for which, by their nature, reparation can be made. Thus, the victim of a violation may have suffered pecuniary loss through having lost an opportunity of finding employment or by having had to pay his lawyer. It may likewise happen that equity demands that he should be granted compensation for moral damage. If, as in the vagrants' case, the primary consequences of the injury cannot be made good either by any internal law or by the Court the national legislature and administration may nevertheless provide for reparation for the secondary consequences.

In every case where such secondary damages are involved the Court has, in my opinion, jurisdiction to decide on them, no matter whether the internal law allows, does not allow, or allows only partial, reparation to be made. However one interprets the German-Swiss Treaty of Arbitration and Conciliation of 3 December 1921 (see paragraphs 16 and 20 of the judgment, and the address of the Commission's Principal Delegate) which

together with other classical arbitration clauses served as a model for Article 50 (art. 50), this article does not restrict the Court's jurisdiction to cases involving restitutio in integrum or compensation for an irreversible act causing damage. The Court's jurisdiction extends to every kind of damage caused by the violation. This conclusion is based both on the very wording of Article 50 (art. 50), which is broader than that of the corresponding clauses in the above-mentioned treaties and on the special nature of the Convention, which is designed to ensure the protection of the individual (see, mutatis mutandis, the Wemhoff judgment of 27 June 1968, p. 23).

(c) The position must be the same if the injury can only be made good by pecuniary compensation, for example if something which has been unlawfully requisitioned is destroyed or lost and so cannot be restored to its owner.

6. Article 50 (art. 50) provides that when the Court is considering what satisfaction is just it shall take account of the remedies provided by the national law. The Court must enquire whether the national law allows or does not allow reparation to be made for the consequences of the violation or only allows partial reparation to be made and if necessary afford such satisfaction as it considers fair. If consideration of the national law were to be excluded with regard to all the other consequences of an injury the result would be that the substantive right to obtain damages and the remedies for the implementation of this right would have no effect on the Court's deliberations when it was dealing with a claim for reparation brought before it. The respondent State would lose the option of complying by its own means with the judgment establishing the violation. This would discourage the State from introducing in its national law provisions ensuring such satisfaction.

7. This interpretation does not, however, imply that the Court should require an applicant to exhaust the domestic remedies. That solution would amount to creating a new procedural hurdle similar to that in Article 26 (art. 26) and this was quite rightly excluded in paragraph 20 of the judgment. Nevertheless, the Court cannot itself take a decision until the applicant has attempted, by making use of the means available to him under the internal law, to obtain satisfaction from the national authorities. The Court has jurisdiction to assure itself that such satisfaction can be obtained within a reasonable time and that the result will be fair. If difficulties are encountered in obtaining satisfaction the Court can, bearing in mind the extremely long proceedings before the Commission (after exhaustion of the domestic remedies) and then before the Court itself, grant such compensation as it thinks fit, without being obliged to wait for the completion of the national proceedings. It has competence to decide according to the circumstances of each individual case to what extent it will await the result of the applicants' claims before the national authorities. It

can lay down time-limits after the expiry of which it will examine the results achieved and itself decide on the question of satisfaction.

8. In the De Wilde, Ooms and Versyp cases the placing of the applicants in detention was, according to the judgment of 18 June 1971, lawful under the Belgian law in force at the time. Under Article 5 (1) (e) (art. 5-1-e) of the Convention the Court had to take the national law as its starting point. Thus, the primary injury was not the detention as such but the absence of any right to take proceedings before a "court" in accordance with the definition given in that judgment. The Belgian Act of 6 August 1971 establishing a remedy could not put this matter right retrospectively. It is the very nature of the violation which makes restitutio in integrum impossible. It is, however, conceivable that there might be secondary consequences to be made good. The Court rightly enquired whether such consequences existed in the present cases and I agree with it in thinking that there were none.

SEPARATE OPINION OF JUDGE ZEKIA

I respectfully agree with the views expressed in the judgment of the Court, As to the Law, Part I on admissibility and Part II on the merits of the case, except the concluding declaratory part of the judgment embodied in the second part disentitling the applicants to damages altogether.

The Court, after finding the applicants' claims for damages admissible, declared that the claims for damages were not well-founded.

In its original judgment of 18 June 1971, the Court reserved for the applicants the right, should the occasion arise, to apply for just satisfaction on the issue relating to the breach of Article 5 (4) (art. 5-4) of the Convention.

The applicants applied to the authorities in Belgium and later to the Commission for compensation as envisaged in the original judgment. Their application was turned down by the Belgian authorities and eventually reached this Court, through the Commission, for consideration. It is true the way the applicants framed their claim for damages was not an acceptable one. Once this Court declared in an unreserved final form that there was no breach of Article 5 (1) (e) (art. 5-1-e), any claim for damages relating to their detention and the duration of such detention or the nature of their detention - whether under Section 13 of 16 of the Belgian 1891 Act – becomes untenable. Their claim for damages, therefore, calculated on the basis of detention - per diem or otherwise - was rightly rejected.

What is left is the inconvenience caused to the applicants in their endeavour to vindicate their right to a judicial decision as to the legality of their detention. Article 5 (4) (art. 5-4) makes it incumbent on the High Contracting Parties to the Convention to render available a court to deal summarily with cases of detainees under Article 5 (1) (art. 5-1) who dispute the legality of their detention, with a view to obtaining their release if such detention is found unlawful.

The Court found that there was no judicial forum answering the requirements of Article 5 (4) (art. 5-4) at the time the applicants were detained. They petitioned the Commission; their complaints were investigated and found to be admissible and in the reported opinion of the Commission the respondent State was found in contravention of Article 5 (4) (art. 5-4) of the Convention.

The case of the applicants was brought before the Court which in turn confirmed that there was violation of Article 5 (4) (art. 5-4) by the respondent State.

Petitions to the Commission were filed by the applicants in the year 1966 and the judgment of this Court touching their complaints was delivered in the middle of 1971.

It was a right recognised to the vagrant applicants to dispute the lawfulness of their detention before a court of law in their own country

which could deal with their recourse in a summary way. This right was denied to them. They had to petition the Commission of Human Rights and incur all expenses and inconvenience in presenting their case before the commissioners and later had to pursue their claims through the Commission before this Court. The applicants were entitled to know from a judicial authority in the country they lived, within a short time of the order for their detention, whether they were rightly or wrongly detained under the order of the police magistrate. Instead they had to travel a long way and wait for years to obtain a judicial decision as to whether they were rightly kept in detention. Instead of knowing within a matter of days whether they were rightly or wrongly detained they had to pursue a long cumbersome procedure before two international bodies of jurists in order to get the answer.

They are surely entitled to be reimbursed for the extra expenses incurred before the Commission and this Court. It is true that we do not exactly know whether they did incur any expense or if they did what was the amount incurred but this, I suggest, could easily be referred to the Registry of this Court to be ascertained and dealt with. In my view, the applicants ought not to be deprived of their costs in vindicating their rights in the way they did. Unless they acted in bad faith, or their petition was devoid of any merits, or their application could be described as frivolous or vexatious or an abuse of the process of the Court, I cannot see how they could be deprived of their costs. On the contrary the very fact that the Commission of Human Rights ruled that their petitions were admissible and in their reported opinion found that there was a contravention of Article 5 (4) (art. 5-4), strongly supports the view that the applicants acted in good faith and their case was not devoid of merit. In other words, they honestly believed that they were not lawfully detained and they had a case for judicial consideration.

Since our Court is competent to give just satisfaction to a victim of a violation of the provisions in the Convention, I entertain no doubt that we possessed the power to award costs to the applicants if we thought the circumstances of the case warranted such course.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

COURT (PLENARY)

CASES DE WILDE, OOMS AND VERSYP ("VAGRANCY")
v. BELGIUM

(Application no. 2832/66; 2835/66; 2899/66)

JUDGMENT

STRASBOURG

18 November 1970

In the De Wilde, Ooms and Versyp cases,

The European Court of Human Rights, taking its decision in plenary session in accordance with Rule 48 of the Rules of Court, and composed of the following Judges:

Sir Humphrey WALDOCK, *President*
(Rules 21, paragraph 7, and 48, paragraph 3),

MM. H. ROLIN,
R. CASSIN,
Å.E.V. HOLMBÄCK,
A. VERDROSS,
G. MARIDAKIS,
E. RODENBOURG,
A.N.C. ROSS,
T. WOLD,
G. BALLADORE PALLIERI,
H. MOSLER,
M. ZEKIA,
A. FAVRE,
J. CREMONA,
S. BILGE,
G. WIARDA,
S. SIGURJÓNSSON,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. J.F. SMYTH, Deputy Registrar,

Decides as follows on the question of procedure raised at the hearing of the afternoon of 17th November 1970:

Whereas, at the hearing on 17th November 1970, Mr. Sørensen, Principal Delegate of the Commission, announced to the Court the intention of the Delegates to avail themselves of the assistance of Me Magnée under Rule 29, paragraph 1, of the Rules of Court; whereas he indicated that Me Magnée, of the Brussels Bar, would furnish to the Court, under the control and responsibility of the Delegates, fuller explanations on certain points relating to the issues arising under Article 7 and Article 6, paragraph (3) (art. 7, art. 6-3), of the Convention; and whereas he informed the Court that on these matters the Delegates were insufficiently informed;

Whereas Mr. De Meyer, Agent for the Belgian Government, objected to the course of action intended by the Commission on the grounds that:

(a) the Commission, in his opinion, must be taken to be sufficiently informed on the points in question, seeing that in July 1969, it had drawn up its final report stating its findings of the facts in the present cases;

(b) since Me Magnée had been counsel for the three individual claimants before the Commission, the application of Rule 29, paragraph 1, intended by the Delegates would defeat the provisions of Article 44 (art. 44) and the

whole spirit of the Convention under which, according to Mr. De Meyer, individuals may not plead before the Court;

Whereas under Article 44 (art. 44) of the Convention "only High Contracting Parties and the Commission shall have the right to bring a case before the Court" ("Seules les Hautes Parties Contractantes et la Commission ont qualité pour se présenter devant la Cour"); whereas it follows that "Contracting States and the Commission are alone empowered to bring a case before the Court or to appear in Court" - comparaître juridiquement - (Lawless Judgment of 14th November 1960, p. 15);

Whereas Rule 29, paragraph 1, of the Rules of Court provides that the Delegates of the Commission "may, if they so desire, have the assistance of any person of their choice"; whereas, furthermore, any person appointed by the Delegates in accordance with Rule 29, paragraph 1, may be called upon to speak in the hearings before the Court (Rule 37 of the Rules of Court);

Whereas Rule 29, paragraph 1, recognises for the Delegates a right which it is for them to exercise "if they so desire", that is to say, by appreciating at each stage of the proceedings before the Court the usefulness of availing themselves of that right;

Whereas Rule 29, paragraph 1, does not place any limit on the freedom of the Delegates in their choice of persons to assist them; and whereas, therefore, it does not preclude them, inter alia, from having the assistance of the lawyer or former lawyer of an individual applicant;

Whereas the Court has previously held in its Lawless Judgment of 7th April 1961, page 24, that nothing precludes the Commission from asking "the applicant to nominate a person to be available to the Commission’s Delegates"; and whereas in the same judgment the Court further held that "it did not follow that the person in question has any locus standi in judicio" (ibidem);

Whereas, by the very terms of Rule 29, paragraph 1, the role of such a person consists of assisting the Delegates of the Commission whose main function is to assist the Court (Lawless Judgment of 14th November 1960, page 11);

Whereas, in consequence, the person assisting the Delegates must restrict himself in his statements to presenting to the Court explanations on points indicated to him by the Delegates, and this always subject to the control and responsibility of the Delegates;

Whereas it is the duty of the Delegates to ensure the observance of this fundamental requirement by any person assisting them, in order to avoid any situation inconsistent with Article 44 (art. 44) of the Convention;

Whereas, in any event, it is for the Court, whose President directs the hearings, "to ensure that the Convention is respected and, if need be, to point to any irregularities" (see mutatis mutandis Lawless Judgment of 14th November 1960, page 12);

FOR THESE REASONS,

Takes note, by sixteen votes against one, of the intention of the Delegates of the Commission to entrust Me Magnée with the task of assisting them at the hearing of 18th November 1970;

Decides to proceed with the examination of the merits of the cases.

Done in English and French, the English text being authentic, at the Human Rights Building, Strasbourg, this eighteenth day of November one thousand nine hundred and seventy.

Sir Humphrey WALDOCK
President

M.-A. EISSEN
Registrar

In accordance with Article 51 (2) (art. 51-2) of the Convention and Rule 50 (2) of the Rules of Court the separate concurring opinion of Judge Rolin and the dissenting opinion of Judge Favre are annexed to the present judgment.

H. W.
M.-A. E.

SEPARATE CONCURRING OPINION OF JUDGE ROLIN

(Translation)

I realise that, in view of its Rules 29 and 37, the Court cannot object to the Commission having the assistance of any person of its choice, in this case the Belgian lawyer Me Magnée, or to his addressing the Court. But I still think it would be unacceptable for Me Magnée, who appeared before the Commission as counsel for the applicants, to address the Court "in the name of the Commission" as Mr. Sørensen, Delegate, appeared to suggest at the hearing on 17th November.

Moreover, I think that to hear counsel for the applicants can only be justified if he confines himself to those new points raised in the written and oral proceedings before the Court on which the Commission considers it was not sufficiently informed previously and with which it therefore could not deal in its report.

DISSENTING OPINION OF JUDGE FAVRE

(Translation)

The Commission may have the assistance, according to Rule 29 of the Rules of Court, of any person of its choice. It may therefore have the assistance of the applicant's lawyer, which is usually the case.

But Rule 29 needs to be interpreted in the light of Article 44 (art. 44) of the Convention, which provides that only the High Contracting Parties and the Commission shall have the right to bring a case before the Court.

The Commission's task is to defend the public interest. It cannot be represented, even partially, by the applicant's lawyer, who acts on the applicant's behalf.

The applicant's lawyer may not speak at the Court's hearing on behalf of the Commission or in order to submit an opinion different from the Commission's.

He could be heard by the Court only under Rule 38 of the Rules of Court, which enables the Court to hear any person whose statements seem likely to assist it in the carrying out of its task. In such case, it is the Court that would say on what facts it desires explanations.

The Court's judgment does not seem compatible with Article 44 (art. 44) of the Convention. It departs from an established practice. I cannot approve it.